

This is a digital copy of a book that was preserved for generations on library shelves before it was carefully scanned by Google as part of a project to make the world's books discoverable online.

It has survived long enough for the copyright to expire and the book to enter the public domain. A public domain book is one that was never subject to copyright or whose legal copyright term has expired. Whether a book is in the public domain may vary country to country. Public domain books are our gateways to the past, representing a wealth of history, culture and knowledge that's often difficult to discover.

Marks, notations and other marginalia present in the original volume will appear in this file - a reminder of this book's long journey from the publisher to a library and finally to you.

Usage guidelines

Google is proud to partner with libraries to digitize public domain materials and make them widely accessible. Public domain books belong to the public and we are merely their custodians. Nevertheless, this work is expensive, so in order to keep providing this resource, we have taken steps to prevent abuse by commercial parties, including placing technical restrictions on automated querying.

We also ask that you:

+ *Make non-commercial use of the files* We designed Google Book Search for use by individuals, and we request that you use these files for personal, non-commercial purposes.

+ *Refrain from automated querying* Do not send automated queries of any sort to Google's system: If you are conducting research on machine translation, optical character recognition or other areas where access to a large amount of text is helpful, please contact us. We encourage the use of public domain materials for these purposes and may be able to help.

+ *Maintain attribution* The Google "watermark" you see on each file is essential for informing people about this project and helping them find additional materials through Google Book Search. Please do not remove it.

+ *Keep it legal* Whatever your use, remember that you are responsible for ensuring that what you are doing is legal. Do not assume that just because we believe a book is in the public domain for users in the United States, that the work is also in the public domain for users in other countries. Whether a book is still in copyright varies from country to country, and we can't offer guidance on whether any specific use of any specific book is allowed. Please do not assume that a book's appearance in Google Book Search means it can be used in any manner anywhere in the world. Copyright infringement liability can be quite severe.

About Google Book Search

Google's mission is to organize the world's information and to make it universally accessible and useful. Google Book Search helps readers discover the world's books while helping authors and publishers reach new audiences. You can search through the full text of this book on the web at `http://books.google.com/`

3 2044 103 149 647

Digitized by Google

HARVARD LAW SCHOOL
LIBRARY

Digitized by Google

Digitized by Google

Digitized by Google

Digitized by Google

Digitized by Google

Digitized by Google

Digitized by Google

Digitized by Google

Digitized by Google

National Reporter System.—State Series.

THE

SOUTHEASTERN REPORTER,

VOLUME 9,

CONTAINING ALL THE DECISIONS OF THE

SUPREME COURTS OF APPEALS OF VIRGINIA AND WEST VIRGINIA, AND SUPREME COURTS OF NORTH CAROLINA, SOUTH CAROLINA, GEORGIA.

PERMANENT EDITION.

APRIL 2—OCTOBER 15, 1889.

KF
135

ST. PAUL:
WEST PUBLISHING CO.
1890.

Digitized by Google

COPYRIGHT. 1890.
BY
WEST PUBLISHING COMPANY.

Digitized by Google

JUDGES

OF THE

COURTS REPORTED DURING THE PERIOD COVERED BY THIS VOLUME.

VIRGINIA—Supreme Court of Appeals.

LUNSFORD L. LEWIS, PRESIDENT.

JUDGES.

BENJAMIN W. LACY. THOMAS T. FAUNTLEROY.
ROBERT A. RICHARDSON. DRURY A. HINTON.

WEST VIRGINIA—Supreme Court of Appeals.

ADAM C. SNYDER, PRESIDENT.

JUDGES.

THOMAS C. GREEN. JOHN W. ENGLISH.
HENRY BRANNON.

NORTH CAROLINA—Supreme Court.

WILLIAM N. H. SMITH, CHIEF JUSTICE.

ASSOCIATE JUSTICES.

AUGUSTUS S. MERRIMON. JOSEPH J. DAVIS.
ALPHONSO C. AVERY. JAMES E. SHEPHERD.

SOUTH CAROLINA—Supreme Court.

W. D. SIMPSON, CHIEF JUSTICE.

ASSOCIATE JUSTICES.

SAMUEL M. McGOWAN. HENRY McIVER.

GEORGIA—Supreme Court.

LOGAN E. BLECKLEY, CHIEF JUSTICE.

ASSOCIATE JUSTICES.

MARK H. BLANDFORD. THOMAS J. SIMMONS.

597675

Digitized by Google

Digitized by Google

CASES REPORTED.

	Page
Adams v. Hays (Va.)	1019
Adams v. Richardson (S. C.)	95
Adams, Commonwealth v. (Va.)	148
Adrian v. McCaskill (N. C.)	284
Ætna Ins. Co., Nease v. (W. Va.)	233
Alderman, De Laine v. (S. C.)	950
Alderson v. Commissioners (W. Va.)	863
Alderson v. Commissioners (W. Va.)	868
Alexander v. Meroney (S. C.)	266
Alexander, Krake v. (Va.)	991
Alexander, Scroggs v. (N. C.)	401
Alkire, Lewis v. (W. Va.)	890
Allen v. Brown (Ga.)	674
Allen v. Wilmington & W R. Co. (N. C.)	4
Allen, Powell v. (N. C.)	138
Allen, State v. (N. C.)	626
Allison, Rynerson v. (S. C.)	656
Alvey v. Cahoon (Va.)	994
American Writing-Machine Co., Thornton v. (Ga.)	679
Anderson v. Butler (S. C.)	797
Anderson v. Freeman (Ga.)	1075
Anderson v. Holland (Ga.)	670
Anderson v. Pilgram (S. C.)	587
Anderson v. Ryan (Ga.)	331
Anderson, Ballew v. (S. C.)	743
Andrew, South-West Va. Imp. Co. v. (Va.)	1015
Armfield v. Colvert (N. C.)	461
Arnold v. Coburn (W. Va.)	21
Arrington v. Arrington (N. C.)	200
Ashby's Trustees, Shenandoah Val. R. Co. v. (Va.)	1008
Asheville & S. R. Co., Bomar v. (S. C.)	512
Askew v. Askew, (N. C.)	646
Athens Water-Works Co., Fowler v. (Ga.)	678
Atkinson v. Orr (Ga.)	787
Atkinson, Kanawha Valley Bank v. (W. Va.)	175
Atlanta Nat. Bank v. Fletcher (Ga.)	1072
Atlanta Nat. Bank v. Northwestern Fertilizing Co. (Ga.)	671
Atlanta & C. Ry. Co., Wilson v. (Ga.)	1076
Atlanta & W. P. R. Co. v. Texas Grate Co. (Ga.)	600
Atlanta & W. P. R. Co., Jarrett v. (Ga.)	681
Atlantic Phosphate Co. v. Ely (Ga.)	170
Atwood v. Shenandoah Val. R. Co. (Va.)	748
Augusta Sav. Bank v. Stelling (S. C.)	1028
Augusta & K. R. Co., Tompkins v. (S. C.)	521
Augusta & K. R. Co., White v. (S. C.)	96
Aultman v. Mason (Ga.)	536
Avery, Gordon v. (N. C.)	486
Ayres v. Wells' Adm'r (Va.)	326
Babb, Strain v. (S. C.)	271
Bacon, State v. (S. C.)	765
Baer v. Christian (Ga.)	790
Baggs, Ryals v. (Ga.)	1074
Bagley v. State (Ga.)	721
Bagley, Winfree v. (N. C.)	198
Bailey v. State (Ga.)	1072
Baker v. Brem (N. C.)	629
Baker v. Mills (Ga.)	1100
Baker v. State (Ga.)	743
Baker, Parrott v. (Ga.)	1068
Ballard, Simmons v. (N. C.)	495
Ballew v. Anderson (S. C.)	749
Barber, Gibson v. (N. C.)	543
Barker, Taylor v. (S. C.)	115
Barnard, Conant v. (N. C.)	575
Barrett v. James (S. C.)	263
Barry, Moore v. (S. C.)	589
Battle v. Mayo (N. C.)	384
Baugh, Paul v. (Va.)	339
Bear, Jaffray v. (N. C.)	383
Bearden v. Metropolitan St. Ry. Co. (Ga.)	603
Beardsley, Sands v. (W. Va.)	925
Beauchamp, Treadwell v. (Ga.)	1040
Becker, Kine v (Ga.)	828
Beckham v. Duncan (Va.)	1002
Beckham v. Howard (Ga.)	784
Bee, Neely v. (W. Va.)	898
Beers v Estill (Ga.)	596
Belcher, King v. (S. C.)	359
Belcher, Tyson v. (N. C.)	634
Bell, State v. (N C.)	548
Bennett v. Gray (Ga.)	469
Bennett, Gaston v. (S. C.)	515
Bennett, Norman v. (W. Va.)	914
Berrien v. State (Ga.)	609
Berry v. Henderson (N. C.)	455
Berry, Perkins v. (N. C.)	621
Best v. Sanders (S. C.)	778
Betsill v. Betsill (S. C.)	652
Biggs v. City of Huntington (W. Va.)	51
Black, Blair v. (S. C.)	1033
Black, Cohen v. (S. C.)	1033
Blackwell v. Dibbrell (N. C.)	192
Blackwell, McCord v. (S. C.)	777
Blair v. Black (S. C.)	1033
Blalock, Wheatley v. (Ga.)	168
Blanton, Weathersbee v. (S. C.)	817
Blitch v. Brewer (Ga.)	837
Blount v. Bowne (Ga.)	164
Blount v. Walker (S. C.)	804
Blue, Woodard v. (N. C.)	492
Board of Sup'rs v. Catlett's Ex'rs (Va.)	999
Bodkin, Boggs v. (W. Va.)	891
Boggs v. Bodkin (W. Va.)	891
Bomar v. Asheville & S. R. Co. (S. C.)	512
Bond's Adm'r, Jones' Ex'r v. (Va.)	508
Booker, Wagener v. (S. C.)	1055
Booker, Watkins v. (S. C.)	1055
Boone v. Lewis (N. C.)	644
Boone, Hughes v. (N. C.)	286
Borden v. Ward (N. C.)	800
Boston, Coast Line R. Co. v. (Ga.)	1106
Botts, Glenn v. (Ga.)	425
Bowden v. Hatcher (Ga.)	724
Bowden v. Parrish (Va.)	616
Bowden, Edwards v. (N. C.)	194
Bowne, Blount v. (Ga.)	164
Bracco, State v. (N. C.)	404
Branch v. Cooper (Ga.)	1130
Brem, Baker v. (N. C.)	629
Brewer, Blitch v. (Ga.)	837
Bridges v. Dooly County (Ga.)	1085
Britton, Jones v. (N. C.)	554
Bromley, Pasley v. (W. Va.)	40
Brooks v. Fowler (Ga.)	1089
Brooks, Woody v. (N. C.)	294
Brown v. Brown (N. C.)	706

Digitized by Google

	Page
Brown v. Lawson (Va.)	1014
Brown v. McWhite (S. C.)	277
Brown v. Meador (Ga.)	681
Brown v. Mercer (Ga.)	471
Brown v. Mitchell (N. C.)	702
Brown, Allen v. (Ga.)	674
Brown, Poullain v. (Ga.)	1131
Browse, Jones v. (W. Va.)	873
Brunswick & W. R. Co., Wilds v. (Ga.)	595
Bryan, Jordan v. (N. C.)	135
Bryant v. Mercier (Ga.)	166
Bryant, State v. (N. C.)	1
Bullington v. Newport News & M. V. Co. (W. Va.)	876
Burnett v. Neves (Ga.)	128
Burns v. Mills (S. C.)	689
Burnside v. Watkins (S. C.)	518
Burton v Gibson (W. Va.)	255
Bushong v. Rector (W. Va.)	225
Butler, Anderson v. (S. C.)	797
Byrd, Cole v. (Ga.)	618
Cahoon, Alvey v. (Va.)	994
Calhoun Land & Min. Co., Hamby Mountain Gold Mines v. (Ga.)	881
Callaham v. Callaham (S. C.)	120
Callaham v. Robinson (S. C.)	120
Calvert, Hescht v. (W. Va.)	87
Campbell v. Metropolitan St. R. Co. (Ga.)	1078
Campbell, State v. (N. C.)	410
Carr v. Wilson (W. Va.)	81
Carraker, Gibson v. (Ga.)	124
Carrier, Mills v. (S. C.)	350
Carrier, Mills v. (S. C.)	741
Carrigan v. Evans (S. C.)	852
Carroll v. Giles (S. C.)	422
Carter, Wallace v. (S. C.)	659
Catlett's Ex'rs, Board of Sup'rs v. (Va.)	999
Cavender, Utley v. (S. C.)	957
Central Land Co. v. Laidley (W. Va.)	61
Central Railroad Co. v. Ralford (Ga.)	169
Central Railroad & Banking Co. v. Kitchens (Ga.)	827
Central Railroad & Banking Co., Coles v. (Ga.)	127
Central R. R. v. Denson (Ga.)	788
Chalfant, Ogden v. (W. Va.)	879
Chambers v. Harper (Ga.)	717
Chancey v. Powell (N. C.)	298
Chapman v. City Council of Charleston (S. C.)	591
Chattanooga, R. & C. R. Co. v. Jones (Ga.)	1081
Cheatham v. Morrison (S. C.)	964
Chenowith v. Ritchie County Court (W. Va.)	910
Childress, Richmond & D. R. Co. v. (Ga.)	602
Childs v. Hurd (W. Va.)	862
Christian, Baer v. (Ga.)	790
Christian, Moore v. (S. C.)	981
Church-Wardens, etc., of Christ Church v. City of Savannah (Ga.)	537
City Council of Charleston, Chapman v. (S. C.)	591
City of Asheville, Moffit v. (N. C.)	695
City of Brunswick, Dupree v. (Ga.)	1085
City of Columbus v. Pearson (Ga.)	1102
City of Huntington, Biggs v. (W. Va.)	51
City of Macon v. East Tennessee, V. & G. Ry. Co. (Ga.)	1127
City of Montezuma v. Wilson (Ga.)	17
City of Savannah, Church-Wardens, etc., of Christ Church v. (Ga.)	537
City of Toombsboro, Duncan v. (Ga.)	1100
Clark v. Gordon (Ga.)	883
Clayton v. Mitchell (S. C.)	814
Clegg, Cummings v. (Ga.)	1042
Cloud v. Kendrick (Ga.)	1084
Clyburn v. Reynolds (S. C.)	973
Coast Line R. Co. v. Boston (Ga.)	1108
Coburn, Arnold v. (W. Va.)	21
Coffman v. Hedrick (W. Va.)	65
Cohen v. Black (S. C.)	1033
Cohn v. Ward (W. Va.)	41
Colclough, State v. (S. C.)	811
Cole v. Byrd (Ga.)	618
Cole, Gulley v. (N. C.)	196
Coleman v. Keels (S. C.)	270
Coleman v. Keels (S. C.)	735
Coles v. Central Railroad & Banking Co. (Ga.)	127
Colvert, Armfield v. (N. C.)	461
Commercial Bank v. Stelling (S. C.)	1028
Commercial Bank, Nelson v. (Ga.)	1075
Commercial Bank of Suffolk, Elam v. (Va.)	498
Commissioners, Alderson v. (W. Va.)	863
Commissioners, Alderson v. (W. Va.)	868
Commissioners, Fleming v. (W. Va.)	867
Commonwealth v. Adams (Va.)	148
Commonwealth v. Hurt (Va.)	148
Commonwealth v. Krise (Va.)	1121
Commonwealth v. Plunkett (Va.)	1120
Commonwealth, Cuthbut v. (Va.)	16
Commonwealth, Hicks v. (Va.)	1024
Commonwealth, Smith v. (Va.)	148
Commonwealth, Watson v. (Va.)	418
Comron v. Standland (N. C.)	317
Conant v. Barnard (N. C.)	575
Connell v. Connell (W. Va.)	252
Cook v. Patterson (N. C.)	402
Cooper, Branch v. (Ga.)	1130
Cooper's Adm'r, New York, P. & N. R. Co. v. (Va.)	821
Copeland v. Todd (S. C.)	841
Copeland, Gulley v. (N. C.)	137
Corder, Farmers' Bank v. (W. Va.)	220
Core v. Wigner's Heirs (W. Va.)	86
Cothran v. Western Union Tel. Co. (Ga.)	886
Corrothers v. Jolliffe (W. Va.)	889
Cotton States Life Ins. Co., MacIntyre v. (Ga.)	1124
Cottrell, Virginia Fire & Marine Ins. Co. v. (Ga.)	182
County Com'rs, State v. (S. C.)	692
County of Albemarle, Fry v. (Va.)	1004
Cox v. Murphy (Ga.)	604
Cox, Strickland v. (N. C.)	414
Cox, Taylor's Ex'rs v. (W. Va.)	70
Crawley, State v. (N. C.)	409
Creech, Solomon v. (Ga.)	165
Creighton, Stedham v. (S. C.)	465
Cribb v. Waycross Lumber Co. (Ga.)	426
Cummings v. Clegg (Ga.)	1042
Cummings v. Wingo (S. C.)	658
Currie, Fry v. (N. C.)	898
Cuthbut v. Commonwealth (Va.)	16
Damron v. Ferguson (W. Va.)	89
Daniel, McCulloh v. (N. C.)	418
Darnall v. Wood (Ga.)	282
Davenport v. Terrell (N. C.)	197
Davis v. Living (W. Va.)	84
Davis v. Richmond & D. R. Co. (S. C.)	105
Davis v. Town of Point Pleasant (W. Va.)	228
Davis' Adm'r v. McMullen's Adm'r (Va.)	1095
Davis Sewing-Machine Co. v. Dunbar (W. Va.)	287
Dawson v. Garland (Ga.)	888
Dean v. Georgia Pac. Ry. Co. (Ga.)	424
Dean, Ledbetter v. (Ga.)	720
De Lacy v. Hurst (Ga.)	1052
De Laine v. Alderman (S. C.)	950
Denmead, Western & A. R. Co. v. (Ga.)	683
Denson, Central R. R. v. (Ga.)	788
De Vaughn v. Howell (Ga.)	173
De Vaughn, Smith v. (Ga.)	425
Devereux v. McMahon, (N. C.)	635
Dickenson, Edwards v. (N. C.)	456
Diocese of East Carolina v. Diocese of North Carolina (N. C.)	810

Digitized by Google

	Page
Diocese of North Carolina, Diocese of East Carolina v. (N. C.)	310
Dixon, Marshall v. (Ga.)	167
Dixson v. Williams (Ga.)	468
Dooly County, Bridges v. (Ga.)	1085
Douglas, Wallace v. (N. C.)	453
Dibbrell, Blackwell v. (N. C.)	192
Ducker, Gregory v. (S. C.)	780
Dunbar, Davis Sewing-Machine Co. v. (W. Va.)	287
Duncan v. City of Toombsboro (Ga.)	1100
Duncan, Beckham v. (Va.)	1002
Dunlap, Wilcox v. (Ga.)	1046
Dupree v. City of Brunswick (Ga.)	1085
Durant v. Nash (S. C.)	19
East v. Garrett (Va.)	1112
Eastern Ice Co. v. King (Va.)	506
East Tennessee, V. & G. Ry. Co., City of Macon v. (Ga.)	1127
Edwards v. Bowden (N. C.)	194
Edwards v. Dickenson (N. C.)	456
Egerton v. Jones (N. C.)	2
Elam v. Commercial Bank of Suffolk (Va.)	498
Elkin v. Gregory (S. C.)	335
Ellington v. Ellington (N. C.)	208
Elliott, Niagara Fire Ins. Co. v. (Va.)	694
Ellis v. Young (S. C.)	955
Ely, Atlantic Phosphate Co., v. (Ga.)	170
Emry v. Raleigh & G. R. Co. (N. C.)	139
Eppens v. Forbes (Ga.)	723
Equitable Life Ins. Co. v. May (Ga.)	597
Erdmann, Millhiser v. (N. C.)	582
Erwin v. Lowry (S. C.)	961
Erwin, Roddey v. (S. C.)	729
Estill, Beers v. (Ga.)	596
Etheredge, Sparks v. (Ga.)	1103
Eubanks v. State (Ga.)	424
Euker, Ford v. (Va.)	500
Eutawville R. Co., Harley v. (S. C.)	782
Evans, Carrigan v. (S. C.)	852
Fabian, Hodges v. (S. C.)	820
Farmers' Bank v. Corder (W. Va.)	220
Farmers' Nat. Bank of Salem, Thomas v. (Va.)	1122
Farrar, State v. (N. C.)	449
Farrell v. Richmond & D. R. Co. (N. C.)	302
Faulcon v. Johnston (N. C.)	394
Ferguson v. Millender (W. Va.)	38
Ferguson, Damron v. (W. Va.)	39
Fidelity Ins., T. & S. D. Co. v. Shenandoah Val. R. Co. (W. Va.)	180
Fidelity Ins., T. & S. D. Co. v. Shenandoah Val. R. Co. (Va.)	759
First Nat. Bank of Alexandria v. Payne & Co.'s Assignees (Va.)	153
Flack v. Fry (W. Va.)	240
Flanagan, Savannah, etc., Ry. Co. v. (Ga.)	471
Flaum v. Wallace (N. C.)	567
Fleetwood, Hodges v. (N. C.)	640
Fleming v. Commissioners (W. Va.)	867
Fleming v. Guthrie (W. Va.)	28
Fleming v. Shepherd (Ga.)	789
Fleming, Stultz v. (Ga.)	1067
Flemister v. Flemister (Ga.)	724
Fletcher, Atlanta Nat. Bank v. (Ga.)	1072
Florence R. Co., Rogers v. (S. C.)	1059
Florence R. Co., Whittington v. (S. C.)	1059
Foley, Martin v. (Ga.)	532
Forbes, Eppens v. (Ga.)	723
Ford v. Euker (Va.)	500
Fore v. Foster's Adm'r (Va.)	497
Foster's Adm'r, Fore v. (Va.)	497
Fountain v. Hendley (Ga.)	666
Fowler v. Athens Water-Works Co. (Ga.)	678
Fowler, Brooks v. (Ga.)	1089
Fox, Henderson v. (Ga.)	839
Frame v. Frame (W. Va.)	901
Frantz, McDevitt v. (Va.)	282
Frederick v. Williams (N. C.)	298
Freeman, Anderson v. (Ga.)	1075
Fry v. County of Albemarle (Va.)	1004
Fry v. Currie (N. C.)	393
Fry, Flack v. (W. Va.)	240
Fullington, Mitchell v. (Ga.)	1083
Furse, Rodgers v. (Ga.)	669
Garland, Dawson v. (Ga.)	838
Garlington v. Gilliam, three cases, (S. C.)	1037
Garlington, Young v. (S. C.)	960
Garrett, East v. (Va.)	1112
Garvin, Lindsay v. (S. C.)	862
Gaston v. Bennett (S. C.)	515
Gentry, Owens v. (S. C.)	525
George, Grayson v. (Va.)	18
George, Miller v. (S. C.)	659
Georgia Imp. Co., Snook v. (Ga.)	1104
Georgia Land & Lumber Co., Long v. (Ga.)	425
Georgia M. & G. R. Co. v. Harris (Ga.)	786
Georgia Pac. Ry. Co., Dean v. (Ga.)	424
Georgia Railroad & Banking Co. v. Nelms (Ga.)	1049
Gerald v. Gerald (S. C.)	274
Gerald v. Gerald (S. C.)	792
Gibson v. Barber (N. C.)	549
Gibson v. Carraker (Ga.)	124
Gibson, Burton v. (W. Va.)	255
Giles v. Hunter (N. C.)	549
Giles v. State (Ga.)	788
Giles, Carroll v. (S. C.)	422
Giles, State v. (N. C.)	433
Gillespie, Jones v. (W. Va.)	235
Gilliam, Garlington v., three cases, (S. C.)	1037
Ginn v. Linn (Ga.)	784
Gladney, Talbott v. (S. C.)	658
Glenn v. Botts (Ga.)	425
Glenn, Hambleton v. (Va.)	129
Goblet, Marines v. (S. C.)	803
Goff v. Wilson (W. Va.)	26
Goldston, State v. (N. C.)	580
Goodman v. Sapp (N. C.)	433
Goodwin, State v. (W. Va.)	85
Gordon v. Avery (N. C.)	486
Gordon, Clark v. (Ga.)	333
Gordon, Jones v. (Ga.)	782
Grace v. Martin (Ga.)	841
Graham, Greaves v. (S. C.)	742
Gray, Bennett v. (Ga.)	469
Grayson v. George (Va.)	18
Greaves v. Graham (S. C.)	742
Gregory v. Ducker (S. C.)	780
Gregory, Elkin v. (S. C.)	335
Griffith, Tate v. (Ga.)	719
Griggs v. Swift (Ga.)	1062
Griswold, Hughes v. (Ga.)	1092
Guess v. South Carolina Ry. Co. (S. C.)	18
Gulley v. Cole (N. C.)	196
Gulley v. Copeland (N. C.)	187
Gunn v. Slaughter (Ga.)	772
Guthrie, Fleming v. (W. Va.)	28
Gwynn v. Schwartz (W. Va.)	880
Hagood, Port Royal Min. Co. v. (S. C.)	686
Haley v. Thames (S. C.)	110
Hall v. McAuthur (Ga.)	534
Hall v. Tillman (N. C.)	194
Hall v. Woodward (S. C.)	684
Hall, Johnson v. (Ga.)	788
Hambleton v. Glenn (Va.)	129
Hamby Mountain Gold Mines v. Calhoun Land & Min. Co. (Ga.)	831
Hamilton v. Phillips (Ga.)	606
Hamilton v. Richmond & D. R. Co. (Ga.)	670
Hammack, Jones v. (Ga.)	537
Hammond v. Hightower (Ga.)	1101
Hardee v. Lovett (Ga.)	680

Digitized by Google

	Page
Hardin v. Ledbetter (N. C.)	641
Hardin v. Melton (S. C.)	423
Hardin v. Trimmier (S. C.)	342
Harding v. Long (N. C.)	445
Hargrave, State v. (N. C.)	406
Harle v. Morgan (S. C.)	659
Harle v. Morgan (S. C.)	742
Harley v. Eutawville R. Co. (S. C.)	782
Harper, Chambers v. (Ga.)	717
Harper, State v. (S. C.)	664
Harris v. Richmond & D. R. Co. (S. C.)	690
Harris, Georgia M. & G. R. Co. v. (Ga.)	786
Harrison v. Hoff (N. C.)	638
Harrison v. Jones (Ga.)	527
Harrison v. State (Ga.)	542
Hart, Johnson v. (Ga.)	1110
Hartley, Jefferson v. (Ga.)	174
Hatcher, Bowden v. (Ga.)	724
Hays, Adams v. (Va.)	1019
Hedrick, Coffman v. (W. Va.)	65
Heiskell's Trustees, Stuart v. (Va.)	984
Henderson v. Fox (Ga.)	839
Henderson, Berry v. (N. C.)	455
Hendley, Fountain v. (Ga.)	666
Henry v. Henry (S. C.)	726
Hescht v. Calvert (W. Va.)	87
Hicks v. Commonwealth (Va.)	1024
Hicks v. Riley (Ga.)	771
Hightower, Hammond v. (Ga.)	1101
Hill v. Hilliard (N. C.)	639
Hilliard, Hill v. (N. C.)	639
Hilton v. McAdams (Ga.)	426
Himan v. Thorn (W. Va.)	930
Hinson, State v. (N. C.)	552
Hiott, Utsy v. (S. C.)	838
Hodge v. State, (Ga.)	676
Hodge v. Weeks (S. C.)	953
Hodge, Riddle v. (Ga.)	786
Hodges v. Fabian (S. C.)	820
Hodges v. Fleetwood (N. C.)	640
Hodges v. Roberts (Ga.)	424
Hodges v Tarrant (S. C.)	1038
Hodges, Hughes v. (N. C.)	437
Hoff, Harrison v. (N. C.)	638
Holland, Anderson v. (Ga.)	670
Holland, Savannah, F. & W. Ry. Co. v. (Ga.)	1040
Hollar, Tulburt v. (N. C.)	430
Holler v. Richards (N. C.)	460
Holliday v. Holliday (S. C.)	104
Holman v. Miller (N. C.)	429
Holman, National Exch. Bank of Augusta v. (S. C.)	824
Holt, Seifert v. (Ga.)	843
Hooper v. Hooper (W. Va.)	937
Hope Mills Manuf'g Co., McLauchlin v. (N. C.)	307
Hopson, Stark v. (S. C.)	845
Horan v. Strachan (Ga.)	429
Horner, Lyon v. (W. Va.)	875
Houston, State v. (N. C.)	699
Howard, Beckham v. (Ga.)	784
Howell, De Vaughn v. (Ga.)	173
Hughes v. Boone (N. C.)	286
Hughes v. Griswold (Ga.)	1092
Hughes v. Hodges (N. C.)	437
Hughes v. McIntosh (Ga.)	1110
Hughes' Ex'rs, Key v. (W. Va.)	77
Hulings Lumber Co., Spring Garden Bank v. (W. Va.)	243
Hunter, Giles v. (N. C.)	549
Hurd, Childs v. (W. Va.)	362
Hurst, De Lacy v. (Ga.)	1052
Hurt, Commonwealth v. (Va.)	148
Hutcherson v. Robinson (Ga.)	722
Ingraham, MacCutcheon v. (W. Va.)	260
Ingram v. Lukens (S. C.)	848
Isom v. State (Ga.)	1051
Jackson v. Roberts (Ga.)	671
Jackson v. State (Ga.)	126
Jackson, Trinkle v. (Va.)	986
Jacobs, State v. (N. C.)	404
Jaffray v. Bear (N. C.)	382
James, Barrett v. (S. C.)	263
James, Saunders v. (Va.)	147
James, State v. (S. C.)	844
James Meyer Buggy Co. v. Pegram (N. C.)	413
Jameson v. Major's Adm'r (Va.)	480
Jarrett v. Atlanta & W P. R. Co. (Ga.)	681
Jefferson v. Hartley (Ga.)	174
Jenkins v. Jenkins (Ga.)	541
Jinkins v. Lawrence (Va.)	417
Johnson v. Hall (Ga.)	783
Johnson v Hart (Ga.)	1110
Johnson v. MacCoy (W. Va.)	887
Johnston, Faulcon v. (N. C.)	394
Jolliffe, Carrothers v. (W Va.)	889
Jones v. Britton (N. C.)	554
Jones v. Browse (W. Va.)	873
Jones v. Gillespie (W. Va.)	235
Jones v. Gordon (Ga.)	782
Jones v. Hammack (Ga.)	537
Jones v. Quattlebaum (S. C.)	982
Jones v. Wilson (N. C.)	580
Jones v. Wylie (Ga.)	614
Jones, Chattanooga, R. & C. R. Co. v. (Ga.)	1081
Jones, Egerton v. (N. C.)	2
Jones, Harrison v. (Ga.)	527
Jones, Rice v. (N. C.)	571
Jones' Ex'r v. Bond's Adm'r (Va.)	503
Jordan v. Bryan (N. C.)	135
Kanawha Valley Bank v. Atkinson (W. Va.)	175
Kanawha & O. Ry. Co., Searle's Adm'r v. (W. Va.)	248
Keels, Coleman v. (S. C.)	270
Keels, Coleman v. (S. C.)	735
Keiter's Adm'r, Sherrard's Adm'r v. (W. Va.)	25
Keiter's Adm'r, Sherrard's Adm'r v. (W. Va.)	26
Keith, Newman v. (Ga.)	1100
Kelly v. State (Ga.)	171
Kelly, Powell v. (Ga.)	278
Kelly, Wilson v. (S. C.)	523
Kendrick, Cloud v. (Ga.)	1084
Kennon, White v. (Ga.)	1082
Key v. Hughes' Ex'rs (W. Va.)	77
Kilbreth, Roots v. (W. Va.)	927
Kine v. Becker (Ga.)	828
King v. Belcher (S. C.)	359
King, Eastern Ice Co. v. (Va.)	506
King, Talbott v. (W. Va.)	48
Kitchens, Central Railroad & Banking Co. v. (Ga.)	827
Klugh, Miller v. (S. C.)	1036
Klugh, Richey v., two cases, (S. C.)	1036
Knowles v. Norfolk S. R. Co. (N. C.)	7
Knox v. Knox (S. C.)	358
Koonce v. Russell (N. C.)	316
Koonce, Russell v. (N. C.)	403
Koonce, Stephens v. (N. C.)	315
Krake v. Alexander (Va.)	991
Krise, Commonwealth v. (Va.)	1121
Kuhland, Rehkopf v. (S. C.)	99
Laidley v. Smith's Ex'r (W. Va.)	209
Laidley, Central Land Co. v. (W. Va.)	61
Lamar v. Pearre (Ga.)	1043
Lamar v. Wright (S. C.)	736
Lambeth, Thornton v. (N. C.)	432
Lancaster's Adm'r v. Lancaster's Adm'r (Va.)	988
Lathrop v. Standard Oil Co. (Ga.)	1041
Law, Yates v. (Va.)	508
Law, Zinn v. (W. Va.)	871
Lawrence, Jinkins v. (Va.)	417

Digitized by Google

	Page
Lawson v. Moorman (Va.)	150
Lawson, Brown v. (Va.)	1014
Leaman, Waldrop v. (S. C.)	466
Ledbetter v. Dean (Ga.)	720
Ledbetter, Hardin v. (N. C.)	641
Leftwich, Moore v. (Va.)	1013
Lewis v. Alkire (W. Va.)	890
Lewis v. Long (N. C.)	637
Lewis, Boone v. (N. C.)	644
Lindsay v. Garvin (S. C.)	862
Lindsay, Page's Adm'r v. (Va.)	993
Linn, Ginn v. (Ga.)	784
Lipscomb v. Tanner (S. C.)	733
Lipsey, Wylie v. (S. C.)	1056
Little, Lockhart v. (S. C.)	511
Little Kanawha Nav. Co., Miller v. (W. Va.)	57
Living, Davis v. (W. Va.)	84
Lockhart v. Little (S. C.)	511
London v. Youmans (S. C.)	775
London, Neisler v. (Ga.)	682
Long v. Georgia Land & Lumber Co. (Ga.)	425
Long v. Wight (Ga.)	585
Long, Harding v. (N. C.)	445
Long, Lewis v. (N. C.)	637
Long, McGee v. (Ga.)	1107
Lorentz v. Lorentz (W. Va.)	886
Love v. Tinsley (W. Va.)	44
Lovett, Hardee v. (Ga.)	680
Low v. Settle (W. Va.)	922
Low, State v. (N. C.)	411
Lowman, Warlick v. (N. C.)	458
Lowry v. Parker (Ga.)	677
Lowry, Erwin v. (S. C.)	961
Lufburrow, McGowan v. (Ga.)	427
Lukens, Ingram v. (S. C.)	848
Lumsden, Richardson v. (Ga.)	1109
Lyle v. Siler (N. C.)	491
Lyles v. Roach (S. C.)	834
Lynch v. Wilder (S. C.)	742
Lyon v. Horner (W. Va.)	875
MacCoy, Johnson v. (W. Va.)	887
MacCutcheon v. Ingraham (W. Va.)	260
MacIntyre v. Cotton States Life Ins. Co. (Ga.)	1124
Major's Adm'r, Jameson v. (Va.)	480
Manesa, Moffitt v. (N. C.)	399
Marchant, Rowe's Adm'rs v. (Va.)	995
Marco, Tate v. (S. C.)	269
Marines v. Goblet (S. C.)	803
Marshall v. Dixon (Ga.)	167
Martin v. Foley (Ga.)	532
Martin, Grace v. (Ga.)	841
Marx v. Milstead (Va.)	617
Marx, Ex parte (Va.)	475
Mason, Aultman v. (Ga.)	536
Massey, State v. (N. C.)	682
May, Equitable Life Ins. Co. v. (Ga.)	597
Mayo, Battle v. (N. C.)	884
McAdams, Hilton v. (Ga.)	426
McAteer v. McAteer (S. C.)	966
McAuthur, Hall v. (Ga.)	534
McBride v. McBride (Ga.)	1111
McCaskill, Adrian v. (N. C.)	284
McConnell v. Norfolk & W. R. Co. (Va.)	1006
McCord v. Blackwell (S. C.)	777
McCoury, State v. (N. C.)	412
McCulloh v. Daniel (N. C.)	413
McCutcheon, McGhee v. (Ga.)	785
McDevitt v. Frantz (Va.)	282
McDonald, Scott v. (Ga.)	770
McGee v. Long (Ga.)	1107
McGehee, Ryan v. (N. C.)	197
McGhee v. McCutcheon (Ga.)	785
McGowan v. Lufburrow (Ga.)	427
McIntosh, Hughes v. (Ga.)	1110
McKinne v. State (Ga.)	1091
McKinsey v. Squires (W. Va.)	55
McLauchlin v. Hope Mills Manuf'g Co. (N. C.)	307
McLaws v. Moore (Ga.)	615
McMahan, State v. (N. C.)	489
McMahon, Devereux v. (N. C.)	635
McMillan v. Reeves (N. C.)	449
McMullen's Adm'r, Davis' Adm'r v. (Va.)	1095
McWhite, Brown v. (S. C.)	277
Meador, Brown v. (Ga.)	681
Mehlinger, Utterback v. (Va.)	479
Melton, Hardin v. (S. C.)	423
Mercer, Brown v. (Ga.)	471
Mercier, Bryant v. (Ga.)	166
Meroney, Alexander v. (S. C.)	266
Metropolitan St. R. Co., Campbell v. (Ga.)	1078
Metropolitan St. Ry. Co., Bearden v. (Ga.)	603
Millender, Ferguson v. (W. Va.)	38
Miller v. George (S. C.)	659
Miller v. Klugh (S. C.)	1036
Miller v. Little Kanawha Nav. Co. (W. Va.)	57
Miller, Holman v. (N. C.)	429
Millhiser v. Erdmann (N. C.)	582
Mills v. Carrier (S. C.)	350
Mills v. Carrier (S. C.)	741
Mills, Baker v. (Ga.)	1100
Mills, Burns v. (S. C.)	689
Milstead, Marx v. (Va.)	617
Mitchell v. Fullington (Ga.)	1088
Mitchell, Brown v. (N. C.)	702
Mitchell, Clayton v. (S. C.)	814
Mize v. Speight (Ga.)	1080
Moffit v. City of Asheville (N. C.)	695
Moffitt v. Maness (N. C.)	399
Moore v. Barry (S. C.)	589
Moore v. Christian (S. C.)	981
Moore v. Leftwich (Va.)	1013
Moore v. Peirce (Va.)	1008
Moore v. Willard (S. C.)	273
Moore, McLaws v. (Ga.)	615
Moore, Slater v. (Va.)	419
Moorman, Lawson v. (Va.)	150
Morgan, Harle v. (S. C.)	659
Morgan, Harle v. (S. C.)	742
Morgan, Thompson v. (Ga.)	534
Morgan, Vaughn v. (S. C.)	748
Morris, Swann v. (Ga.)	767
Morrison, Cheatham v. (S. C.)	964
Munro, Richards v. (S. C.)	108
Murphy v. Valk (S. C.)	101
Murphy, Cox v. (Ga.)	604
Mustain v. Pannill's Ex'r (Va.)	419
Napier, Russel v. (Ga.)	746
Nash, Durant v. (S. C.)	19
National Exch. Bank v. Stelling (S. C.)	1028
National Exch. Bank of Augusta v. Holman (S. C.)	824
Neal v. Simmons (Ga.)	671
Nease v. Ætna Ins. Co. (W. Va.)	233
Neely v. Bee (W. Va.)	898
Neely, State v. (S. C.)	664
Neisler v. London (Ga.)	682
Nelms, Georgia Railroad & Banking Co. v. (Ga.)	1049
Nelson v. Commercial Bank (Ga.)	1075
Neves, Burnett v. (Ga.)	128
Newman v. Keith (Ga.)	1100
Newport News & M. V. Co., Bullington v. (W. Va.)	876
Newport News & M. V. Co., Rece v. (W. Va.)	212
New York, P. & N. R. Co. v. Cooper's Adm'r (Va.)	821
Niagara Fire Ins. Co. v. Elliott (Va.)	694
Nicholson, State v. (N. C.)	545
Noell, Richmond & D. R. Co. v. (Va.)	473
Noel's Adm'r v. Noel's Adm'r (Va.)	584
Norfolk S. R. Co., Knowles v. (N. C.)	7
Norfolk & W. R. Co., McConnell v. (Va.)	1006

Digitized by Google

	Page
Norman v. Bennett (W. Va.)	914
Norton, Wiggins v. (Ga.)	607
Northwestern Fertilizing Co., Atlanta Nat. Bank v. (Ga.)	671
Oakley, State v. (N. C.)	575
Ogden v. Chalfant (W. Va.)	879
Olin, Riley v. (Ga.)	1095
Oliver v. Union Point & W. P. R. Co. (Ga.)	1086
Orr, Atkinson v. (Ga.)	787
Owens v. Gentry (S. C.)	525
Page's Adm'r v. Lindsay (Va.)	996
Pannill's Ex'r, Mustain v. (Va.)	419
Parker v. Sutton (N. C.)	283
Parker, Lowry v. (Ga.)	677
Parrish, Bowden v. (Va.)	616
Parrott v. Baker (Ga.)	1068
Parrott, Tumlin v. (Ga.)	718
Pasley v. Bromley (W. Va.)	40
Patterson, Cook v. (N. C.)	402
Paul v. Baugh (Va.)	329
Payne & Co.'s Assignees, First Nat. Bank of Alexandria v. (Va.)	153
Pearre, Lamar v. (Ga.)	1043
Pearson, City of Columbus v. (Ga.)	1102
Pearson, Wilson v. (N. C.)	707
Peck, State v. (W. Va.)	919
Pegram, James Meyer Buggy Co. v. (N. C.)	412
Peirce, Moore v. (Va.)	1008
Perkins v. Berry (N. C.)	621
Phillips, Hamilton v. (Ga.)	606
Phinizy, Port Royal & W. C. Ry. Co. v. (Ga.)	609
Pickens v. Quillian (S. C.)	743
Pilgram, Anderson v. (S. C.)	587
Pittman, Yonn v. (Ga.)	667
Pitts v. Spotts (Va.)	501
Plonk, Warlick v. (N. C.)	190
Plunkett, Commonwealth v. (Va.)	1120
Point Pleasant Bridge Co. v. Town of Point Pleasant (W. Va.)	231
Pollock, Pulaski County v., two cases, (Ga.)	1065
Port Royal Min. Co. v. Hagood (S. C.)	686
Port Royal & W. C. Ry. Co. v. Phinizy, (Ga.)	609
Poullain v. Brown (Ga.)	1131
Powell v. Allen (N. C.)	138
Powell v. Kelly (Ga.)	278
Powell, Chancey v. (N. C.)	298
Powell, Rials v. (Ga.)	613
Powell, State v. (N. C.)	627
Prather v. Richmond & D. R. Co. (Ga.)	530
Pulaski County v. Pollock, two cases, (Ga.)	1065
Quattlebaum, Jones v. (S. C.)	982
Quillian, Pickens v. (S. C.)	743
Raiford, Central Railroad Co. v. (Ga.)	169
Raleigh & G. R. Co., Emry v. (N. C.)	139
Rece v. Newport News & M. V. Co. (W. Va.)	212
Rector, Bushong v. (W. Va.)	225
Reeves, McMillan v. (N. C.)	449
Rehkopf v. Kuhland (S. C.)	99
Reid v. Wright (Ga.)	834
Reid, Simmons v. (S. C.)	1058
Reilly v. State (Ga.)	332
Rembert v. South Carolina Ry. Co. (S. C.)	968
Reynolds, Clyburn v. (S. C.)	973
Rials v. Powell (Ga.)	613
Rice v. Jones (N. C.)	571
Richards v. Munro (S. C.)	108
Richards, Holler v. (N. C.)	460
Richards, State v. (W. Va.)	245
Richardson v. Lumsden (Ga.)	1109
Richardson v. Subers (Ga.)	172
Richardson, Adams v. (S. C.)	95
Richey v. Klugh, two cases, (S. C.)	1086
Richmond & D. R. Co. v. Childress (Ga.)	602
Richmond & D. R. Co. v. Noell (Va.)	473
Richmond & D. R. Co. v. Williams (Va.)	990
Richmond & D. R. Co., Davis v. (S. C.)	105
Richmond & D. R. Co., Farrell v. (N. C.)	302
Richmond & D. R. Co., Hamilton v. (Ga.)	670
Richmond & D. R. Co., Harris v. (S. C.)	690
Richmond & D. R. Co., Prather v. (Ga.)	530
Riddle v. Hodge (Ga.)	786
Riley v. Olin (Ga.)	1095
Riley, Hicks v. (Ga.)	771
Ritchie County Court, Chenowith v. (W. Va.)	910
Roach, Lyles v. (S. C.)	884
Robbins v. Slattery (S. C.)	510
Roberts v. State (Ga.)	675
Roberts, Hodges v. (Ga.)	424
Roberts, Jackson v. (Ga.)	671
Robinson v. State (Ga.)	528
Robinson, Callaham v. (S. C.)	120
Robinson, Hutcherson v. (Ga.)	722
Robson v. State (Ga.)	610
Rodahan v. Terry (Ga.)	721
Roddey v. Erwin (S. C.)	729
Rodgers v. Furse (Ga.)	669
Rogers v. Florence R. Co. (S. C.)	1059
Roland, Stoddard v. (S. C.)	741
Roland, Stoddard v. (S. C.)	1027
Roots v. Kilbreth (W. Va.)	927
Rosenbaum, Seddon v. (Va.)	826
Rosenberg, Wando Phosphate Co. v. (S. C.)	969
Rowan, Satterfield v. (Ga.)	677
Rowe's Adm'rs v. Marchant (Va.)	995
Ruffner, Walker v. (W. Va.)	215
Russell v. Koonce (N. C.)	403
Russell v. Napier (Ga.)	746
Russell, Koonce v. (N. C.)	816
Ryals v. Baggs (Ga.)	1074
Ryan v. McGehee (N. C.)	197
Ryan, Anderson v. (Ga.)	881
Rynerson v. Allison (S. C.)	656
Sanders v. Sanders (S. C.)	94
Sanders v. Sanders (S. C.)	97
Sanders v. Sanders, two cases, (S. C.)	465
Sanders v. Sanders (S. C.)	818
Sanders, Best v. (S. C.)	773
Sands v. Beardsley (W. Va.)	925
Sapp, Goodman v. (N. C.)	483
Satterfield v. Rowan (Ga.)	677
Saunders v. James (Va.)	147
Savannah, etc., Ry. Co. v. Flanagan (Ga.)	471
Savannah, F. & W. R. Co. v. Watts (Ga.)	129
Savannah, F. & W. Ry. Co. v. Holland (Ga.)	1040
Savannah, F. & W. Ry. Co. v. Verdery (Ga.)	1133
Savannah, F. & W. Ry. Co., Verdery v. (Ga.)	1133
Schwartz, Gwynn v. (W. Va.)	880
Scoggins v. Smith (S. C.)	971
Scott v. McDonald (Ga.)	770
Scott, Walker v. (N. C.)	488
Scroggs v. Alexander (N. C.)	401
Seabrook, State v. (S. C.)	802
Searle's Adm'r v. Kanawha & O. Ry. Co. (W. Va.)	248
Seddon v. Rosenbaum (Va.)	826
Seibert v. Todd (S. C.)	829
Seifert v. Holt (Ga.)	843
Settle, Low v. (W. Va.)	922
Shaw v. State (Ga.)	768
Shaw's Adm'r, West v. (W. Va.)	81
Sheffield, Smith v. (Ga.)	791
Shenandoah Val. R. Co. v. Ashby's Trustees (Va.)	1003
Shenandoah Val. R. Co., Atwood v. (Va.)	748
Shenandoah Val. R. Co., Fidelity Ins., T. & S. D. Co. v. (W. Va.)	180

Digitized by Google

	Page
Shenandoah Val. R. Co., Fidelity Ins., T. & S. D. Co. v. (Va.)	759
Shepherd, Fleming v. (Ga.)	789
Sherrard's Adm'r v. Keiter's Adm'r (W. Va.)	25
Sherrard's Adm'r v. Keiter's Adm'r (W. Va.)	26
Siler, Lyle v. (N. C.)	491
Simmons v. Ballard (N. C.)	495
Simmons v. Reid (S. C.)	1058
Simmons, Neal v. (Ga.)	671
Slater v. Moore (Va.)	419
Slattery, Robbins v. (S. C.)	510
Slaughter, Gunn v. (Ga.)	772
Smith v. Commonwealth (Va.)	148
Smith v. De Vaughn (Ga.)	425
Smith v. Sheffield (Ga.)	791
Smith v. Turley (W. Va.)	46
Smith, Scoggins v. (S. C.)	971
Smith, State v. (N. C.)	200
Smith, State v. (N. C.)	485
Smith's Ex'r, Laidley v. (W. Va.)	209
Snook v. Georgia Imp. Co. (Ga.)	1104
Solomon v. Creech (Ga.)	165
South Carolina Ry. Co., Guess v. (S. C.)	18
South Carolina Ry. Co., Rembert v. (S. C.)	968
South Carolina Ry. Co., South Carolina Steam-Boat Co. v. (S. C.)	650
South Carolina Steam-Boat Co. v. South Carolina Ry. Co. (S. C.)	650
South-West Va. Imp. Co. v. Andrew (Va.)	1015
Sparks v. Etheredge (Ga.)	1108
Speight, Mize v. (Ga.)	1080
Spivy, Whitehead v. (N. C.)	319
Spotts, Pitts v. (Va.)	501
Spring Garden Bank v. Huling's Lumber Co. (W. Va.)	243
Squires, McKinsey v. (W. Va.)	55
Standard Oil Co., Lathrop v. (Ga.)	1041
Standland, Comron v. (N. C.)	317
Staples, Turner's Adm'r v. (Va.)	1123
Stark v. Hopson (S. C.)	345
State v. Allen, (N. C.)	626
State v. Bacon (S. C.)	765
State v. Bell (N. C.)	548
State v. Bracco (N. C.)	404
State v. Bryant (N. C.)	1
State v. Campbell (N. C.)	410
State v. Colclough (S. C.)	811
State v. County Com'rs (S. C.)	692
State v. Crawley (N. C.)	409
State v. Farrar (N. C.)	449
State v. Giles (N. C.)	433
State v. Goldston (N. C.)	580
State v. Goodwin (W. Va.)	85
State v. Hargrave (N. C.)	406
State v. Harper (S. C.)	664
State v. Hinson (N. C.)	552
State v. Houston (N. C.)	699
State v. Jacobs (N. C.)	404
State v. James (S. C.)	844
State v. Low (N. C.)	411
State v. Massey (N. C.)	632
State v. McCoury (N. C.)	412
State v. McMahan (N. C.)	489
State v. Neely (S. C.)	664
State v. Nicholson (N. C.)	545
State v. Oakley (N. C.)	575
State v. Peck (W. Va.)	919
State v. Powell (N. C.)	627
State v. Richards (W. Va.)	245
State v. Seabrook (S. C.)	802
State v. Smith (N. C.)	200
State v. Smith (N. C.)	485
State v. Tingler (W. Va.)	935
State v. Verner (S. C.)	118
State v. Walker (N. C.)	582
State v. Weddington (N. C.)	577
State v. Whitesides (S. C.)	661
State v. Wilkerson (N. C.)	415
State v. Williams (S. C.)	853
State v. Young (S. C.)	855
State, Bagley v. (Ga.)	721
State, Bailey v. (Ga.)	1072
State, Baker v. (Ga.)	743
State, Berrien v. (Ga.)	609
State, Eubanks v. (Ga.)	424
State, Giles v. (Ga.)	783
State, Harrison v. (Ga.)	542
State, Hodge v. (Ga.)	676
State, Isom v. (Ga.)	1051
State, Jackson v. (Ga.)	126
State, Kelly v. (Ga.)	171
State, McKinne v. (Ga.)	1091
State, Reilly v. (Ga.)	882
State, Roberts v. (Ga.)	675
State, Robinson v. (Ga.)	528
State, Robson v. (Ga.)	610
State, Shaw v. (Ga.)	768
State, Taylor v. (Ga.)	788
State, Travis v. (Ga.)	1068
State, Vann v. (Ga.)	945
State, Wilson v. (Ga.)	1078
State, Young v. (Ga.)	1108
Stedham v. Creighton (S. C.)	465
Stelling, Augusta Sav. Bank v. (S. C.)	1028
Stelling, Commercial Bank v. (S. C.)	1028
Stelling, National Exch. Bank v. (S. C.)	1028
Stephens v. Koonce (N. C.)	315
Stewart v. Stisher (Ga.)	1041
Stisher, Stewart v. (Ga.)	1041
Stoddard v. Roland (S. C.)	741
Stoddard v. Roland (S. C.)	1027
Strachan, Horan v. (Ga.)	429
Strain v. Babb (S. C.)	271
Street, Taylor v. (Ga.)	829
Strickland v. Cox (N. C.)	414
Stuart v. Heiskell's Trustees (Va.)	984
Stultz v. Fleming (Ga.)	1067
Subers, Richardson v. (Ga.)	172
Sullivan v. Susong (S. C.)	156
Susong, Sullivan v. (S. C.)	156
Sutton, Parker v. (N. C.)	283
Swann v. Morris (Ga.)	767
Swann, Watson v. (Ga.)	615
Sweygert v. Sweygert (S. C.)	657
Swift, Griggs v. (Ga.)	1062
Swygert, Wagener v. (S. C.)	107
Talbird v. Whippee (S. C.)	742
Talbott v. Gladney (S. C.)	658
Talbott v. King (W. Va.)	48
Tanner, Lipscomb v. (S. C.)	783
Tarrant, Hodges v. (S. C.)	1038
Tate v. Griffith (Ga.)	719
Tate v. Marco (S. C.)	269
Taylor v. Barker (S. C.)	115
Taylor v. State (Ga.)	788
Taylor v. Street (Ga.)	829
Taylor's Ex'rs v. Cox (W. Va.)	70
Terrell, Davenport v. (N. C.)	197
Terry, Rodahan v. (Ga.)	721
Texas Grate Co., Atlanta & W. P. R. Co. v. (Ga.)	600
Thames, Haley v. (S. C.)	110
Thomas v. Farmers' Nat. Bank of Salem (Va.)	1123
Thompson v. Morgan (Ga.)	534
Thompson, Towner v. (Ga.)	672
Thorn, Himan v. (W. Va.)	930
Thornton v. American Writing-Machine Co. (Ga.)	679
Thornton v. Lambeth (N. C.)	432
Tillman, Hall v. (N. C.)	194
Tingler, State v. (W. Va.)	935
Tinsley, Love v. (W. Va.)	44
Todd, Copeland v. (S. C.)	341
Todd, Seibert v. (S. C.)	822

Digitized by Google

	Page
Tompkins v. Augusta & K. R. Co. (S. C.)	521
Towner v. Thompson (Ga.)	672
Town of Point Pleasant, Davis v. (W. Va.)	228
Town of Point Pleasant, Point Pleasant Bridge Co. v. (W. Va.)	281
Travis v. State (Ga.)	1063
Treadwell v. Beauchamp (Ga.)	1040
Trimmier, Hardin v. (S. C.)	842
Trinkle v. Jackson (Va.)	986
Trippe v. Winter (Ga.)	672
Trout's Adm'r v. Trout's Adm'r (Va.)	1121
Tucker v. Tucker (N. C.)	299
Tulburt v. Hollar (N. C.)	480
Tumlin v. Parrott (Ga.)	718
Turley, Smith v. (W. Va.)	46
Turner's Adm'r v. Staples (Va.)	1123
Tyson v. Belcher (N. C.)	684
Union Point & W. P. R. Co., Oliver v. (Ga.)	1086
Utley v. Cavender (S. C.)	957
Utsy v. Hiott (S. C.)	838
Utterback v. Mehlinger (Va.)	479
Valk, Murphy v. (S. C.)	101
Vann v. State (Ga.)	945
Vaughn v. Morgan (S. C.)	743
Verdery v. Savannah, F. & W. Ry. Co. (Ga.)	1133
Verdery, Savannah, F. & W. Ry. Co. v. (Ga.)	1133
Verner, State v. (S. C.)	113
Virginia Fire & Marine Ins. Co. v. Cottrell (Va.)	182
Wagener v. Booker (S. C.)	1055
Wagener v. Swygert (S. C.)	107
Wagener, Youmans v. (S. C.)	106
Waldrop v. Leaman (S. C.)	466
Walker v. Ruffner (W. Va.)	215
Walker v. Scott (N. C.)	488
Walker, Blount v. (S. C.)	804
Walker, State v. (N. C.)	582
Wallace v. Carter (S. C.)	659
Wallace v. Douglas (N. C.)	453
Wallace, Flaum v. (N. C.)	567
Wando Phosphate Co. v. Rosenberg (S. C.)	969
Ward v. White (Va.)	1021
Ward, Borden v. (N. C.)	300
Ward, Cohn v. (W. Va.)	41
Warlick v. Lowman (N. C.)	458
Warlick v. Plonk (N. C.)	190
Watkins v. Booker (S. C.)	1055
Watkins, Burnside v. (S. C.)	518
Watson v. Commonwealth (Va.)	418
Watson v. Swann (Ga.)	612
Watts, Savannah, F. & W. R. Co. v. (Ga.)	129
Waycross Lumber Co., Cribb v. (Ga.)	426
Weathersbee v. Blanton (S. C.)	817
Weddington, State v. (N. C.)	577
Wecks, Hodge v. (S. C.)	953
Wells' Adm'r, Ayres v. (Va.)	826
West v. Shaw's Adm'r (W. Va.)	81
Western Union Tel. Co., Cothran v. (Ga.)	836
Western & A. R. Co. v. Denmead (Ga.)	683
Wheatley v. Blalock (Ga.)	168
Whippee, Talbird v. (S. C.)	742
White v. Augusta & K. R. Co. (S. C.)	96
White v. Kennon (Ga.)	1082
White, Ward v. (Va.)	1021
Whitehead v. Spivy (N. C.)	819
Whitehead v. Whitehead (Va.)	10
Whitesides, State v. (S. C.)	661
Whittington v. Florence R. Co. (S. C.)	1059
Wiggins v. Norton (Ga.)	607
Wight, Long v. (Ga.)	535
Wigner's Heirs, Core v. (W. Va.)	36
Wilcox v. Dunlap (Ga.)	1046
Wilder, Lynch v. (S. C.)	742
Wilds v. Brunswick & W. R. Co. (Ga.)	595
Wilkerson, State v. (N. C.)	415
Willard, Moore v. (S. C.)	273
Williams, Dixon v. (Ga.)	468
Williams, Frederick v. (N. C.)	298
Williams, Richmond & D. R. Co. v. (Va.)	990
Williams, State v. (S. C.)	858
Wilmington & W. R. Co., Allen v. (N. C.)	4
Wilson v. Atlanta & C. Ry. Co. (Ga.)	1076
Wilson v. Kelly (S. C.)	523
Wilson v. Pearson (N. C.)	707
Wilson v. State (Ga.)	1073
Wilson, Carr v. (W. Va.)	31
Wilson, City of Montezuma v. (Ga.)	17
Wilson, Goff v. (W. Va.)	26
Wilson, Jones v. (N. C.)	580
Winfree v. Bagley (N. C.)	198
Wingo, Cummings v. (S. C.)	658
Winter, Trippe v. (Ga.)	672
Wood, Darnall v. (Ga.)	282
Woodard v. Blue (N. C.)	492
Woodward, Hall v. (S. C.)	684
Woody v. Brooks (N. C.)	294
Wright, Lamar v. (S. C.)	736
Wright, Reid v. (Ga.)	834
Wylie v. Lipsey (S. C.)	1056
Wylie, Jones v. (Ga.)	614
Yates v. Law (Va.)	508
Yonn v. Pittman (Ga.)	667
Youmans v. Wagener (S. C.)	106
Youmans, London v. (S. C.)	775
Young v. Garlington (S. C.)	960
Young v. State (Ga.)	1108
Young, Ellis v. (S. C.)	955
Young, State v. (S. C.)	855
Zinn v. Law (W. Va.)	871

Digitized by Google

THE

Southeastern Reporter.

VOLUME IX.

(103 N. C. 436)

STATE v. BRYANT *et al.*

(*Supreme Court of North Carolina.* March 4, 1889.)

FORCIBLE ENTRY—INDICTMENT.

To constitute the offense of forcible entry, under Code N. C. § 1028, the premises must be in the actual, not merely constructive, possession of the person whose possession is charged to have been interfered with; and an indictment which charges merely that a certain person "was seised in his demesne as of fee," and that defendants forcibly, etc., "did make entry, contrary to the statute," etc., is fatally defective, in that it fails to charge such actual possession and dispossession.

Appeal from superior court, Nash county; SHIPP, Judge.

The Attorney General, for the State. *Bunn & Battle*, for defendants.

MERRIMON, J. The indictment charges that B. F. Amerson "was seised in his demesne as of fee, of and in a certain tract of land situate and being in the county of Nash, and state aforesaid, with the appurtenances thereof; and, the said B. F. Amerson being so seised thereof as aforesaid, A. Bryant, S. P. Gill, and J. W. Murray, in the county of Nash, and state aforesaid, afterwards, to-wit, on the 15th day of September, 1887, into the said land and appurtenances, with force and arms, with strong hand, and with multitude of people, unlawfully and willfully did make entry, contrary to the statute in such cases made and provided, and against the peace and dignity of the state." The defendants moved to quash the same, on the ground that it did not charge "that the prosecutor was in possession when the entry was made." The court allowed the motion, gave judgment for the defendant, and the solicitor for the state, having excepted, appealed to this court.

An essential element of the offense of "forcible entry," as defined by the statute, (Code, § 1028,) is that the "lands and tenements or term of years" must be, not simply in the constructive, but in the actual, possession of the person whose possession is charged to have been interfered with. It is the invasion of such actual possession with strong hand, or a multitude of people, or a degree of force greater than a simple trespass, that tends to produce a breach of the peace, whether it actually does so or not, that makes up a constituent part of this offense. By actual possession is not meant that the person having it is continuously present in person on the land, but that he actively exercises authority and control over it, whether personally present or not, as by having it cultivated or used for some purpose by his family or servants. Hence it must be charged in the indictment, by apt words, that the person whose possession has been disturbed was in the possession of the land at the time of the entry; that he was expelled therefrom, etc. Otherwise the offense would not be charged. In the indictment in question it is not charged that the prosecutor was in possession of the land, and that he was expelled therefrom, etc. It was therefore properly quashed. The offense was not sufficiently charged. It was suggested on the argument that the charge that the prosecutor was "seised," etc., sufficiently charged his possession of the land. Such was not its purpose or effect. It charged the nature of the estate, the relation of the prosecutor to it, and embraced only such possession as was necessarily incident to it, but not necessarily actual possession; it might be constructive possession only. Besides, it is not charged that the defendant was in possession at the time of the entry, or that it was consummated by his expulsion therefrom. By "entry" is meant taking possession by the forcible means indicated by the statute, and the offense is not complete until such entry is made. An ineffectual attempt to make such entry might constitute another different offense. State v. Mills, 2 Dev. 420; State v. Pollok, 4 Ired. 305; State v. Jacobs, 94 N. C. 950; State v. Walker, 10 Ired. 234; State v. Caldwell, 2 Jones, (N. C.) 469; 2 Busb. Crim. Law, § 484; Rosc. Crim. Ev. 506; 1 Whart. Prec. Ind. 492. There is no error. Let this opinion be certified to the superior court. It is so ordered.

Digitized by Google

(102 N. C. 278)

EGERTON v. JONES *et al.*

(*Supreme Court of North Carolina.* March 4, 1889.)

PAROL EVIDENCE—DEED.

Plaintiff's intestate owned land on which an execution was levied in favor of C. A part of the land was laid off to intestate as a homestead, and the proceeds of the residue applied to another execution, nothing being paid on C.'s debt. Intestate, by deed absolute on its face, conveyed the homestead to B., and afterwards married. B. conveyed the homestead to intestate's wife, and, after intestate's death, plaintiff sued to sell the land to pay intestate's debts, one of which was C.'s judgment. Defendants, intestate's widow and children, over objection, gave evidence that the deed to B. was in fact made as security for a debt, with the agreement that B., on payment, should reconvey the land, and that, the debt being paid, the land was conveyed to intestate's wife, whereby intestate's homestead was never lost. *Held*, in the absence of any proof or pretense, that the alleged agreement to reconvey said land upon payment of the debt was omitted from the deed by fraud, mistake, or undue influence, defendants could not add to its terms by parol testimony, and that, therefore, the evidence mentioned was improperly admitted.

Appeal from superior court, Warren county; GRAVES, Judge.

Action by Egerton, administrator, etc., of Mark P. Jones, deceased, against his widow, Nannie P. Jones, and others, to sell land to pay debts. There was a trial of an issue by a jury, and a verdict and judgment for defendants, and plaintiff appeals.

E. C. Smith, for appellant. *Batchelor & Devereux* and *C. M. Cooke*, for appellees.

SHEPHERD, J. This was a proceeding begun by summons and petition before the clerk of the superior court of said Warren county, on the ——— day of June, 1886, for the purpose of having sold to pay the debts of plaintiff's intestate a certain tract of land situated in the said county of Warren, belonging to plaintiff's intestate, and described in the petition, and which was allotted to plaintiff's intestate as a homestead on the 3d day of June, 1871; the said allotment having been made when homesteader was unmarried and without children, and the homesteader having afterwards, and before he ever married, conveyed the homestead to one John E. Boyd by deed dated 20th of August, 1873, by a deed upon its face in fee-simple. Plaintiff's intestate died in March, 1885, having intermarried with the defendant Nannie P. Jones in the year 1876, and leaving the defendants Willie, Lucy, and Lizzie, the issue of said marriage, who are now living, and are still minors. The plaintiff insisted that as his intestate had before his said marriage conveyed his homestead as aforesaid, his said homestead fell in at his death, and was subject to his debts, even though he, after the said deed was made by him, married and had children. The defendants Nannie P. Jones, the widow of plaintiff's intestate, and her children, the said Willie, Lucy, and Lizzie, answered the petition, alleging that the deed made by the said plaintiff's intestate to John E. Boyd, though on its face a fee-simple deed, yet in fact was one for the security of money; that the money was afterwards paid by said Mark P. Jones to the said Boyd; and that with his consent the said Boyd, on the 21st of July, 1883, conveyed the same to the said Nannie P. Jones; and that the same is not, nor will be, subject to the debts of plaintiff's intestate until his youngest child shall become 21 years old. This issue of fact having been joined by the pleadings, the clerk transferred the same for trial to the fall term, 1886, of the superior court of said county. The matter came on for trial at the spring term, 1888, of said court, after regular continuances, and after several new parties had been made, as the record will show, at which spring term, 1888, Peter H. Allen, John Watson, and Mary Powell, on their own motion, were made parties, and filed their answer. Their answer sets up the same defense which the other defendants made, and the further defense that, after the said John E. Boyd had conveyed the said homestead to the said Nannie P. Jones, the said Nannie P. and her husband, the plaintiff's said intestate, executed a deed of trust to the defendant P. H. Allen, to secure two debts due to the said John Watson, —one in his own right, and the other to him as guardian of the defendant Mary E. Powell,—upon the said homestead, together with other lands of the said Nannie P.; and that this deed of trust is a first lien on said homestead and other lands; and that said Boyd had the right to convey said land to said Nannie P. Jones, because he held the same coupled with a parol trust to convey the same to the said Mark P. Jones upon the payment of a large sum of money due to him by the said Mark P., which he was unable to pay, and which the said Nannie P. paid out of her separate estate, and which conveyance was made with the consent of her husband, the said Mark P. Jones.

A jury was impaneled to try the issue submitted to them, which appears in the record, and was in the following words: "Was the conveyance by M. P. Jones to John E. Boyd subject to the trust declared in defendants' answer?"

The following facts were admitted on the trial: (1) That on the 12th day of April, 1870, M. P. Jones, plaintiff's intestate, executed a deed of trust to C. T. Sims and Peter R. Davis, on a tract of land of which he was in possession and control, in Warren county, N. C., on Shocco creek, adjoining the lands of Peter R. Davis, J. M. Heck, and others, containing 980 acres, more or less, less 140 acres thereof, which he had before that time sold to John E. Jones, to secure two debts therein named due to Sol. Ward, guardian. (2) That at the April term, 1871, of Wake superior court, B. F. Cheatham obtained a judgment against plaintiff's intestate and others, the others being then and now insolvent, in the sum of $862.33, with interest on $750 from 10th of April, 1871, at 8 per cent., till paid; that said judgment was docketed in Warren county on the 27th of April, 1871; that the same is now the property of Mary Jane

Digitized by Google

Cheatham; and that the sheriff of said Warren county, under an execution on said judgment duly issued to him, had the homestead of plaintiff's intestate laid off to him in the above-described lands, and the excess sold, and proceeds applied towards another execution then in said sheriff's hands in favor of E. H. Plummer against plaintiff's said intestate; and that no part of the said judgment of said Cheatham has ever been paid, and the whole is still due, and that the plaintiff has no money or personal property in hand with which to pay said judgment. (3) That by a decree of Warren superior court, made at its August term, 1873, in the case of B. F. Cheatham and others against Mark P. Jones and others, W. S. Davis was appointed commissioner to sell the land which had been conveyed in trust as aforesaid by said Mark P. Jones to said Sims and Peter R. Davis, to pay the debts secured in the deed of trust, but with directions not to sell the homestead of the said Mark P. Jones, unless it became necessary to pay the said debts, but, if necessary, to sell the same; that it did not become necessary to sell the said homestead, the other part of the land bringing sufficient money at the sale to pay the said debts; and that at the sale which was made on the ——— day of August, 1873, the said John E. Boyd became the purchaser of the land other than the homestead, and deed was made to him therefor by said commissioner on the 4th day of April, 1874. (4) That the tract of land allotted to the said Mark P. Jones as a homestead, as aforesaid, was conveyed by him to said John E. Boyd by a deed dated the 20th of August, 1873, for the consideration of $1,000, which on its face is a deed in fee-simple; and that at that time the said Mark P. Jones was unmarried, and without children. (5) The execution of a deed from said John E. Boyd to said Nannie P. Jones, wife of said Mark P. Jones, on the 21st day of July, 1883, conveyed a tract of land of 720 acres, including the said homestead tract, and also the execution of a deed of trust by said Mark P. and Nannie P. Jones, to P. H. Allen, on the same tract of land, to secure the debts due to said John Watson as set out in defendant Watson's answer, which deed is dated 21st of July, 1883. It was in evidence that Mark P. Jones was in possession of the said tract of land from its sale, in 1867, until his death, in 1885, and that John E. Boyd was never in the possession of the same.

The defendants then introduced John R. Boyd, a son of the said John E. Boyd, John E. Boyd being then dead, to prove that the deed from Mark P. Jones to the said John E. Boyd was in truth and in fact a deed for the security of money, and was so intended at the time of its execution, by conversations had between him and his deceased father in his life-time. The plaintiff objected to the competency of the witness on two grounds: (1) That the witness, being the son of the grantee, was interested in the event of the suit; and (2) that the deed, being in fee-simple on its face, and fully executed, ought not to be varied or altered in its meaning by verbal testimony. The objections were overruled, the plaintiff excepted, and the witness then testified as follows: That he had often heard his father, the said John E. Boyd, say that the said deed, although on its face a fee-simple one, yet was intended only as a deed to secure him an amount of money which the said Mark P. Jones owed him; that the money was paid to him by Mark P. Jones in 1883, with money borrowed by Mark P. Jones from John Watson. The witness further testified that he knew nothing of these facts of his own knowledge. The defendant John Watson then introduced Joseph S. Jones, the father of the said Mark P. Jones, and brother-in-law of the said John E. Boyd, to prove the same facts for which the witness John R. Boyd was introduced, and the plaintiff entered the same objections to the testimony as were entered to the testimony of the said John R. Boyd, and the objections were overruled by the court. The plaintiff excepted, and the witness then testified "that he had heard both Mark P. Jones and John E. Boyd, both at the time of the execution of the said deed and afterwards, say that the said deed was intended to be a security for money due to said Boyd by said Jones." The witness was then asked by counsel for defendant Watson if there was any parol agreement by which said Boyd was to reconvey to said Mark P Jones the said homestead tract, and also the balance of the land embraced in the tract of 720 acres conveyed by said Boyd to said Nannie P. Jones on the 21st day of July, 1883. The plaintiff entered the same objections, which were overruled, the plaintiff excepted, and the witness then stated "that, at the time of the purchase by John E. Boyd of the land sold by W. S. Davis, commissioner, in August, 1873, the said Boyd agreed with the said Mark P. Jones that if he, the said Mark P. Jones, would convey to him, the said Boyd, his homestead tract, he would hold the land bought by him from said commissioner, and also the homestead tract, for the said Mark P. Jones' benefit, and would reconvey the whole to him upon his repaying to him, the said Boyd, the amount which he had paid for the land sold to him by said commissioner, and also the value of a one-sixth interest in a tract of land in Warren county, which said one-sixth interest the said Boyd had conveyed to said Mark P. Jones in 1868, and for which he had not paid; that on the 21st day of July, 1883, the said Boyd conveyed by deed to said Nannie P. Jones, with the consent of said Mark P. Jones, the said 720-acre tract of land, including the said homestead; whereupon the said Mark P. Jones and Nannie P. Jones borrowed from the said John Watson the amount due by said Mark P. Jones to said John E. Boyd, and executed to P. H. Allen a deed of trust, dated 21st day of July, 1883, to secure the said amount, and with this borrowed money the amounts due under

Digitized by Google

the said agreement between Mark P. Jones and John E. Boyd were paid off in full."

The court was asked by the plaintiff's counsel to charge the jury that the evidence in this case, being the testimony of the said J. R. Boyd and J. S. Jones, did not in law establish a parol trust, which instruction the judge refused to give, but instructed the jury that, unless the declarations of John E. Boyd were corroborated by facts and circumstances inconsistent with the idea of an absolute purchase, then they must find there was no trust, and the plaintiff excepted. The jury returned a verdict in the affirmative to the said issue submitted to them; whereupon a judgment was rendered that the plaintiff take nothing by his suit, and that said P. H. Allen, trustee, sell the land under the said deed from Mark P. Jones and Nannie P. Jones to him, for the purpose of paying the debts named therein. Appeal by plaintiff.

It seems to have been conceded upon the trial that, if the deed conveying the homestead tract (which was the subject of this controversy) were not declared to have been intended as a mortgage, the plaintiff would be entitled to sell the land, and with the proceeds thereof pay the Cheatham judgment. This judgment against Mark P. Jones constituted a lien upon his land, and, if before his marriage he conveyed it absolutely to Boyd, the latter, and those claiming under him, could not insist upon the homestead exemption after the death of Jones. The plaintiff, representing the judgment creditor, has therefore a sufficient interest in the property to entitle him to maintain the integrity of the deed as it is written; for if a clause of redemption is supplied by parol, and the debt has been paid as alleged by the defendants, the homestead exemption will be prolonged until the death of the widow and the attainment of the majority of the youngest child. It would be needless to multiply the pages of the Reports by quoting largely from the numerous decisions of our court to the effect that, in order to convert a deed absolute on its face into a mortgage, "it must be alleged, and of course proved, that the clause of redemption was omitted by reason of ignorance, mistake, fraud, or undue advantage." Streator v. Jones, 1 Murph. 449; Bonham v. Craig, 80 N. C. 228. There is no pretense in our case that the alleged clause of redemption was omitted under any of the circumstances above mentioned. On the contrary, the deed seems to have been written as the parties intended. There is nothing in the testimony or pleadings which suggests any other view. The witnesses all say, in substance, that the homestead tract was conveyed as an additional security for the payment of the remainder of the land which Boyd had bought at the sale by the commissioner. Whatever may be said as to a trust attaching to this land in the hands of Boyd, and the admissibility of parol testimony to establish it, can have no application to the homestead tract, the title to which was in Jones, who conveyed it to Boyd upon the alleged agreement to reconvey if the purchase money of the other tract was paid. We think that this case falls within the principles so happily expressed by PEARSON, C. J., in Wood v. Cherry, 78 N. C. 110, cited and approved in Shields v. Whitaker, 82 N. C. 516. For these reasons we think the objection to the testimony was well taken, and that there should be a new trial.

(102 N. C. 381)

ALLEN v. WILMINGTON & W. R. Co.

(*Supreme Court of North Carolina.* March 4, 1889.)

EMINENT DOMAIN—COMPENSATION—APPEAL.

1. Under the North Carolina Statutes a railroad company may enter on land and lay out the route for its road, and either the company or proprietors may apply by petition to the county court, which shall appoint five freeholders to assess damages to the owner of the land. In an action by the proprietor to set aside a deed of the right of way as induced by fraud, and for damages, the course prescribed by the statute was not followed, but the deed was set aside, and the jury was allowed to ascertain the value of the rights and privileges taken. *Held* erroneous, the proceedings prescribed being exclusive; and, as no easement had been acquired, no damages could be awarded therefor; nor could damages be recovered for the act of entry on the premises and constructing and using the road.

2. An instruction of the court proceeded on the idea of a vesting in defendant of an interest in the land as a right of way over it, and directed the jury to ascertain as the measure of value "the difference between what the whole property would have sold for unaffected by the road, and what it would have sold for as injured (if it was injured) by the construction of the road." *Held* that, as the plaintiff's complaint did not propose to transfer to defendant any interest in land or easement therein on payment of damages, it was error to instruct on the measure of damages for the right of way.

3. It was proper to take such objection by exceptions to the court's instruction, and it was not waived by failure to demur to the complaint.

Appeal from superior court, Johnston county; AVERY, Judge.

Action by Josiah G. Allen against the Wilmington & Weldon Railroad Company to set aside a deed of the right of way through plaintiff's land, and for damages caused by the construction of the road. Judgment for plaintiff. Defendant appeals.

Busbee & Busbee, for plaintiff. *Geo. Davis*, for defendant.

SMITH, C. J. The defendant company, to whom, under the name of "The Wilmington & Raleigh Railroad Company," its charter was granted in 1833 by the general assembly, and whose corporate name was by the act of February 14, 1855, changed into that it now bears, upon the substitution of another terminus for the road was authorized by section 21 "to construct a branch or branches to the main road, to be connected with the main road at such point or points as they (the stockholders) may determine on, and to lead in such direction and to such point or points as they may think best." In the exercise of the authority conferred, the company proposed to construct a branch road from a point in the county of Wilson, on its line,

Digitized by Google

to a point on the boundary line between this state and South Carolina, in either the county of Richmond or the county of Robeson, and with a view to this end procured from the plaintiff a free and perpetual right of entry over the plaintiff's land, and easement therein for the location and operating their contemplated railway upon any part whereon the company may select its route. The deed conveying the easement, with all the incidental rights and privileges necessary to its full enjoyment, was made and bears date August 29, 1882. Under this grant of the right of way made, as on its face is expressed, "in consideration of the benefits to be derived from the building of the said branch road, and in further consideration of one dollar," the company proceeded in the latter part of December, 1885, to construct its road upon the route selected and determined by its agents, and have, since its completion, been running its trains over the same. On the 5th day of December, 1887, the plaintiff began the present action against the defendant, and in his complaint alleges that the deed for the right of way was procured from him by the false and fraudulent representations of the company's agent that the road was to be built upon a line which had theretofore been surveyed and marked out, and ran through the rear part of the tract, from which but little inconvenience would have been caused to the use of the plantation, and an assurance that, if the location was elsewhere, a new conveyance would be required, for which, if not meant as a donation, compensation would be given; and that the road had been built on a different route, over cultivated land, and to the great damage of the farm. The plaintiff further demands, in other assigned causes of action, compensation in damages sustained by reason of the alleged unskillful and negligent construction of the road in the various particulars mentioned. The demand is that the deed be declared void; for $1,500 damages; and for general relief. The defendant, in answer to the complaint, denies all the imputations of falsehood and fraud in inducing the execution of the deed, averring that it was made freely and willingly, and after it had been read and explained; admits that a change had been adopted in the route of the road after the plaintiff's conveyance in general terms of the right of way across the land, as it was found most convenient and useful to the company; and, after controverting most of the allegations in the complaint, as a further defense alleges that the plaintiff "demanded and received from it $100 for the license and privilege of constructing said road on the line as located." Upon issues submitted to the jury they find: (1) That the deed was procured through false and fraudulent representations, made by the company's agent, who thereby superinduced its execution; (2) that the road has been constructed over a different route from that marked out when the deed was given; (3) that the damage resulting from the change of route is $500, and from the failure to construct cattle-guards and crossings at plantation roads, $225; and (4) that none has been occasioned by washing of the land caused by the negligent and unskillful manner of constructing the road. Judgment having been rendered according to the verdict, the defendant appealed.

The exceptions are very numerous, and we deem it necessary to notice only one that is taken to the prosecution of the claim set out in article 5 of the first-named cause of action contained in the complaint, and none is taken to the first, whose sole object is the setting aside the conveyance of the right of way over the premises, nor to the damages arising from the failure to put up cattle-guards, and to construct crossings. The deed, if effectual, allowed the company to select its route, and would bar all claim for damages incidental to, and necessarily incurred in, exercising the conferred right. This obstacle in the way of any proceeding under the statute to acquire an easement in the land must be removed by annulling the deed, for this method of obtaining the right is given when the parties are unable to agree upon the terms of the acquirement. There is no difficulty, then, in prosecuting the action, so far as it proposes to put the conveyance out of the way and seeks damages for subsequent injuries, unless it be in the plaintiff's own inaction to make objection when he found a new line had been adopted by the defendant, and even accepted compensation for letting the water out of his pond to enable the company to go on with its work, and expend largely in constructing the road. This point has been strongly urged in the argument, but as no exception of the kind is shown in the record, it cannot now be entertained, whatever may have been its force if taken in apt time. The judgment following the verdict, which affirms the allegations as to the influences brought to bear upon the plaintiff in inducing the making of the deed, will remain undisturbed. The remaining causes of action are based upon trespasses committed upon the land, and the complaint demands compensation in damages therefor, simply as such, and not for the value of any permanent right of way to be acquired over the land, when such damages have been paid. It is obvious, if the judgment is permitted to stand which gives compensation therefor, the defendant would have no easement or estate in the land, and would be equally exposed to another and successive actions for continuing trespasses in the use of the road by running its cars over the track. The right of eminent domain possessed by the state may be exercised, when conferred upon public corporations of the class to which the defendant belongs, as decided in Railroad Co. v. Davis, 2 Dev. & B. 451, and many subsequent cases, but it must be exercised, and can only be exercised, in the mode pointed out in the statute. The provision in the act incorporating the defendant company au-

Digitized by Google

thorizing the proceeding to condemn lands of an owner over which the road is to pass, when the parties cannot agree on the terms of purchase, renders it "lawful for the president and directors to file a petition in the name of the company in the [now extinct] court of pleas and quarter sessions of the county wherein the land lies, under the same rules and regulations as are now prescribed for laying off public roads in said county," under certain restrictions mentioned. Section 14. Authority is given the company in section 17 to enter upon lands for the purpose of surveying a route for the track, and laying off and marking the same, and upon failure of the company to take steps for condemning the land the same remedy is given the owner, and he is required to proceed "after the manner and according to the rules provided in the sixteenth section hereof, and not otherwise." Section 18. The concluding clause of this section declares that "if the owners of said lands shall bring any action of trespass against the company or any of its officers, or any other action but a petition as aforesaid, the defendants may give this act in evidence under the general issue, or upon a special plea, and it shall bar the said action or suit."

The abolition of the county courts prevents a literal compliance with the terms prescribed in reference to the tribunal to which application must be made, but the objection disappears by the enactments contained in sections 9 to 22, inclusive, of chapter 61, Rev. Code, which supersede, at least in some particulars, the method of procedure, and determine the corporate rights and privileges of public corporations found in the charter. By these provisions the railroad company may enter upon land, and lay out the route on which to put the road, and either the company or proprietor "may apply by petition (five days' previous notice having been given) to the county or superior court of the county in which the land or some part thereof may be situate; and the court shall appoint five disinterested and impartial freeholders to assess the damages to the owner for the occupation and use of the land aforesaid." And the method of proceeding for the condemnation of land in furtherance of such public enterprises is furnished more in detail in chapter 49 of the Code, § 1932 et seq., entitled "Railroad and Telegraph Companies." In its original form, as found in Acts 1871–72, § 13, the procedure for condemnation prescribed is confined to companies formed under the act, but in the Code, § 1943, that clause is reproduced by the addition of the words, "or by special act of the general assembly," so that it is now applicable to railroads whether formed under the general law or by special act of incorporation. It is not material to inquire to what extent the charter of the defendant in these features has been modified by subsequent legislation, though, as not impairing vested rights, we are inclined to the opinion that the modified provisions made on the subject must be pursued, and, instead of a jury of view, the freeholders, as directed in section 1945, should be appointed, whose duty it is to go upon the premises and hear the proofs, and then make up and return their report to the clerk as representing the superior court for its action thereon, as directed in the section next succeeding. However this may be, the course pursued in the present case, in which the jury was allowed to ascertain the value of the rights and privileges demanded by the plaintiff, is wholly without warrant of law, and, as no easement has been acquired, so no damages should have been awarded as the consideration therefor, nor could any damages be recovered for the act of entry upon the premises and the constructing and using the road.

The third instruction proceeds upon the idea of a vesting in the defendant of an interest in the land, as a right of way over it, and directs the jury to ascertain, as the measure of value thereof, "the difference between what the whole property would have sold for unaffected by the road and what it would have sold for as injured (if it was injury) by the construction of the road," this being "the measure of damage for the right of way," etc. The charge is excepted to by the appellant in exceptions 5, 6, 7, and 8, and we think there is error therein. The counsel for the appellee, in answer to the objection, argues that it should have been taken by demurrer, and has been waived. But this is not a case of the joinder of incongruous causes of action in the complaint, over each of which jurisdiction is possessed, but an association of separate alleged causes of action, of which some are within and others without the jurisdiction of the court, so that redress may be given in the former, and cannot be given in the latter. The cause of action growing out of the act of appropriating the plaintiff's real estate to the uses of the company can be prosecuted only in a single special proceeding provided in the statute, in its nature exclusive of any other, and which, as said by ASHE, J., in Holloway v. Railroad Co., 85 N. C. 452, "has taken away the common-law remedy." The allegations that introduce the clause for damages growing out of the construction of the road, and for which compensation must be sought in the statutory mode of procedure, are but harmless surplusage, and may be disregarded in the pursuit of such as are recoverable and are consequent upon a faulty construction of the road, (Manufacturing Co. v. Barrett, 95 N. C. 36,) and for such redress may be had in the present action, (Code, § 1975.) The complaint does not propose to transfer to the defendant any interest in the land, or easement upon it, upon the payment of the assessed damages, and hence no equivalent is secured to the company by making payment; as, while the deed continued in force, and it could be annulled only for the imputed vitiating infirmity at the instance of those who

Digitized by Google

made it, and by them it was acquiesced in until the bringing of the suit, the condition —the inability of the parties to come to an agreement—did not exist, so as to warrant the summary action by petition; and therefore the case stands upon the conferred authority to enter upon the land and build the road. The compensation for this deprivation of property must await the result of the action of the commissioners and its confirmation, and meanwhile the common-law remedy for other lawless invasions of the property of another is withheld, unless damages supervene afterwards, for which it does afford relief.

We pretermit an inquiry into the sufficiency of other exceptions taken at the trial to rulings of the court that have been the subject of earnest controversy upon the hearing, because not necessary in disposing of the case on appeal. The counsel for appellant conceded the plaintiff's right to recover damages, as assessed in the issues, for defendant's neglect to put up cattle-guards, and to provide proper crossings at the intersection of the railroad with plaintiff's plantation roads, and the judgment, so far as it awards these, and sets aside the conveyance, must be affirmed; and reversed so far as it awards damages for the building of the road over the new, instead of over the original, route by the mill.

(102 N. C. 59)

KNOWLES v. NORFOLK S. R. CO.

(*Supreme Court of North Carolina.* March 4, 1889.)

CARRIERS OF PASSENGERS—DAMAGES—PLEADING.

1. In an action for damages caused by being ejected from defendant's train, the complaint alleged "that the plaintiff explained the case to the said conductor, telling him that he knew where his ticket was; that he could and would get it as soon as he reached W., and there deliver it to him, or that he would deposit with him [the said conductor] money of the value of the ticket, to be returned if he should produce the misplaced ticket at W., as agreed; that the money was tendered the said conductor, but he refused to receive the same, and forced the plaintiff off the train several miles from his destination." *Held*, that this was an allegation that plaintiff made two offers: (1) To deposit the value of the ticket, and on the conductor's refusal to accept it, (2) an unconditional tender; and the complaint stated a good cause of action.

2. The allegations in the complaint that the conductor "forced the plaintiff off the train," and that he was "put off," and "that by said wrongful act of ejecting plaintiff from said train he has sustained serious damage," convey the idea that actual violence was used, and are sufficient to allow proof of rudeness on the part of the conductor, and the charge of the court on the question of punitive damages was proper.

3. The denial in the answer was so expressed as to show that the allegations of the complaint were construed by defendant to imply a charge of rudeness on the part of the conductor, which was therefore denied. *Held*, that the doctrine of aider by answer applied, and the right to recover punitive damages for the rudeness, if proved, was established.

4. Under Code N. C. § 242, which provides that if no "objection be taken, either by demurrer or answer, the defendant shall be deemed to have waived the same, excepting only the objection to the jurisdiction of the court, and the objection that the complaint does not state facts sufficient to constitute a cause of action," the supreme court will on motion, or *ex mero motu*, dismiss an action on the ground that the complaint does not state facts constituting a cause of action.

Action by Knowles against the Norfolk Southern Railroad Company, to recover damages caused by ejecting plaintiff from defendant's train. Verdict and judgment for plaintiff. Rule for new trial discharged. Defendant appeals.

B. C. Beckwith, for plaintiff. *Pruden & Vann*, for defendant.

AVERY, J. This was a civil action tried at the fall term, 1888, of the superior court of Perquimans county, before MACRAE, Judge. There was evidence on the part of the plaintiff tending to show that before the plaintiff was put off the train he offered to pay the conductor his fare, but that the same was refused; that the conductor was rude in his manner, and pushed the plaintiff as he got off the train. Evidence denying this, and showing that the conductor had acted discreetly and kindly in ejecting the plaintiff, and that the plaintiff refused to pay his fare or exhibit a ticket, was introduced by defendants. The following issues were submitted to the jury: (1) Did the defendants' agent wrongfully eject plaintiff from defendants' train? (2) What damage has plaintiff sustained?

The court charged the jury as follows: "(1) If the plaintiff was on the train from Elizabeth City to Winfall without his ticket, the conductor had the right to collect fare or put him off at the next station. Plaintiff could not require of the conductor to agree with him to return the money if he gave him the ticket in the morning. But if plaintiff offered to pay his fare without conditions, and the conductor refused to receive it, he had no right to put him off. If he did put him off under these circumstances it was wrongful, and your response should be 'Yes.' (2) If, however, the plaintiff refused to pay his fare, and the conductor put him off in a rude or insulting manner, such as to show malice on the part of the conductor, the plaintiff would be entitled to such damage as you deem proper,—punitive. If he did offer to pay his fare, and the conductor put him off without using force or acting towards him in a rude or insulting manner, the damages would be the actual expenses which he incurred, and compensation for the trouble to which he was put by reason of being wrongfully ejected." The defendants excepted to this charge, and assigned as error that the court instructed the jury that they might assess punitive damages, when, under the pleadings as they are, the plaintiff was not entitled, in any aspect of the case, to punitive damages. The jury answered the first issue, "Yes;" and the second, "$250;" and the court rendered the judgment set out in the record. Rule for new trial. Rule discharged. Defendants appealed.

The complaint, and answer and issues,

Digitized by Google

were submitted as follows: The plaintiff, for complaint, alleges: (1) That the defendants are a railroad corporation, doing business in and under a charter of the general assembly of this state. (2) That the plaintiff on the ——— day of ———, 1887, purchased of the defendants' agent, at Winfall, a station on their road, a return ticket to Elizabeth City, also a station on said road. (3) That on his return, the day following, he was put off the train by the conductor, one Poindexter, because he had no ticket, which fact he, plaintiff, had not discovered until the same was called for. (4) That the plaintiff explained the case to the said conductor, telling him that he knew where his ticket was; that he could and would get it as soon as he reached Winfall, and there deliver it to him, or that he would deposit with him, the said Poindexter, money of the value of the ticket, to be returned if he should produce the misplaced ticket at Winfall, as agreed; that the money was tendered the said conductor, but he refused to receive the same, and forced the plaintiff off the train several miles from his destination. (5) That it is a custom of the defendants to accept money in lieu of tickets when the latter cannot be had. (6) That by said wrongful act of ejecting the plaintiff from said train he has sustained serious damage. Wherefore he prays judgment for the sum of $5,000 damages, and the costs of this action.

The defendant, answering the complaint in this cause, says: (1) That section 1 thereof is true. (2) That section 2 thereof is true. (3) That on the day named the plaintiff was a passenger on the defendants' train going from Elizabeth City south, and the conductor of said train called on him for his ticket, but was informed by the plaintiff that the same had been left by him in the pockets of another suit of clothes, and he could not then produce it, but would do so the next day. The conductor then demanded of him the usual fare between Elizabeth City and Winfall, where he wanted to go, but this the plaintiff refused to pay, but did offer to deposit with the conductor enough money to pay the fare, provided the conductor would agree to return the same if the plaintiff would next day produce the ticket. The conductor refused to do this, and informed the plaintiff that he was ordered in all cases to collect from passengers a ticket or the fare in money, and that unless the plaintiff presented his ticket or paid the fare he would put him off the train; and, upon the plaintiff's refusing to do either, the conductor, at the next station, stopped the train, and told the plaintiff he must get off, which he did. (4) That the conductor was carrying out in this matter the general orders of the defendant company; that he committed no violence whatever towards the plaintiff, but acted considerately and carefully towards him, and the plaintiff left, upon the demand of the conductor, and without being ejected by him. (5) That sections 3 and 4 of the complaint, so far as they state facts inconsistent with sections 3 and 4 of this answer, are denied. (6) That section 5 of the complaint, so far as it is inconsistent with this answer, is untrue. (7) That section 6 thereof is untrue. (8) That sections 3 and 4 of this answer are stated upon information and belief. Wherefore defendant demands judgment that it go without day, and recover its costs.

The following issues were submitted to the jury, viz.: *Question.* Did the defendants' agent wrongfully eject plaintiff from defendants' train? *Answer.* Yes. *Q.* What damage has plaintiff sustained? *A.* $250.

The appellant moved in this court for the first time to dismiss the action, because the complaint did not state facts sufficient to constitute a cause of action. It seems that the court of appeals of New York, giving effect to precisely the same language as section 99 of the Code of Civil Procedure, and substantially the same as section 242 of the Code of North Carolina, have construed it to mean that the motion to dismiss, on the ground relied on in this case, would not be entertained when made for the first time in the appellate court. Bliss, Code, § 499, p. 355, note *z*. We must stand to our repeated decisions, that this court will, on motion or *ex mero motu*, dismiss an action on this ground, just as would be done when it appeared upon the face of the record that the action had been brought in a court that did not have original jurisdiction. Tucker v. Baker, 86 N. C. 1; Hunter v. Yarborough, 92 N. C. 68; Rogers v. Jenkins, 98 N. C. 129, 3 S. E. Rep. 821; Johnson v. Finch, 93 N. C. 205. But if the complaint does state facts that constitute a cause of action, by a fair construction of the language, the motion must be denied. If the language used in the fourth paragraph of the complaint is susceptible of the interpretation that the plaintiff tendered to the conductor the usual fare from Elizabeth City to Winfall, and that the conductor put him off the train notwithstanding the amount usually paid for passage between these points was offered, there is a statement of facts sufficient to constitute a cause of action. Nance v. Railroad Co., 94 N. C. 624. Though nothing more appearing, the recovery of the plaintiff might be restricted on trial to an almost nominal sum. The original jurisdiction must depend entirely on the amount demanded in good faith as damages. Fell v. Porter, 69 N. C. 140. The paragraph mentioned is divided into two parts, separated by a semicolon, as it appears in the record, but might have been divided into two paragraphs. The first paragraph, if it had been so arranged, would have been as follows: "That the plaintiff explained the case to said conductor, telling him that he knew where his ticket was, that he would get it as soon as he reached Windfall, and then deliver it to him, or he would deposit with him, Poindexter, the value of the ticket, to be returned if he should produce the misplaced ticket at Winfall as agreed." The second

Digitized by Google

portion of the section, as a distinct paragraph, would be as follows: "That the money was tendered to the said conductor, but he refused to receive the same, and forced the plaintiff off the train several miles from his destination." These two propositions, in no way dependent upon or qualifying each other, and not necessarily inconsistent, (no matter what punctuation may be adopted,) can be construed only as distinct offers. First, the plaintiff proposes to deposit the value of the ticket, which, in the absence of any proof to the contrary, we must assume to be the usual fare between the two points named, but upon condition that he is to take it as a pledge, and return it, if the ticket should be produced. When the conductor refused to accede to that proposal, "the money [meaning the usual fare or value of the ticket] was tendered to the said conductor, but he refused to receive the same, and forced the plaintiff off the train." This is clearly susceptible of the interpretation that the tender at last was unconditional, but the conductor impatiently declined it, and ejected the plaintiff. There can be no doubt that the language, so construed, is a statement of a good cause of action.

In considering a motion of this kind, we cannot look beyond the language of the complaint, to the fact that the parties tried the case without objection, and apparently acted upon the idea that the pleadings put in issue the question whether the regular fare had been tendered; because, as already stated, the motion might have been purposely reserved for this court. There was testimony on the part of the plaintiff tending to show that he offered to pay his fare before he was put off the train, and that the conductor, after refusing the money tendered, rudely pushed him as he was getting off. On the other hand, there was evidence on behalf of defendant that the plaintiff refused either to pay the fare, or exhibit a ticket, and that the conductor acted kindly and discreetly in ejecting him. The defendant excepted to the charge, assigning as error that the court instructed the jury that they might assess punitive damages, when, under the pleadings as they are, the plaintiff was not entitled, in any aspect of the case, to punitive damages. Conceding that there must be sufficient allegations in the complaint as well as corresponding proof to sustain them, and that testimony otherwise sufficient would not support a verdict without *allegata* in accord with the *probata*, the question arises whether the complaint does not contain a statement of a cause of action in support of which the plaintiff may prove himself entitled to exemplary damages. "Few, if any, of the ancient rules of pleadings are now applicable. All that is required of the plaintiff is a plain and concise statement of the facts constituting a cause of action." Gorman v. Bellamy, 82 N. C. 496; Moore v. Edmiston, 70 N. C. 510; Jones v. Mial, 82 N. C. 252. The words "forced the plaintiff off the train" and that he was "put off," together with the further allegation that "by said wrongful act of ejecting plaintiff from said train," etc., *ex vi termini* convey the idea that actual violence was used, because a demonstration of power would have compelled him "to get off the train," and the word "ejecting" in this connection implies more than a mere command to leave the train, with power to enforce obedience. This view of the case is strengthened by the fact that the defendant in the answer is careful to aver that the conductor "stopped the train, and told the plaintiff he must get off, which he did," and that the former "committed no violence whatever towards him, and the plaintiff left upon the demand of the conductor, and without being ejected by him." The complaint charges actual, if not more than ordinary, violence, and the words "put him off" imply rudeness, however informal the expression may be. If the words do not import all that we have held they mean, a sufficient cause of action being alleged, there would not be such a variance from the proof as would be deemed material, if any at all. Willis v. Branch, 94 N. C. 147; Usry v. Suit, 91 N. C. 406. But in fact the proof offered of rudeness to the plaintiff on the part of the conductor in the very act of expelling him accords with the true interpretation of the allegations mentioned, and such rude expulsion will entitle the plaintiff to recover more than ordinary damages. 2 Wood, Ry. Law, § 317, pp. 1242–1245, with notes. Mr. Justice ASHE, delivering the opinion in Holmes v. Railroad Co., 94 N. C. 318, adopts the rule which must control this court, and which is decisive of the point we have discussed. "When there is an element either of fraud, malice, or such a degree of negligence as indicates a reckless indifference to consequences, oppression, insult, rudeness, caprice, willfulness, or other cause of aggravation in the act or omission causing the injury," punitive damages may be awarded by the jury. Conceding that our interpretation of the language of the complaint is correct, there was an allegation, as there was evidence, of rudeness. It is apparent, too, from the careful denial in the answer, that the defendant was not misled, but understood what was meant by the plaintiff, and not only carefully avoided admitting the force as alleged, but set up an affirmative averment as to the force used, which draws the line very nicely between rudeness and a courteous discharge of a trying duty. Usry v. Suit, supra; Code, §§ 269–271; Garrett v. Trotter, 65 N. C. 430.

On the argument there was some discussion of the point whether the objection that there was a variance between the allegation and the evidence offered by the plaintiff, if it had been well founded, could have been made for the first time after the defendant had introduced testimony to rebut the evidence offered by the plaintiff, without objection on the part of the former. It would seem that the practice of the courts in New

Digitized by Google

York differs from ours, also, in this respect. Lounsbury v. Purdy, 18 N. Y. 515; Emery v. Pease, 20 N. Y. 62. The practice there permitted must be made consistent with the sections of the Code cited above, on the ground that a party, by failing to object to evidence introduced by his adversary, and offering rebutting testimony, waives his right to take advantage of the defect in the pleading at a later stage of the trial. While the holding of this court as to variance differs widely from that of the appellate court of New York, our court has repeatedly drawn the distinction between a defective statement of a cause of action and a statement of a defective cause of action. In the case of Garrett v. Trotter, 65 N. C. 430, Chief Justice PEARSON says: "The defect is aided by the answer, which shows that the defendant understood the complaint to charge an illegal withholding of the possession." When, therefore, we have reached the conclusion that the complaint stated a cause of action, upon which the plaintiff could recover actual damages, if there was some doubt or room for discussion as to the true meaning of the complaint considered alone, but the denial was so expressed in the answer as to prove that the allegations of the complaint were construed by the defendant to imply a charge of rudeness, and therefore denied, the doctrine of aider would apply, and the right to recover punitive damages for the rudeness, if proved, would be established. The judgment must be affirmed.

(85 Va. 870)

WHITEHEAD v. WHITEHEAD.

(*Supreme Court of Appeals of Virginia.* March 7, 1889.)

TRUSTS—EQUITY—COMPENSATION.

1. Defendant had a large trust fund in his hands, and was directed by a decree of court at one time to invest $50,000, and six months later a like sum, in United States bonds. The funds were in a bank of which he was president, a large stockholder, and from which he and the cashier were large borrowers. He disregarded both directions to invest until nearly a year after the first decree, when he bought $50,000 worth of bonds, but borrowed the money to pay for them, and left the trust funds, amounting then to $100,000, in the bank. After these decrees, he loaned himself and the cashier a portion of the funds and purchased certain stocks of himself with another portion, without the knowledge of the court. A few days after buying the United States bonds, the bank failed, defendant being then indebted to it for $230,000. *Held*, that the loss of the trust fund resulted from his gross negligence in depositing it with a bank known to be insolvent, and from his disobedience to the decrees of the court, and he was responsible for the whole thereof.

2. Defendant having received 5 per cent. commission on all the sums received by him, in addition to $3,000 given him by the will, under which he was trustee, and 3 per cent. commission on the value of the assets he turned over on his resignation, besides all expenses incurred by him, is sufficiently remunerated, and it is not error to refuse an additional 2 per cent. on the assets turned over; the compensation of a trustee being discretionary and dependent on the circumstances of the case.

Appeal from circuit court, Nansemond county.

Bill by William R. Whitehead, guardian of certain infants, against John B. Whitehead, executor and trustee under the will of William B. Whitehead, deceased, to compel a settlement of his accounts. Decree for complainant, and defendant appeals.

Walke & Old and *Tunstall & Thom*, for appellant. *Robert R. Prentis*, for appellee.

FAUNTLEROY, J. This is an appeal from a decree of the circuit court of Nansemond county, rendered November 29, 1886, in a chancery cause therein pending of William R. Whitehead, guardian, etc., against John B. Whitehead, executor and trustee under the will of William B. Whitehead, deceased, and others, determining the principles on which the accounts of the said fiduciary should be settled; and also from a final decree in the said cause, rendered April 11, 1887, against the said fiduciary, John B. Whitehead, in favor of Robert B. Prentiss, curator of the estate of William B. Whitehead, deceased, for the sum of $77,358.10, with interest thereon from April 1, 1885, till paid. William B. Whitehead died in 1877, leaving a will by which he devised and bequeathed the bulk of his large estate to John B. Whitehead and John R. Kilby, as trustees, to accumulate for the benefit of his infant grandchildren; directing and providing in his said will that they should apply to the circuit court of Nansemond for all necessary decrees, powers, or orders. John R. Kilby having died on the 5th day of December, 1878, the surviving trustee, John B. Whitehead, (the appellant here,) continued in possession of the assets, and acted alone. He never applied to the court for instruction, aid, or direction. The guardian of certain of the *cestuis que trustent*, finding that the estate was not accumulating, and that the income from it was largely consumed in payment of taxes and other charges, in February, 1882, brought this suit in his own name as their guardian, and in their names as their next friend, for the purpose of obtaining a decree authorizing a sale of the unproductive portion of the property, and of having the trust administered by a chancery court. The bill specifically prays that the funds arising from the sales of property and from the surplus income of the estate may be invested in United States bonds, or in such other good securities as the court should direct. The surviving executor and trustee, John B. Whitehead, answered the bill, admitting its allegations, and acquiescing in the objects and purposes of the suit. There was a decree responsive to the prayer of the bill, and John B. Whitehead was appointed special commissioner to make sale of the property decreed to be sold. At the April term, 1884, of the circuit court of Nansemond county, the executor and trustee, John B. Whitehead, reported an account of his transactions from August 1, 1882, to August 1, 1883, and, it appearing from the said report that the said executor and trustee had a large amount of money to his credit on de-

Digitized by Google

posit in the Exchange National Bank of Norfolk, an order or decree of court was, thereupon, at that April term, 1884, entered, directing him to invest at least $50,000 of the said deposits in United States 4 per cent. registered bonds. In October, 1884, the said Whitehead then having, as special commissioner, a large amount in his hands, or to his credit in bank, a considerable part of which had been received by him subsequently to the decree of April term, 1884, a decree was entered authorizing him to invest the further sum of $50,000 out of any funds then in his hands, or thereafter coming into his hands, in United States 4 per cent. registered bonds; the said investments, when so made, to be made in his name as surviving executor and trustee, and to be held subject to the trusts of the will of his testator.

The next report of the executor and trustee's transactions from August 1, 1883, to August 1, 1884, was dated March 23, 1885, and was made to the court April 27, 1885, accompanied with the trustee's written resignation of the trust. It showed that the trustee had, up to August 1, 1884, wholly failed to obey the decrees of April, 1884, and that, on August 1, 1884, he had over $100,000 of the trust fund in the Exchange National Bank of Norfolk. This report the court did not confirm, but entered an order thereupon, appointing a curator to take possession of the trust fund, and referring the cause to a master commissioner, to make a final settlement of John B. Whitehead's accounts as executor and trustee of William B. Whitehead, deceased, and also to report to the court the amount for which the said John B. Whitehead was responsible to the estate of William B. Whitehead, deceased, by reason of moneys deposited by him in the Exchange National Bank of Norfolk. The commissioner, after a careful and painstaking investigation, reported on the 15th day of September, 1886, for reasons set out in the report, that John B. Whitehead was responsible, as executor and trustee, for $47,002.74, and, as special commissioner, for $33,099.03, aggregating an indebtedness to the trust fund of $80,101.77. It also appears from this report that John B. Whitehead was a large stockholder in the Exchange National Bank, and its president; that he did not make the investment directed by the decree of April, 1884, until October 2, 1884, and that, for the purpose of making it, he borrowed $48,300 of the purchase money from the National Bank of the Republic of New York, although, at that time, he had over $100,000, belonging to the trust estate, in the Exchange National Bank; and that he did not pay off the debt thus incurred until the 23d day of March, 1885, about a week before the failure of the Exchange National Bank. That the bonds did not become the property of the trust-estate until March, 1885, nearly 12 months after he had been directed to withdraw from the fund which he had on deposit in the Exchange National Bank of Norfolk, at least $50,000, and to invest the same in United States 4 per cent. registered bonds. That he failed altogether to make the further investment of $50,000 authorized by the decree of October 10, 1884. That during the period from April, 1884, to the failure of the bank, in April, 1885, instead of obeying the orders of the court to invest the trust funds in United States bonds, he deposited them in the Exchange National Bank of Norfolk, and afterwards loaned to himself and George M. Bain, Jr., the cashier of the said bank, on August 1, 1884, $12,741 as an investment of the fund. That on December 6, 1884, he invested $7,700 of the trust fund in 154 shares of the stock of the Norfolk & Ocean View Railroad & Hotel Company, which he purchased from himself at par. During all this period he was a large borrower from the Exchange National Bank, and at the time of its failure his individual indebtedness to the said bank, and his indebtedness jointly with the cashier, Bain, and others, amounting to the enormous sum of $230,320.90. Upon this state of facts the court, being of opinion that John B. Whitehead is legally responsible, entered the decree of November 28, 1886, adjudicating the principles upon which his accounts should be settled. The report was substantially confirmed, though it was recommitted to the master commissioner with instructions to increase the appellant's commissions from 2 per cent. to 3 per cent. on the par value of the assets delivered by him in kind to the curator. He had already charged and been allowed 5 per cent. commission on the funds which passed through his hands. The 3 per cent. commission was allowed, in addition, upon those assets which had not been changed in character, but were merely delivered to his successor. The account was thus restated, in accordance with the instruction of the court, and a personal decree pronounced against John B. Whitehead for $77,358.10. Of these two decrees the appellant is here complaining.

He assigns as error that the court held him personally liable for amounts due the trust-estate standing to his credit as executor and trustee and as special commissioner in the Exchange National Bank of Norfolk at the time of the failure of the said bank in April, 1885. He was expressly directed by the will to apply to the circuit court of Nansemond for aid and direction in administering the trust, and in making investments of the funds of the estate. As early as February, 1882, the chancery jurisdiction of the court was invoked by a suit asking the direction, authority, and guidance of the court in making investments, and to have the funds of the estate securely invested in United States registered bonds,—safe not only from ordinary casualties and misfortunes, but beyond the control of the fiduciary himself; and as early as April term of the court, 1884, when he made the first report of funds in his hands belonging to the estate, he was directed by a decree of the court to invest at least $50,000 of the fund in United States 4 per cent. reg-

Digitized by Google

istered bonds. This he did not do until the 23d day of March, 1885,—about a week before the failure of the bank. At the October term, 1884, it being apparent that the funds had largely accumulated in the hands of the executor and trustee by the realization of assets in New Orleans city bonds, and the court being wholly uninformed that he had not made the investment of $50,000, ordered by the April term decree, and it not then appearing to the court what was the precise amount in the hands or under the control of John B. Whitehead, either as executor and trustee or as special commissioner, the court, without discriminating between the funds held by him in the one character or the other, entered the decree authorizing him to invest the further sum of $50,000 out of any funds in his hands (in addition to the $50,000 ordered to be invested by the decree of the April term) in United States 4 per cent. registered bonds. The purpose of the court to invest the funds of the estate in United States bonds was thus clearly and unmistakably indicated and authoritatively expressed, not only as to all the trust funds then in the bank, but also as to all such funds as might be thereafter collected by him, either as executor and trustee or as special commissioner; yet, notwithstanding the orders of the court that those large amounts should not longer remain in the Exchange National Bank, John B. Whitehead never did make the investment directed by the decree of the October term, 1884. The trust-estate has been lost because the fiduciary disregarded and disobeyed the decrees of the court; and now he seeks to escape his adjudged personal liability, claiming to have acted in "perfect good faith" in setting his own judgment above the wisdom and authority of the chancery court, who had jurisdiction over him and the trust-estate, and, in defiance of its decrees, keeping the large fund in the bank in which he was interested as a large stockholder, of which he was the president, and from which he was a large borrower. It appears from his own testimony that on the 1st day of August, 1884, he loaned to the cashier of the bank and himself $12,741 of the trust fund, without any warrant or authority whatever, and that, on the 6th day of December, 1884, he bought 154 shares of stock of the Norfolk & Ocean View Railroad & Hotel Company from himself at par; which transactions were never discovered nor reported to the court until after the failure of the bank. Although he was the president of the bank, having his office at the bank, he only occasionally made a cursory examination of the books of the bank; and, although he knew that the cashier of the bank, Bain, made loans to Bain & Bro., (a firm of which the cashier was a member,) he was entirely ignorant of the extent of such loans, or of the character and sufficiency of the securities, if any whatever.

The only reason given by the appellant, John B. Whitehead, for keeping these large amounts in this bank of which he was president, and in which he was so largely interested, is that he thought this a better investment than that which the beneficiaries preferred, and which the court had ordered. If the court had ever been informed of his failure to obey its decrees, and he had assigned the foregoing reason for his neglect or defiance of its authority, he would have been in open contempt; and now, surely, when the trust-estate has been lost by reason of his failure to obey the decrees of the court, it is utterly insufficient to relieve him from a responsibility which he deliberately and contumaciously assumed. When a court having competent and actual jurisdiction of the fund and the fiduciary has instructed or authorized a particular investment, it is the imperative duty of the fiduciary to obey, and to strictly conform, and for loss occasioned by his failure, neglect, or disobedience to make the investment indicated by the court, the fiduciary is personally responsible. Particular inquiry may fail to disclose to an outsider the true condition of a bank reputed to be solvent; but John B. Whitehead cannot be heard to plead ignorance of the financial condition and management of a bank of which he was president, with daily and hourly opportunities and duty to look and see and inform himself, and in which he kept a large trust-estate, in open defiance of the express directions of the court, and whose cashier he was apprised was borrowing money from it, and lending money in unknown amounts to a firm of which that cashier was a member. While he was depositing the trust funds in the bank he was himself a large borrower from the bank, and at the time the bank failed he was indebted, individually and jointly with others, in the sum of $230,320.90. He cannot be allowed now to plead his own failure to make inspection and observation which it was his duty to make, both as president of the bank and as a fiduciary with a vast trust-estate in the bank, and which he had every opportunity to make. A fiduciary is required to act in good faith, and "with the same prudence and discretion that a prudent man is accustomed to exercise in his own affairs." Douglass v. Stephenson's Ex'r, 75 Va. 749; Leake's Ex'r v. Leake, Id. 800. The appellant need not have taken the slightest risk, and he was relieved even of the labor of seeking investments. The object of the suit was to have the funds of the estate invested in United States bonds. The beneficiaries had asked it, and the court had so decreed; and the record does not disclose any reasonable or legal excuse for John B. Whitehead's failure to respect the wishes of the *cestuis que trustent* and the expressed will of the court. The record is full of evidence of the want of due care, and of open disregard of duty, by John B. Whitehead in the management of this trust, and the court below was right in holding that, independently of the inferences to be drawn from the fact of his enormous indebtedness to the bank, individually and jointly

Digitized by Google

with the cashier and others, the appellant is liable for the amount deposited and lost in the bank. When the aid of the court had been invoked, and freely and positively given, and the appellant deliberately disregarded and disobeyed the decrees of the court upon the ground or assumption that the policy of the court was, in his judgment, unwise, there is no legal or equitable ground for him to claim excuse or immunity from the consequences of his own unwarranted action, resulting in the loss of the trust-estate committed to his legal and moral responsibility.

The only other error assigned is that the court erred in not allowing the appellant 5 per cent. commission "on all receipts," etc. An examination of the record shows that the appellant has been allowed a commission of 5 per cent. upon all moneys received by him, which commissions, together with the sum of $3,000 bequeathed to him by the will, make his compensation received for his services, up to the date of his resignation as executor and trustee and special commissioner, amount to $15,926.48. Not content with this, and the allowance of all expenses incurred by him besides, he claimed to be allowed, in addition, 5 per cent. upon the assets turned over by him to the curator under the decree of the court of April, 1885, which amounted to $10,295.87 more. The court allowed him 3 per cent. commissions upon the par value of the assets delivered by him to the curator, amounting to $7,634.44, making his total compensation $22,660.92. He now demurs, and claims that instead of 3 per cent. he should have been allowed 5. The error which the court committed was to the prejudice of the appellees, and not to the prejudice of the appellant, and they ask this court to correct the error under the ninth rule of this court, and to disallow the appellant any commissions whatsoever upon the assets turned over by him to the curator. There is no law which prescribes what commissions shall be allowed an executor, trustee, or other fiduciary. The allowance or refusal of commissions rests in the sound discretion of the court, under the circumstances of the case. Boyd v. Oglesby, 23 Grat. 689; Lovett v. Thomas, 81 Va. 256.

The extent of the loss which will be sustained by the disregard of the duties incumbent upon the trustee is not yet fully ascertained. The receiver of the broken bank refuses to pay the dividend due to the estate upon the ground that he claims that the estate is liable to the bank on account of the money withdrawn from it by the executor and trustee within 10 days of its failure, for the purpose of paying the note given by him to the National Bank of the Republic for the money borrowed from it by the appellant with which to purchase United States bonds, instead of withdrawing from the trust-estate fund on deposit to his credit in the Exchange National Bank for that purpose, as ordered by the court to do. No explanation is given, although the appellant himself was examined as a witness, why it was that instead of drawing the money from deposit to his credit in the bank, with which to purchase the bonds, he borrowed it ($48,944) from a bank in New York, and permitted the trust fund to remain in the bank, and perish with its failure, nearly six months thereafter. See Asberry's Adm'r v. Asberry, 33 Grat. 469; Boyd's Ex'rs v. Boyd's Heirs, 3 Grat. 125. We are of opinion to affirm the decrees complained of. Affirmed.

HINTON, J., concurs in the opinion and decree, except as to the allowance of 3 per cent. to the personal representative on the securities turned over to his successor. He does not regard this as a proper case for such allowance.

(85 Va. 908)

GRAYSON v. GEORGE *et al.*

(*Supreme Court of Appeals of Virginia.* March 14, 1889.)

DEED—CONSIDERATION—WITNESS.

1. Testator owned a tract of land jointly with his son W., and by a deed voluntary on its face conveyed his moiety to W.'s children. A bill was filed by creditors to subject it to testator's debts, and W., the only defendant who answered, alleged that the deed was not wholly voluntary, but that he and testator bought the land for $2,500, and that he used $1,500 of his wife's money to pay for it, for which reason the conveyance was made. W.'s deposition, which was his only evidence, showed that the funds used, though coming to W. by his wife, had been reduced into possession by him, and were therefore his. The residue of the purchase money he testified was paid from partnership funds belonging to him and the testator, but there was no evidence showing the *status* of the partnership, or whether any portion of the $1,500 had not been repaid W. in the firm dealings. *Held*, that if the evidence showed any indebtedness for the money used in paying for the land, it was from testator to W., and did not show any valuable consideration for the deed.

2. W., having no interest in the controversy as to the land in question, is competent to testify to the facts mentioned on behalf of his children, the grantees.

A. McD. Green, *G. D. Gray*, and *J. F. Rixey*, for appellant. *J. G. Field*, for appellees.

FAUNTLEROY, J. This is an appeal from the circuit court of the county of Culpeper, rendered July 7, 1887, in the cause in said court pending styled "John C. Grayson, complainant, against Cumberland George's Executor and others, defendants." The facts disclosed by the record are as follows, namely: Cumberland George was a resident of Culpeper county, Va., and in August, 1863, was seised and possessed of a considerable real and personal estate. His realty consisted of a farm of about 663½ acres of land, on which he resided, and of which he was the sole owner in fee, and also of an undivided moiety of another tract in the said county of Culpeper, containing 300 acres, and called the "Petty Tract," which had been purchased by the said Cumberland George and his son Williamson C. George jointly. On the 18th day of August, 1863, the said Cumberland George made his two deeds, in which his

Digitized by Google

wife Annie S. George united, and on that same date he made his last will and testament. By one of the said deeds he, in consideration of one dollar, and of natural love and affection for his children thereinafter named, granted, with general warranty to his son John W. George, the said tract of 663⅓ acres, with power to sell and convey the same; the proceeds to be divided equally among the said John W. George in his own right, William A. Herndon as trustee for Elizabeth Herndon and her children, and the said John W. George as trustee for M. Elizabeth George (wife of Williamson C. George) and her children, with the proviso: "But, before the division of the proceeds of sale of the land is made, the said John W. George is directed to pay all debts due by said Cumberland George." By the other deed, of the same date, said Cumberland George and wife, in consideration of one dollar, and of natural love and affection to his grandchildren thereinafter named, grant, with general warranty to, (it is not stated to whom,) the undivided interest of the said Cumberland George in the Petty farm, bought by said C. George and Williamson C. George, which interest is one-half of the land; in trust, that the said John W. George shall hold the land for the use and benefit of the children of Williamson C. George, with power to sell, etc. On the same day said Cumberland George made his will, by which, after payment of debts and expenses, he gives his widow the interest on $12,000 of Confederate bonds for her life, and he gives the residue of his property, and the remainder in the principal of the $12,000 of Confederate bonds, to his children, John W. George, Elizabeth Herndon, and M. Elizabeth George, (wife of Williamson C. George,) and her children by Williamson C. George; which said share of said M. Elizabeth George and her children is to be held by John W. George in trust for them, upon the same trusts as declared in the deed aforesaid, for their benefit. The said deeds of August 18, 1863, were duly recorded in the clerk's office of the county court of Culpeper county, 19th of August, 1863. Between the 18th of August and October, 1863, Cumberland George died. His said will was admitted to probate on the 19th of October, 1863, in the county court of Culpeper; and John W George qualified as sole executor, giving bond and security as such.

At May rules, 1869, John C. Grayson (the appellant here) filed his bill in the circuit court of Culpeper, claiming a debt of $1,500, and interest, as owing by the said Cumberland George at and before the date of the said deeds of August, 1863, and which, subject to certain credits, was then unpaid, due, and owing by the said George's estate to the said Grayson. The bill charged that said debt was a lien on the entire realty of the said Cumberland George, and every part of it, in the hands of his grantees, devisees, and heirs; charging that the said deeds of August 18, 1863, were voluntary deeds, and not valid against the then existing indebtedness of the said Cumberland George, and charging that said John W. George had executed his bond as executor in the penalty of $60,000, with Edward Hill, John S. Turner, and Zephaniah Turner as his sureties. The bill charges that the said executor John W. George is wholly insolvent, and had wasted the entire estate, except the said undivided moiety of the Petty farm, which yet remains; that William A. Herndon, as trustee for his said wife Elizabeth Herndon, and children, had invested the proceeds of her share in the 663⅓-acre farm which had been sold in land in Buckingham county; and that the said half of the Petty farm and said investment in the Buckingham land were all the remnant of Cumberland George's estate in the hands of his devisees; and the bill prays that these said two parcels of land be subjected to the payment of the said debt due by said Cumberland George before the date of the said deeds of August 18, 1863. All the parties interested—the executor and his sureties, the sons and their wives, the daughter and her husband, and their children—are made defendants. None of the said defendants answered, except the guardian *ad litem* of the infants; and the cause coming on to be heard upon the bill taken for confessed as to the adults, and on the answer of the infants by guardian *ad litem*, a decree was entered 11th of June, 1869, directing an account (1) of the administration of John W. George as executor of the will of Cumberland George, deceased; (2) of the assets of the estate other than any balance due by the executor; (3) of the plaintiff's debt, and of all other outstanding debts due by the estate of Cumberland George, deceased, and their priorities; (4) of the disposition made by John W. George of the proceeds of the 663⅓-acre farm called the "Bell Tract;" (5) of the value and annual value of the moiety of the Petty tract; (6) of the money received by W. A. Herndon, for Elizabeth, his wife, from the proceeds of sale of the Bell tract, and his disposition of it.

The commissioner reported October 13, 1879, that the executor, John W. George, had appeared before him, and stated that he had settled up years before his executorial account of the small personal estate, and had fully administered, except as to two bonds due the estate, which were worthless, and he had no further account to settle. The commissioner does not, nor does any one, file any copy of the said alleged settlements of the executor, nor of his account as trustee for Mrs. M. Elizabeth George and children, which also he alleged he had settled. The commissioner reports the debt of complainant Grayson at $1,035, with interest on $500 part thereof from November 1, 1879, which, with the other debts reported as due by the estate, aggregated in all $3,275.30 on November 1, 1879. He also reports the value of the one-half of the Petty farm at $900, and its annual value at $75; also that William A. Hern-

Digitized by Google

don received $20,000 Confederate money, as his wife's share of the proceeds of sale of the Bell tract, and that he had invested $10,000 of this in a tract of land in Buckingham county, which he held, and which was valued at $560, and its annual value at $50. This report was recommitted, and was re-reported without change, October 27, 1880.

On the 27th of March, 1883, leave was granted to Williamson C. George and his wife, Z. T. George, James A. Flint and Sallie G., his wife, Henry H. George, Lucy A. George, Willie C. George, and C. J. Rixey, administrator of W. A. Herndon, and C. J. Rixey and Elizabeth, his wife, and C. George Herndon, to file their answers. An answer was filed 27th March, 1883, reciting it to be the answer of Williamson C. George and M. Elizabeth, his wife, Zeph. T. George, J. A. Flint and Sallie G., his wife, Henry H. George, Lucy A. George, and Willie C. George, but which was signed and sworn to by Williamson C. George only, and therefore the answer of said Williamson C. George only, and not sworn to till on June 4, 1884, nearly 15 months after it was filed. The bill remains confessed as to all the other adult defendants. In his said answer the said Williamson C. George admits that the deed of the 18th August, 1863, for the undivided half of the Petty farm, is on its face a voluntary deed, but he avers affirmatively that it was not wholly voluntary, because, as he avers, Cumberland George and he, W. C. George, had bought the whole tract of 300 acres for $2,500, of which the sum of $1,500 was paid in cash, which was made from the funds of his wife, M. Elizabeth George, derived from the estate of her father, Zephaniah Turner, Jr., of Rappahannock county, and was raised by sale of bank stock, the property of his said wife, M. Elizabeth George; that, at the time of the said purchase of the Petty farm, the said Cumberland George and Williamson C. George were farming in partnership the said Bell tract of 663½ acres, belonging to said Cumberland George, and they thence on farmed the Petty farm in partnership also, and the residue of the purchase money for the Petty tract was paid by C. George and Williamson C. George from the joint partnership profits of the said two farms. He admits that technically his wife, the said M. Elizabeth George, did not have a separate estate in the property derived from her father's estate, but that some portions of it were not actually reduced into possession by him, but had been set apart by him, and regarded as her separate estate; and that on the 18th of August, 1863, when the said deed for the undivided moiety of the Petty farm was made, the said Cumberland George was indebted in the sum of $1,500 of respondent's property taken and applied as the cash payment on the Petty farm.

The only evidence in support of the affirmative allegations of this answer of Williamson C. George is the deposition of the respondent Williamson C. George himself, taken June 2, 1885. The estate accounts of the executor of the will of Cumberland George, deceased, are not filed, the books of Cumberland George are not put in evidence, nor is the inventory or other evidence of the derivation of any bank stock or other property by Mrs. M. Elizabeth George from the estate of her father, Zephaniah Turner, Jr., deceased, or from any other source, put in evidence. The deposition or W. C. George is excepted to, on the ground that he is incompetent to testify on behalf of his wife.

On the 6th of June, 1885, the circuit court rendered a decree sustaining the exception to the competency of Williamson C. George as a witness, confirming reports of the commissioner, and directing the sale of the undivided moiety of the Petty farm, allotted theretofore to the grantees in the deed from C. George of August 18, 1863; and also directing the sale of William A. Herndon's interest in the Buckingham farm. The moiety of the Petty farm was sold, reported, and sale confirmed by a decree of 12th of September, 1885, but without prejudice to the right of defendants to petition for a rehearing, the proceeds of sale to be deposited in bank at Alexandria, or to be loaned out on good security. A petition was filed for a rehearing, and the circuit court reheard the cause, and by its decree of July 7, 1887, it reversed the former decree, and overruled the exception to Williamson C. George's competency as a witness, and adjudged that the deed of Cumberland George of August 18, 1863, for the Petty farm, was for valuable consideration, and that the proceeds of the sale of the said moiety passed to the children of the said Williamson C. George, and, on their request, directed the same to be invested in a home for their mother; and it ordered that John C. Grayson, who had borrowed the fund, $790.69, should pay it at once. From this decree John C. Grayson has taken this appeal.

We are of opinion that this decree complained of should be reversed, so far as it adjudges that the deed of Cumberland George of August 18, 1863, for the moiety of the Petty farm, was founded on a valuable consideration, and that the said moiety and its proceeds shall pass to the grantee in the said deed, and is not liable for payment of Cumberland George's debts owing at the date of said deed. The court did not err in sustaining the competency of Williamson C. George as a witness in the cause. The gift of the moiety of the Petty farm was not to the wife of the witness, nor does she take any interest under or by virtue of that deed, in law or in equity. The children are the only beneficiaries in that deed, and their father, the witness, is competent to testify on their behalf. His credibility only can be affected by his relation to the beneficiaries, or by his own interest.

The debt claimed and sued for by the complainant Grayson is not contested. The sole controversy is as to whether the said deed of 18th August, 1863, for the said moiety of the Petty farm, was voluntary or not, and

Digitized by Google

whether the said moiety is or is not liable in the hands of the grantees for the debts of Cumberland George, the grantor, existing at the date of the said deed. The said deed is, on its face, undoubtedly a voluntary deed of gift, for a good, but not for a valuable, consideration; and as such it cannot protect the said moiety, in the hands of the grantees in the deed, from liability as assets of the grantee's estate for payment of his creditors existing at the date of the deed. There is nothing to disprove the voluntary character of the said deed but the deposition of the witness Williamson C. George. There is no denial of it, but in his answer, and that by an affirmative averment. It is confessed by every other party who alone have any interest. All are silent, and even Mrs. M. Elizabeth George says nothing, by answer or by deposition, though she would have been competent to testify for or against her children. The answer, which recites that it is the answer of all, is signed only by W. C. George, and is not even sworn to for 15 months after it is filed. He is the only respondent; and, if full belief be given to the answer and the deposition of Williamson C. George, it amounts to nothing. He says that Cumberland George, his father, and he were working the land of Cumberland George in partnership, and that while so engaged they bought the Petty farm jointly, and thereafter they worked that also in partnership. The Petty farm cost $2,500. A cash payment of $1,500 was made on it, which sum is alleged to have been raised by the sale of bank stock inherited by Mrs. M. Elizabeth George from her father's estate, (there is no proof of this from the records of the court in which her father's, Zephaniah Turner, Jr.'s, estate was settled and distributed,) but, be it all so,—the answer says this $1,500 was paid by W. C. George. He reduced the bank stock into possession, and it became his, and with it he paid the half of the $2,500, ($1,250,) and $250 over. Thus the one moiety became W. C. George's own, and Cumberland George, according to the respondent and witness, became thereby indebted, not to Mrs. W. C. George, but to W. C. George himself, in this excess of $250, and the remaining $1,000 was paid out of the partnership profits of the two farms. There is no settlement of partnership accounts, and nothing to show whether or not this $250, the personal debt of Cumberland George to his partner, W. C. George, was or was not paid off in the partnership transactions. If it never was so paid off, arranged, or satisfied, it was simply a debt due by Cumberland George's estate like the others reported. But the presumption is against it. The witness testifies and answers that his father was a most careful, prudent man, accurate in his accounts, and anxious to settle with his children on terms of equality and justice, yet he disposes of this moiety as his own, and is careful to say expressly that his interest in the Petty tract is one undivided half, and he gives it to his grandchildren by a voluntary deed. The executor and trustee has wasted the estate, and W. C. George and his wife and children have stood by and permitted it. Their share of the 663½-acre "Bell Tract" was charged with the debts of the grantor. They got their one-third so expressly charged, without paying appellant's debt or any other. The deed is plainly voluntary on its face. There is nothing in the fact (if it were a fact) that Cumberland George owed W. C. George $250, a personal debt, to convert this deed for said moiety into a deed for a valuable consideration to the children of W. C. George. The said moiety of the Petty farm and the Buckingham land, in which Elizabeth Herndon's money was invested, are still liable to pay the debt of appellant and other creditors, if any, though it does not appear whether the other debts reported were paid or not; those creditors seem not to be claiming anything in this suit.

The decree complained of is erroneous, and must be reversed and annulled, and the appellant recover his costs in this court. And the cause will be sent back to the circuit court of Culpeper county for a decree that the Buckingham land be sold, and the proceeds of it, and of the Petty tract already sold, be applied to the payment of the complainant's costs below, and of the debt of appellant, Grayson, and of such other debts as may be ascertained to remain unpaid. Reversed.

(85 Va. 899)

CUTHBUT v. COMMONWEALTH.

(Supreme Court of Appeals of Virginia. March 14, 1889.)

CONSTITUTIONAL LAW—LICENSE—SELLING STATE COUPONS.

Acts Va. 1883-84, c. 450, § 65, imposing a tax on the business of selling coupons cut from the bonds of the state is constitutional. Following Com. v. Maury, 82 Va. 882, 1 S. E. Rep. 185.

Error to the hustings court of Petersburg.

W. L. Royal, for plaintiff in error. *R. A. Ayers*, Atty. Gen., for the Commonwealth.

HINTON, J. The petitioner was convicted of the offense of unlawfully selling coupons cut from the bonds of the state of Virginia, without having first obtained the license therefor required by law. The propriety of this conviction depends upon the question of the constitutionality of the act of assembly imposing a tax upon the business of a coupon-broker. See section 65, c. 450, Acts 1883-84, p. 590. In the case of Com. v. Maury, reported in 82 Va. 882, 1 S. E. Rep. 185, this precise question was submitted to this court, and determined in favor of the constitutionality of that act, and the reasons for that decision are fully stated in the opinion of RICHARDSON, J., speaking for the court in that case. We are now asked, without the citation of a single additional authority, or the presentation of a new reason, to reverse that deliberate decision. This we cannot do. The state has, in our opinion, the power to tax the business of a coupon-

Digitized by Google

broker just as it has the right to tax persons engaged in other avocations within its jurisdiction. The case is therefore ruled by the case of Com. v. Maury, supra, and the judgment of the hustings court of the city of Petersburg must be affirmed.

(82 Ga. 206)

MAYOR, ETC., OF MONTEZUMA v. WILSON.

(*Supreme Court of Georgia.* Feb. 20, 1889.)

PLEADING—VARIANCE—DEFECTIVE STREETS—NOTICE.

1. In an action against a town for injuries sustained through a defective sidewalk, plaintiff alleged that he fell through a bridge across the sidewalk. The act which he alleged as charging negligence against defendant was that the bridge was badly constructed. The evidence showed that plaintiff was injured, not by falling through the bridge, nor on account of the bridge being badly constructed, but by stepping into a hole which had been made by a recent rain on the side of a sewer. *Held* a fatal variance between the allegations and proof.

2. The afternoon before plaintiff was injured the hardest rain of the season fell. Before the rain, and afterwards, the marshal of the town went to the place, and examined it carefully, and could not detect any defect in the sidewalk or the sewer. The injury was caused by the dirt and sand becoming very wet from the hard rain, and caving in one side of the sewer. *Held*, that plaintiff was not entitled to recover, the defect not having existed for a sufficient length of time from which notice thereof could be inferred on the part of the town.

Error from superior court, Macon county; FORT, Judge.

Suit by one Wilson against the mayor and aldermen of the town of Montezuma, to recover damages for personal injuries sustained through an alleged defective sidewalk. There was judgment for plaintiff, and defendants bring error.

E. G. Simmons, for plaintiffs in error. *J. W. Dupree* and *E. A. Hawkins*, for defendant in error.

SIMMONS, J. Wilson sued the mayor and aldermen of Montezuma for damages. In his declaration he alleged that on the 13th of August, 1885, he was walking on the sidewalk of a street in that town, at night, and when crossing a little bridge or crossway across said sidewalk, covering a ditch two feet deep, he stepped into a hole in the sidewalk, and near said crossing, and fell into the ditch, whereby he was injured. He alleged that this crossing was badly constructed, and that between the outer planks and the earth was a hole about six inches by twelve, through which the petitioner fell. On the trial of the case the jury found a verdict for the plaintiff, and the defendants made a motion for a new trial, which was overruled by the court, and they excepted.

1. The grounds urged before us in the argument for a reversal of the judgment in this case were that the verdict was contrary to evidence and to law. We think that the court below should have granted a new trial on both of these grounds. The plaintiff made an entirely different case by his evidence from what he alleged in the declaration. In that declaration he alleged that he fell through a bridge across the sidewalk. No act of negligence on the part of the defendant was alleged by him in his declaration. The only act which he alleges in any way tending to charge negligence against the defendants was that the bridge was badly constructed. The evidence in the case shows that the place where the plaintiff was injured was not a bridge, but a sewer a foot and a half under the ground, and that the plaintiff was injured, not by falling through the bridge, nor on account of the bridge being badly constructed, but by stepping into a hole which had been made by a recent rain on the side of the sewer. The plaintiff, therefore, recovered on a different cause of action from that set out in his declaration. When a plaintiff brings a case into court, and makes certain allegations on which he seeks to recover against the defendant, he must abide by those allegations. He cannot set up one state of facts in his declaration, and recover upon an entirely different state of facts in the evidence. If he cannot prove the allegations made in the declaration, then he must amend it so as to meet his proof, provided he does not set up a new cause of action. In this case no amendment was offered or made, and, as said before, he recovered on a different state of facts from that alleged in his declaration, and this was contrary to law.

2. We also think that the verdict was contrary to the evidence. The overwhelming weight of the evidence was that it had been raining in that vicinity for about three weeks, and that on the afternoon before this plaintiff was injured the hardest rain of the season had fallen. Before this rain, and afterwards, the marshal of the town, whose duty it was to look after the streets and sidewalks, went to this place, and examined it carefully, and he could not detect any defect in the sidewalk or the sewer. He had been instructed by one of the street committee to look closely after the streets and sewers, particularly in that part of the town, on account of a "protracted meeting" in progress in that part of the town. If this witness and others are to be believed, there was no defect in this sewer on the afternoon of the day in which the plaintiff was injured. The injury was caused on account of the dirt and sand becoming very wet from hard rains, and caving in one side of the sewer. If any acts of negligence had been alleged against the defendants for this in the declaration, we think that the evidence would have fully disproved them. According to the evidence in this record, the officers and servants of this municipal corporation exercised all the care and diligence that was possible, under the circumstances. They examined this sewer twice in one day. It had been there for years, and nothing had ever occurred to put them on notice that there was any defect in the sewer, or that it was dangerous, or likely

Digitized by Google

to become so. A municipal corporation cannot be held liable for damages occurring by reason of a defect in its streets, sidewalks, sewers, or bridges, when it has no notice thereof, or when such defect has not existed for a sufficient length of time from which notice can be inferred, provided the corporation has been guilty of no negligence in constructing or repairing the same. According to the testimony in this case, this defect was of such a recent origin that the officers of the town government could not possibly have had notice of it, and we think, therefore, that the jury found contrary to the evidence. Judgment reversed.

(30 S. C. 163)

GUESS *v.* SOUTH CAROLINA RY. CO.

(*Supreme Court of South Carolina.* Feb. 18, 1889.)

RAILROAD COMPANIES—KILLING STOCK.

In an action against a railroad company for killing plaintiff's cow, which was on defendant's track with a block attached to her by a small rope, an instruction that "if the injury to the cow was in any degree the consequence or result of the block and chain attached to the cow, * * * and the injury would not have occurred but for that incumbrance, * * * then defendant should have a verdict," is not error of which plaintiff can complain.

Appeal from common pleas circuit court of Barnwell county; KERSHAW, Judge.

Action by J. G. Guess against the South Carolina Railway Company. Judgment for defendant, and plaintiff appeals.

James B. Davis, for appellant. *Robert Aldrich* and *Brawley & Barnwell*, for respondent.

SIMPSON, C. J. The plaintiff (appellant) in the action below sought to recover the value of a cow killed by the defendant's train of cars on the 23d of April, 1886. The main defense set up was contributory negligence on the part of the plaintiff, and it was the charge of the judge on this subject that has given rise to this appeal. It seems that the cow was within the appellant's inclosure, through which the track of the railroad ran. She had a block attached to her by a small rope. She was upon the track with this block attached. The portion of the charge complained of was as follows: "If the injury to the cow was in any degree the consequence or result of the block and chain attached to the cow at the time, as described by the plaintiff in his testimony, in preventing the escape of the animal from the road, and that the injury would not have occurred but for that incumbrance, preventing the cow getting out of the way, then the defendant should have a verdict." Was this error? is the only question in the case. Contributory negligence, in cases of this kind, is a good defense in law, where it constitutes the proximate cause of the injury complained of. In Carter v. Railroad Co., 19 S. C. 29, this court said: "Where the plaintiff has contributed to the accident to the extent of furnishing a proximate cause thereof, the defendant is exempt from liability as matter of law, and the judge could so charge, but whether a particular fact, if proved, shall amount to such contribution, is a matter for the jury, and not for the court." See, also, Kaminitsky v. Railroad Co., 25 S. C. 59. "One who is injured by the mere negligence of another cannot recover at law or in equity any compensation for his injury, if he, by his own or his agent's ordinary negligence or willful wrong, contributed to produce the injury of which he complains, so that, but for his concurring and co-operating fault, the injury would not have happened to him." Shear. & R. Neg. §§ 24–26. See, also, Gunter v. Manufacturing Co., 15 S. C. 456, and the cases there cited. It is needless, however, to multiply authorities upon this point. It is well settled by cases in this state, and by text writers, that contributory negligence, when it becomes a proximate cause of the injury, is a good defense, notwithstanding there may be negligence on the other side.

Now, the question is, did the circuit judge go beyond this rule in the remarks excepted to? It is true that when stock is killed by a railroad train the killing, without more, under Danner's Case, 4 Rich. Law, 329, is *prima facie* evidence of negligence, sufficient to found a verdict upon, unless this is overthrown by counter-testimony. And, even if this is not overthrown, yet if contributory negligence by the plaintiff is proved to the extent of furnishing a proximate cause of the injury, this will release the defendant. We do not think that the charge of the judge excepted to weakened the force of this principle to the defendant. On the contrary, when looked at in one point of view, he made it more rigid. All that this principle requires from a defendant is to prove that the plaintiff contributed by his negligence a proximate cause to the injury, and the judge, when he charges that, charges the law. Now, the charge here might be construed to mean that the defendant could not escape responsibility unless it had shown that, but for the act of the plaintiff, the injury would not have occurred; in other words, that defendant should be required to show that plaintiff had contributed not merely a proximate cause, but the only cause. The judge did not charge that the cow being upon the track with a block attached was contributory negligence, nor that this block prevented the cow from escaping; nor did he charge that but for this the injury would not have occurred. Had he done so this would have been invading the province of the jury. But he charged that, if the injury was the result of the block attached preventing the escape, and but for this the injury would not have happened, then the defendant was not liable; in other words, that it was necessary for the jury to reach the conclusion that the injury would not have occurred but for the attached block, preventing escape, thus being not simply a proximate cause, but the direct and absolute cause. When thus construed, the charge

Digitized by Google

was stronger against the defendant than the settled principle above required the judge to go. Hence we fail to see that the appellant should complain. We do not think that the portion of the charge excepted to, even when considered alone, is obnoxious to objection, much less when the whole charge is considered. It is the judgment of this court that the judgment of the circuit court be affirmed.

McIver and McGowan, JJ., concur.

(30 S. C. 194)

DURANT v. NASH.

(*Supreme Court of South Carolina.* Feb. 28, 1889.)

WILLS—NATURE OF ESTATE.

A will directed testator's realty to be divided between his wife "and all my children, share and share alike," the wife's portion to be hers for her life only, and on her death to "return to my surviving children or child, or their legal issue." In case testator should leave no surviving child, nor legal issue of such child, the wife's portion was devised to testator's mother, brothers, and sisters, or their children. Another clause of the will directed that on the death of either of testator's children without issue, "his or her portion shall be equally divided between my surviving child or children, or their legal issue," and in case of the death of all the children without issue, their portions were to pass to testator's mother, brothers, and sisters, or their children. The will directed that the property given to the children should be kept together until they either should marry or come of age. The testator died leaving a widow and two children. *Held*, that each child took a fee in one-third of the realty, subject to be defeated by his or her death without issue before the time fixed for division, in which case the decedent's share would pass to the survivor, and a contingent remainder in the widow's third, and that on the death of the widow, and of one child without issue, both intestate, the absolute title to the whole realty passed to the surviving child.

Appeal from common pleas circuit court of Sumter county; T. B. FRASER, Judge.

Action by Andrew Clarence Durant against Shepard Nash, for specific performance of a contract to purchase land. Judgment for plaintiff, and defendant appeals.

Shepard Nash, pro se. Haynsworth & Cooper, for respondent.

SIMPSON, C. J. One William R. Shaw, late of Sumter county, died in 1864. He left a last will and testament, of which the following is a copy: "*First.* I direct that a fair valuation or appraisement be made of all my personal property, (except kitchen furniture,) and be equally divided between my beloved wife, Mary M. Shaw, and all my children, share and share alike. I will and direct that my said wife be allowed the privilege of choosing her lot of the personal property, and the said portion of the personal property so coming to my said wife shall be and remain hers, and at her disposal. I also give my said wife all my kitchen furniture. *Second.* I will and direct that all my real estate be equally divided between my beloved wife, Mary M. Shaw, and all my children, share and share alike. The portion of said real estate so coming to my said wife shall be hers during her natural life only; at her death, then and in that case return to my surviving children or child, or their legal issue, if any. In the event there being no surviving child or children of mine, nor legal issue of theirs, then and in that case the said portion of real estate I will and direct shall go to my mother, brothers, and sisters; and, in the event that either of my brothers or sisters should be dead, then and in that case his or her legal children to be entitled, and shall receive such share or shares as their respective parent or parents would have been entitled to had they been living. *Thirdly.* I will and direct that all the personal property not willed to my wife, but to my children. In the event that either of them should die leaving no legal issue, then his or her portion to be equally divided between my surviving child or children. In the event that all my children should die leaving no legal issue, then and in that case I will and direct that their portion or portions shall go to my mother, brothers, and sisters, as provided for in the disposition of my real estate. *Fourthly.* I will and direct that the real estate coming to my children, that, in the event either of them should die leaving no legal issue, then his or her portion shall be equally divided between my surviving child or children, or their legal issue. In the event that all my children die leaving no legal issue, then and in that case I will and direct that their portion or portions of real estate shall go to my mother, brothers, and sisters. And should either of them—that is, either of my brothers or sisters—should die, then and in that case his or her legal issue shall be entitled to such share or shares as their respective parents or parent would have been entitled to had they been living. *Fifthly.* I will and direct that the several portions, both of real and personal estate as directed to my mother, brothers, and sisters, or their legal issue, shall be equally divided between them, share and share alike. *Sixthly.* I will and direct that the real and personal estate herein given to my children be kept together until either should marry or arrive at legal age; then let an equal division be made, and their portions assigned them. Should there be an occasion to sell any portion of my property for the payment of any just debt that may be against my estate, I hereby authorize and empower my executors to sell any portion of my personal property for the liquidation of the same." The only other provision of the said will was the appointment of executors. The will was dated April 6, 1864, and he died soon thereafter. At the time of the execution of the will he had a wife and two children, and they survived him. One of the children died in early infancy, intestate, and without issue; and the widow died some years after the testator. The other child, W. Reese Shaw, became of age years ago. There was never any actual division of the estate of the testator, either real or personal, as directed by the will. W. Reese Shaw, the surviving son, in February, 1888,

Digitized by Google

conveyed the tract of land in controversy (to-wit, the real estate of his father, mentioned in his will) to the plaintiff, who in December, 1888, contracted to sell the same to the defendant, Nash, for $4,980, to be paid on the execution and delivery to him of good and sufficient titles in fee-simple. A deed accordingly was executed and tendered by plaintiff to defendant on the 3d day of December, 1888, with covenant of general warranty, etc., who refused to receive it on the ground that plaintiff's title was defective. Whereupon the action below was commenced for specific performance.

The question in the case is whether W. Reese Shaw had such interest in the real estate of his father as authorized him to convey the tract of land in question, with good and sufficient titles, to the plaintiff. The determination of this question must depend upon the intention of the testator, W. R. Shaw, reached through the language used in the will, read in the light of surrounding circumstances, with a careful consideration of all the parts of the will, construed so that, if possible, as a whole, it shall stand together. Reams v. Spann, 26 S. C. 564, 2 S. E. Rep. 412. Now, the second clause of the will directs that all of the testator's real estate be divided between his wife, Mrs. Mary M. Shaw, and all of his children, share and share alike; the portion going to his wife to be hers for life, and at her death then to return to his surviving children or child, or their legal issue. If there had been no other clause in the will but as above, there could be no doubt but that Mrs. Shaw, the widow, would have taken a life-estate in one third, with contingent remainder to such child or children of the testator as may have survived her, or, in case of the death of a child, to his legal issue, if any. But this clause went further. It provided that in the event of no surviving child or children, or their legal issue, that this portion given to the widow should go to his mother, brothers, and sisters, if alive, but, if dead, then to their children; the children to take the share of the parent, etc. A proper construction of this clause as a whole and independently, we think, gave a life-estate to the widow, with a contingent remainder in fee, first, to the child or children of the testator; second, to their legal issue; third, to the mother, brothers, and sisters of the testator; then to his or her children; the contingency being which of these classes might survive the life-tenant. W. Reese Shaw, a son of testator, having survived the life-tenant, under this construction took a fee absolute in her third. This seems to be conceded; so that, as to that third, his conveyance to the plaintiff would confer complete title. In the fourth clause,—which is the important one here, in connection with the sixth,—he directed that the real estate devised to his children, in the event that either of them should die leaving no issue, should be equally divided between his surviving child or children, or their legal issue; and in the event that all of his children should die leaving no legal issue, then to go to his mother, brothers, and sisters, as directed in the second clause, with reference to the portion given to his wife for life. And in the sixth clause he directed that the real and personal property given to his children should be kept together until either of his said children should arrive at age or marry, when the division between them should be made. Now, there was no life-estate here between the death of the testator and his children as to their interest. The devise was to the children directly, and the second clause above directed a division, so that the widow should have her portion. This division did not actually take place, but in contemplation of law it must be regarded as having been made. The widow was entitled to enter at once upon the enjoyment of hers, and the other portion held under the sixth clause above, subject to division when either child arrived at age or married.

Now, what was the intention of the testator when he said in the second clause "that his real estate should be divided between his wife and all of his children?" Did he mean his children at the date of his will or at his death? But it is not necessary to discuss that question, as the two children who were in being at the date of the will were in being at his death, so that it is certain whatever interest was devised to children went to these two. But what was meant by the language in the fourth clause, where it is directed that "in the event either of his children should die leaving no legal issue, then his or her portion shall be equally divided between my surviving child or children, or their legal issue?" The testator must have meant by this language one of three things: *First*, that his children in being at the date of his will, and such as might be born before his death, should at his death take the property in fee, except that if any died before his death his or her portion should go to his surviving child or children, or their legal issue in fee; *second*, that the child or children in being at his death should take the property, and it should be kept together, under the sixth clause, until one arrived at age or married, when it should be divided between them, except that if any should die without leaving legal issue before that time such interest should go to the survivors or their legal issue, and if all should die before said period of division, leaving no legal issue, then the whole should go to his mother, brothers, and sisters; *third*, that the child or children in being at his death should take, but if any died at any time after this, leaving no legal issue, then to go to the survivors or their legal issue, and if all died without leaving legal issue, then to the mother, brothers, and sisters, etc. If he meant the first, then his two children who were in being at the making of the will, and in being at his death, and the contingency of death leaving no legal issue, which, if it had

Digitized by Google

happened in the intermediate time, would have defeated them, not having happened, they took a fee, subject to no defeasance,—one-third each,—or, rather, one-half each of the two-thirds after the widow's portion had been taken off. And, one of these children having died since, intestate and unmarried, his mother, and brother, W. Reese Shaw, became his heirs, and, the mother having died intestate, W. Reese became entitled to the whole of his deceased brother's portion. In which event the conveyance of the said W. Reese Shaw to the plaintiff would be good as to the whole of the land conveyed. If the testator meant as suggested second above, then the two children of the testator took a fee each, subject to be defeated in each, in the event either died before the time fixed for the division between them, leaving no legal issue, in which event the defeated fee would go to the survivor, and, if both died before that time leaving no legal issue, then to go to the mother, brothers, and sisters. One of the two died before the time fixed for the division, leaving no legal issue. His fee therefore was defeated, and went to the survivor, W. Reese Shaw, who, having survived the time fixed, became thereby the absolute owner of both his deceased brother's portion and of his own, free from all contingency or danger of defeasance; in which event his conveyance to the plaintiff would carry a good and sufficient title to the whole land conveyed, as in the first instance. If he meant as indicated in the third suggestion above, then, one of the children having died leaving no legal issue, but with his brother, the said W. Reese Shaw, surviving, his portion became vested in the said W. Reese in fee, holding his own share, however, still dependent upon the contingency whether he shall hereafter die leaving no legal issue, which would defeat his fee of the one-third devised to him. If this last be the true construction of the will, then the conveyance of W. Reese Shaw to the plaintiff would pass a good title to only two-thirds of the land; the title to the other third being still liable to be defeated by W. Reese Shaw leaving no legal issue at his death, when this third would pass to the mother, brothers, and sisters of the testator.

Now, the language of the will might be construed in harmony with either one of the three suggestions made above. But which did the testator mean? If he had intended the first, to-wit, that if either of his children in being at the making the will died before his death, leaving no issue, then the property should go to such as might be living at his death, there would have been no necessity to use the word "surviving." The words "to his children" alone would have been sufficient. Roundtree v. Roundtree, 26 S. C. 450, 2 S. E. Rep. 474. But the word "surviving" was used; and under that rule of constructions which requires all the words in an instrument to be considered, and be given some force, if possible, we cannot overlook that word; and especially it cannot be disregarded in this case, because, when we come to consider the second suggested interpretation above, we find a very appropriate place for it. Suppose the testator had intended to devise a fee defeasible to his children in being at his death, the fee to be defeated in any one upon his death at any time before a period fixed in the will for a division of the property between said children, leaving no issue, in which event the share of said deceased should go to the survivor, or, if all the children should die before that time leaving no issue, then over to others, then the word "surviving" would have the place found in this will. Indeed, if such was the intent and desire of the testator, we do not see how he could have better expressed it than has been done here. It is true, perhaps, that the will might be construed in harmony with the third suggestion above equally with the second, to-wit: That if either of his children died at any time leaving no legal issue, then the fee should be defeated in favor of the "surviving." There this word would also be appropriate and necessary. Now, which of these constructions must be adopted? The children of the testator were the primary objects of his bounty, and we must suppose that it was his purpose to give them the full enjoyment of the property devised to them, and, after it was put in their possession at a proper age, that it should be theirs, rather than that it should be tied up for an indefinite period for the benefit of collateral relations. The second interpretation above accomplishes this purpose. And besides, the law favors an early vesting of estates, and abhors perpetuities, restrictions, and hinderances to the enjoyment of property. We conclude that the testator intended as supposed in the second suggestion above, and that the deed of W. Reese Shaw to the plaintiff ought to have been accepted as conveying a good and sufficient title to the land in question. See Evans v. Godbold, 6 Rich. Eq. 30; Roundtree v. Roundtree, 26 S. C. 450, 2 S. E. Rep. 474; Reams v. Spann, 26 S. C. 561, 2 S. E. Rep. 412; Schoppert v. Gillam, 6 Rich. Eq. 86; Cripps v. Wolcott, 4 Madd. 11. It is the judgment of this court that the judgment of the circuit court be affirmed.

McIVER and McGOWAN, JJ., concur.

(32 W. Va. 272)

ARNOLD v. COBURN *et al.*

(*Supreme Court of Appeals of West Virginia.* Feb. 25, 1889.)

VENDOR'S LIEN—PARTIES.

1. In a suit to enforce a vendor's lien on land, it is not error to decree a sale of such land to pay said lien, without making other creditors, having subsequent liens thereon, parties, and ascertaining the amounts and priorities of their debts.

2. If the land on which the vendor's lien exists has been conveyed by trust deeds to secure debts, it is proper in such suit to make the trustees in such trust deeds parties, but it is not necessary to make the *cestuis que trustent* in such deeds par-

Digitized by Google

ties before decreeing in favor of the person holding the vendor's lien.

(Syllabus by the Court.)

Appeal from circuit court, Barbour county.

Sam. V. Woods, for appellant. *Dayton & Dayton*, for appellees.

SNYDER, P. In November, 1885, Jesse W. Arnold filed his bill in the circuit court of Barbour county against M. W. Coburn, in which he avers that, in consideration of love and affection for his daughter, the wife of said Coburn, and $3,000 to be paid in three equal annual payments, with interest from date, he did on November 2, 1874, sell and convey to said Coburn a valuable tract of land lying in said county, containing 233 acres, and that he retained a vendor's lien in the deed for said $3,000; that the plaintiff is still the owner of two of said payments of $1,000 each, no part of which has been paid; and prays that his vendor's lien may be enforced by a sale of said land. In March, 1886, the defendant filed his answer, admitting the allegations of the bill in all respects, except as to the non-payment of said purchase money. In regard to this he avers that he and the plaintiff had by written agreement submitted all matters in difference between them, including two of the three bonds given for the said land, to three arbitrators, and that said arbitrators made their award, by which they determined that the said two land bonds had been reduced by payments and set-offs to $1,111.43, with interest from August 1, 1885, and that this was all that remained due on said two land bonds. In October, 1886, James Pickens, on his own petition, was made a defendant in the cause. It is shown by the petition of said Pickens that in January, 1885, he had become the owner, by assignment, of the third of said land bonds, upon which he had, in March, 1886, obtained a judgment in said court for $1,649.80 against the defendant Coburn, and prays that he may be decreed to have the first lien on said 233 acres of land, etc. In March, 1887, the defendant Coburn asked leave to withdraw his answer, whereupon Franklin Maxwell, a creditor of Coburn, but not a party to the suit, objected to such withdrawal of said answer; and the court permitted Coburn to withdraw his answer, upon his leaving in the cause attested copies of the same, and the exhibits filed therewith. Subsequently the plaintiff filed an amended bill, in which he admits that James Pickens had become the owner of one of said land bonds, and avers that said Pickens had since died, and that John D. and Dever Pickens had qualified as his executors. He further avers that, after said 233 acres of land had been conveyed to the defendant Coburn, he, the said Coburn, by deed dated September 7, 1878, in which deed the plaintiff united as a grantor, conveyed the said 233 acres and a number of other tracts of land to James E. Hall, trustee, to secure a debt of $6,600 to John D. Pickens, but that a large part of said debt had been paid by the sale of other lands of the said Coburn; that by another deed, dated December 21, 1885, the said Coburn conveyed said 233 acres, with other lands, to James Pickens and A. G. Dayton, trustees, to secure the payment of $3,000 to Dever Pickens; and that by another deed, dated December 25, 1885, the said Coburn conveyed all of said lands to Thomas A. Bradford, trustee, to secure a large number of debts due from him to other creditors, among which is a debt of $5,000 to Franklin Maxwell. To this bill the said James E. Hall, trustee, James D. and Dever Pickens in their own rights, and as executors of James Pickens, deceased, A. G. Dayton, trustee, Thomas A. Bradford, trustee, and Franklin Maxwell are made defendants, and its prayer is for the same relief as that asked in the original bill. The defendant Maxwell filed his answer to this bill, and made part thereof the answer of Coburn, and the exhibits therewith to the original bill, which, after having been filed, had been withdrawn as aforesaid; and he averred that the withdrawal of said answer was by collusion between the plaintiff and said Coburn, the latter being the son-in law of the former, and for the purpose of defrauding this defendant and other creditors of the said Coburn; that the aforesaid award and settlement between the plaintiff and said Coburn was valid and binding; and that the $1,111.43 found by said award is the true balance due from Coburn to the plaintiff on the two land bonds held by him. After this answer of Maxwell had been filed the plaintiff amended his bill, alleging that said pretended award between him and Coburn was illegal, fraudulent, and void, and stating in detail the grounds which rendered it invalid. Depositions were taken by both the plaintiff and defendant Maxwell in respect to said arbitration and award, and said depositions fully and distinctly prove that said award was invalid, both upon the ground that it was obtained by the fraud of said Coburn, and upon mistake of the arbitrators in the application of the law to the facts, when they intended to decide according to the law. Mathews v. Miller, 25 W. Va. 817. On November 2, 1887, the court entered a decree against Coburn in favor of the executors of James Pickens for $1,755.03, being the amount of the judgment recovered on one of the purchase-money bonds for the aforesaid 233 acres of land, and in favor of the plaintiff for $3,560, being the other two bonds for said land, and for both of which sums a vendor's lien existed on said 233 acres of land, and, in default of the payment of said sums within 30 days, the decree directed the sale of said land to pay the same, etc. From this decree the defendant Maxwell has appealed.

It is contended for the appellant that the plaintiff's bill is demurrable, because the creditors secured in the three trust deeds referred to in the bill are not all made parties. This court has repeatedly decided that, in a suit to enforce a vendor's lien, it is not error

Digitized by Google

to decree a sale of the land on which such lien exists before ascertaining the amounts of other liens on the land, and their priorities, because in such suit the doctrine which requires all the lienors in an ordinary creditor's suit to be made parties does not apply. Cunningham v. Hedrick, 23 W. Va. 579; Neeley v. Ruleys, 26 W. Va. 686. This is conceded to be the law of this state by counsel for the appellant, but it is insisted that this is not a suit for the sole purpose of enforcing a vendor's lien, and therefore the rule applicable to such suits does not apply to this suit. It seems to me this is purely a suit to enforce a vendor's lien, and that it was so treated and considered by the circuit court. The trust deeds on the 233 acres are all subsequent in date and subject to the vendor's lien; the rights of the creditors secured therein were all inferior to the said lien at the time they became creditors. It was necessary, or at least proper, to make the trustees in these trust deeds parties, in order that a sale might divest the title which they held, and confer upon the purchaser a clear title. This was done in this cause, and it was all that ought to be required in such cases. I do not think the facts in this cause differ essentially from the facts in the two cases above decided, in which this court held it was not necessary to make the other lienors parties, or to ascertain the amounts and priorities of their debts. The relief prayed in the bill, and granted in the decree, relates wholly to the vendor's lien, and in no manner adjudges or prejudices the rights of the trust creditors. They may hereafter bring a new suit, or make themselves parties to this suit, and have their rights determined and their liens enforced, not only against the other lands conveyed in trust for them, but in respect to the surplus in the 233 acres, if any part thereof remains after satisfying the vendor's lien. It is further insisted for the appellant that the plaintiff only sued for the enforcement of two of the land bonds, while the decree orders the payment of three bonds, and that this was error. The most that can be said in favor of this objection is that it is technically true, but substantially untrue; because the amended bill admits that Pickens is the holder of the third bond, and that it is unpaid, and the executors of Pickens are made parties to the suit. It was entirely proper, in view of these facts, that the decree should provide for the payment of all three of the purchase-money bonds. It appears in the foregoing statements that the plaintiff united with Coburn and wife in the deed of September 7, 1878, by which the said 233 acres and other lands were with general warranty conveyed to Hall, trustee, to secure a debt to John D. Pickens. The appellant claims that by this act the plaintiff in some manner lost his vendor's lien on the 233 acres, or became estopped from asserting it against the appellant, who is a *cestui que trust* in a subsequent deed on the same land. I confess I am unable to appreciate the force of this claim, or the alleged legal principle on which it is asserted. The plaintiff's bill avers that a large part of this Pickens debt has been paid; and the other lands conveyed in said deed to secure it are ample to pay it, without resorting to the 233 acres. But, if this were not so, I cannot see what right the appellant, who is not a party to said deed or secured by it, has to complain. He is secured, it is true, by a subsequent deed on the same land, but his lien is subject, not only to the right of Pickens to have his debt paid out of said land, but also subject to the right of the plaintiff, if he is compelled to pay said debt, to be reimbursed by a sale of said land, in preference to any right or claim of the appellant acquired by his subsequent trust deed. For these reasons I am of opinion that the decree of the circuit court should be affirmed.

ENGLISH and BRANNON, JJ., concurred. GREEN, J., absent.

(32 W. Va. 1)

FLEMING v. GUTHRIE, Judge.

(*Supreme Court of Appeals of West Virginia.* Jan. 12, 1889.)

INJUNCTION—JURISDICTION—PROHIBITION.

1. A court of equity has no jurisdiction to enjoin the secretary of state from delivering to the speaker of the house of delegates the sealed returns of an election for governor, properly transmitted to him, and such injunction, if granted, will be treated as a nullity.

2. This court will not award a writ of prohibition against a circuit court to prohibit it from proceeding by *mandamus* to compel the secretary of state to deliver such returns, on the petition of a party who alleges no other ground or interest in the matter than that he is the plaintiff in said injunction suit, and that the circuit court has ignored his injunction, although it appears that said court had no jurisdiction to award said *mandamus*.

(*Syllabus by the Court.*)

Petition for writ of prohibition.

Okey Johnson, J. W. St. Clair, and *Brown & Jackson*, for petitioner. *J. A. Hutchinson* and *W. P. Hubbard*, for respondent.

SNYDER, P. On January 10, 1889, A. B. Fleming presented his petition to this court, in which he alleged that on January 9, 1889, he exhibited his bill in equity to A. N. Campbell, a circuit judge of this state, and obtained from him an injunction restraining Henry S. Walker, secretary of state, from laying before the legislature of the state the certificate of the commissioners of the county court of Kanawha county, purporting to ascertain the result of the general election held in said county on November 6, 1888, for the office of governor of this state; that, after said injunction had been perfected and served upon said Walker, Nathan Goff, who was also a defendant to said bill of injunction, without any notice to the petitioner, applied to F. A. Guthrie, judge of the circuit court of Kanawha county, in term, for a writ of *mandamus* to compel said Henry S. Walker, secretary as aforesaid, to do what he had been enjoined from doing by said bill; that Judge

Digitized by Google

Guthrie, being fully advised of the existence of said injunction, announced from the bench that he would ignore and treat as naught said injunction, and thereupon he did ignore said injunction, and awarded a *mandamus nisi*, returnable at 9 o'clock A. M. on January 10, 1889, commanding said Walker, secretary as aforesaid, to forthwith deliver said certificate to the speaker of the house of delegates of the legislature; that said Walker has no personal interest in said injunction or *mandamus* proceedings; and that petitioner is the real and only opposing party in interest against the said Goff in any of said matters. The petition prayed for a rule against said Guthrie, judge, etc., and said Goff, to show cause why a writ of prohibition should not issue prohibiting said Guthrie, judge, etc., from holding for naught and setting aside said injunction, and prohibiting him and the said Goff from proceeding in said *mandamus* case without notice to petitioner, or opportunity for him to appear and defend his interests therein. The rule was awarded as prayed for, returnable on January 11, 1889, at which time the respondents appeared, and moved the court to quash the rule. On the motion of the petitioner, his petition was so amended as to show that the injunction bill averred that a writ of *certiorari* had been sued out of the circuit court of Kanawha county by petitioner against the county commissioners of said county to supervise and correct the action of said commissioners in canvassing the vote for governor at the election of November 6, 1888; that said writ had been sued out on January 4, 1889, and was still pending; and that said county commissioners had transmitted said certificate to said Walker, secretary, etc., on December 15, 1888. The motion to quash the rule, after having been argued by counsel for the respective parties, was on January 12, 1889, submitted to this court for its decision.

It is contended by the respondents that the injunction awarded by Judge Campbell, referred to in the petition, was void, because a court of equity has no jurisdiction to restrain a public officer from performing a plain duty required by the constitution. On the other hand it is insisted for the petitioner that, if any jurisdiction existed for the injunction, then the action of the circuit court in the *mandamus* proceedings is such an abuse of its powers and jurisdiction as will be prevented by prohibition. It is thus apparent that the important question is, did the judge have jurisdiction to award said injunction? In Walton v. Develing, 61 Ill. 201, it was held that, "where the law plainly requires an officer to perform a duty, and he is not exceeding or abusing his powers, but fairly acting within the same, and a court issues a writ to restrain him from its performance, he must discharge his duty as prescribed by the law." That case was a proceeding for contempt against election officers for holding an election in disobedience to an order of injunction, and in which the court held that the injunction, having been issued without authority, was void, and that there was no contempt in disobeying it. The court, in its opinion, says: "In such case what must control the officer,—the mandate of the court or the plain behests of the law? The court, as well as the inferior officer, must be governed by the law. When the law imposes a positive duty upon a public functionary, and a court commands him not to perform it, he must obey the law, and disobey the writ of the court." In Moulton v. Reid, 54 Ala. 320, it was decided that a court of equity has no jurisdiction to enjoin the person declared elected to a municipal office from using his certificate of election, where the law provides for a contest. In Smith v. Myers, 109 Ind. 1, 9 N. E. Rep. 692, it was held that "the courts have no jurisdiction of a suit to enjoin the secretary of state from delivering to the speaker of the house of representatives the sealed returns, alleged to be wrongful and illegal, of an election for lieutenant governor, which are directed to the speaker as required by law, in care of the secretary, and are to be delivered to him by the latter." The court in its opinion says: "It is a principle of constitutional law, declared in our constitution and enforced by many decisions of our own and other courts, that the departments of government are separate and distinct, and that the officers of one department shall not invade any other. To interfere by injunction in this case would involve a violation of this fundamental principle, as a conflict between two great departments of the government would result from an exercise of the jurisdiction invoked by the appellant. The general assembly has power to compel the attendance of persons at its sessions, and to compel the production of papers which are necessary to enable it to justly and intelligently discharge its duties and exercise its functions. If the judiciary should enjoin the secretary of state from delivering to the speaker the papers described in the complaint, and the general assembly should demand their delivery to the officer to whom they are addressed, a conflict of authority would arise which no tribunal could effectually determine. If the secretary should, in such case, yield to the demand of the general assembly, he would be in contempt of the authority of the court, and liable to punishment; if, on the other hand, he should disobey the command of the general assembly, he would be in contempt of its authority, and subject to punishment. If the general assembly should deem it the duty of the secretary of state to deliver the papers, it would not require the aid of the courts to compel its performance, for it possesses the power to coerce the production of papers and documents. * * * It is apparent, therefore, that as, on the one hand, the general assembly would not require the aid of the courts, by *mandamus* or otherwise, to compel the production of papers addressed, by direction of the constitution and the statute, to the presiding officer of one of its branches, so, on the other hand, the courts

Digitized by Google

cannot by injunction restrain it from obtaining those papers, nor by indirection produce that result by stopping them in the hands of one whom the law makes a mere custodian." Our constitution and statute, in respect to the question before us, are almost identical with those of Indiana, and the facts in the case from which I have quoted and the one at bar are so nearly alike as to make the opinion from which the above quotation is taken a very apposite, though not an absolutely binding, authority in the case under consideration. Without referring to other authorities, of which there are many, it is sufficient to say that, according to well-settled principles of law, I am clearly of opinion that, under our constitution and statutes, a court of equity has no jurisdiction to award an injunction in a case such as the one made in the petition in this case. Our constitution (article 7, § 3) declares: "The returns of every election for the above-named officers [one of whom is the governor] shall be sealed up and transmitted by the returning officers to the secretary of state, directed to 'the speaker of the house of delegates,' who shall immediately after the organization of the house, and before proceeding to business, open and publish the same, in the presence of a majority of each house of the legislature, which shall for that purpose assemble in the hall of the house of delegates;" and ample provision is made by statute to compel the production of papers before either house of the legislature. Code 1887, § 7, c. 12. The eighteenth section of article 6 of the constitution provides that the regular biennial session of the legislature "shall commence on the second Wednesday of January," which for the year 1889 was on the 9th day of January. It is thus shown that, at the time the injunction in question was granted, the legislature was in actual session, indeed, it was presumably this very fact that prompted its issuance; for otherwise there could have been no delivery of the election returns by the secretary of state, and therefore no necessity for the injunction. And the legislature, a coordinate branch of the state government, being in session, and having exclusive control over the said certificate or election returns for governor, and possessing plenary power to compel their delivery, the courts had no jurisdiction or control over said returns by injunction or otherwise. They had been delivered to the secretary of state in the manner prescribed by law before any proceedings had been taken in the courts in respect to them, as is shown in the petition in this case. As the statute (section 23, c. 3, Code) has made it the positive duty of the secretary of state to deliver the same to the speaker of the house, the said injunction was an absolute nullity, and constituted no ground for the refusal of said officer to discharge that duty.

It will be observed that the said injunction is the only ground alleged in the petition for the writ of prohibition, and, while it is apparent from what we have already said that the *mandamus* complained of was improperly awarded by the circuit court, yet, as the petitioner does not by his petition show such interest or right as would entitle him to interfere in or complain of said *mandamus*, we cannot at his instance, for any ground alleged in his petition, take cognizance of said proceedings, or award the writ of prohibition. For these reasons the motion to quash the rule is sustained, and the writ denied.

GREEN, ENGLISH, and BRANNON, JJ., concurred.

(32 W. Va. 144)

SHERRARD'S ADM'R v. KEITER'S ADM'R.

(*Supreme Court of Appeals of West Virginia.* Feb. 11, 1889.)

REVIVAL OF JUDGMENT—LIMITATION OF ACTIONS.

Under sections 11, 12, c. 139, of the Code a judgment can be revived by *scire facias* against the personal representative of the debtor within 10 years from the return-day of the last execution, though that time may be more than 10 years from the date of the judgment: provided such revival be made within 5 years from the qualification of such representative.

(*Syllabus by the Court.*)

Error to circuit court, Hampshire county.

On the 4th day of April, 1881, the president, directors, and company of the Farmers' Bank of Virginia, use of R. B. Sherrard, sued out of the circuit court of Hampshire county a writ of *scire facias* to revive a judgment recovered by them on the 8th of November, 1856, against George Keiter, for $1,200 and $2.01, with interest on whole from 5th of July, 1855, and costs. The writ averred that on the 12th of November, 1856, an execution issued on the judgment, which was returned "No property found," and that on 17th of April, 1860, a second execution issued, returnable in May, 1860, which was returned "No property found." It averred the death of Keiter, and that on the 7th of September, 1880, administration of his estate was granted to the sheriff, defendant to said writ. The defendant filed a plea of the statute of limitations, averring that more than 10 years had elapsed from the date of the judgment to the issuing of the *scire facias*, to which plea the plaintiff entered a demurrer, which the court overruled. The plaintiff then filed three replications to the plea, to which defendant demurred, and his demurrers were sustained. Facts were agreed, and the case submitted on them, viz., that judgment was rendered and execution issued and returned at the date as and for the amount stated in the *sci. fa.*, and that the plaintiff could not truly make the affidavit prescribed by section 27, c. 106, of the Code, and that plaintiff's right to sue out execution was obstructed by war, insurrection, and rebellion from the 17th day of April, 1861, to March 1, 1865. The replications referred to were: (1) That plaintiff

Digitized by Google

could not truly make the affidavit prescribed by section 27, c. 106, of the Code; (2) that his right to sue out execution was obstructed by war, insurrection, and rebellion from the 1st day of June, 1861, to 17th day of November, 1865; (3) that his right to sue out execution was obstructed by war, insurrection, and rebellion from the 17th day of April, 1861, to 1st day of March, 1865. Robert B. Sherrard filed an affidavit that he could not truly take the oath prescribed by section 27, c. 106, of the Code. On the 20th day of February, 1882, the circuit court entered an order finding that at the time of the issuing of the *scire facias* more than 10 years had elapsed from the date of the judgment, excluding the period from the 17th of April, 1861, to 6th of February, 1873, and, expressing the opinion that the judgment was barred, refused to revive or award execution on it, and gave the defendant his costs. The plaintiff, Sherrard's administrator, obtained this writ of error.

S. L. Flournoy, for plaintiff in error.

BRANNON, J., (*after stating the facts as above.*) The circuit court evidently proceeded under the view that under section 11, c. 139, Code 1868, where there has been a change of parties by death, 10 computable years after its date would bar the judgment, notwithstanding less than 10 years had elapsed from the return-day of the last execution; but that construction of that section has been overruled by the case of Laidley v. Kline's Adm'r, 23 W. Va. 565, holding, in point 5 of the syllabus, that under sections 11, 12, c. 139, Code 1868, a judgment may be revived by *scire facias* against a personal representative of the judgment debtor within 10 years of the return-day of the last execution issued thereon, although that time may be more than 10 years after the date of the judgment: provided such revival be made within five years from the date of the qualification of such representative. Therefore the plea averring that more than 10 years had elapsed from the date of the judgment was not good, because the *scire facias* alleged that two executions had issued,—the last returnable in May, 1860,—and the plea therefore did not answer its averment, and the demurrer to it should have been sustained. The plea fixing the date of the judgment—8th of November, 1856—as the initial day of the running of the statute, the replications were no answer to it, for, excluding all the time which they sought to exclude from computation, still there would remain 10 years running time under the statute from date of the judgment, and in that view they were properly rejected; but if the plea had not based itself on the date of the judgment, but on the return-day of the last execution, which it should have done, the replications would have been good. The judgment upon the *scire facias* must be reversed, with costs to the plaintiff in error, and the plaintiff's demurrer to the the defendant's plea sustained, and said plea rejected, and the cause is remanded to said circuit court for further proceedings.

SNYDER, P., and GREEN and ENGLISH, JJ., concurred.

(32 W. Va. 147)

SHERRARD'S ADM'R *v.* KEITER'S ADM'R.

(*Supreme Court of Appeals of West Virginia.* Feb. 11, 1889.)

Error to circuit court, Hampshire county.

S. L. Flournoy, for plaintiff in error.

BRANNON, J. On the 4th day of April, 1881, R. B. Sherrard sued out of the circuit court of Hampshire county a writ of *scire facias* to revive a judgment recovered by him against George Keiter on the 8th of November, 1856, for $1,750, with interest and costs, in the county court of Hampshire. The writ averred that on the 12th day of November, 1856, execution issued on said judgment, which was returned, "No property found;" and that on the 17th of April, 1860, another execution issued on said judgment, returnable to May, 1860, and returned, "No property found." It averred the death of Keiter, and that on the 7th of September, 1880, administration of his estate was granted to the sheriff, defendant to said writ. Precisely the same pleadings were filed, the same facts agreed and the same action of the court was had thereon, and the same judgment against the plaintiff, as in the case of Sherrard's Adm'r v. Keiter's Adm'r, ante, 25, (decided at this term,) and Sherrard's administrator obtained this writ of error; and for the reasons given in the opinion in that cause the judgment upon the *scire facias* must be reversed, with costs to plaintiff in error, the plaintiff's demurrer to the defendant's plea sustained and the plea rejected, and the cause is remanded to said circuit court for further proceedings therein.

SNYDER, P., and ENGLISH and GREEN, JJ., concurred.

(32 W. Va. 393)

GOFF *v.* WILSON.

(*Supreme Court of Appeals of West Virginia.* March 12, 1889.)

ELECTIONS—GOVERNOR—MANDAMUS.

When neither the speaker of the house of delegates, nor the joint assembly of both houses of the legislature, convened under section 8 of article 7 of the constitution of this state for the purpose of opening and publishing the returns of the election for the office of governor, does in fact open and publish the returns in respect to said office, or declare any person elected to that office, this court cannot by *mandamus* adjudge the person who appears from the returns certified to the speaker of the house to have received the highest number of votes for that office to be the governor, and compel the person who was the governor during the preceding term to deliver the office and its insignia to him.

(*Syllabus by the Court.*)

Petition for *mandamus*.

Petition by Nathan Goff for *mandamus* to compel E. W. Wilson to deliver to petitioner the office and insignia of governor of the state.

W. P. Hubbard, J. A. Hutchinson, and *Abram Burlew*, for petitioner. *J. W. St. Clair, E. W. Wilson*, and *Atty. Gen. Caldwell*, for respondent.

SNYDER, P. On March 7, 1889, Nathan Goff presented his petition to this court, then in session, in which the petitioner avers, in substance, as follows: That at the general election held in this state on November 6, 1888, he was voted for and elected by the

Digitized by Google

qualified voters to the office of governor of the state for the term commencing on March 4, 1889; that the commissioners of the respective county courts ascertained the result of said election in their several counties in respect to the office of governor in the manner prescribed by law, and made out and signed certificates, which they transmitted, in due form of law, to the secretary of state, in sealed envelopes, directed to the speaker of the house of delegates; that the secretary of state delivered said certificates to the speaker of the house as required by law; that said certificates contained the result of said election for the auditor and the other executive officers, as well as for governor, and all of said county certificates were inclosed in one envelope; that the speaker of the house, in the presence of a majority of each house, assembled in the house of delegates for that purpose, opened the envelopes containing all the said certificates and returns, and as to the aforesaid offices other than governor published the same, and as to the office of governor the said certificates and returns, after they had been opened as aforesaid, were delivered to a committee of the legislature, appointed under the statute relating to contests for governor, to report upon the same; that the said certificates and returns with respect to the office of governor showed that for said office petitioner received at said election 78,714 votes, A. B. Fleming received 78,604 votes, and all other persons together received for said office less than 5,000 votes, thereby showing that petitioner had received a plurality of all the votes cast for said office at said election; that said A. B. Fleming had caused a notice of contest for the office of governor to be given to petitioner, and he in turn had a counter-notice given to said Fleming, both of which notices had been served, and were, on January 17, 1889, presented to the legislature, and printed at large upon the journal of the house of delegates, which notices, as well as the journals of the senate and house of delegates, so far as the same show the action had with respect to ascertaining the result of said election, and in the matter of said contest for the office of governor, are made parts of the petition; that on March 4, 1889, petitioner took the oath of office of governor in the manner prescribed by law, and on the afternoon of that day he went to the governor's office in the state capitol, where he found E. W. Wilson, who had been elected governor at the election held in 1884, and had held said office for four years ending on said 4th day of March, 1889, and still had in his possession the property and insignia of said office, and demanded of him the possession of said office, and the property and insignia of, belonging, and pertaining thereto, but the said Wilson refused to surrender and deliver such possession to petitioner, and held and still holds and detains the said office, property, and insignia, against the right and demand of petitioner, and declares that he will continue to do so. Petitioner insists that he was elected to the office of governor; that neither the speaker of the house, the two houses of the legislature, nor either of them, did or would declare him elected, but wholly failed and refused to do so, or to declare any one elected to said office; and that such failure to make such declaration cannot affect his right to said office. Petitioner therefore prays for the writ of *mandamus* against said E. W. Wilson, to require him to show cause why he should not be compelled to surrender to petitioner said office, and all the property and insignia belonging thereto, etc. Upon the presentation of said petition the defendant, E. W. Wilson, appeared in court, and waived process, and demurred to and moved to quash said petition, which it was agreed by the parties should be treated as an alternative writ; and it was further agreed that the case should be heard upon said petition, demurrer, and motion to quash without further pleadings, and determined upon its merits, without regard to merely technical objections or questions. The case was afterwards fully argued and submitted to the court.

It appears from the journal of the house of delegates, which is made a part of the aforesaid petition, that the following resolutions were adopted by the joint vote of the two houses of the legislature assembled in the house of delegates for the purpose of complying with section 3 of article 7 of the constitution of this state, relative to the returns of the election for state officers, held November 6, 1888: "Whereas, it appears that there is a contest as to the result of the election for governor of the state, as set forth in the petition and notice of the Hon. A. B. Fleming against the Hon. Nathan Goff, presented before this joint assembly this day, therefore be it resolved, that the publishing and declaration of the result of the vote for the said office of governor be suspended until said contest be decided in the manner prescribed by law. Resolved, that it is hereby declared as the opinion and decision of this joint assembly, that the mere reading of the returns of the election of governor, already opened, shall not be construed to give either the Hon. N. Goff or the Hon. A. B. Fleming any claim or right to the office of governor, and that all of the returns of the said election shall be referred without reading any of the returns not yet opened to the joint committee provided by the law, relating to contests for the office of governor, and be hereafter considered and have the effect as if none of the said returns had been read." It further appears that a joint committee of the two houses was appointed to examine and report upon the contest between Fleming and Goff for the office of governor, and all the returns and papers relating thereto were referred to said committee. It further appears upon said journal that on January 4, 1889, an order was made by the circuit court of Kanawha county, superseding the certificate of the commissioners of the county court of Kanawha county as-

Digitized by Google

ascertaining the result of the election for the office of governor, held on November 6, 1888, in said county. Other facts appearing upon said journal may be hereinafter referred to, so far as they may be found material to the matters under consideration. It is conceded and it is unquestionably true that, if the petitioner is entitled to the office of governor, he may obtain it by *mandamus*. Dew v. Judges, 3 Hen. & M. 1; Conlin v. Aldrich, 98 Mass. 557; Harwood v. Marshall, 9 Md. 83; Bridges v. Shallcross, 6 W. Va. 562. The second and third sections of article 7 of our constitution are as follows: "(2) An election for governor, state superintendent of free schools, auditor, treasurer, and attorney general shall be held at such times and places as may be prescribed in this constitution or by general law. (3) The returns of every election for the above-named officers shall be sealed up and transmitted by the returning officers to the secretary of state, directed 'to the speaker of the house of delegates,' who shall, immediately after the organization of the house, and before proceeding to business, open and publish the same, in the presence of a majority of each house of the legislature, which shall for that purpose assemble in the hall of the house of delegates. The person having the highest number of votes for either of said offices shall be declared duly elected thereto; but, if two or more have an equal number, and the highest number of votes for the same office, the legislature shall, by joint vote, choose one of such persons for said office. Contested elections for the office of governor shall be determined by both houses of the legislature by joint vote, in such manner as may be prescribed by law." The first section of the same article provides that the terms of said officers "shall be four years, and shall commence on the 4th day of March next after their election," and by section 7 of article 4 of the same constitution it was provided that "the general elections of state and county officers and of members of the legislature shall be held on the second Tuesday of October until otherwise provided by law." The time fixed for the commencement of the sessions of the legislature is the second Wednesday of January every two years.

Under the aforesaid provision of the constitution in respect to contesting the election for the office of governor, the legislature at its session in 1873 passed an act providing that, if the election of governor, treasurer, auditor, etc., be contested, the contestant must give notice to the person whose election is contested within 60 days thereafter, and within 30 days thereafter the party whose election is contested shall in like manner give notice to the contestant. The parties shall finish taking depositions within 40 days after the last-mentioned notice is delivered. In case the contest is for the office of governor, the petition of the contestant and the depositions shall be referred to a joint committee of the two houses for examination and report. The contest shall be determined by the legislature, both houses thereof sitting in joint session in the hall of the house of delegates, the speaker of which house shall preside. Sections 63, 64, c. 118, Acts 1872-73. It will thus be observed that it required at least 110 days from the date of the election to mature the contest for trial, which would still leave ample time for the trial and determination of the contest before March 4th, the time at which the governor goes into office. But by amendment of said section 7 of article 4 of the constitution, adopted in 1880, the time of holding the general election for governor and other state officers was changed from the second Tuesday in October to the next Tuesday after the first Monday in November, thus leaving an insufficient time intervening between the date of the election and the 4th of March to mature and determine the contest for the office of governor. Since this change in the constitution no alteration has been made by the legislature in respect to the time for maturing the trial of a contest for the office of governor, although in 1882 some slight modifications were made in the statute on that subject in other respects. Chapter 6, Code. In this condition of the law the legislature, when it assembled in January last, and found that there was a contest pending between Gen. Goff and Judge Fleming for the office of governor, were confronted with this very grave and serious question: Was it their duty to declare either of the claimants elected to the office of governor until after the contest could be decided? If they, or the speaker of the house, should at the commencement of the session, or during the term fixed by law for its continuance in regular session, declare either Goff or Fleming governor, the inevitable consequence would be that the person so declared would have to assume the duties of the office before it would be possible to try the contest or determine his right to the office under the existing law. The result of this might be to place in the high and responsible office of governor, and at the head of the state government, a person who had never been elected or otherwise designated by either the constitution or the law to discharge the duties of that office; for, if the trial of the contest should result in favor of the other claimant, his title would relate to the date of his election, and he would be the *de jure* governor from the commencement of the term fixed by the constitution. The decision upon the contest would be simply the determination of a fact. It would not create a fact or a right, nor confer the office. The election gives the right to the office, and the decision of the tribunal fixed by law to try the contest simply declares the title upon the evidence, but does not create or confer it; and, having the title by virtue of his election, his qualification entitles him to exercise the duties of the office. Bier v. Gorrell, 30 W. Va. 95, 100, 3 S. E. Rep. 30. This being so, it is plain that the person thus placed in the office

Digitized by Google

before the decision of the contest would be there without any legal right. He would be a mere intruder, because he had never been elected, and was never legally entitled to the office.

It is not overlooked that under some constitutions and systems of government it may occur and is contemplated that a person may during a contest exercise the functions of an office to which he has not been elected, and which he had no legal right to hold. This is conspicuously so in the cases of members of the legislature and the lower house of congress. In these cases such a result is unavoidable, because the very body in which such person sits is the tribunal appointed to determine the contest. But such is not the case in respect to the governor and other executive officers of this state. Our constitution provides that the terms of all officers, except the executive officers, shall commence on January 1st. but, in order that the governor and other executive officers may not be called upon to exercise the duties of their respective offices until any contest in respect thereto may be determined, the constitution wisely postpones the commencement of their terms until March 4th. It may also be conceded that by the provision of the constitution before quoted, which provides for the opening, publishing, and declaring the result of the election, it was intended that this declaration of the result should precede the contest, and thus give to the person having the highest number of votes, as shown by the certificates and returns, the *prima facie* title to the office, and the right to the advantageous position of contestee in the subsequent contest. But, while this may have been contemplated by the framers of the constitution, it is just as plain that they also contemplated that the legislature would, as it was clearly its duty to do, provide by law for the maturity and trial of a contest for any and all of said offices before the time fixed for the commencement of the term. It is scarcely possible to believe that it was contemplated by those who made and adopted our constitution that we should ever have the anomaly of a person discharging the high and responsible duties of the chief executive office of the state who had never been elected or otherwise designated by law to perform the duties of that office. The careful and guarded provisions of the constitution itself, as well as its general policy, forbid any such construction, unless there is no escape from it. The joint assembly of the two houses, finding itself in this serious dilemma, produced, not by any question as to the intent and purpose of the organic law, but by a defective statute or the omission of the legislature,—whether resulting from inadvertence or other cause it is immaterial to inquire,—to provide in a proper and practicable manner, and in accordance with the express power conferred upon it by the constitution, for the trial and determination of a contested election for the office of governor before the commencement of the term of office, decided, as we must assume it believed it had the right to do, to refer the certificates and returns for said office to a joint committee on the contest, appointed in the manner prescribed by law, and to suspend the publishing and declaration of the results until said contest be decided. This decision and action of the joint assembly, to say the least of it, do not appear to be either unreasonable or unjust to any one, under the peculiar and embarrassing circumstances of the situation before it.

But, for the purposes of the case now before us, it is unnecessary for us to determine whether this action of the joint assembly was right or wrong. The real questions for us to decide are: (1) Did that assembly, or any constituent part of the legislature, have jurisdiction of the subject? that is, whether or not it had the constitutional right to determine the question; and, (2) if so, had it any discretion as to how it should determine it, or the manner in which, or the time within which, it should finally decide? If these two inquiries are solved in the affirmative, then, so far as this proceeding by *mandamus* is concerned, it had the same legal power to decide wrong that it had to decide right; for it is a principle of law too well settled to justify the citation of precedents, that, while *mandamus* may be invoked to compel the decision of a discretionary question, it cannot be used to dictate or control that decision, even when directed to the officer or tribunal having the power to determine the question; much less will a court in a collateral proceeding, such as the one before us, undertake to review or correct such decision, however erroneous it may be, or however unjust and unreasonable.

1. That either the speaker of the house or the joint assembly (and for present purposes it is immaterial which) has jurisdiction to open and publish the returns of the election, and declare the result, there can be no denial, because the right to do so is conferred by the constitution in express terms. The language employed is: "The speaker of the house of delegates shall * * * open and publish the returns in the presence," etc. "The person having the highest number of votes * * * shall be declared duly elected."

2. The important inquiry is whether or not this authority, to which is given the right to open and publish the returns and declare the result, has any discretionary power; that is, whether or not the power conferred is merely mechanical, or purely ministerial, involving no act in which there is any legal right to exercise discretion, or make any choice as to the conclusion which must be reached. It is hardly possible to conceive of a public office, the duties of which do not require of the officer filling it the exercise of discretion. In some instances judicial officers perform ministerial acts, and on the other hand purely ministerial officers exercise discretionary or *quasi* judicial functions. Almost every pub-

Digitized by Google

lic officer, whether judicial or ministerial, must, in the discharge of his duties, act in both capacities. Some of his acts will necessarily be ministerial, while others, from the same necessity, must be judicial or discretionary. When a ministerial officer exercises discretionary powers, such acts are generally denominated "*quasi* judicial acts." In Henderson v. Smith, 26 W. Va. 829, this court decided that a notary public, in taking and certifying the acknowledgment and privy examination of a married woman to a deed, acted in a *quasi* judicial capacity. And in Brazie v. Commissioners, 25 W. Va. 213, we decided that the county commissioners of a county court, when assembled in special session to ascertain the result of an election, exercised *quasi* judicial functions in determining that the ballots, poll-books, and certificates of the election returns laid before them are genuine; that they are in fact the returns, and substantially in the form prescribed by the statute. It is true, we held in that case that prohibition would lie to prohibit the commissioners from usurping and attempting to exercise judicial functions not conferred upon them by law, but the opinion clearly shows that the court could not interfere, either by prohibition or its correlative writ, *mandamus*, with the judicial discretion of the commissioners in respect to any of the discretionary powers conferred upon them by the statute. If the county court commissioners, which is conceded to be a ministerial body, can, when sitting as a canvassing board, to ascertain the result of an election, exercise discretion in determining the genuineness of the certificates of the returns laid before them, it seems to me to be equally reasonable and proper that the joint assembly of the two houses of the legislature, when the certificates of the returns of an election for governor or other executive officer are opened and published by it, or by the speaker in its presence, should determine whether or not those certificates are genuine, and in fact the legal returns or certificates of the election. If it is the right and duty of that body to do so, then of necessity that right involves the exercise of a discretion and choice of decision. It involves the power to decide wrong as fully as it does to decide right, and in neither case can its decision be controlled or reviewed by *mandamus*. The house journal, which is made a part of the petition in this case, shows that in the returns from Wood county there was a defective certificate of the vote for auditor, and in the returns from Webster county there was no certificate as to the vote for attorney general. If the returns had been published without supplying these omissions, the result would have been different from that which it was ultimately declared to be. It does not seem that the right of the joint assembly to supply this omission, by supplementing the returns laid before it, was or could be, with propriety, questioned by any one. In respect to the returns for the office of governor, the said journal shows that the certificate for the county of Kanawha had been superseded by an order of the circuit court of that county upon a writ of *certiorari* to set aside said certificate and return, and that said order was still in force. It cannot be denied that said court had jurisdiction to make said order, and in a proper case to set aside or correct said certificate; for this court has expressly decided that it it had such jurisdiction. Chenowith v. Commissioners, 26 W. Va. 230; Alderson v. Commissioners, 31 W. Va. —, 8 S. E. Rep. 274. What the defect was in this certificate, or the returns it purported to give, we have no means of determining, but, in the absence of anything showing the contrary, even if this court could inquire into any question in respect to said returns, which is not conceded, it would be mere assumption to hold that the joint assembly had not the legal right to question or reject, at least, that certificate; and, if that had been done, enough appears upon said journal to make it probable that Fleming, and not Goff, would have had a majority of the votes cast in the state, and would therefore probably have been declared elected governor. It seems to me, therefore, that the joint assembly, sitting for the purpose of opening and publishing, or hearing opened and published, the returns of the election for governor and other executive officers, acted in a *quasi* judicial capacity, at least in respect to determining the genuineness of the certificates, and that it was not bound to publish the returns or declare the result until it had before it all the genuine returns, or exhausted all the means in its power to obtain them without being able to do so; and it having a *quasi* judicial or discretionary authority in respect to these matters, and not having finally refused to exercise that authority, this court cannot by *mandamus*, if it could do so in any proceeding, take jurisdiction, either for the purpose of determining those matters for itself, or determining the result of the election.

It is, however, insisted that the demurrer to the petition admits that the petitioner had received the highest number of votes for the office of governor, and that, therefore, nothing was left undone or could have been done by the joint assembly to entitle him to the office, except the purely ministerial act of declaring him elected; and, inasmuch as that must be the inevitable result of what had been done or what is admitted by the demurrer here, this court will treat that ministerial act as having been done, and adjudge the office to the petitioner. I do not think the admission goes to the extent claimed. The petition simply avers that the certificate and return made out by the county commissioners, so opened and published, in fact showed that the petitioner had the highest number of votes for the office of governor. Now, as a matter of fact, other parts of the petition and the journal of the house, which is made part of it, show that

Digitized by Google

only a part of the certificates for governor had been opened, and that none of them had been approved as correct or published. We must take all the allegations of the petition together, and when we do so we find that it is impossible that the certificates and returns "so opened and published in fact showed that petitioner had received 78,714 votes." I think, therefore, there is no foundation for this contention.

I have thus far considered the important questions presented without reference to the fundamental principles lying at the basis of our republican system of government, and which were so learnedly and ably discussed by counsel. According to these principles, the case must also be determined against the claim of the petitioner. Our constitution declares: "The legislative, executive, and judicial departments shall be separate and distinct, so that neither shall exercise the powers properly belonging to either of the others; nor shall any person exercise the powers of more than one of them at the same time, except that justices of the peace shall be eligible to the legislature." Article 5. Other portions of the constitution, as we have seen, not only provide that the legislative department of the government shall open and publish the returns of the election for governor and declare the result, but confer upon that department the exclusive right to try and determine contested elections for that office. It was admitted in the argument in this case that the legislature must first act upon the returns of the election for governor, or, at least, that body, or some constituent part of it, is the only authority by which the returns can be opened and published; but it is denied by the counsel for the petitioner that, if that body refuses to declare the result of the election, such refusal will prevent the person having the highest number of votes from qualifying and exercising the duties of the office; and, as a corollary of this proposition, they insist that the judiciary department has the power, in case the legislative department fails to discharge its whole duty by declaring the result of the election, to declare that result, or, to do what is the same in effect, adjudge the person receiving the highest number of votes for the office of governor to be in fact the governor. It is claimed that this right or power in the court is the result of absolute necessity; for otherwise the sacred rights of the people are at the mercy of the legislature, however corrupt or partisan may be its actions. This was a proper matter for the consideration of the framers of the constitution, and of the people when they adopted it, but when the people in their sovereign capacity declared in their constitution that this power should be vested in the legislative department of the government, and that the judiciary should not exercise any of the powers belonging to that department, the question was settled, and the courts have no power to interfere or question its wisdom. For the grounds and reasons why the courts cannot and will not undertake to determine questions such as the one here presented, I refer to the exhaustive discussion of the subject in the following decisions: State v. Baxter, 28 Ark. 129; Baxter v. Brooks, 29 Ark. 173; Grier v. Schackleford, 2 Treadw. (S. C.) 642; Batman v. Megowan, 1 Metc. (Ky.) 533; State v. Marlow; 15 Ohio St. 114; Royce v. Goodwin, 22 Mich. 496; State v. Mason, 77 Mo. 189; State v. Lewis, 51 Conn. 113; State v. Harmon, 31 Ohio St. 250; Collin v. Knoblock, 25 La. Ann. 263; Rogers v. Johns, 42 Tex. 339; People v. Supervisors, 100 Ill. 495; Attorney General v. Barstow, 4 Wis. 567; Ex parte Smith, 8 S. C. 495; People v. North, 72 N. Y. 124; People v. Crissey, 91 N. Y. 616.

I could add nothing, either in argument or conclusiveness, to the views expressed in the foregoing cases, and I shall therefore simply say that, according to the principles decided in those cases, the declaration of the result of the election for governor, under the provisions of our constitution, is essential to the right to exercise the duties of that office; and, as the constitution has conferred the power to make this declaration upon the legislative department, that power is exclusive, and beyond the control or interference of the courts in any manner. To dispense with this declaration would be to nullify an express requirement of the constitution. This we are not at liberty to do. This declaration is the only record provided by the constitution to show who is entitled to the office of governor. It is the only commission provided for him, and is the only constitutional evidence of his title to the office. For the reasons hereinbefore given, I am of the opinion that the peremptory writ of *mandamus* should be denied, and the petition dismissed.

ENGLISH and BRANNON, JJ., concurred. GREEN, J., absent.

(32 W. Va. 419)

CARR v. WILSON.

(*Supreme Court of Appeals of West Virginia.* March 14, 1889.)

ELECTIONS — GOVERNOR — MANDAMUS — CONSTITUTIONAL LAW.

1. Where persons are voted for for governor at a regular election for the office of governor, but there has been no declaration of the result of the election by either the speaker of the house of delegates or the joint assembly of the two branches of the legislature, and a contest for that office is pending before such joint assembly, and the declaration of the result has been by such assembly postponed until the decision of such contest, that does not create such a condition of things, within the meaning of section 16, art. 7, of the constitution, as will entitle the president of the senate to act as governor.

2. In such case the governor elected for the next preceding term has the right and is under duty, by virtue of section 6, art. 4, of the constitution, to continue to discharge the duties of his office until a successor shall be declared elected.

3. The act of taking the official oath prescribed for governor by a candidate voted for for governor at such election, before a declaration of his election, under section 3, art. 7, of the constitution, would not entitle him to take office; and his ina-

Digitized by Google

bility to take office for want of such declaration of election, whether he attempts to qualify or not, would not entitle the president of the senate to act as governor.

4. A declaration of election to the office of governor, as provided for by section 3, art. 7, of the constitution, is indispensable to perfect and consummate the title to that office.

5. The provisions of the constitution limiting the term of office of governor to four years, and making him ineligible to re-election, do not prevent him from continuing to discharge the duties of his office after his term, under section 6, art. 4, of the constitution, in cases where the president of the senate cannot act as governor, under section 16, art. 7, of the constitution.

(*Syllabus by the Court.*)

Application for *mandamus*.

Robert S. Carr is president of the senate. He filed his petition in this court, averring that on the 4th of March, 1889, the office of governor of the state had become and remains vacant, and that under section 16, art. 7, of the constitution, it is his right and duty to act as governor; that, at the election last held for governor, Nathan Goff and A. B. Fleming were the two candidates receiving the highest number of votes for that office; that Goff, claiming to have received a greater number than Fleming, on 4th of March, 1889, took the oath of office, and demanded possession of the office, but that E. Willis Wilson, a private citizen, found in its possession, refused to admit Goff; that Goff asked this court for a *mandamus* to compel Wilson to surrender the office to him, but that the court held that he was not entitled to the writ for reasons stated in the opinion and decision of the court; and that the act of Goff in taking the oath was void and of no effect. He further states that either Goff or Fleming was elected, but that both were and still are under such disability as prevents their acting; that Fleming failed to qualify, and for that reason and others is disabled from entering on the duties of the office; and that Goff, for reasons stated in said opinion of this court, is disabled from so doing; also that he, Carr, demanded the office from Wilson, but was refused admission, and alleged that Wilson had no right to the office. Carr asked a *mandamus* to compel Wilson to yield the possession of the office to him. By consent, the petition stands as an alternative *mandamus*. Wilson filed a return. It denied that any vacancy in the office existed, and that Carr had under the constitution right to act as governor; and averred that he, under the constitution had the right, and was under duty, to continue in the discharge of the powers of the office until his successor should be declared elected and qualified. It admitted that said Goff and Fleming were candidates for governor, each claiming to have received the highest number of votes, but whether either received a majority of legal votes, or both an equal number, neither said Carr nor he could possibly know, as the returns of the election were sealed and transmitted to the secretary of state, to be disposed of as directed by section 3, art. 7, of the constitution; that under the constitution said returns cannot be published, declared, or made known, except as by it provided; that in fact they had never been published and made known; that there is no law whereby they can be legally published, except as set forth in said section 3; and therefore any averment of the petition that either Goff or Fleming had received a majority or been elected, or did not receive an equal number of votes, is beyond the possibility of the petitioner's knowledge, and therefore untrue. It averred that neither Goff nor Fleming, nor any one else, had been declared elected, and therefore it was untrue that either a failure to qualify, or any disability or any condition of facts whatever, had occurred concerning the governor that entitled Carr to act. It averred that Wilson had been elected in October, 1884, governor for four years, beginning March 4, 1885, and that he was eligible to be so elected, and was declared elected and served as such governor for such term, and is still in the office performing its duties, his successor not having been declared elected and qualified, within the meaning, intent, and requirement of the constitution. It averred that Goff and Fleming were candidates for governor at the election on the Tuesday after the first Monday in November, 1888, for the term commencing March 4, 1889, and both and no other person claimed to have been elected. It also averred that said Fleming instituted proceedings contesting the election of said Goff before the legislature in joint assembly at its session commencing on second Wednesday in January, 1889; that the petition and notice of contest of Fleming, and the counter-petition and notice of Goff, were presented, received, and entered on the journals of both houses of the legislature, and also in the joint assembly, and that the necessary steps were taken by the joint assembly and the houses for the trial of the contest. Copies of the journal are filed with the return. It appears therefrom that the joint assembly adopted a resolution referring to said contest, and suspending the declaration of the result as to governor until the decision of said contest; and that it was the opinion and decision of said assembly that the mere reading of the returns already opened (those from a few counties had been opened) should not be construed to give either Goff or Fleming any claim or right to the office, and that all the returns should be referred, without reading any of them not yet opened, to the joint committee provided by law relating to contests for the office of governor, and be considered as if none of said returns had been read. Such a committee was appointed to examine and report on the contest between Fleming and Goff, and all returns and papers relating to it were referred to the committee. It appears, also, that on the 4th January, 1889, an order was made by the circuit court of Kanawha, suspending the certificates of the commissioners of that county as to the election for governor. A resolution was passed

Digitized by Google

extending the time for taking depositions in the contest until ——— day of May, 1889. Plaintiff, Carr, demurred to the return of said Wilson. The case was fully argued, and submitted to the decision of the court.

J. H. Ferguson, for petitioner. *J. W. St. Clair* and *E. W. Wilson*, for respondent.

BRANNON, J., (*after stating the facts as above.*) President Carr bases his claim for the office of governor on section 16, art. 7, of the constitution, which reads as follows: "In case of the death, conviction on impeachment, failure to qualify, resignation, or other disability of the governor, the president of the senate shall act as governor until the vacancy is filled or the disability removed." Gov. Wilson denies the application of that provision to the present circumstances, and, though his term of four years as governor has expired, he claims to hold over until his successor shall be declared elected and qualified, under section 6, art. 4, of the constitution, which reads as follows: "All officers elected or appointed under this constitution may, unless in cases herein otherwise provided for, be removed from office for official misconduct, incompetence, neglect of duty, or gross immorality, in such manner as may be prescribed by general laws, and unless so removed they shall continue to discharge the duties of their respective offices until their successors are elected or appointed and qualified." Carr contends that while it is true, under section 6, art. 4, officers hold over beyond their term until their successors are qualified, yet that that section itself says, "unless in cases herein otherwise provided for;" and that if we turn to said section 16, art. 7, it is therein otherwise provided for, namely: "That in case of the death, conviction on impeachment, failure to qualify, resignation, or other disability of the governor, the president of the senate shall act as governor." Wilson maintains that the words, "unless in cases herein otherwise provided for," apply only to removals of officers, and not to the clause providing for holding over, as if it read, "all officers may be removed in such manner as may be prescribed by general laws, unless in cases herein otherwise provided for," or as if the clause as to officers holding over were in another section. It is said that as to removal it was necessary to insert these words, because this section gives the legislature power to provide as to the manner of effecting removals from office, whereas section 9, art. 4, provides for the impeachment of all state officers, and their trial and removal by the senate, and the insertion of those words as to removals avoids any inconsistency. Their location, not at the opening of the section, but after the word "may," which is a part of the verb "remove," and their absence from the clause relating to officers continuing in office, would seem, grammatically speaking, to confine them to the clause relating to removals. To annex them, also, to the other clause, we would have to transport them to it, and make it read, "and unless so removed, or unless in cases herein otherwise provided for, they shall continue to discharge," etc., which Carr's counsel say should be done, but which the text of the section does not do. But I regard this matter not material; for, if they were not used at all, the general rule that removals should be made as might be prescribed by the legislature would yield as to, or rather not apply to, those officers who can be removed only by process of impeachment, for the legislature could not as to them prescribe another mode of removal. And, as to the general rule that all officers shall hold over until their successors are qualified, that, being a general rule, would yield to a clause providing otherwise as to a particular officer, for instance, governor, as there would be as to that officer a provision applicable only to him, and as to him that particular provision would govern his particular case. Bish. St. Crimes, §§ 126, 390. Those words were inserted out of abundant caution, and to give harmony to the face of the constitution. I do not think it material, and so do not decide, whether those words are annexed to only one or both the sentences or clauses of said section 6; but, say they qualify both, now it is plain that it is a general rule in our constitution that, "unless removed, all officers shall continue to discharge the duties of their respective offices until their successors are elected or appointed and qualified," and the governor falls within it, unless some other provision takes him out of it as an exception to that rule, and to the extent such other provision may go he would be out of that general rule. On search we find that section 16, art. 7, of the constitution, does to the extent therein provided take him out of the general rule by the language, "In case of the death, conviction on impeachment, failure to qualify, resignation, or other disability of the governor, the president of the senate shall act as governor until the vacancy is filled or the disability removed." I should say under it that if Gen. Goff had been declared upon the face of the returns elected, and had failed to qualify, the president of the senate would act as governor, ousting Gov. Wilson, for here would be a failure to qualify by the governor elected, and so declared, and under the language quoted the president of the senate would come in. But the president of the senate can come into the office of governor, or rather act as governor temporarily *ex officio*, as president of the senate, only on the contingency or state of facts specified in section 16, art. 7; that is: "In case of the death, conviction on impeachment, failure to qualify, resignation, or other disability of the governor;" and under a legal rule of construction, where there is a general rule, exceptions must be strictly construed, and cases must clearly fall within the exceptions.

Now, the death, conviction, or resignation of a governor are not suggested as existing

Digitized by Google

as grounds of President Carr's claim. If it be said that because of the fact that no one has been declared elected no one has legally taken the oath of office, and that there exists a "failure to qualify," giving the president of the senate for that reason, under the words of the constitution, a right to the office, the question arises, has that contingency arisen, within the true meaning of the constitution? As above stated, had Gen. Goff, or any one else, been declared elected, and failed to qualify, there would be a failure to qualify, within the meaning of the constitution. But no one has been declared elected. The constitution says that the returns for governor from the counties shall be sealed, and opened by the speaker of the house in the presence of both houses of the legislature, and the person having the highest number of votes shall be declared elected. Can we dispense with this declaration required by the very letter of the constitution? Does the demand for such declarations embodied in the constitution mean nothing? Constitutional requirements are regarded, unlike statutory requirements, mandatory, not directory. Cooley, Const. Lim. 78, 83.

The court of appeals of New York in People v. North, 72 N. Y. 124, held that where the act of the legislature has provided in a town charter that the returns be laid before the council, and the person having the highest number of votes shall be declared duly elected, the declaration and certificate of the council "are necessary to complete the election of a ward officer as well as a general officer of the city, and are indispensable to qualify the candidate to enter upon the duties of his office." The same court in People v. Crissey, 91 N. Y. 616, held that the legislature may provide the manner in which the result of an election shall be determined and declared; that the power to declare the result must be lodged somewhere; and that, where the mode of so doing is commanded, until it is obeyed, and such acts are done, the election is not complete, and the candidate not qualified to serve; and the court held, for want of such declaration, that the old officers held over. The constitution itself in this state requires this declaration by either the joint assembly, or by the speaker in its presence. How do we know, legally speaking, for the purpose of qualification, who is elected until such ascertainment? What do the certificates from the many counties show? They are secret, sealed, and sacred, under the constitution, and no one can answer the question until then. This court has held at this term, in Goff v. Wilson, ante, 26, that for want of a declaration of his election Gen. Goff had no title and was not entitled to enter upon the duties of the office of governor. The constitution divides the government into three great departments, legislative, executive, and judicial, and forbids either to exercise the functions of another. It provides that the returns as to the election for governor shall go before the two houses of the legislature, in order that their result may be declared. It provides that a contest as to the governorship shall be tried by a joint assembly of those two houses. Their jurisdiction is exclusive in the exercise of this political function. The joint assembly has had these returns before it; has suspended and postponed any declaration of the result as to governor until the decision of the contest between Gen. Goff and Judge Fleming. Whether that action was right or wrong, this court has no jurisdiction to even indicate. The legislature is the sole tribunal to take action in that matter. We possess no power, directly or indirectly, to review or reverse that action. The whole matter, both the function of passing on the returns sent from the counties, and that of deciding, on the law and the evidence, the contest between Goff and Fleming, has been taken in charge, under the mandate of the constitution, by the legislature; it is waiting for the evidence to be taken by the parties, and has merely continued the case for trial.

This court could not, directly or indirectly, oust the legislature of its jurisdiction, and, assuming superior wisdom and power, arrogate to itself the function of saying that either was lawfully elected. To do so would be usurpation of unwarranted authority by this court. Therefore this court has held that, for want of declaration of his election, Gen. Goff could not have the *mandamus* to compel Gov. Wilson to admit him, and because he had no declaration of election, the only commission to complete his title. If, then, President Carr were to base his claim on a failure of Gen. Goff, or any one else, to qualify, the question would arise, how could any one qualify until after he had been declared elected? How could there be a failure to qualify until there was someone in a condition to qualify? The only provisions as to qualification of officers are in section 7, c. 10, Code 1887, requiring that officers shall take the oath within 60 days after they have "been duly declared elected," with the proviso as to the executive officers that they shall do so "on or before the 4th of March next after they are declared elected, or before they exercise the duties of their respective offices." These provisions do not contemplate or provide for any officer taking the oath before he is declared elected. Thus, if the president of the senate demand the office on account of a failure to qualify by the elected governor, the answer is there has been no failure to qualify, legally speaking, because no one has as yet become entitled to qualify. How can there be a failure to qualify, when no one has been called upon to do so? The words "failure to qualify" mean failure to qualify as required by law, such as would forfeit the office. But the statute has not demanded this qualification until after the declaration of election.

But the distinguished counsel for President Carr says that the failure of the legislature to declare either Goff or Fleming or any one elected creates a vacancy or "disa-

Digitized by Google

bility of the governor," and under the constitution for that cause the president of the senate comes in. This is the ground chiefly, if not solely, relied on by him. Now the language is: "In case of the death, conviction on impeachment, failure to qualify, resignation, or other disability of the governor, the president of the senate shall act as governor until the vacancy is filled or the disability is removed." It says disability of "the governor." But it must be by reason of the disability of, not one who was a mere candidate,—one not declared elected,—but one who, but for some disability attaching to him, could act as governor. Before the president of the senate can act there must be a person whose duties and powers he assumes; in whose shoes he stands. He can exercise no functions but those of the man whose position he takes. The one for whose disability he becomes acting governor must be, not an incomplete governor, so far as the votes of the people and the authority selected to declare his election are concerned. They must have done all they were required by the constitution to do to make him governor. If anything essential to be done by them to complete his title be wanting, he is only partly governor, not fully so, not entitled to enter into the office. The constitution is not, in section 16, art. 7, making provision for the discharge of the duties of one who, under no circumstances, is entitled or ready to perform such duties himself. The president of the senate acts on the death of the governor, or on the conviction on impeachment of the governor, or on the failure of the governor to qualify, or on the resignation of the governor, or other disability of the governor. He must be, in any or all those occasions calling on the president of the senate to act, one who in law can be deemed a governor. But as yet no one has been declared governor. Such declaration is, under the cases cited from New York, and our decision in Goff v. Wilson, indispensable to give any one title as governor, and, none of the candidates having been declared elected, no one of them is such a governor under that section of the constitution as that the president of the senate can be called on to assume the functions in his stead, which functions such governor could not himself assume because of such disability. Again, I do not think the non-declaration of the result of the election is a disability of the governor, such as is meant by the constitution. It is simply non-action, or incomplete action, by the agencies of the law assigned to vest the title in the candidate. It is not like insanity, conviction of the officer for crime, continued absence, or other disability connected with the person of the governor. Death, conviction on impeachment, failure to qualify, or resignation would produce a vacancy, and it would seem that the language "or other disability" means something of a different character from those cases named,—something attaching to the person of the governor, and disabling him; and this construction seems confirmed by the after language of the section, providing that "the president of the senate shall act as governor until the vacancy is filled or the disability is removed,"—thus using the words "vacancy" and "disability" as meaning different things; "vacancy" referring to death, conviction, failing to qualify, and resignation, but "disability" referring to something relating to the person, and for the time being disabling him, notwithstanding the use of the word "other." The words, "shall continue to discharge the duties of their respective offices until their successors are elected and qualified," seem to fit this case, where the proceedings leading to the completion of the election are yet pending, but will end in the declaration of a result when the governor will come on to qualify, while the other section, as to the president of the senate acting, seems to provide for a different class of cases; that is, where the election is complete, but there is a vacancy caused by death or other fact, or a disability preventing his action. And in Lawhorne's Case, 18 Grat. 93, the court, under similar provisions in the Virginia constitution, held that the clause relating to the lieutenant governor's acting, in case of death or other cause disabling the governor, did apply only to a case not provided for by the section authorizing officers to hold over.

Again, this position of President Carr assumes that somebody was elected governor in November last. His petition says either Fleming or Goff was elected. Quite likely this is so. To succeed, he must have somebody elected at that election, so that he may have some one whose place he is to take. But it does not appear that anybody was in fact elected. The assertion of his petition that some one was elected, even if not denied in respondent's answer, (but it is denied,) could not be taken for true, for it asserts a fact which, legally speaking, cannot be yet known and is not susceptible of proof here. There is no declaration of the result, and the returns have never been approved or published; their contents are yet sealed and sacred, in the keeping of the joint assembly, awaiting publication. Can we or President Carr say whether or not they show an election? They may show a tie vote. Is it clear that we can presume because an election was held that some one was elected? The judge delivering the opinion in the court of appeals of New York in People v. Crissey, supra, says: "At this point it appears needful to determine who was lawfully the alderman of the Seventh ward, entitled to occupy the seat for which Morrissey and Fleming contested. We cannot say that either was elected. It is argued that one must have been. That does not follow. A canvass in which all or a majority of the inspectors concurred, or an investigation by a court of justice in which the vote actually and honestly cast was correctly counted, might have resulted in a tie. While that is not probable,

Digitized by Google

it is certainly possible. We cannot know. We have no legal evidence before us from which we can give the seat to either by virtue of the election." He further said: "The votes are not here for us to count. The authority appointed by law has not acted, has certified nothing, and stands equally divided, and asserting contrary results, both of which cannot be true." He also says: "For us nothing is possible except to treat the election as a failure, so far as either party seeks to found a right upon it, and deny to either any resulting benefit from that source." Under these principles, the claim of President Carr that some one was elected, and that he can stand on that fact as a foundation to entitle him to act, is untenable, as, for the purposes of this case, the election is a failure, or has no yet known result, and he must be denied any resulting benefit from that source. And if it should appear there was a tie vote, whereby the legislature would elect, that election would date and confer title only from the day of election, and not relate back to the election in November, and thus prove that no person was then elected. Thus no contingency has arisen, no condition exists, such as to call upon the president of the senate to act as governor. The clause of the constitution on which he rests is an exception to the general rule fixed by another clause, declaring that all officers shall continue to discharge their duties until their successors are elected and qualified, and, as he does not come within that exception, he cannot act, but under said general rule of section 6, art. 4, of the constitution, E. Willis Wilson has the right to continue to act as governor until his successor shall come in. We are in this cause called on by both sides to decide, not only whether Carr has title to admit him, but also whether Wilson has title to hold over; and, as we see it, we are compelled to pass on Wilson's right to hold over, for it seems certain, under these two provisions of the constitution, that if Carr has title to enter into the office Wilson has no title to continue to hold it. In deciding as to the right of the one, we inevitably decide as to the right of the other. This case is unlike that of Goff v. Wilson, for there it was a question only of Goff's title. If his title was imperfect by reason of the absence of the declaration of his election, he failed whether Wilson had title to hold over or not, and we did not in that cause pass on Wilson's right. If Goff's title had been complete, surely Wilson's tenure was at an end; if Goff's title was imperfect, he could not be admitted, though Wilson's claim to hold should be weak.

Mention has been made, though it does not seem to be urged, that under section 4, art. 7, of the constitution, a governor is ineligible for the same office for the term succeeding that for which he was elected, and therefore Gov. Wilson is not competent to hold over. I consider him holding over under his old term; it is a prolongation of that. His competency is tested by his eligibility for his old term. As he was eligible for that, he can hold under his old term, and its eligibility and qualification, until his successor comes. He holds *ex officio*. In Lawhorne's Case, 18 Grat. 85, a pardon was issued by Gov. Pierpont to a convict after Pierpont's term expired, and the people of the penitentiary refused to obey it for that reason. The case went to the court of appeals of Virginia. Its constitution pro ided that "judges, and all other officers, whether elected or appointed, shall continue to discharge the duties of their respective offices, after their terms of service have expired, until their successors are qualified." Its constitution provided that "in case of the removal of the governor from office, or of his death, failure to qualify, resignation, removal from the state, or inability to discharge the powers and duties of the office, the said office, with its compensation, shall devolve upon the lieutenant governor." There being no election of a governor,—no qualification of one,—the court held that Gov. Pierpont should continue in his office beyond his term, notwithstanding the latter provision; and held that he was capable of holding over, though the Virginia constitution contained the same clause as to ineligibility for a second term as is found in ours.

For these reasons the demurrer to the return must be overruled, the peremptory writ of *mandamus* be denied, and the petition dismissed.

SNYDER, P., and ENGLISH, J., concurred. GREEN, J., absent.

(32 W. Va. 277)

CORE *v.* WIGNER'S HEIRS.

(*Supreme Court of Appeals of West Virginia.* Feb. 25, 1889.)

VENDOR AND VENDEE—REFERENCE—ESTOPPEL.

1. In a suit by vendor to enforce the payment of purchase money under an executory contract for the sale of land, and defendant alleges a defect of title in the vendor, he may have a reference to ascertain the character of the title, or the court may, where the proof raises a doubt as to title, make such reference; but unless such reference be asked by the vendee, or such doubt appear, such reference is not necessary, and the court may proceed to subject the land to sale for the purchase money.

2. If at the date of the decree of sale, the title, though originally defective, has become good by reason of the purchaser's possession under the statute of limitations, the court may go on to enforce the contract.

3. A vendor who, after sale to a vendee, sells and conveys to another, without notice to the second purchaser of the first sale, the land sold to the first purchaser, is estopped thereby from collecting by specific performance of the contract from the first purchaser the purchase money for the land sold to the second purchaser.

(*Syllabus by the Court.*)

Appeal and *supersedeas* from circuit court, Ritchie county; JAMES M. JACKSON, Judge.

Thos. E. Davis, for appellant. *R. S. Blair*, for appellee.

BRANNON, J. On the 14th January, 1868, A. S. Core made an agreement whereby Core

Digitized by Google

sold to Wigner a farm, bounded in part by J. M. Stephenson, Nathan Park, and M. M. Hitchcock, said to contain 206 or 208 acres, but if it should contain more than 200 acres Wigner was not to pay more than $1,600 for it, and if it should contain 200 acres or less Wigner was to pay $8 per acre. Core was to convey with general warranty whenever Wigner should ask a deed, retaining a lien for unpaid purchase money. Core brought a chancery suit to enforce the payment of the purchase money by sale of the land. Wigner answered, alleging that by actual survey the tract contained only 185 acres, and may be not so much, and that by the agreement he was entitled to an abatement for 15 acres from the $1,600; and, further, that 12 acres more of the land was in dispute, and claimed by others, who were threatening to take possession, which disputed land would entitle him to an abatement of $96 more. He alleged and specified various payments, and claimed that these, with the abatement for loss of quantity, would more than pay for the land. He further averred that since the commencement of the suit he had discovered that plaintiff had no title to the land, and never had, but that other parties had title to it, and he therefore asked a rescission of the contract of purchase, and refunding of the purchase money. Plaintiff replied generally to the answer, and also filed a special replication, in which he denied the allegation of the answer that the tract did not contain 200 acres, and denied that the purchase money had been paid as claimed by Wigner, and denied the allegation of plaintiff's want of title. He averred that defendant had entered into possession under his purchase on 1st of April, 1868, and had continued in quiet and peaceable possession ever since, and claimed that he could hold the land by reason of such possession against all adverse claim, having been in possession more than 10 years, and could not now complain of defect of title. The case was referred to a commissioner to have a survey made to ascertain the number of acres sold by Core to Wigner, and to state an account between the parties in regard to the sale under the contract of sale, and report what balance, if any, was due for unpaid purchase money. There were three surveys and reports of the master under orders in the case. The last report, based on a survey of Douglas, county surveyor, submits without decision by him, but for the decision of the court, statements numbered 1 and 2, —the one based on the tracts containing 199¼, the other on the quantity of 164, acres, at $8 per acre, and finding a balance due the plaintiff of $862.65.

There seems to be no controversy as to payments, but on the contents of the tract. This question is involved in the following facts: The contract of purchase declares that the land sold is bounded by J. M. Stephenson, Nathan Park, and M. M. Hitchcock and others. It appears that, in 1843, Vanwinkle, commissioner of forfeited and delinquent lands, conveyed to Isaac Lambert a lot of 200 acres, being lot No. 3 of a 5,000-acre tract sold as forfeited or delinquent in the name of Worth. It seems that lot No. 6 in said 5,000-acre survey was sold by said commissioner to one Jacob Cork, and 140 acres of it was sold for non-payment of taxes in his name in 1858, and purchased by Michael M. Hitchcock, who had the 140 acres surveyed by precise metes and bounds by the county surveyor, the report being given in the record, but no deed is shown to Hitchcock. From the plat of Surveyor Douglas, both lot No. 3 and said Hitchcock's 140 acres are represented, and from them, and the evidence of the surveyor that there is an interlock between them, said Hitchcock 140-acre boundary lapping on lot No. 3, containing 201¼ acres, and, subtracting 2 acres within it for part of an entry made by Rollins, left 199¼, the quantity on which none of the commissioner's statements is based; and, substracting the lap of 34½ acres, leaves it to contain 164⅜ acres, the quantity assumed in commissioner's statement No. 2. There is some question as to the true location of No. 3, but it seems to me that the figure formed on the surveyor Douglas' plat P P, by the lines A B, B C, C D, D A, correctly represent lot No. 3 of the Worth survey. Surveyor Douglas is of opinion that the land sold by Core to Wigner is lot No. 3, and that Hitchcock's tax purchase could not lawfully lap on it, because Cork, in whose name it was sold for taxes, purchased lot 6 in the Worth survey, yet Douglas is decided in stating in evidence that by error the 140 acres of Hitchcock was made to lap over on lot No. 3. So it is plain that such lap exists.

Now, in this case, it is not a trial of title between the Hitchcock claim and the owner of lot 3 as to the territory within the interlock; but, seeing that the contract of sale between Core and Wigner calls for the Hitchcock land, we must first fix the line of that land, ascertain where it is, and, having done so, there is the line of the land sold by Core to Wigner. It may be true that in laying down the 140-acre Hitchcock tax purchase it was by mistake made to encroach on lot 3, and it may be lot No. 3 is the superior title, though as to that we cannot say under the light of this case; but when you once see that there is a Hitchcock survey, (and the contract admits and the evidence shows that,) and fix its place, you fix the limit there of Core's sale to Wigner. Core did not in terms sell lot No. 3 to Wigner; he sold him a farm bounding on Hitchcock land. How can he stretch the land beyond the line of the Hitchcock land,—make him take land he did not buy? The court cannot make a contract. Wigner, knowing of this trouble about the interlock between the lands, might very well and prudently have intended not to be involved in a lawsuit about it with Hitchcock, and for that very reason have called for the Hitchcock land, for that land had been made by actual survey 10 years before the contract

Digitized by Google

between Core and Wigner. The question of title is irrelevant.

It seems that Wigner and Hitchcock were in possession of their tracts, but it does not appear that Wigner was in possession of the interlock, and he says in evidence that he did not claim it, but Hitchcock seems to have made an improvement within it as far back as before 1861. But possession is irrelevent. It is only a question of how far Wigner's purchase went. The circuit court refused to limit his purchase to the Hitchcock line, or make any abatement for what I have called the "interlock," but compelled Wigner to cross the Hitchcock line, and go on to the line C D of lot 3, and in doing so erred. Wigner's executrix, after the revival of the suit after Wigner's death, (if there was an order of revival,) filed an answer alleging that Core had since the death of Wigner sold and conveyed to one Haga a tract of land covering this Hitchcock land, (he having acquired it from Hitchcock subsequent to the commencement of the suit,) and in so doing conveyed up to the line E P, including to Haga this 34½ acres, thus recognizing the line E P and the Hitchcock land. So it would seem that he does so recognize it. What further effect has this act on his cause? He had filed with his bill a deed conveying this interlock, the very land he afterwards conveyed to Haga, and this deed, not recorded, would be no notice to Haga if it includes this interlock; and the vendor turns round and conveys to another the very land which he seeks to make a former purchaser take and pay for, imposing a lawsuit on such former purchaser. He would thus get pay for the same land from two persons. But, while this action makes his claim inconsistent, the view I take gave him power to sell the interlock to Haga, as he had not sold it to Wigner; but from Core's stand-point, he contending that he had sold this interlock to Wigner, and asking pay for it from Wigner, this act of conveying it to Haga on 22d January, 1885, would seem to be an estoppel against his obtaining a decree on 7th November, 1887, against Wigner, compelling him to pay for that identical land. This deed was merely tendered with the bill, and the answer rejected it; and, if the court had held it insufficient, how could the plaintiff have complied with its order requiring another deed, after having disabled himself from conveying by conveying the legal title to Haga? This is an additional reason for saying the court erred. It should be added that Wigner says he never had set up any claim to any of the land within the interlock.

Claim is made by the defense for a further abatement of 12 acres between the lines B C and the dotted line E X, on plat P P, based on a claim of one Vinton. It is not easy from the indefiniteness of the record to state the precise character of the claim. Vinton's claim or boundary is not shown by deed or title paper, further than a deed to him from Wolff, which does not show the source of his title so as to show just where or what he claims, and thus establish his line. If, as seems, he owns lot No. 4 of Worth survey, there would seem to be no conflict, for lot No. 3 and 4 are coterminous. No particular line of Vinton's is shown. There is apparent no ground for this abatement. As to the allegation that plaintiff had no title, the answer on this point is very indefinite, not specifying what title conflicted with the plaintiff's or wherein the plaintiff's was defective. And the evidence makes this no better. There is no appearance that the plaintiff's title is defective, and Wigner took possession in April, 1868, and was still in peaceable possession when this suit began, in July, 1879, and his title has, even if defective, become good. Moreover, if he had any serious reason to contest the title, he should have asked a reference specially as to title. Middleton v. Selby, 19 W. Va. 168. There should be no rescission of the contract. The decree should have been on the basis of statement 2, finding a balance of purchase money of $270.65 as of 19th June, 1882, amounting on 7th November, 1887, to $342, which latter sum, with interest and costs, should have been decreed instead of $1,140.52; and the decree complained of is to be reversed, with costs to appellant in this court, and a decree entered for the plaintiff for $342, with interest from the 7th day of November, 1887, and costs of suit, instead of $1,140.52, as decreed by the circuit court; and the cause is to be remanded to the circuit court for further proceedings.

SNYDER, P., and ENGLISH, J., concurred. GREEN, J., absent.

(32 W. Va. 30)

FERGUSON *v.* MILLENDER *et al.*

(*Supreme Court of Appeals of West Virginia. Jan. 29, 1889.*)

APPEAL — JUDGMENT — SATISFACTION — PARTNERSHIP.

1. Generally, if, pending an appeal or writ of error, the matter of controversy in the suit be settled, this court will simply dismiss the appeal or writ of error without deciding the merits merely to determine as to costs, and will not pass on the question of costs. Otherwise, under the circumstances of this cause.

2. It is error to render judgment against several defendants, one of them not served with process and not appearing, for which he may reverse the judgment, under section 5, c. 134 of the Code, by motion.

3. If he make such motion, and it is overruled, the decision of the circuit court overruling such motion makes such judgment valid and binding, though before void, unless such decision be reversed; and he is entitled to reverse it though the judgment has been satisfied by another of the judgment debtors.

4. All partners must be served with process for judgment against all.

(*Syllabus by the Court.*)

Error to circuit court, Wayne county.

Z. T. Vinson, for plaintiff in error.

BRANNON, J. In an action of *assumpsit* in the circuit court of Wayne county by S.

Digitized by Google

J. Ferguson against J. H. Millender, Jacob Zouck, and W. H. Grothe, as partners in the name of J. H. Millender & Co., process was served on Millender and Zouck, but not on Grothe. Millender and Zouck appeared and pleaded, but Grothe did not appear; and there was a trial and verdict for plaintiff for $1,374.94, and judgment against the defendants. Afterwards Grothe moved the circuit court to reverse such judgment, assigning in his notice as causes for such reversal that he had not been served with process, had no notice of the action, and had not appeared therein. The court overruled his motion, and he obtained this writ of error. It is shown to this court that since the granting of the writ of error Millender has by payment to Ferguson satisfied his demand, and they ask the dismissal of the writ, while Grothe opposes dismissal, and demands a decision of the cause.

A preliminary question is, shall this court dismiss the cause, or hear it on the merits? Generally, it is true that there must be a matter in controversy during the entire progress of a suit from its inception to final determination, both in the lower and appellate court,—something on which the final judgment is to operate; and when it appears that the cause of action has ceased to exist by its discharge, and thus the error complained of waived or removed, or that it has been released, both courts will stop in the cause, and this court will dismiss the appeal, and it will not pass on the question of costs, since the right as to costs can only be decided on a full hearing, which hearing the court will refuse for the reason just stated. But this seems to be an exceptional case. While the controversy as between Ferguson and his alleged debtors has been discharged, yet if, as between Grothe and his copartners, it is *res judicata*,—if the judgment fixing a liability in favor of Ferguson against the copartners is binding still on Grothe,—he would have to bear his share of it in the way of contribution in the settlement of the partnership accounts, and has a right to call on this court to consider his writ of error. It is settled that if a party sue out a writ of error from a judgment against him, and the judgment is affirmed, the judgment of the appellate court affirming the judgment of the lower court has all the force of *res judicata*, and makes that judgment binding. Armstrong v. Poole, 30 W. Va. 669, 5 S. E. Rep. 257; Camden v. Werninger, 7 W. Va. 528; Campbell v. Campbell, 22 Grat. 649; Henry v. Davis, 13 W. Va. 252; Mason v. Bridge Co., 20 W. Va. 223; Board v. Parsons, 24 W. Va. 551; Newman v. Mollohan, 10 W. Va. 505. It is binding as a judgment even on parties who did not appeal, and were not served with the appellate process, if a joint judgment. Newman v. Mollohan, Id. 488. And section 5 of chapter 134 of the Code having made the circuit court the forum for the reversal of judgments for error for which this court but for that statute would reverse, in case of judgment by default, performing for this purpose the same function which otherwise would be performed by this court, the judgment of the circuit court overruling the motion to reverse, adjudging against the party asking the reversal all his points of error, is logically likewise *res judicata*, and makes valid the judgment, unless the action of the circuit court overruling the motion to reverse be itself reversed by this court. Thus the action of the circuit court overruling Grothe's motion to reverse the judgment, overruling the grounds assigned by him for its reversal, in effect making the judgment, though void before, valid and binding on him under the doctrine of *res judicata*, entitles him to have the decision of this court upon the merits of his writ of error. We hold that the rendition of judgment generally against all the defendants—Grothe not having been served with process or appeared in the suit—is error. There should have been service of process on all the partners for judgment against all. Pars. Partn. §§ 1085, 1086; Carlon's Adm'r v. Ruffner, 12 W. Va. 297. The judgment, being joint, must be reversed *in toto*. Midkiff v. Lusher, 27 W. Va. 439; Hoffman v. Bircher, 22 W. Va. 537; 2 Tuck. Bl. Comm. 333; Vandiver v. Roberts, 4 W. Va. 493. For these reasons the judgment of the circuit court of Wayne county rendered on the 14th day of June, 1887, overruling Grothe's motion to reverse the original judgment, and the original judgment of the said court rendered on the 2d day of June, 1887, must both be reversed, and the verdict of the jury rendered on the 1st day of June, 1887, set aside, and the plaintiff in error must recover of the defendant in error his costs in this court and his costs about said motion in said circuit court. Capehart v. Cunningham, 12 W. Va. 759. This cause is not remanded, as the matter of controversy has been discharged, and the action is dismissed.

SNYDER, P., and ENGLISH, J., concurred. GREEN, J., absent.

(32 W. Va. 33)

DAMRON v. FERGUSON.

(*Supreme Court of Appeals of West Virginia.* Jan. 29, 1889.)

WRIT OF ERROR—FINAL JUDGMENT.

1. An order overruling a motion to set aside a verdict of a jury and refusing to grant a new trial is not such an order or judgment as will authorize a writ of error to this court.
2. In order to authorize a writ of error there must be a final judgment on the verdict.

(*Syllabus by the Court.*)

Error to circuit court, Wayne county; T. H. HARVEY, Special Judge.

Action by Samuel Damron against Martha J. Ferguson, administratrix of M. J. Ferguson, deceased, before a justice of the peace on a note for $300, executed by S. J. Ferguson, with decedent as surety. The justice gave judgment for plaintiff, whereupon defendant appealed to the circuit court. A trial was had there *de novo* before a jury, whose

Digitized by Google

verdict was for defendant. The record does not show that any judgment was entered on the verdict. Plaintiff brings error.

Z. T. Vinson, for plaintiff in error. *H. K. Shumate*, for defendant in error.

ENGLISH, J. This was a writ of error allowed from an order of the circuit court of Wayne county entered on the 6th day of June, 1885, overruling a motion then made by the plaintiff to set aside the verdict of the jury therein rendered, and award him a new trial. An examination of the record discloses the fact that no judgment was ever rendered by said circuit court upon said verdict, and, there being no final judgment in the cause, and no order from which a writ of error would lie to this court, the writ of error awarded to the plaintiff must be dismissed as having been prematurely allowed, with costs against the plaintiff in error.

SNYDER, P., and BRANNON, J., concurred. GREEN, J., absent.

(32 W. Va. 21)

PASLEY *v.* BROMLEY.

(*Supreme Court of Appeals of West Virginia.* Jan. 29, 1889.)

SET-OFF—EVIDENCE.

B. executed and delivered to P. a writing in these words: "I this day agree to pay Wm. R. Pasley all the money that Jesse Pasley's timber comes to, after deducting out all the money that Jesse Pasley * * * owes me." At the time this writing was executed, B. had been garnished in a Kentucky court by a creditor of Jesse Pasley, and was subsequently by the judgment of said court compelled to pay said debt to said creditor. In an action of *assumpsit* by P. against B. on said writing the record in said Kentucky suit is admissible in evidence to prove the payment of the amount for which B. was so garnished as a set-off against the claim of the plaintiff.

(*Syllabus by the Court.*)

Error to circuit court, Wayne county; IRA J. MCGINNIS, Judge.

Z. T. Vinson, for plaintiff in error. *H. K. Shumate*, for defendant in error.

SNYDER, P. Writ of error to a judgment rendered September 3, 1886, by the circuit court of Wayne county, in an action of *assumpsit* brought in said court by William R. Pasley against John B. Bromley. The judgment was on the verdict of a jury, and is for the sum of $703.38. The defendant saved several bills of exceptions, in one of which all the evidence is certified; and, the court having overruled his motion for a new trial, the defendant has brought the case to this court.

In our view of the case only one of the numerous errors assigned by the plaintiff in error need be considered by us. The plaintiff's cause of action is the following *assumpsit*, duly signed by the defendant: "I this day agree to pay Wm. R. Pasley all the money that Jesse Pasley's timber comes to, after deducting out all the money that Jesse Pasley, James H. Pasley, and Elias Williamson owes me. This is for timber that has been already delivered, this 12th day of May, 1884." The evidence tends to prove that Jesse Pasley, the father of the plaintiff, was the owner of certain timber, which he had, prior to March, 1884, sold to the defendant, Bromley, who had, in money and supplies, paid the greater part of the purchase money therefor In the spring of 1884 the said Jesse Pasley became embarrassed in his business, and certain of his creditors sued him in the circuit court of Boyd county, Ky., and among these creditors were D. H. Carpenter and the firm of Williamson & Hampton. Carpenter commenced his action and filed his petition in said court on March 17, 1884, in which he claimed that said Jesse Pasley was indebted to him in the sum of $209; that the defendant was a non-resident of the state of Kentucky, and was disposing of his property with the intent to defraud his creditors. At the same time the plaintiff, Carpenter, sued out an attachment against the estate of Jesse Pasley; and on May 9, 1884, the said Williamson & Hampton commenced their action and filed their petition in said court, claiming that said Jesse Pasley was indebted to them in the sum of $288, that he was a non-resident of the state of Kentucky, and that the said John B. Bromley was indebted to said Pasley; and asking an attachment against the estate of said Pasley and garnishee process against said Bromley. An attachment was issued in each of these actions requiring the sheriff to attach the estate of said Pasley, and to summon the garnishees to answer. The attachment in the Carpenter case was served on the defendant Jesse Pasley and said Bromley on March 19, 1884; and in the case of Williamson & Hampton it was served on said Pasley and Bromley on May 9, 1884. Afterwards, on December 12, 1884, Bromley answered as garnishee, and admitted that at the time the said attachments were served upon him he was indebted to the defendant Jesse Pasley in the sum of $301, and asked that the plaintiffs in said attachments might be compelled to litigate and settle their rights to said fund, and determine which has the prior lien thereon. These two actions were consolidated, and finally heard and decided by the said circuit court of Boyd county, Ky., and, the court having rendered judgment for the plaintiffs in each case against Jesse Pasley, it held that Carpenter had the prior lien on the fund attached in the hands of Bromley, and thereupon it ordered Bromley to first pay off the judgment in favor of Carpenter, and then pay the balance of the said $301 in his hands to the said Williamson & Hampton on their judgment against said Jesse Pasley. In satisfaction of this judgment, and as required by the order of said court, Bromley paid over said sum of $301 to the said Carpenter and Williamson & Hampton. On the trial of the present action the defendant, Bromley, included this $301 in his account of set-offs and payments filed against the claim of the plaintiff, William R. Pasley,

Digitized by Google

and in order to prove this item of his account offered in evidence a duly-certified record of the judgment and proceedings in said cases in said circuit court of Boyd county, but, upon objection by the plaintiff, the court refused to permit said record to be read in evidence to the jury, and to this action of the court the defendant excepted. This ruling is assigned as error by the plaintiff in error. The grounds upon which this record was excluded by the trial court do not appear in the record; but it is contended by the counsel for the defendant in error that, inasmuch as the defendant, Bromley, had been garnished before he executed the writing on which this action is founded, and in which he agreed to pay the balance then due from him to the plaintiff as the assignee of Jesse Pasley, and, having made no provision in the said writing for the payment of claims set out in said record, he is not entitled to credit for the amount paid on said claims as against the plaintiff in this action. It is true this writing does not make any specific reference to these Kentucky claims, but it does in general terms provide and except from its operation as an assignment "all the money that Jesse Pasley owed the defendant for timber." It is admitted that Bromley had been garnished before this writing was executed, and that the debt for which he was garnished was a debt of Jesse Pasley. It follows, therefore, that Bromley was under a legal liability at the time he executed this writing to pay these Kentucky debts, and the subsequent payment of them by reason of that liability created a debt in favor of Bromley against Jesse Pasley, which by relation and in legal contemplation arose at the time the garnishee process was served upon Bromley, and was therefore at the time said writing was executed an existing legal liability or debt in favor of Bromley against Jesse Pasley. It was certainly a conditional liability which Bromley had no power to escape, and which could not be defeated by Jesse Pasley except by his doing so in the actions of the Boyd county circuit court; and, he having failed to do so, though having full notice of the pendency of said actions, even if such notice could be material, neither he nor the plaintiff, who claims under said writing, can be now heard to deny that the debt arising out of said Kentucky claims was not an existing liability at the time said writing was executed, and, as such, excepted from the operation of the assignment to the plaintiff. For these reasons I think said Kentucky record should have been admitted in evidence, and that the circuit court erred in rejecting it.

The other errors assigned relate principally to the order and regularity of the conduct of the proceedings during the trial in the circuit court, and as it is not probable, and for the most of them it is impossible, that they can arise on the retrial of the case, it could subserve no useful purpose for us to notice or consider them. This observation will also apply to the instructions asked and given in the case, because the construction we have given to the writing sued on in this case makes those instructions wholly immaterial. For the error aforesaid the judgment of the circuit court must be reversed, a new trial ordered, and the case remanded.

GREEN, ENGLISH, and BRANNON, JJ., concurred.

(32 W. Va. 34)

COHN *et al.* v. WARD *et al.*

(*Supreme Court of Appeals of West Virginia.* Jan. 29, 1889.)

DEED — CONSIDERATION — FRAUDULENT CONVEYANCES—TRUSTS.

1. It is the settled law of this state that the recital in a deed of the payment of a valuable consideration for the property therein conveyed is not evidence of such payment as against a stranger or a creditor of the grantor assailing the deed as voluntary, and fraudulent as to him.

2. But when, in such case, the conveyance is shown to be founded upon a valuable consideration, the burden of proving that the deed is fraudulent in fact rests upon the creditor assailing it.

3. A trust deed conveying real and personal property, including a stock of store goods, is not *per se* fraudulent because it postpones the sale of real estate for six months from the date of the deed, and authorizes the trustee, after taking an inventory of the store goods, to take control of them, and sell the same at private sale, if that can be done in six months, and then sell the residue at public auction; in either case the sales to be in the best possible manner for the interests of the creditors of the grantor.

4. Where a trust deed secures many debts in separate classes or to different persons, the simple fact that a part of the debts secured are shown to be invalid or voluntary will not make the deed invalid as a security for other and *bona fide* debts secured therein.

5. The fact that a trustee in a trust deed is insolvent and untrustworthy will not, of itself, make the deed void; but in such case the court may appoint a receiver, and administer the trust according to the provisions of the deed.

(*Syllabus by the Court.*)

Appeal from circuit court, Roane county; R. F. FLEMING, Judge.

Bill in equity by Theodore Cohn, Julius Cohn, Emil Cohn, and Abe Bloom, partners under the firm name and style of Cohn Bros. & Co., who sue for the benefit of themselves and other creditors of James T. Ward, against said James T. Ward and others, to set aside and cancel certain deeds as fraudulent and void. A decree was entered in accordance with the prayer of the bill, and James T. Ward appeals.

W. A. McCorkle, for appellant. *J. G. Schilling*, for appellees.

SNYDER, P. James T. Ward and Martha A., his wife, by three several deeds, dated in October, 1883, and recorded in September, 1884, conveyed to J. C. Dillard, with general warranty, the following real estate, situate in Roane county, viz.: (1) A house and lot in the town of Walton, in and upon which the said Ward and wife then resided; (2) the store-house and lot in the same town, then occupied by the said Ward; and (3) a lot of land on the south side of Poca river, near

Digitized by Google

said town. By three subsequent deeds, dated November 19, 1883, and recorded on September 26, 1884, the said J. C. Dillard and wife conveyed all of said real estate to Martha A. Ward, the wife of said James T.; and afterwards the said James T. Ward and Martha A., his wife, by deed dated January 31, 1885, duly acknowledged by them, and recorded February 3, 1885, conveyed to Uriah Dobbins, trustee, all the aforesaid real estate, together with all the other real and personal property owned by the grantors, the personalty consisting of (1) a stock of dry goods, boots and shoes, queen's-ware, and hardware, and clothing and all the fixtures and appurtenances in the store-house then occupied by said Ward in the town of Walton; (2) all the household and kitchen furniture in the dwelling-house of said Ward in the said town of Walton; (3) the cattle, horses, and other live-stock of the said Ward; and (4) all the notes, accounts, and other evidences of credits belonging to said Ward,—in trust for the following purposes: "The said trustee to take charge of the above-mentioned property, to appraise and take an inventory of the same, and take control of the store-room and the goods therein, and sell the goods in the best possible manner for the creditors of the said J. T. Ward, at private sale, for the space of six months, and at the end of said six months, in case said personal property and store goods are not sold at private sale, then the said trustee shall, after advertising for the space of thirty days, sell the said personal property at public auction. The said trustee shall also sell the said real estate, if after the space of six months thereof it shall be ascertained that the personal estate shall not pay all of the indebtedness due and owing by said Ward in the following manner, and upon the following terms: Notice shall be given of the terms of said sale by publishing in some newspaper published in Roane county. The payment shall be one-third cash in hand, and the balance in twelve and twenty-four months, respectively, in equal installments, the purchaser executing bonds for the purchase money, with approved security, and title withheld until whole of purchase money is paid; and that the proceeds of the sale of the said above-mentioned real and personal property shall be paid by said trustee to the following persons, and in the following order, and for the following purposes, to-wit: *First*, to pay the costs of the execution of said trust; *second*, J. C. Dillard the sum of one thousand dollars; *third*, James S. Gandee the sum of one thousand dollars; *fourth*, Jasper Peterson, of Lewis county, the sum of eight hundred and thirty-five dollars; *fifth*, Clayburn Cunningham the sum of seven hundred and fifty dollars; *sixth*, F. J. Daniels & Co. the sum of two hundred and fifty dollars; *seventh*, G. R. Jacobs the sum of thirty dollars; *eighth*, A. B. Wells the sum of fifty dollars; and after the above sums shall be paid in the order set out in the above manner, then the trustee shall pay the following debts *pro rata* with each other: MacFarland, Sanford & Co., $280; Reed & Peebles, $150; Cohn Bros., about $300; Goodrich, Peele & Co., $150; and any other indebtedness not herein expressly mentioned shall be paid *pro rata* with the above last-named parties. And it is further understood that in case any of the sums above mentioned shall be ascertained to be incorrect, that the said trustee shall correct the same, and pay the same according to said corrections, and the party of the first part warrant generally the property herein conveyed." On February 14, 1885, Cohn Bros. & Co., suing for themselves and other creditors of said James T. Ward, filed their bill in the circuit court of Roane county against the said Ward and wife, the trustee and creditors mentioned in said trust deed, in which they allege that the said James T. Ward is indebted to them, the plaintiffs, in the sum of $377.72, being the balance on two notes of the said Ward, and on which an action of debt had been instituted in said court on January 5, 1885. Then, after alleging the indebtedness of said Ward to several other creditors, and setting out the conveyances before mentioned, the bill charges that the aforesaid deeds from Ward and wife to J. C. Dillard, and from Dillard to Martha A. Ward, were voluntary, and made with intent to delay and defraud the creditors of said Ward; that the said trust deed from Ward and wife to Uriah Dobbins, trustee, "is fraudulent and void, because the sale of the real estate therein mentioned is postponed for six months, and because the said deed provides for the voluntary distribution of the proceeds of the sale of the property to the amount of $———, to Dillard, Gandee, Peterson, Cunningham, Daniels, Jacobs, and Wells, and out of the residue, if any, it provides for the payment of the debts *pro rata* of said Ward; and for other reasons appearing on the face of said deed."

The bill further alleges that the trustee, Dobbins, was a confidential friend of Ward, and under his influence; that he was selected as trustee because said Ward knew he could induce him to allow the trust property to be used and converted to the benefit of Ward; and that Dobbins was wholly insolvent and irresponsible, and was made trustee on this account; and, further, that Ward and wife did not surrender the possession of the trust property, but they retained the same, and are still in possession thereof. The prayer is that all of said deeds may be declared fraudulent, and set aside, and the property therein conveyed subjected to the debts of Ward; that the trustee, Dobbins, be enjoined from interfering with said property; and that a receiver be appointed to take charge of the same, etc. The defendants James T. Ward and the trustee, Dobbins, the only parties who answered the bill, each deny all the allegations charging fraud or imputing bad faith, or any illegal purpose in the execution of said deeds or either of them; and they aver

Digitized by Google

that the same were executed *bona fide*, and for legitimate purposes. To these answers there were general replications, but no depositions were filed or other proof offered to sustain the facts charged in the bill or the averments of the answers, except the exhibits filed by the plaintiffs to prove the indebtedness of Ward to them and other creditors. The cause was heard on September 3, 1887, and a decree entered setting aside all the aforesaid deeds, including the trust deed from Ward and wife to Dobbins, as to the plaintiffs and other creditors of Ward; and by the same decree the cause was referred to a commissioner to take an account of the debts and assets of the said Ward, and a receiver was appointed to take charge of the real and personal property of Ward. From this decree the defendant James T. Ward has appealed.

It seems to me this decree is plainly erroneous. It is the settled law of this state that the recital in a deed of the payment of the consideration for the conveyance is not evidence as against a stranger or a creditor of the grantor assailing it as voluntary, and therefore fraudulent as to him. In such case the burden of proving that the deed was made for a valuable consideration rests upon the grantee or persons claiming the benefit of the deed. But when the consideration is admitted, or properly established by proof, then the burden of proving that the deed is fraudulent in fact is upon the creditor who assails the deed. Rogers v. Verlander, 30 W. Va. 619, 5 S. E. Rep. 847; Knight v. Capito, 23 W. Va. 639. According to these authorities, if the bill in this cause had alleged that the debt of the plaintiffs was in existence in 1883 at the time the deeds from Ward and wife to Dillard, and from Dillard to Mrs. Ward, were executed, and that said deeds affected the rights of the plaintiffs, then, in the absence of any evidence other than the recitals in the deeds that they were made for a valuable consideration, the court would have been bound to set them aside as voluntary and inoperative against the debts of the plaintiffs and other creditors of the grantors. But the bill in this cause does not allege that Ward was indebted to the plaintiffs at the time said deeds were executed, and therefore they had no right to complain of said conveyances on the mere ground that they were voluntary. In addition to this, it appears that by the trust deed of January 31, 1885, Mrs. Ward and her husband conveyed all these lands to Dobbins for the benefit of all the creditors of Ward, including the plaintiffs. It does not, therefore, appear that the said conveyances of 1883 do or can in any manner prejudice the rights of the plaintiffs, whether they are valid or invalid, unless the trust deed is also held invalid. The material question, then, is whether or not the said trust deed is valid. There is no proof that this deed is fraudulent in fact. The burden of showing this is, as we have seen, upon the plaintiffs, and they have failed to show it. But the plaintiffs contend that this deed is fraudulent and void on its face; and this contention is based upon two grounds: *First.* Because the sale of the real estate is postponed for six months. There is certainly nothing in this ground. Lewis v. Caperton, 8 Grat. 148; Dance v. Seaman, 11 Grat. 778; Sipe v. Earman, 26 Grat. 563. Nor does it make the deed fraudulent *per se* because the trustee is authorized to sell the store goods at private sale for a period of six months, as this court has expressly decided in Kyle v. Harveys, 25 W. Va. 716. *Second.* It is claimed said trust deed is fraudulent because it "provides for the voluntary distribution of the proceeds of the sale" to a specified amount to certain named creditors; and because the trustee is insolvent, irresponsible, and the mere tool or instrument of Ward, selected for the purpose of defrauding the creditors of Ward. If by the phrase, "voluntary distribution of the proceeds of the sale," it is intended to assert that the amounts secured to the creditors named in the deed are voluntary, and without valuable consideration, then the burden of proving that these alleged debts thus assailed by the plaintiffs were valid, and based upon a valuable consideration, was upon the said secured creditors; and, as they failed to offer any proof of that fact, it was proper to hold said debts invalid as against the plaintiffs and the other creditors of Ward; but that would not of itself make the deed fraudulent as to the other creditors secured in it, who had valid and *bona fide* debts which are not questioned or assailed by the plaintiffs in their bill or otherwise, unless the deed was shown to be fraudulent in fact. Where a trust deed secures numerous debts in different classes or to different persons, the simple fact that a part of the debts thus secured are shown to be voluntary, or even fraudulent, will not make the deed invalid as a security for other debts mentioned or secured therein which appear to be *bona fide*, and founded upon a valuable consideration. Klee v. Reitzenberger, 23 W. Va. 749; Bank v. Arthur, 3 Grat. 173. In regard to the insolvency of the trustee, and the fraudulent purpose of the grantors in selecting him as such, it is enough to say that these are matters *dehors* the face of the deed, and there is no proof of their truth. But even if these charges had been proven, in the absence of any evidence to show that the *bona fide* creditors secured in the deed had actual notice of its fraudulent purpose, the deed would not be void as to them. The appointment of an insolvent or untrustworthy trustee will not, of itself, render a trust deed void. In such case the court of equity may upon a proper showing take charge of the trust property, and put it in the hands of a receiver, and thus administer the trust according to the provisions of the deed. Harden v. Wagner, 22 W. Va. 356. If the charges against the trustee, as made in the bill, are established by proof, then the plaintiff's bill should be sustained, and a re-

Digitized by Google

ceiver appointed to take charge of the property conveyed in the trust deed, and the same should be administered by the court according to the terms of the deed, so far as it secures *bona fide* debts founded upon a valuable consideration, unless the deed is proven to be fraudulent in fact, with notice to the trustee of its fraudulent purpose. In this latter event the property of the defendant Ward should be made liable for his debts, regardless of the trust deed or its provisions. For the reasons before stated the decree of the circuit court must be reversed, and the cause remanded for further proceedings in accordance with the principles announced in this opinion.

ENGLISH and BRANNON, JJ., concurred. GREEN, J., absent.

(32 W. Va. 25)

LOVE v. TINSLEY.

(*Supreme Court of Appeals of West Virginia.* Jan. 29, 1889.)

FRAUDULENT CONVEYANCES—RECORD ON APPEAL.

1. In a suit by a judgment creditor to set aside a deed as fraudulent, it is error to set the deed aside *in toto*, as it is valid and binding between the parties to the fraud, and only void as to creditors.

2. A judgment creditor, in his bill to enforce his judgment lien, alleges that he files as part of his bill copies of his judgment and of the lien docket marked "Exhibit B" and "C," but "Exhibit B," the copy of the judgment, is not found among the papers, or copied as part of the record. It is so probable that "Exhibit B" never was filed, but exists, and it is so necessary to a just decision of the cause, that this court will remand the case to the court below in order that the plaintiff may have an opportunity to supply said exhibit.

(*Syllabus by the Court.*)

Appeal from circuit court, Cabell county.

John B. Laidley, for appellants. *Geo. J. McComas*, for appellee.

ENGLISH, J. This was a bill in chancery, filed in the circuit court of Cabell county by S. J. Love, the object of which was to set aside as fraudulent and void a certain deed of conveyance from George F. Miller, Jr., to Lucinda Tinsley, the wife of the defendant A. Tinsley, and to sell the tract of land mentioned and described in said deed of conveyance, and subject the alleged equitable interest of said A. Tinsley in said tract of land to the payment of a judgment lien in favor of the plaintiff for the sum of $145.96, with interest and costs, which costs amount to $2.55, which judgment the plaintiff claims he obtained before one A. E. NELSON, a justice of the peace of Cabell county; and that on the 20th day of June, 1885, he caused said judgment to be placed on the judgment lien docket of Cabell county; and he also claims that he filed copies of said judgment and lien docket as part of his bill, marked "Exhibits B and C." The plaintiff also exhibits with his bill a certified copy of the deed from George F. Miller, Jr., and wife to Lucinda Tinsley for said tract of land, with the vendor's lien preserved on the face of said deed, to secure the unpaid purchase money, as Exhibit A. The defendants, A. Tinsley, his wife, Lucinda Tinsley, and George F. Miller, Jr., filed separate answers to the plaintiff's bill. The defendant A. Tinsley, in his answer, denies that he was indebted to the plaintiff in the early part of the year 1885. He also denies that the plaintiff obtained a judgment against him before a justice of Cabell county on the 19th of April, 1885, for the sum of $145.96; and he denies that plaintiff placed any such judgment upon the judgment lien docket in the county clerk's office of Cabell county on the 20th day of June, 1885, or that any such pretended judgment is a lien upon the land mentioned in the bill. He says also that if any judgment was rendered against him in favor of plaintiff, as he alleges, that the same was procured by fraud, and is void and of no effect; that he never had any notice by summons or otherwise of any action or judgment against him in favor of plaintiff. He denies that he owed the plaintiff anything, or that he owned any interest in the land mentioned in the bill, or that he procured the deed for said land to be made to his wife to cheat and defraud his creditors. He also denies that he bought said land, or that he paid any money therefor to said George F. Miller, Jr., or furnished any part of the consideration therefor. The defendant Lucinda Tinsley, in her answer, denies that A. Tinsley was the equitable owner or holder of the equitable title to the land in the bill mentioned at the time the legal title was in George F. Miller, Jr., or that said A. Tinsley caused the said land to be conveyed to her by said George F. Miller, Jr., for the purpose of defrauding plaintiff, or for the purpose of hindering or delaying the plaintiff in the collection of his pretended claim, but says she bought the land herself, and paid the cash payment recited in the deed exhibited with the bill, and $67.33 on the deferred payment; and exhibits a receipt from said Miller to herself, dated March 15, 1886, for said last-named amount. She also denies that the plaintiff obtained the judgment in the bill mentioned, or that he placed said judgment on the judgment lien docket of Cabell county on the 20th of June, 1885; and she also denies that the same, if such there be, is a lien upon said land. The defendant George F. Miller, Jr., in his answer, says that he sold the land to his co-defendant Lucinda Tinsley, and made her a deed therefor on the 16th day of March, 1885; and avers that the entire transaction was between him and said Lucinda Tinsley, and that he had no contract dealings or transaction with her husband in reference to said land; that he had no knowledge of any fraud in any way in said transactions; and admits that she paid him the cash payment at the time the deed was made, and $67 afterwards, leaving a balance due him on the purchase money of $239. To these answers the plaintiff replied generally. No depositions were taken in the cause by either side, and on the 20th day of March, 1887, the cause was heard upon the bill and

Digitized by Google

exhibits, and upon the said answers and the general replication thereto, and the court below decreed that the deed aforesaid be set aside, annulled, and held for naught, and that unless the defendant A. Tinsley, or some one for him, should within 30 days from the rising of the court pay to the plaintiff the sum of $163.98, with interest from the date of the decree, and the costs of the suit, including the costs before the justice, that then the land should be advertised and sold by a special commissioner therein named. Now, while the bill alleges that the defendant A. Tinsley procured this deed to be made by the defendant George F. Miller, Jr., to his wife, Lucinda Tinsley, with intent to hinder and delay and defraud the plaintiff, and without any consideration, yet the answers of the defendants A. Tinsley and his wife, Lucinda, deny this allegation, and the defendant George F. Miller, Jr., states in his answer that the entire transaction was with the wife, and that he had no contract or dealings with the husband, A. Tinsley. But, suppose the allegations of the bill were true and uncontroverted, yet, as between the grantor and grantee, this deed would be valid, and only void as to creditors, and the court below committed an error in decreeing that the deed from George F. Miller, Jr., to Lucinda Tinsley be set aside, annulled, and held for naught. See Warth's Code, p. 631, § 1. "Every conveyance," etc., "with intent to hinder, delay, or defraud creditors, purchasers, or other persons of or from what they are or may be lawfully entitled to, shall, as to such creditors, purchasers, or other persons, their representatives or assignees, be void." And reviewing the decisions of this court we find in the case of Murdock v. Welles, 9 W. Va. 552, it is held: "It is error to decree such deed null and void in a decree in favor of the judgment creditor. It should be so held as to the creditor, it being good between the parties." See, also, the case of Duncan v. Custard, 24 W. Va. 731, in which this court holds that, "where a deed is fraudulent as to creditors, but good between the parties, in a suit to subject the land to the liens of creditors it is error to decree the conveyance void *in toto;* it should only have declared them void as to the creditors of the grantor." Many other decisions to the same effect have been rendered by this court, but these are sufficient to show the rulings of the court upon this subject.

The appellant, however, assigns as further error in this cause that the material allegations of the bill are not sustained by the evidence, and on that account it was error to decree against the defendant Lucinda Tinsley, and contends that the suit should have been dismissed at the plaintiff's cost. This assignment of error evidently refers to the allegation in the plaintiff's bill that on the 19th day of April, 1885, he obtained before A. E. NELSON, a justice of Cabell county, a judgment against the defendant A. Tinsley for the sum of $145.96, with interest and costs, which costs amount to $2.55; alleging, further, that a copy of said judgment, marked "Exhibit B," is filed with his bill, while no such exhibit appears as part of the record; and the clerk of the circuit court of Cabell county certifies that no such exhibit was ever filed with the papers in the cause, but in regard to this the clerk may be mistaken. It may have been filed, and subsequently lost from the file by the careless handling of attorneys or otherwise; but if a properly certified copy of the transcript of said judgment never was filed and exhibited with plaintiff's bill, it must be conceded that the plaintiff has not sustained his case by the evidence. In the case of Dickinson v. Railroad Co., 7 W. Va. 391, in the latter portion of syllabus No. 7, this court holds that, "where the judgment is put in issue, ordinarily an authenticated copy of such abstract as docketed by the recorder will not be received as proof of the judgment, and dispense with the necessity of producing a properly authenticated copy of the judgment;" and the same thing is held precisely in the case of Anderson v. Nagle, 12 W. Va. 98. Under this ruling it must be conceded that it does not appear from the record that the plaintiff has proven his case. From the record, however, it is manifest that there must have been a judgment of some sort, otherwise the abstract—a copy of which is filed as "Exhibit C" with the bill—would not have been placed on the judgment lien docket of Cabell county; and, if such a judgment really existed, it might easily have been proven by supplying "Exhibit B," which seems to be missing from the record. In regard to defects of this character, either in the pleadings or the evidence, this court has heretofore shown a disposition to be somewhat liberal, as will be seen by reference to the case of Atkinson v. Sutton, 23 W. Va. 197, 200, in which the court uses the following language: "While it is generally true that a court can be called upon only to decide causes as the parties present them, and cannot be expected to formulate and direct the manner in which they shall be presented, still, when from the cause as presented by the parties it is apparent to the court that the real questions sought to be determined are not brought before it, either on account of defects in the pleadings or the evidence, it is the duty of the court to require such defects to be removed before proceeding to hear the cause on its merits, or, rather, without having the merits before it; and when an inferior court fails to discharge this duty, the appellate court will reverse and remand the cause." And the same ruling seems to have been quoted with approval, and adopted to some extent, in the case of Rogers v. Verlander, 30 W. Va. 656, 5 S. E. Rep. 847. This cause must, however, be reversed on account of the error in the decree in directing said deed from George F. Miller, Jr., to Lucinda Tinsley to be set aside *in toto*. See Core v. Cunningham, 27 W. Va. 207. And, following

Digitized by Google

the liberal rulings and practice indicated in the decisions above cited, the cause is remanded to the circuit court of Cabell county, with leave to the appellee to supply the defects in the record, and for further proceedings to be there had therein according to the principles announced in this opinion, but the appellee must pay to the appellants their costs in this court expended.

SNYDER and BRANNON, JJ., concurred. GREEN, J., absent.

(32 W. Va. 14)

SMITH v. TURLEY.

(*Supreme Court of Appeals of West Virginia.* Jan. 29, 1889.)

RESULTING TRUSTS—HUSBAND AND WIFE—WITNESS—EQUITY.

1. *Quære*, whether a resulting trust arises in favor of a wife, if the husband acquires property with her separate estate, and without her knowledge and consent takes title in his name. If so, the proof must be clear and explicit to establish that fact, especially against husband's creditors.

2. Long lapse of time will defeat its enforcement.

3. It must arise at the time the title is taken. No subsequent oral agreement or payment will create it.

4. The wife is incompetent to prove any transaction or communication personally between herself and her husband going to create or sustain the trust, or any admissions by him of its existence, not only as against his heirs, but also his creditors seeking to subject the property.

5. An answer containing new matter only, calls for reply in writing, under sections 35, 36, c. 125, Code, only when such new matter in its nature, as applied to the cause, calls for affirmative relief against some of the parties, and is not simply matter of defense of plaintiff's case, and it may by its matter call for such reply only from certain of the parties, and not from others, or only as to part of its matter, and not as to the residue thereof.

6. The personal representative must be a party before debts can be decreed against a decedent's estate.

(*Syllabus by the Court.*)

Appeal from circuit court, Cabell county; IRA J. MCGINNIS, Judge.

Bill in equity by D. L. Smith against Agnes Turley and others, the widow and children of Elijah Turley, deceased, to subject certain lands, the legal title to which was in decedent, to his debts. The bill was dismissed, and complainant appeals.

Simms & Enslow, for appellant. *J. H. Ferguson*, for appellee.

BRANNON, J. In 1860, Elijah Turley purchased in his own name a tract of 292 acres of land in Cabell county at a sale under decree, and a deed was made to him. He held the land until his death in 1884, leaving Agnes Turley, his widow, and certain children. In February, 1885, D. L. Smith filed his bill in equity in the circuit court of Cabell county to sell this land to pay judgments recovered against Elijah Turley in 1887, making Agnes Turley and said children defendants. Agnes Turley filed her answer alleging that said land had been purchased by Elijah Turley with money belonging to her, derived from two deceased uncles; that part of the money ($637.49) derived from one of the uncles she directed her husband to invest in this land, it being distinctly understood between her and her husband that the title to said land, when purchased, should be conveyed to her, and that she always understood and believed during his life that it had been conveyed to her, and never knew to the contrary until after his death; and that he always called it her land, and that afterwards she derived about $2,200 from the estate of another uncle, out of which she paid the balance of the purchase money not paid at the time of the purchase. It appears from the evidence that, in 1860, $637.49, money of Agnes Turley and her sister from an uncle's estate, was paid on the land by their receipting to the commissioner for that amount on their shares in the proceeds of the sale of the land of the uncle's estate, said tract of 192 acres being a part thereof; and that, in 1870, $1,200 out of the $2,200 derived by Agnes Turley from another uncle was paid on the land. Under a reference the plaintiff's and various other debts, considerable in amount, were reported against Turley's estate. In her answer Agnes Turley prayed that said land be exempted from debts of her husband, and that his heirs be required to convey the legal title of the land to her in execution of the alleged trust. The court held the land not liable to Turley's debts, and dismissed Smith's bill, and Smith obtained an appeal to this court.

The claim of Agnes Turley to exempt the land is based on the theory of a resulting trust from the purchase of the land with her money, under agreement with her husband that it was to be acquired in her name. In McGinnis v. Curry, 13 W. Va. 64, Judge GREEN says: "It is well settled that where, upon a purchase of property, the conveyance of the legal title is taken in the name of one person, while the consideration is given or paid by another, the parties being strangers to each other, a resulting trust immediately arises from the transaction, and the person named in the conveyance will be a trustee for the party from whom the consideration proceeds." And it seems that where a husband purchases land in his own name with the separate estate of his wife a trust arises in her favor. 1 Perry, Trusts, § 127, citing many cases. Usually a trust comes from the fact that the wife's money has been used in the purchase, and without her knowledge or consent the deed is taken in the husband's name. Wells, Mar. Wom. §§ 213, 214, p. 258. But Mrs. Turley's case does not meet the requirements of the law. The deed to her husband was made in May, 1860. The purchase had been confirmed in his name by decree in the open court prior to the date of the deed, and the deed was put on the public record in 1867, and she allows this important matter to sleep, and her husband to die, as late as 1884, without obtaining a deed, taking no step to assert her claim until her husband's creditors attack the land, when she filed her answer, in Febru-

Digitized by Google

ary, 1885. In substantially the language of Judge CHRISTIAN in Miller v. Blose's Ex'r, 30 Grat. 750, after the lapse of a quarter of a century, it is claimed that this land, though held by Turley for this great length of time under a deed absolute on its face, and long on record, informing his creditors and the world who chose to deal with him that the land was absolutely his, cannot be subjected to his debts, and that he held the naked legal title as trustee for his wife. Courts will not enforce a resulting trust after a great length of time or laches on the part of the supposed *cestui que trust*. Pusey v. Gardner, 21 W. Va. 470. Lapse of time, when not a statutory bar, operates in equity as evidence of assent, acquiescence, or waiver. Same case, point 7 of syllabus. In Troll v. Carter, 15 W. Va. 582, Judge GREEN says: "So, too, all the authorities agree that an equitable claim of any sort, and especially one which depends on parol testimony only, will not be recognized after great lapse of time, during which it has been ignored, where no satisfactory reason can be assigned for not setting up the claim sooner. And this is more especially true when the equitable claim is of a character which required clear and explicit evidence to sustain it; such lapse of time itself rendering the evidence, which might otherwise have been regarded as sufficiently clear and explicit, unsatisfactory." The fact that defendant's husband, being indebted and knowing the land to be in danger from his debts, should let the matter lie, and die without executing a deed to satisfy this call upon his conscience, is a circumstance against the claim she now sets up. On the facts developed by the evidence the case is not strong enough. The court of Virginia in Miller v. Blose, 30 Grat. 751, says that "the evidence to establish such a claim, in the face of absolute deeds so long of record, must be very clear and explicit, and such as to leave no doubt as to the character of the transaction." The facts must be proved with great clearness and certainty. 1 Perry, Trusts, § 137. Judge GREEN in Troll v. Carter, 15 W. Va. 582, says that, "if the statute of frauds in any case be inapplicable, and a trust of land be permitted to be established by parol evidence, to establish such a trust the evidence must be full, clear, and satisfactory." See Bank v. Carrington, 7 Leigh, 566. Again, a resulting trust must arise at the time of the execution of the conveyance, for a resulting trust cannot arise by after-agreement, by matter *ex post facto*. Judge SNYDER'S opinion in Murry v. Sell, 23 W. Va. 480; 1 Perry, Trusts, § 133. Payment before or at the time of the purchase is indispensable. A subsequent payment will not, by relation, attach a trust to the original purchase. Miller v. Blose, 30 Grat. 751. As the money paid in 1860 was under the law the husband's, as the wife's then existing estate when realized would be his, no trust could then arise from its payment. Subsequent payment of other money, though her separate estate, years after the legal title had been conveyed to him, cannot raise a trust. H. J. Samuels, commissioner, who sold and conveyed the land to Turley, as a witness says nothing of any declaration of Turley at the time that he was buying for his wife. He does say that he heard Turley say he expected the purchase money to come out of proceeds going to Agnes Turley and her sister out of the Dundas estate, so far as it would go towards paying. But the payment of some of the money for the land was long deferred, and this declaration may have been made long after the conveyance, and would not necessarily imply that he was buying for her, in the face of the fact that he bought in his own name, especially as this money in 1860 would not be her separate estate, but his, when realized. It expressed the mere expectation that he could get the money to pay from that source. The money paid in 1860 was the husband's *ex jure marito*, not hers, so far as is disclosed. It is to be noted that Mrs. Turley in evidence does not say there was an agreement or understanding between her and her husband at the time of the purchase that he should buy for her. She merely says he paid for it with her money, and called it her land. She realized some $2,200 from another uncle, and, in 1870, $1,200 of it was paid on her husband's debt for this land. When asked if she knew whether any of this money was applied to the land, she replied that she did not, but so understood. Only $1,200 of this money is proven to have gone on the land, and that as far back as 1870. This proof is not the clear, explict proof, eaving no doubt, required in such secret trusts as this. It might well be said that as to all these moneys a gift to her husband was intended; that she neither contracted for nor expected its return, or that land should be bought in her name, and that it is only when the storm has come the shelter of this trust is sought. That she made no effort in this direction for so long, and only when creditors came against the land, strongly confirms this view. In McGinnis v. Curry, 13 W. Va. 29, this court presumed a gift from wife to husband, and denied a trust, though it was clear the proceeds of her land had paid for the land in question. This transaction is between husband and wife, and, if sustained, defeats the honest debts of Turley, after an ownership of 25 years, on evidence almost solely of the wife, and that not very explicit; and the leaning of this court in McGinnis v. Curry, and in a series of decisions on kindred questions in contests between the wife and the husband's creditors, is towards creditors, to the extent, at least, of requiring full proof of all the elements to bring the case to the standard of exemption. It is well that the law on this matter should be definitely understood. If any one is to suffer, it should be the negligent *cestui que trust*, rather than just creditors. Counsel for appellee relies on the fact that there was no reply in writing to Agnes Turley's answer, claiming that for that reason no proof of its allegations is necessary. If it required such

Digitized by Google

reply of the plaintiff complaining of this decree, certainly this position would be correct. As to the heirs of Turley, Agnes Turley's answer alleging new matter calling for affirmative relief from them, alleging that her husband purchased for her and was her trustee, and praying specific execution by them of the trust by a conveyance to her, demanded such reply. But as to Smith it was simply matter of defense of the land against his debts. It asked no relief as against him,—simply sought a dismissal of his bill; and, while the answer does contain new matter, that matter calls for no relief against him. To fall under sections 35, 36, c. 25, of the Code, the answer must not only contain new matter, (many answers contain that,) but that matter must call for affirmative relief against the party from whom such reply in writing is demanded. In Moore v. Wheeler, 10 W. Va. 42, it is held that an answer alleging new matter for affirmative relief, in the meaning of said statute, was intended to be simply in lieu of a cross-bill, and not to make any other change in practice. A cross-bill implies a pleading by a defendant against the plaintiff or other defendants, or both, to bring into the cause and enforce new matters not merely in bar. The statute makes now one pleading perform the two functions of an answer in bar and a cross-bill for affirmative relief; and logically why may not the answer be divisible as to matter and parties, when some of the matter is only in bar of plaintiff's demand, or the matter is in bar of said demand as to some of the defendants only, thus calling for a reply in writing as to some of the matter or from some of the defendants, and only a general replication as to the other matter or from the other defendants? We think the answer did not call for a reply in writing from Smith.

As to the error assigned that Turley's personal representative was not a party, had debts been decreed against his estate and the land, his heirs might assign such error, but, as the bill was dismissed without such decree, it seems the plaintiff cannot sustain this assignment.

The appellant assigns as error that Mrs. Turley's evidence is incompetent as to declarations of her husband. If by this is meant that his declarations, however proven, are inadmissible under all circumstances, the position is untenable. Admissions of the nominal purchaser and grantee in the deed are admissible. 1 Perry, Trusts, § 137. Especially admissions when not in debt, and long before the controversy with creditors. McGinnis v. Curry, 13 W. Va. 68. But if it is meant that she is incompetent to testify as to transactions between her and her husband or his declarations, the assignment is well made under section 23, c. 130, Code, which renders a party incompetent to give evidence of such transactions and communications with a deceased person against parties claiming as his heirs. True, that statute does not expressly exclude such party from giving evidence against creditors of the deceased; but creditors claiming under heirs as to lands, in a sense stand in their shoes. If Mrs. Turley establishes the trust, she overthrows the title of the heirs, and also the relief of the creditors, as a consequence. Giving evidence against the heirs, she gives evidence against the creditors, and as to the heirs she is incompetent under the letter of the statute, and as to the creditors incompetent under its spirit. Otherwise her children willing to let her sustain her claim might make no exception, and thus defeat creditors, if said creditors could not except for incompetency. This position is sustained by Judge SNYDER in Martin v. Smith, 25 W. Va. 587.

This court is required to render such decree as the circuit court should have rendered, but, in the absence of the personal representative of Elijah Turley, that court could not have decreed debts against his estate, and consequently this court cannot, and the cause must be remanded without further decree here. Hill v. Proctor, 10 W. Va. 78.

Therefore the decree of the circuit court of Cabell county pronounced in this cause on the 14th day of December, 1885, must be reversed, with costs to the appellant; and the cause is remanded to said circuit court, with direction to require the plaintiff to make said personal representative a defendant by amended bill, and to proceed further in the cause according to the principles herein indicated, and principles governing courts of equity.

SNYDER, GREEN, and ENGLISH, JJ., concurred.

(32 W. Va. 6)

TALBOTT v. KING.

(*Supreme Court of Appeals of West Virginia.* Jan. 29, 1889.)

NUISANCE—INJUNCTION—HIGHWAYS.

1. An individual cannot enjoin a public nuisance, such as the obstruction of a road, unless it works special and peculiar injury to him, and that injury must not be trivial, or such as may be compensated in damages, but must be serious, affecting the substance and value of the plaintiff's estate. The first point of syllabus in Bridge Co. v. Summers, 13 W. Va. 476, reaffirmed.

2. Mere user of a road will not make it a public road, under section 31, c. 43, Code 1887. The user must be accompanied either by an order of the county court recognizing it in some way as a road, or the road must be worked by a surveyor as such. Dedication by the land-owner, though accompanied by public user, will not make it a public road, unless the dedication be accepted by either the county court in its order book, or by a surveyor's working it.

(*Syllabus by the Court.*)

Appeal from circuit court, Barbour county; WILLIAM T. ICE, Judge.

Bill in equity by Robert R. Talbott against John King, to enjoin the obstruction of a road through defendant's land. The temporary injunction was perpetuated on the hearing, and defendant appeals.

John Bassel and *Dayton & Dayton*, for appellant. *Sam. V. Woods*, for appellee.

BRANNON, J. Robert R. Talbott presented to the judge of the Third circuit his bill, stat-

Digitized by Google

ing that he resided in road precinct 5, in Barbour county, on what is known as the "Belington Road," a main thoroughfare for all that section of densely populated country between Valley river, at Belington, and the Staunton and Parkersburg turnpike, for a distance of many miles; that in said precinct is a public road called the "Davitt Road," running through lands of defendant, John King, Owen Davitt, and Timothy Caveny, from a point on said Belington road near the Talbott church to a point where the same intersects a road known as the "River Road," and thence to its intersection with another road known as the "Roaring Creek Road;" that plaintiff had erected at great expense and keeps in constant operation, at a farm near said Belington road, a large and valuable steam saw and grist mill, the only mill accessible to a large number of people living along said Belington road, and the only one for all the people living on the Davitt road; that very many of the patrons of plaintiff's mill have no other means of reaching it except by the Davitt road, unless by a distant, circuitous and inconvenient route, many miles out of their way; that near said mill are a store, post-office, school-house, cattle scales, and blacksmith shop, which are inaccessible to many of said people except by said Davitt road, in which store and scales plaintiff is part owner; and that, as many customers of said store are in the habit of making one trip to store, post-office, and mill with the same conveyance, if they are deprived of said road for the purpose of reaching the store, post-office, and church, they cannot reach the mill, and will not patronize plaintiff; and that King had fenced, obstructed, and destroyed said road, and refused to permit persons to pass over it to said mill and store, whereby their customers were turned away, their business and profits diminished, and irreparable damage done to the plaintiff; and praying an injunction to restrain King from obstructing the road, which was granted. The defendant demurred and answered, and in his answer denied all the material allegations of the bill specifically. The answer states that for some years, while the lands in its course were uncleared, and before the establishment of other roads afterwards in the answer mentioned, some people in the Roaring creek country made a path through the woods near the line of the alleged Davitt road, which path was changed as the lands were cleared; that it was never established by law or otherwise, never worked by a surveyor, and never by the public regarded as a public road, and was in places almost impassable; and that its establishment would ruin his farm. Said answer further alleges that the county court, recognizing the fact that said path was no public road, established a public road substantially parallel with, and at some points not more than forty-five rods distant from, said path, and entering said Belington road, whereby any customers could reach said mill by traveling less than three-quarters of a mile further from the section which the bill alleged would be inconvenienced, and whose custom would be lost by shutting said pathway. The answer denied all special damage to the mill. No replication was made to this answer, but both parties took depositions of numerous witnesses. The cause was heard on bill, demurrer, answer, and depositions, the injunction was perpetuated, and King appeals.

The first question to be decided is whether the plaintiff can maintain his bill for a public nuisance. In Bridge Co. v. Summers, 13 W. Va. 484, GREEN, P., says: "A court of equity ought not to interfere by injunction to prevent a public nuisance when the party asking its aid shows no private injury actually sustained or justly apprehended by him. The obstruction to a public highway, to justify the interposition of a court of equity, must be more than a mere public nuisance,—it must work a special injury to the plaintiff; and such injury must not be trivial, and such as may be fully compensated in an action at law. But if the right of the public to the use of a highway is clear, and a special injury is threatened by an obstruction of the highway, and this special injury is serious, reaching the very substance and value of the plaintiff's estate, and is permanent in character, a court of equity by an injunction ought to prevent such a nuisance." This must be regarded a fair exposition of the law. We do not see that the plaintiff's case fills its measure. We cannot here follow the voluminous evidence in detail. It seems that this road is of minor importance, by no means largely contributing to the support of the plaintiff's mill and store, and that by means of another established road, known as the "Stalnaker Road," referred to in the answer and described in the proof, all the persons, except two or three, (perhaps we should say one,) can reach them by going 208 rods further, over perhaps a better road, and those two or three may, through their own lands, have access thereto. The loss of custom from stopping this road must be very small and trivial, by no means serious, or reaching the substance or value of plaintiff's property, as it must do, under the rule above laid down. In the case cited from 13 W. Va., the road obstructed was the approach of a toll-bridge on one end, being of vital importance to it, and its obstruction would thus sap its life. Not so here. This road was not the only road leading to store and mill, indeed, not leading directly itself to the mill, but entering the Belington road at some distance from the mill, and only contributing to its business in a degree, and those traveling on it could with equal ease, practically, reach the Belington road by the Stalnaker road. Chief Justice GRAY in Blackwell v. Railroad Co., 122 Mass. 1, says: "If a bridge is constructed across a navigable stream and arm of the sea, the direct injury is to the navigation, which is a public interest, and the fact that the plaintiff alone navigates the river, and is owner of the only wharf above the bridge, being merely proof that the consequential damage to him

Digitized by Google

is greater in degree than to others, does not establish his right to maintain an action, as other riparian owners may suffer in the same way whenever they use the stream." See, also, High, Inj. § 525. Were it the law that any one consequentially sustaining damage from obstruction of a road like others, or even greater in degree than others, may go into equity by injunction, a vast field of private litigation would be opened. To justify it, the injury must be special and peculiar to the plaintiff, and, moreover, serious, and certainly depreciating the value and enjoyment of his estate. The highways are the common property of all, and by our law are under the guard and care of the state. For their obstruction the law gives a remedy by indictment. The general rule of law is well settled that individuals cannot enforce a public right, or redress a public injury, by suits in their own names. Brainard v. Railroad Co., 7 Cush. 510. Endless would be the litigation, were every individual allowed to do so upon his own impulse or for private ends. It is safer and more prudent to trust the vindication of the public right to the public prosecutors and grand juries, and courts should rather limit than widen the jurisdiction to entertain private suits in such cases.

The second question in this cause is, was the road in question a public highway? It was certainly originally a path cut out by Miles King in the forest for his convenience. Then a neighbor, Davitt, settling there, extended it for his convenience, and other paths extending it were made, and it has been for many years, say 27, used by all having occasion to pass over it. It was fenced off as the land was cleared. Miles King made fences along it; so did John King. It is very narrow, not rising to the height of an ordinary road; rather a path than a road; too narrow in places for a wagon; very steep, with rocks in places, difficult to pass. No order of the Barbour county court either establishing or recognizing it is shown or suggested. The end of it in Randolph, if that could be certainly called a part of it, was by that county court made a highway, and worked by surveyors, and then discontinued as too steep. It was never worked by surveyors in Barbour county. Davitt, a surveyor, living on it, interested in its establishment, after this controversy arose, after King closed it, with his boy and a man named Coonts, to whom he allowed credit for one hour's work, did some work, but that work was in removing the fence which King had erected across it, and a little tree which had fallen over it. A man named Caveny, under Davitt, worked a day, but this was after King closed it. Davitt was surveyor two years; did no work there the first year, nor the second, except as stated. He says his predecessor, Surveyor Poling, did not work it, and was asked if one named Durrett worked it, but the record gives no answer to this question. He says he never worked it with the assembled road hands, and never knew any other surveyor to do so. He was asked if he knew of any other road in his precinct that had not been worked for 25 years or 26 years by a surveyor and hands, and answered that he did not. He had resided there 30 years, and had ample opportunity of knowing of such work, if any had been done. Two other surveyors —Poling, a surveyor when his deposition was taken, and for a term before, and Durrett, a surveyor at two different times for two years each—say they did not work it; knew of no surveyor doing so; and, though asked to work it, they pointedly declined to do so, because they did not consider it a road, and did not feel called on by law to work it. Thus this road was never worked by surveyors, and we have two surveyors declaring it not a public road, and refusing to work it.

The plaintiff relies on section 31 of chapter 43 of Warth's Code, which provides that every road used and occupied as a public road shall be taken and deemed to be a public road in all courts and places wherever the establishment thereof shall come in question. What is the meaning of this statute? In Ball v. Cox, 29 W. Va. 407, 1 S. E. Rep. 673, the court, quoting the act of 1872–73, c. 194, § 31, that "every road worked as a public road under the direction of a surveyor of roads shall in all courts and places be deemed a public road," "held that every road worked as a public road, under the direction of a surveyor of roads, shall in all courts of this state be deemed a public road, although it may not appear that the same was formally established by an order of the county court." The section as amended in 1881 leaves out the words, "worked as a public road under the direction of a surveyor of roads," and substitutes the words, "used and occupied as a public road." We do not think this change of phraseology has changed the meaning. To be a public road, under the act of 1881, it must be "used and occupied," both verbs being employed, and used and occupied as a public road. It must be not only used as a public road,—the people do that; their passage over it is transient,—but must be occupied as a public road; that is, completely taken possession of for purposes of easement, shutting out other conflicting control, and occupied as a public road by public authority,—a function performed by the county court or its agent, the public officer called the "surveyor." The occupation, to shut out the perfect use of the owner, must be either by order of the county court or by the surveyor's working it as a road. It must have some stamp of public authority upon it beyond mere user by the public, and that is, the being taken possession of and worked and held out by the surveyor to be a road, at least. To require the sanction of public authority to, at least, this extent is not hurtful to the public convenience, and insures the public safety to an extent greater than would the construction that mere naked use by the public in passing makes it a public road. Our law requires all public roads to be worked at public expense, and makes the county liable for damages for injuries arising from non-

Digitized by Google

repairs; and if mere use by the public, unsanctioned by order of the court or the surveyor makes the road a public road grievous dangers and burdens might fall upon the public; and such a rule would be so indefinite as to render it well nigh impossible to determine what were public and what were not public roads. It would endanger private property, taking land by mere user, and making it a road without compensation would endanger private property. But if we require the sanction of the court or the occupation of the road by the public officer by those visible open acts which manifest to the world its adoption by the public authority, the public liability for maintenance and damages is tested by a reasonable rule and limit, and the owner of the land seeing the public officer working the roads knows of the public claim, and, if he acquiesces for any long time, will be held estopped from denying the validity of the road. Kelly's Case, 8 Grat. 632, holds that mere user of a road by the public for however long a time will not constitute it a public road, but it must be shown to have been established or by some action recognized by the county court; and that a road may become a public road by dedication of a right of passage to the public by the owner of the soil and an acceptance by the public, but that dedication without acceptance will not establish a road; and that this acceptance must be by the county court on its records, before it will be a public road. We think the law of Kelly's Case good now under our present road act with the qualification, as provided by our act, that acceptance by the surveyor of roads, evinced by open control and working of it as roads are commonly worked, stands in lieu of an order by the county court. Dedication, though accompanied by user by the public, not accepted by the court or the surveyor, will not fasten it on the public as a public road. Mere user by the public, unless it be sanctioned by a recorded court order or by work and control by the surveyor, will not deprive the owner of the soil of his right, and make it a public road; but such user by the public and work by the surveyor, if acquiesced in for a long time by the owner, will estop him from denying its existence. Notwithstanding the change of phraseology in section 31 of chapter 43 of the Code, as amended by chapter 14, Acts 1881, from former acts, we still adhere to the first point of the syllabus in Ball v. Cox, 29 W. Va. 407, 1 S. E. Rep. 673, requiring that to make a public road it must be worked by a surveyor. It is claimed that Miles King, grantor of John King, dedicated this road to public use. If he did, such dedication not having been accepted by the court or by surveyors working it, two surveyors having on the contrary refused to regard it a public road, or to do work on it, the dedication alone would not make it a road; and, the question of dedication being one of mere fact, we do not deem it necessary to decide it. The decree of the circuit court of Barbour county in this cause must be reversed, the injunction dissolved, the bill dismissed, and the appellant is to recover from appellee his costs both in this court and in the circuit court.

SNYDER, P., and GREEN and ENGLISH, JJ., concurred.

(32 W. Va. 55)

BIGGS v. CITY OF HUNTINGTON.

(*Supreme Court of Appeals of West Virginia.* Feb. 5, 1889.)

MUNICIPAL CORPORATIONS—DEFECTIVE STREETS.

1. Our statute (section 53, c. 43, p. 331, Code 1887) imposes an absolute liability upon cities, villages, and towns for injuries sustained by reason of the failure of municipal authorities to keep in repair the streets, sidewalks, etc., within the corporate limits, provided its authorities have opened or controlled such street or sidewalk where the injury was sustained as a public street or sidewalk.

2. In an action against such city or town the plaintiff must therefore allege and prove that the street or sidewalk upon which the injury occurred at the time and place when the injury was sustained was controlled and treated by the municipal authorities as a public street or sidewalk, and opened as such.

3. This duty of a city or town in this state to keep its streets, sidewalks, alleys, etc., safe for foot-passengers and vehicles, is not met by keeping simply the bed of the highway or the surface of the sidewalk in proper condition; but such duty is violated if a dangerous excavation or open well be permitted so close to the margin of the sidewalk or highway as to make the use of them as such dangerous. But if a traveler unnecessarily, for his own convenience, deviates designedly from the highway, and in so doing meets with an accident outside of the highway, the city cannot be responsible, no matter how near the highway the obstruction may be.

(*Syllabus by the Court.*)

Error to circuit court, Cabell county.

This was a suit brought by William Biggs, Sr., against the city of Huntington, before a justice of Cabell county, for a wrong, in which the plaintiff claimed damages. In his complaint the plaintiff claimed damages to the amount of $200 for this: that the plaintiff's horse was killed, on the 25th of September, by falling into a hole, or well, on and adjacent to the public and common highway known as "Third Avenue," in the corporate limits of the city of Huntington. To this complaint the defendant, the city of Huntington, pleaded not guilty, and thereupon a jury of six were duly sworn to try this issue, who, having heard the evidence and arguments of counsel, retired to their room to consider their verdict, and returned into court with the following verdict: "We, the jury, find for the plaintiff, and assess his damages at $107.50." And the defendant, by its attorney, moved the court to set aside the verdict, and grant it a new trial, because the same was contrary to the law and the evidence, which motion was overruled by the justice, who signed the following bill of exceptions: "Be it remembered, on the trial of this cause, after the jury was sworn to try the issue joined on the plea of not guilty, the plaintiff, to maintain the issue on his part, introduced a witness, A. J. Beardsley, who swore that he was a resident of the said city, had been living there 7 years, and

Digitized by Google

was a practicing physician; and that on the night of the 25th of September, 1886, he was called to see a woman in what is called 'West Huntington,' in corporate limits of said city, and that the party who came for him said she was a city patient, and that he was city physician, and that he got in his buggy at about 10 o'clock P. M., and drove down Third avenue opposite where the woman was sick, and some one standing in the front door of the house called to him and said that was the place; to come in. He then turned short off Third avenue, and drove across the sidewalk for the purpose of hitching horse and buggy to the fence on a lot by the side of the house that he saw, which was outside the line of the street; and that the lot was adjacent to the north side of the street, and the house on the lot was 30 feet from north line of street; and that he knew he was driving out towards the fence,—that he was leaving Third avenue; and that as he drove out of said avenue his horse gave down in his shoulders, but recovered, and then his hind feet went down in what he learned afterwards to be a well. Witness jumped out, and the young man who was in the buggy with him also, and they went to work to detach horse from buggy, and as soon as he did so the horse fell down into the well, and was killed. The horse was worth $200, and belonged to William Biggs, Sr. That the well was open as far as he could see, and was about from eight to twelve inches north of the line of the sidewalk and street, and that he did not know of the well until he drove into it. That there was no obstruction upon the street or sidewalk near the well to prevent him from driving up or down or across said avenue and sidewalk. That at the point where he was leaving Third avenue he knew there was no street or road, but he knew persons sometimes drove that way. That he had often passed along the street and sidewalk opposite to the well before accident, but that he never saw well at any time. That none of the city officials told him to go to see the woman, but that he often went to see patients as city subjects without being directed by any of the city officials. He did not know the name of the woman he was to see, but thought her name was Tomlin. That there was no fence between line of street and well. There was no barrier, guard, or light at well, and, as far as he saw, there was no covering over well at the time, and that the well was on a level with the ground around it.

The plaintiff introduced one Lucien McGinnis, who swore that at the time of the accident to the horse in question he lived in West Huntington, and that he saw the well before the accident some time, but could not remember the date. The first time he saw it it was open, and the next time it was covered. That the well was about 12 to 18 inches out of the line of the sidewalk and street, and that the sidewalk on Third avenue was 15 feet wide, but there was nothing but a dirt sidewalk. That gutter or drain between sidewalk and part of street traveled by horses or vehicles was about 3 feet wide and 4 to 6 inches deep. George Adams, introduced by plaintiff, swore that before the accident to horse he had often seen the well; that he had spoken to Mr. Taylor, who was agent of the owner of the property, to have it covered; that the well was outside of the line of the street, and was 10 to 12 inches outside of the line marked off for a sidewalk, but there was no pavement, plank, stone, or brick, or curbing, to indicate sidewalk, and that vehicles sometimes drove out on either side of well into the lot; and that the well was about 30 or 40 feet from the middle of the street usually traveled by horses and vehicles; and that all the ground, including the street and the space around the well, was level, except the depression which caused the dirt gutter; that he was away at the time of the accident; that the gutter or drain between sidewalk and street for vehicles was about 3 feet wide and 4 to 6 inches deep; that on the south side, and opposite to well where accident occurred, the sidewalk was plank, and used by pedestrians. Henry Putoff, on the part of the plaintiff, swore that he lived near place where horse was killed, and that he was there the night the horse fell into well; and before that time the well was sometimes covered and sometimes not; and that he had notified T. W. Taylor, agent for the property, that the well should be covered or filled up; that the well was about middle way in the opening; that Beardsley told him that he started to drive out into the lot, when the horse went into the well; that there was a tree standing about 20 feet from where Beardsley crossed the sidewalk, where he could have hitched; that the city lamp was burning about 60 feet away from the well; that he had notified T. W. Taylor, agent for the property, that the well should be covered or filled up, before the accident occurred; that the morning after the accident T. W. Taylor had the well filled up. Florence Webb, for plaintiff, swore that at the time that the horse fell into the well she was well acquainted with the locality, living close by, and that the well was often uncovered, and that she had frequently kept some small children from falling into it. A day or two before horse went into well she saw it, and that it was entirely uncovered. That she had never noticed any light or barrier there to keep persons from falling into it, and that she had frequently seen huckster wagons drive onto the sidewalk near the well. And the above was all the evidence introduced on the part of the plaintiff, and he here rested.

The defendant then, by its attorneys, moved the court to strike out all of the evidence from before the jury because the same was insufficient to sustain any verdict for the plaintiff. The court overruled the motion of the defendant, and refused to strike out the evidence; to which ruling of the court in refusing to strike out the evidence

Digitized by Google

the defendant excepted, and prayed that its exceptions be saved it, which was done. The defendant then introduced some witnesses on its behalf, whose evidence did not materially change the evidence of the plaintiff, and it is so agreed by the parties that said evidence need not be inserted. The jury retired to their room to consider of their verdict, and afterwards returned into court with the following verdict: "We, the jury, find for the plaintiff, and assess his damages at $107.50." The attorneys for the defendant moved the court to set aside the verdict and grant it a new trial, because the same was contrary to the law and the evidence. Thereupon the court overruled the defendant's motion, and refused to set aside the verdict and grant it a new trial as prayed for; to which ruling of the court in refusing to set aside the said verdict and grant a new trial the defendant, by its attorneys, excepted, and prayed that this, its bill of exceptions to all and each of the rulings aforesaid, might be signed, sealed, and made a part of the record in this case, which was accordingly done.

The city of Huntington afterwards, on October 28, 1887, obtained from the judge of the circuit court of Cabell county a writ of *certiorari* and a writ of *supersedeas* to this judgment of said justice, which was executed by the sheriff of said county by delivering to E. M. UNDERWOOD an office copy of this summons, and by an acceptance of the same, indorsed thereon by the counsel of William Biggs, Sr. And on November 3, 1887, the said justice, E. M. UNDERWOOD, filed in the clerk's office of the circuit court of Cabell county the original papers of said case, which, with the transcript of the record thereof, shows it to have been as above stated. And on March 22, 1888, the circuit court made this final order in said case: "The following order is entered as the order of this court *nunc pro tunc* in the place and stead of the order of this court in the said cause entered on the 7th day of the present term of this court: This day came the parties, by their attorneys, and thereupon the plaintiff moved the court to dismiss the said *certiorari* as improvidently awarded, which motion being considered is overruled by the court; to which ruling the plaintiff excepts. And the court, having maturely considered the transcript of the record of the judgment aforesaid, is of opinion that there is error in the judgment in said record; and this court proceeding to make such order as law and justice requires, it is therefore considered by the court that the judgment of the justice rendered herein on the 10th day of October, 1887, be, and the verdict of the jury rendered herein is, set aside; to which said rulings and each of them, and to which judgment, the plaintiff excepts. And it is further considered by the court that the action of the plaintiff be and the same is hereby dismissed, and that the defendant, the city of Huntington, recover against the plaintiff its costs by t in its behalf in this court and before the justice expended, including $5.00 as allowed by statute; to all of which rulings, judgments, and orders the plaintiff excepts." From this order a writ of error and *supersedeas* was awarded William Biggs, Sr., by a judge of the supreme court of appeals of West Virginia, on his giving bond with security in the penalty of $100, conditioned according to law.

Gibson & Michie, for plaintiff in error.
Simms & Enslow, for defendant in error.

GREEN, J., (*after stating the facts as above.*) In this case the question is raised as to the civil liability of a municipal corporation for an injury to a private person, caused by defective streets and sidewalks. The city of Huntington, the defendant, is a municipal corporation subject to section 53, c. 43, Code W Va. 1887, p. 331, which provides that "any person who sustains an injury to his person or property by reason of a public road or bridge in a county, or by reason of a public road, bridge, street, sidewalk, or alley in an incorporated city, village, or town being out of repair, may recover all damages sustained by him by reason of such injury in an action on the case in any court of competent jurisdiction against the county court, city, village, or town in which such road, bridge, street, or sidewalk may be, except that such city, village, or town shall not be subject to such action unless it is required by its charter to keep the road, bridge, street, sidewalk, or alley therein at the place where such injury is sustained in repair." It will be observed that the statute in express terms makes the town liable for damages for injuries sustained by reason of a defect in a public street or sidewalk. The language is unqualified, and without exception or limitation, and therefore the question of notice or want of care on the part of the town is altogether immaterial. If the street or sidewalk is in fact defective, and such defect caused the injury to the plaintiff, it is no defense on the part of the town that it had exercised great care in repairing the street or sidewalk. It is only necessary in such suit to allege and prove the existence of the defect, and that the injury was occasioned thereby. See Sheff v. Huntington, 16 W. Va. 307; Chapman v. Town of Milton, 7 S. E. Rep. 22, (decided by this court, June 27, 1888.) See, also, Shear. & R. Neg. § 389. It is true that the rule is otherwise in the case of towns or municipal bodies upon whom no such absolute liability is imposed by their charter or by statute law. They are only bound to exercise ordinary care and vigilance in keeping their streets in repair. And therefore, before they can be made liable for injuries caused by a defect in a street or sidewalk, not arising from its construction, or from some act authorized by the corporation, either express notice of the nuisance or defect must be brought home to it, or the defect must be so notorious as to be observable by all for a sufficient time to enable the corporation to repair. Shear. & R.

Digitized by Google

Neg. § 407; 2 Dill. Mun. Corp. § 1029. In such cases it is essential that the plaintiff should both allege and prove notice to the corporation of the defect which caused the injury. But in the other case it is not necessary. See Noble v. City of Richmond, 31 Grat. 271; Chapman v. Town of Milton, 7 S. E. Rep. 23.

The defect which caused the injury to the plaintiff's property—the killing of his horse by his falling into a well—was not precisely adjacent to any street or sidewalk of the city of Huntington. But the well was situated on the north side of Third avenue, in the corporate limits of the city of Huntington, and it was about one foot north of the northern limits of the sidewalk along this avenue. It was uncovered, and unguarded by any fence separating this sidewalk or avenue from it, or surrounding the mouth of the well; and travelers along this avenue or sidewalk were not notified of the danger resulting from the fact that there was an open well within one foot of said avenue and sidewalk by hanging up a light or putting out any other signal of danger. There was opposite this well on the south side of this avenue a plank sidewalk usually used by foot-passengers, but there was no sidewalk on the north side of this avenue, where the open well was located. The sidewalk there was nothing but the natural dirt on a level with the open mouth of this well, and it was separated from the portion of this Third avenue used by vehicles and by travelers in vehicles only by a shallow gutter three or four inches deep and some three feet wide; so that the traveler along this Third avenue had nothing in the way of a curb-stone or in any other form to indicate to him where the northern line of this Third avenue began; nothing, in fact, to indicate to the traveler when he had left Third avenue, and was driving on the sidewalk along the northern border of this Third avenue, or when he had left it, and was driving on uninclosed ground on the north of this sidewalk, and on the same level with this sidewalk. Under these circumstances, Dr. Beardsley, a physician in the employment of the city of Huntington, to attend certain paupers in the limits of the city, was, on the night of September 25, 1886, about 10 o'clock P. M., called upon to attend one of the paupers. He got into his buggy, to which was hitched the plaintiff's horse, worth about $200. He drove down Third avenue, in the city of Huntington, until he got to a point opposite where this sick pauper lived. Some one in the front door of her house, which was about 10 yards north of the northern limits of this avenue, called to him, and told him that was the place, and asked him to come in. He therefore turned short at right angles in this Third avenue, and drove across this dirt sidewalk, not separated from the avenue by any curb, or in any other manner, his purpose being to drive across the 10 yards intervening between the north line of this sidewalk and the fence surrounding this pauper's house, and hitch his horse to this fence. The horse barely crossed this sidewalk, when his front feet sank down in the open well, and shortly afterwards his other feet also sank down in this well. The doctor and a young man that was with him in the buggy jumped out, and they united in their efforts to save the horse. These efforts detached him from the buggy, and the horse then fell into the well and was killed. None of the city officials directed the doctor to pay this visit to this pauper, but he often went to see patients of the city without any special direction from any of the city authorities. There was no fence between the line of the street and this well, and no barrier, guard, or signal-light at the well. The doctor was ignorant of the existence of this open well, and while he knew that in driving across the sidewalk to hitch his horse to the fence around the pauper's house, he would quit this Third avenue, still he knew also that horses sometimes in going along this Third avenue quit its nominal boundaries, as he was doing, and drove on this open uninclosed ground on the north side of this avenue. In doing this he did not know he was incurring any danger, as he knew nothing of the existence of the well. It was proven that the mouth of the well was sometimes covered, and sometimes not. There was no fence separating the mouth of this well from this Third avenue for about 30 feet.

The city of Huntington, the defendant in error, insists that Dr. Beardsley, who had charge of the plaintiff's horse at the time it fell into the well, drove out of Third avenue intentionally and knowingly for his own convenience, to tie his horse to the fence of a vacant lot; and that if a traveler, without necessity, or for his own convenience or pleasure, deviates from the traveled track, which is in good condition, and in so doing meets with an accident outside of such track, the town will not be liable for any resulting damages. Whart. Neg. § 968. There are certainly authorities which give more or less countenance to these views. See Keyes v. Village of Marcellus, 50 Mich. 439, 15 N. W. Rep. 542; City of Scranton v. Hill, 102 Pa. St. 378; Sykes v. Piwlet, 48 Vt. 446. There are, however, numerous cases where a traveler, though he meets with an accident outside of the public street, has nevertheless recovered of the town the damages he has sustained, when sustained very close to the edge of the public highway. The following were cases of this description: Niblett v. Nashville, 12 Heisk. 684; Turnpike Co. v. Crockett, 2 Sneed, 271; Memphis v. Lasser, 9 Humph. 757; Burnham v. Boston, 10 Allen, 290; Hill v. Boston, 122 Mass. 349. We think the true rule to be deduced from these cases is that if either an obstruction, excavation, or hole be permitted by a town to exist, though not actually within one of the public streets of the town, yet so close to such a street as to produce danger to a traveler or passenger who is using such highway or sidewalk prudently and properly, the corpo-

Digitized by Google

ration is liable for an injury for permitting such nuisance, though it be only close to the street, and not immediately in such street. My conclusion is that, if this open well was near enough to the traveled highway—Third avenue, in Huntington city—to render the traveling on this highway dangerous; if this well, uncovered and without barriers or fencing, and without signal-lights to warn travelers, and, being left in this condition by the city of Huntington, became the cause of the horse of the plaintiff falling in said well while Dr. Beardsley was using this Third avenue in a prudent manner in the same way that it was commonly used by travelers,—the city would be responsible. The question, then, is whether Dr. Beardsley, turning out of Third avenue, and tying his horse, as was frequently done, to a fence within a short distance from this highway, and not separated from it by an obstruction, ceased to be a traveler, not meeting with the accident in attempting to use this avenue as a thoroughfare. This was, it seems to me, a question for the jury to decide, and that, in deciding that he did not intend to leave the highway and cease using it, they were sustained by the evidence, which showed that when the accident occurred the buggy was still in this highway, or on the sidewalk, and the horse not more than one foot from the northern edge of this highway, and separated from it by no fence, curb, or anything else. I am therefore of opinion that the circuit court should have approved and affirmed the judgment of the justice, E. M. UNDERWOOD, rendered October 10, 1887, and should have rendered a judgment that the plaintiff below, William Biggs, Sr., recover of the defendant below, the city of Huntington, its costs in the circuit court of Cabell county incurred, and damages according to law.

But the other members of the court are of opinion that on the evidence in the case the jury was not justified in deciding the case that Dr. Beardsley did not intend to leave the public highway, and had not ceased using it as a public highway when and where the accident occurred. And certainly it would be difficult to draw such conclusion in view of the fact that Dr. Beardsley himself testified "that he turned short in Third avenue, and drove across the sidewalk for the purpose of hitching horse and buggy to the fence on a lot by the side of the house he was going to, which fence was outside the line of the street, and some 30 feet from the north line of the street, and he knew he was driving towards the fence." The necessary conclusion, they think, from this evidence is that he, without necessity, and for his own convenience, purposely left the traveled track of Third avenue, and by so doing he met with this accident of the horse falling in this well; and that, if this was so, and the jury could not on the evidence find otherwise, then the city was not responsible, no matter how close the open well was to Third avenue; and therefore the verdict of the jury was so contrary to the overwhelming weight of the evidence that it ought to have been set aside by the justice, and a new trial awarded, and the circuit court should have reversed the judgment of the justice for the amount found for the plaintiff by this verdict. I admit that the decided weight of the evidence was opposed to the verdict found by the jury, though I do not concur with the other judges that it was so overwhelming as to require us to set aside the verdict, though the justice who heard the evidence refused to do so. The circuit court, in the opinion of a majority of this court, did not err in reversing the judgment of the justice, and in setting aside, reversing, and annulling the verdict of the jury. But all the members of our court are of opinion that the circuit court did err in dismissing the action of the plaintiff, and rendering a judgment in favor of the defendant against the plaintiff for its costs, including five dollars allowed by statute. The verdict of the jury having been set aside, no judgment could properly be rendered until the case has been again tried by a jury, either before a justice or before the circuit court. As the court below has not acted on the question whether this new trial should be had in the circuit court or before the justice as a court of review, we express no opinion on this point, but will simply reverse the decision of the circuit court at the cost of the defendant in error, and remand the case to the circuit court, to be thus proceeded with according to the principles laid down in this opinion, and further according to law.

SNYDER, P., and ENGLISH and BRANNON, JJ., concurred.

(32 W. Va. 41)

McKINSEY v. SQUIRES *et al.*

(*Supreme Court of Appeals of West Virginia.* Feb. 5, 1889.)

CONSTITUTIONAL LAW — EQUITY — ATTACHMENT — BREACH OF MARRIAGE PROMISE.

1. Our statute, (section 1, c. 106, Code 1887,) which provides that an attachment may be sued out in equity for the recovery of damages for a wrong, is constitutional.

2. A suit in equity may, under the provisions of said statute, be maintained to recover damages for the breach of a marriage contract.

3. Where seduction has been practiced under color of a promise to marry, it is proper to prove, in an action for the breach of such promise, the seduction in aggravation of the damages.[1]

4. In an attachment suit in equity, to which the debtors of a non-resident defendant are made parties, and charged to be such debtors, it is not error to decree that the latter shall pay the amount found to be due from them to the non-resident,

[1] In actions for breach of marriage promise, the jury, in estimating damages, may consider the injury to plaintiff's feelings and reputation, and any circumstances of indignity under which the wrong was done, Vanderpool v. Richardson, (Mich.) 17 N. W. Rep. 986; Campbell v. Arbuckle, 4 N. Y. Supp. 29; and the money value or worldly advantage of the marriage, Dupont v. McAdow, (Mont.) 9 Pac. Rep. 925; or defendant's pecuniary circumstances, Olson v. Solverson, (Wis.) 38 N. W. Rep. 329; Bennett v. Beam, (Mich.) 4 N. W. Rep. 8; and exemplary damages may be awarded in some cases, Johnson v. Travis, (Minn.) 22 N. W.

Digitized by Google

simply because the order of attachment had not been served upon them.

(*Syllabus by the Court.*)

Appeal from circuit court, Braxton county.

Bill by Mattie E. McKinsey against O. B. Squires and others, to recover damages for breach of promise of marriage by said O. B. Squires, and to enforce the lien of an attachment on the property of said Squires. Decree for complainant, and defendants appeal.

John Brannon and *C. C. Higginbotham*, for appellants. *Haymond & Byrne*, for appellee.

SNYDER, P. This is a foreign attachment suit in equity, commenced July 3, 1885, in the circuit court of Braxton county, by Mattie E. McKinsey, to recover damages from the defendant Olen B. Squires, for breach of marriage contract and seduction of the plaintiff by said defendant. The original bill alleged the contract; its breach; the seduction, resulting in the birth of a child; that said defendant had fraudulently disposed of all his estate in Braxton county, consisting of a retail store and other property, to his father, who was a participant in the fraud, and held said property in trust for said defendant; and that the said Olen B. Squires had left the state, and was a non-resident. The only defendants to this bill were the said Olen B. Squires and his father, D. S. Squires. On the day the suit was brought the plaintiff sued out an attachment for $5,000 against the estate of the defendant Olen B. Squires, which was by the sheriff of said county levied upon the goods in said store, and garnishee process was served upon the defendant D. S. Squires. In August, 1886, the plaintiff filed her amended bill, making Abe Carper, Levi Leonard, D. D. T. Farnsworth, G. A. Newlon, and G. F. Stockart parties, and charging that the defendant Olen B. Squires had a bond on the said Newlon and others for $5,000, which, at the time he left this state he placed in the hands of said Abe Carper, who had collected $300 thereon, and held the same as the money of Olen B. Squires; that afterwards said bond purported to be assigned to one B. F. Carper, and then surrendered, and a new bond executed in consideration thereof to said B. F. Carper by the defendants Farnsworth, Leonard, Newlon, and Stockart, for $5,300, being the amount of the original bond, and one year's accrued interest on same; that both said alleged assignment and the execution of said new bond were simply devices to defraud the plaintiff, and that the obligors in said last-named bond still owed the amount thereof to the said Olen B. Squires, and that the obligors as well as the obligee in said bond had notice of said fraud, and abetted therein. After depositions had been taken by both sides, and the case been matured for hearing, the defendant Olen B. Squires, who had been proceeded against by order of publication, appeared in court, and on April 30, 1887, filed his answer to the plaintiff's bill, to which she replied generally; and on the same day the cause was heard on the merits, and a personal decree entered in favor of the plaintiff against the defendant Olen B. Squires for $1,000, and against the other defendants as garnishees or debtors of the said Olen B. Squires as follows: Against D. S. Squires, $500; against Abe Carper, $300; and against the defendants Farnsworth, Leonard, Newlon, and Stockart jointly, $1,000, with a proviso that the payments by all the said defendants should not exceed the sum of $1,000 and the costs of suit. From this decree all the defendants have appealed.

It is earnestly contended for the appellants that, as the cause of action alleged in the bill is for unliquidated damages for a personal injury, a court of equity has no jurisdiction. This contention, it seems to me, is fully answered by our statute, which declares, in express terms, that the action or suit may be "for the recovery of any claim or debt arising out of contract, or to recover damages for any wrong;" and then provides that "such attachment may be sued out in a court of equity for a debt or claim, legal or equitable." Section 1, c. 106, Code 1887. It is unquestionably true that this statute must be construed strictly, but its language is so direct and positive that it does not admit of construction. It authorizes a suit by attachment in equity to recover damages for any wrong. But it is claimed that the statute is in violation of section 13, art. 3, of our constitution, which declares: "In suits at common law, * * * the right of trial by jury, if required by either party, shall be preserved." It is enough to say, in reply to this claim, that this is not a suit at common law, but a suit in equity. But assuming that the legislature has not the power to deprive a party of the right of trial by jury, by simply changing the form of action, and giving a court of equity jurisdiction over a purely legal demand, the question still remains, does this statute necessarily deprive a party of a trial by jury? We have a statute which provides for a trial by jury in any chancery case, when there is a conflict of evidence "or an inquiry of damages." Sections 4, 5, c. 131, Code 1887. In this case, therefore, the appellants, or either of them, if they had required it, could have had a trial by jury, but none of them asked for such trial. I do not think, therefore, that the aforesaid statute is unconstitutional.

It is further contended for the appellants that the circuit court erred in not sustaining the defense of the statute of limitations. The

Rep. 624. Evidence of seduction under the promise may always be considered in aggravation of damages, for mental suffering, injury to reputation, and loss of virtue, Giese v. Schultz, (Wis.) 10 N. W. Rep. 598; Bennett v. Beam, supra; Bird v. Thompson, (Mo.) 9 S. W. Rep. 788; but not that plaintiff was gotten with child by the seduction, and suffered a miscarriage, Giese v. Schultz, supra, second appeal 27 N. W. Rep. 353. Where defendant alleges plaintiff's unchastity as a defense, and fails to establish it, this aggravates damages. Kelley v. Highfield, (Or.) 14 Pac. Rep. 744.

Digitized by Google

evidence of the plaintiff tends to prove that the marriage contract was entered into on New Year's eve, 1881; that the seduction was in May, 1882, or prior thereto; and that the child was born in February, 1883; and also that the contract of marriage was not broken until some time after February, 1884, the time the defendant Olen B. Squires left the state, and became a non-resident thereof. It is true, the said defendant denies that there was ever any contract of marriage, or that he seduced the plaintiff, or ever had sexual connection with her. This suit was brought in July, 1885, and, as the time the defendant was out of the state must be excluded, it seems to me the cause of action was not barred at the time the suit was commenced. If the defense of the statute of limitations is sustained upon the evidence of the defendant Olen B. Squires, it is wholly immaterial, because the evidence offered by him in support of that defense is simply a denial that the plaintiff ever had any cause of action. As to this latter the testimony is conflicting.

The plaintiff testifies positively that there was a contract of marriage, and consequent seduction, while the defendant Olen B. Squires, with equal positiveness, denies that there ever was such a contract, or that he at any time cohabited with the plaintiff. To say the least of this contradictory testimony, it is fully proven that the plaintiff was in February, 1883, delivered of a child; and the letters written by said defendant to the plaintiff during her pregnancy tend strongly to show that he was, or believed himself to be, the father of the child; and there is other evidence which in some degree corroborates the testimony of the plaintiff, and flatly contradicts that of the said defendant, thus rendering his testimony less credible than that of the plaintiff. Be this, however, as it may, the circuit court having decided that there was a marriage contract, and this decision being founded on depositions, which are so conflicting and unsatisfactory that it is at most conjectural as to which side should prevail, this court will, according to its repeated decisions, decline to disturb the finding of the circuit court. Smith v. Yoke, 27 W. Va. 639; Doonan v. Glynn, 28 W. Va. 715.

It is further insisted that the plaintiff's bill should have been dismissed, because she improperly sued for breach of marriage contract and for seduction. I do not understand this to be the character of the bill. The seduction is not alleged as a cause of action, but simply as an aggravation of damages. The law is well settled that, when seduction has been practiced under color of a promise to marry, in an action or suit for the breach of such promise it is proper to aver and prove the seduction in aggravation of the damages. Sherman v. Rawson, 102 Mass. 395; Sauer v. Schulenberg, 33 Md. 288; Wells v. Padgett, 8 Barb. 323; Kniffen v. McConnell, 30 N. Y. 285.

It is further insisted that the defendant Olen B. Squires was improperly refused a continuance. He had been proceeded against as a non-resident, but after depositions had been taken on both sides, including that of said Squires, and the cause regularly matured and set for hearing, he appeared and filed his answer, in which he avers that he has recently discovered some very material evidence in his behalf bearing upon said pretended contract of marriage, and that in right and justice he is entitled to a continuance of the cause until the next term of the court. But he does not set out any sufficient excuse for not having discovered and taken said testimony, nor does he say by whom he expects to prove it, or what it is. The fatal defect in this assignment of error, however, is that neither the decree nor any order in the record shows that he ever asked for a continuance of the cause. This is a sufficient reason for his not getting one. It is therefore unnecessary in this cause to consider whether or not, if he had moved the court for a continuance under the circumstances disclosed by the record, it would have been error to refuse it.

The only other assignment of error which is of sufficient importance to require notice is that the court erred in pronouncing any decree against the appellants other than Olen B. Squires and D. S. Squires, because no order of attachment was ever sued out or served upon them. In the answer filed by Olen B. Squires he admits that the bond of $5,300, executed to B. F. Carper by the appellants Farnsworth, Leonard, Newlon, and Stockart, had been assigned to him by said Carper, that it was in his possession, and that the money due thereon from said appellants was due to him. The said appellants were all parties to the suit, and the decree directed that, upon the payment of the amount decreed against them, they should have credit therefor upon said bond. It was not necessary in a cause such as this to serve the order of attachment upon said appellants, they being parties to the bill, and having appeared and having answered as such. The decree is certainly not to their prejudice, as there is no pretense that they do not owe the money they are ordered to pay; and as to the appellant Abe Carper, the decree against him being based upon a conflict of testimony and the finding of the circuit court, this court will decline to disturb it. Upon the whole record, I am of opinion that there is no error for which this court can reverse the decree of the circuit court, and it must therefore be affirmed.

GREEN and ENGLISH, JJ., concurred. BRANNON, J., absent.

(32 W. Va. 46)

MILLER v. LITTLE KANAWHA NAV. CO.

(*Supreme Court of Appeals of West Virginia.* Feb. 5, 1889.)

APPEAL—JURISDICTION.

In an action of *assumpsit* by a private corporation, authorized by its charter to levy tolls upon

Digitized by Google

persons using a river which had been improved by it, against the defendant for tolls, the defendant pleaded *non assumpsit*, and there is a judgment for the plaintiff for less than $100. Upon a writ of error by the defendant, *held*, this court has no jurisdiction to review the judgment of the circuit court, although the record shows that the real defense to the action was that the condition of the river was such that the plaintiff had no right to levy the tolls for which the judgment was recovered.

(*Syllabus by the Court.*)

Error to circuit court, Wood county; J. M. JACKSON, Judge.

Civil action by the Little Kanawha Navigation Company against D. M. Miller to recover certain tolls on logs passing plaintiff's dams on the Little Kanawha river, instituted before a justice of the peace of Wood county. The defendant appealed to the circuit court, where judgment was again rendered for plaintiff, and the defendant brings error.

Loomis & Tavenner and *Okey Johnson*, for plaintiff in error. *J. A. Hutchinson* and *J. B. Jackson*, for defendant in error.

SNYDER, P. Writ of error to a judgment of the circuit court of Wood county rendered on December 24, 1887, in an action theretofore commenced by the Little Kanawha Navigation Company against D. M. Miller, before a justice of said county. The claim of the plaintiff was for tolls on 22 log rafts, $66, and for penalty, (double tolls,) $66, making, together, $132. The justice gave the plaintiff judgment for $122, and the defendant, Miller, appealed to the circuit court, where the case was tried upon the issue of *non assumpsit* before a jury, which found a verdict in favor of the plaintiff for $66, for which sum the court, after overruling the motion of the defendant to set aside the verdict, entered judgment; and it is to this judgment that the defendant, Miller, obtained this writ of error.

The first question presented is, has this court jurisdiction of this case? The defendant in error, the Little Kanawha Navigation Company, is a domestic corporation. It was first incorporated by statute in 1863, and was authorized to improve the navigation of the Little Kanawha and Hughes rivers by locks and dams, sluices, canals, or other usual modes of improvement, commencing at or near the mouth of the Little Kanawha river, and extending up the same and Hughes river so far as may be deemed practicable, with power to condemn lands, and to "charge and receive such tolls for the use of their [its] improvement as may be fixed by the board of public works or by law." By an act passed March 4, 1868, the legislature amended the charter of the company, and therein prescribed the specific tolls to be charged by the company, and among others fixed the rate of the toll "on timber and logs at two cents per hundred cubic feet per mile." The facts certified in this case show that said company accepted the said charter, and improved both of the aforesaid rivers; that it had constructed several locks and dams on the Little Kanawha below the mouth of Hughes river, one at Leachtown, 13 miles from the mouth of the Little Kanawha river, and another at Shocktown, 4 miles from the mouth of said river; that these locks and dams were, during the whole month of February, 1887, in good order and condition; that about the 17th day of February, 1887, the defendant, Miller, passed 22 rafts of logs from a point about one mile above the mouth of Hughes river, over said two dams; that the toll on said rafts at the rate the company is authorized to charge was $66, and that this sum was demanded of the defendant, and he refused to pay the same, or to pay any toll whatever on said rafts; at the time said rafts were passed over said dams the back-water from the Ohio river was over the dam at Leachtown, and the lock at that place as well as the one at Shocktown was entirely under water; and that not only rafts, but steam-boats, passed over the dams on that day without touching either locks or dams. The counsel for Miller, in their brief, say: "The question involved is not whether these tolls or lockages were excessive, but whether, at the time they were demanded and *quoad* this transaction, the plaintiff had the right to levy any tolls whatever." This is a correct statement of the only plea or ground of defense made by the defendant in this case. He concedes that if he is not legally entitled to use the river without the payment of tolls when by reason of the high water in the river he can pass over the dams without using the locks, then he is liable for the tolls the plaintiff has charged him, and that the judgment of the circuit court must be affirmed. But, on the other hand, the counsel for the plaintiff contend that the question presented is not whether the plaintiff had the legal right to levy tolls, but whether the defendant owed the amount recovered by the plaintiff in this case, and, the amount recovered being less than $100, this court has no jurisdiction to review the judgment of the circuit court. The third section of article 8 of our constitution declares that the supreme court of appeals "shall have appellate jurisdiction in civil cases, (1) where the matter in controversy, exclusive of costs, is of greater value or amount than $100; (2) in controversies concerning the title or boundaries of land, the probate of wills, the appointment or qualification of a personal representative, guardian, committee, or curator; (3) or concerning a mill, road, way, ferry, or landing; (4) or the right of a corporation or county to levy tolls or taxes; and (5) also in cases of *quo warranto, habeas corpus*," etc. Our statute carrying into effect these provisions is substantially the same as the constitution. Section 1, c. 135, p. 828, Code. As the amount in controversy in this case is less than $100, it is plain that the jurisdiction of this court, if it exists at all, is conferred by that one of the above provisions which declares that it shall have jurisdiction "in controversies concerning the right of a corpora-

Digitized by Google

tion or county to levy tolls or taxes." In order to show that this provision does not confer jurisdiction, the counsel for the defendant in error rely on the following cases: Hutchinson v. Kellam, 3 Munf. 202; Skipwith v. Young, 5 Munf. 276; Hancock v. Railroad Co., 3 Grat. 328; Clark v. Brown, 8 Grat. 549; Umbarger v. Watts, 25 Grat. 167.

The act of 1792, defining the jurisdiction of the supreme court of appeals of Virginia, under which the first two of the above-cited cases were decided, provided that said court should have jurisdiction where "the matter in controversy should be equal in value, exclusive of costs, to $100, or be a freehold or franchise." Under this statute it was decided in Hutchinson v. Kellam, 3 Munf. 202, that, "to give the court of appeals jurisdiction, on the ground that the matter in controversy is a freehold or franchise, the right to the freehold or franchise must be directly the subject of the action, not incidentally or collaterally." This was an action of trespass *quare clausum fregit*, and the record showed that the title or bounds of land was drawn in question, but, as the damages recovered were less than $100, the jurisdiction was denied. CABELL, J., in his opinion, says: "To give this court jurisdiction, the matter in controversy must be equal in value to $100, or must be a freehold or franchise. The action of trespass is one in which damages only are recovered, and, although the title or bounds of land may be incidentally and collaterally brought in question, yet the value of the matter in controversy is, from the very nature of the action, the value of the damages sustained by the trespass; and this, as well where the title or bounds of land may be drawn in question as where they may in no manner be involved in the dispute." This view of the case was concurred in by Judges ROANE and FLEMING. The case of Skipwith v. Young, supra, was an action on the case for injury to the plaintiff's family, and to his adjoining land, occasioned by the erection of a mill and dam by the defendant. It plainly appeared from the pleading in the case that the right of the defendant to erect the mill was drawn in question, but, the damages recovered being less than $100, it was held that the court of appeals had no jurisdiction, although the statute, in express terms, gave such jurisdiction in cases where the matter in controversy was a freehold or franchise, regardless of the amount or value in controversy. BROOKE, J., in his opinion, after reviewing and affirming the principles and decision of the court in Hutchinson v. Kellam, says: "The matter in controversy is that for which the suit is brought, and not that which may or may not come in question. In the case relied on in 3 East, 346, [Outram v. Morewood,] Lord ELLENBOROUGH says the judgment is the fruit of the action, and can only follow the particular right claimed and injury complained of. The injury in the case before the court, I think, is emphatically the matter in controversy, though other matters may have been put in issue, the finding of which by the jury may, if pleaded, estop the party in another action." 5 Munf. 286. And then, adverting to the consequences of so construing the statute as to extend the appellate jurisdiction to cases in which matters were not directly in controversy, but which may have been indirectly drawn in question, the same judge says: "If this court is to take jurisdiction by consequence,—that is, if an appeal will lie here from the indirect decisions of the inferior courts, in which matters may have come in question, though not in controversy between the parties, according to the foregoing exposition of that expression, few cases will escape the jurisdiction of this court." The decision of the court sustained these views of Judge BROOKE. In 1819, after the two foregoing decisions had been rendered, the statute was amended by authorizing appeals as of right in controversies concerning roads, mills, etc., and yet, after this change in the statute, the court in Hancock v. Railroad Co., 3 Grat. 328, decided that "appeals as of right from orders of the county court in controversies concerning roads only exist where the controversy is concerning the establishment of a road, and not where it is a collateral controversy concerning the damages occasioned by a road already established." And subsequently, in 1852, the court, in Clark v. Brown, supra, decided that, "in an action on the case for an injury done to plaintiff's land by the mill dam of the defendant, though the freehold or franchise was drawn in question, yet if the damages found by the jury are under $200 the court of appeals has no jurisdiction of the case." The constitution of Virginia, adopted in 1869, provides that the "supreme court shall not have jurisdiction in civil cases where the matter in controversy, exclusive of costs, is less in value or amount than $500, except in controversies concerning the title or boundaries of land, the probate of a will, * * * or concerning a mill, roadway, ferry, or landing, or the right of a corporation or of a county to levy tolls or taxes," etc. It is plain that the language here employed excepts from the limitation of $500, and allows appeals, without regard to the amount in controversy, in all controversies concerning the title or boundaries of land, and the other excepted controversies mentioned in said provision of the constitution; and yet in the case of Umbarger v. Watts, 25 Grat. 167, decided in 1874 under said constitutional provision, the court reviews all the Virginia cases hereinbefore mentioned, and, in effect, decide that the law as announced in those cases is still the law of that state, notwithstanding the aforesaid constitutional provision. In concluding the opinion of the court in that case, CHRISTIAN, J., says: "In support of these views as to the true construction of the constitution, it may be further observed that not only have the words 'matters in controversy' received a judicial exposition, but also the word 'concerning,' as

Digitized by Google

used in the constitution;" citing Hancock v. Railroad Co., supra.

In Neal v. Com., 21 Grat. 511, the town of Danville assessed Neal with a double tax for failing to take out a license as a commission merchant, and he applied to the corporation court of that town to be relieved from said tax, on the ground that he was not bound to take out such license. The amount of the tax was less than $500, and said court refused to relieve Neal from the tax. On appeal, the supreme court held that the appeal did not lie, and dismissed it, because the amount in controversy was less than $500. In delivering the opinion of the court, MONCURE, P., after deciding that it was a civil, and not a criminal, case, proceeds to quote the provisions of section 2, art. 6, of the constitution of that state, which, among other matters, gives the court of appeals jurisdiction, just as our constitution does, in controversies "concerning the right of a corporation or of a county to levy tolls or taxes," and then says: "Certainly none of these exceptions [that is, these special provisions] apply to these cases;" and with this remark he dismisses the discussion, thus declaring that it is too plain for argument that the constitutional provision "concerning the right of a corporation or of a county to levy tolls or taxes," does not confer jurisdiction. 21 Grat. 515. This court, in Greathouse v. Sapp, 26 W. Va. 87, after reviewing and approving the aforesaid cases of Hutchinson v. Kellam and Skipwith v. Young, as well as referring to many other cases, held: "If, in an action of trespass *quare clausum fregit*, the damages recovered be less than $100, the defendant cannot obtain a writ of error from this court, though it appears from the record that the title or boundaries of the land were drawn in question." This case, it seems to me, decides the question before us. The provision under which the jurisdiction was claimed in this case is that the court shall have jurisdiction in controversies "concerning the title or boundaries of land." If the mere fact that the title to land was drawn in question in the case did not confer jurisdiction, as we decided in that case, it inevitably follows that the mere fact that the right of a corporation to levy tolls is drawn in question in the case at bar will not confer jurisdiction. There are two provisions of the constitution affecting these cases; that is, the language applicable to the one case is, "concerning the title or boundaries of land," and to the other, "concerning the right of a corporation or of a county to levy tolls or taxes." The word "concerning" is used in each class, and must therefore have the same effect in both. If it requires a direct proceeding in the one instance to confer jurisdiction, it must be equally direct in the other to confer jurisdiction; and it having been held, both in this state and in decisions of the supreme court of Virginia, which are binding upon this court, that in order to confer jurisdiction, independently of the amount in controversy, it is not enough that the title or boundaries of land is incidentally or collaterally drawn in question, but that the land must be the direct subject of the controversy, it follows in the case at bar that it is not enough that the right of the corporation to levy tolls is drawn in question, but the right to levy tolls by the corporation must be the direct subject of the controversy. In this case the right of the corporation to levy tolls is not questioned, but it is claimed that this right does not authorize the levy of tolls under the particular facts as shown by the defendant in this case. The only matter in controversy is the amount of the tolls, and not the right to levy tolls. It is true the right to levy tolls under the special facts shown by the record in this case is drawn in question incidentally and collaterally, but the direct purpose of the action is the recovery of a specified amount of money. As, in the instance concerning the title or boundaries of land, the action must be for the land, as in the action of ejectment, so in this instance the action must be against the right to levy tolls in any case, and not merely a denial of the right in the particular case or under the special circumstances. For these reasons, and in accordance with authorities before referred to, I am of opinion that this court has no jurisdiction to review the judgment of the circuit court in this case.

Having decided this question upon the constitutional and statutory provisions of this state as construed by our own court and the court of appeals of Virginia in decisions which are binding upon us, it is irrelevant to refer to the decisions of other states, relied on by counsel for the plaintiff in error to sustain the jurisdiction of this court, because, even if the statutes of those states are the same as our own, still the decisions made under them, if not in accord with our own, would not warrant us in departing from the construction given to our constitution and statutes by our own courts. It is, however, insisted that the only direct proceeding by which the right of a corporation to levy tolls can be put in issue is by *quo warranto*, and, as our constitution in terms gives this court jurisdiction in all cases of *quo warranto*, the provision of the constitution now in question, if the construction we have given it is sustained, would be wholly useless and without effect. It is not necessary or proper to decide in this case whether or not *quo warranto* is the only direct proceeding by which the right of a corporation to levy tolls or taxes can be tested. The courts of this state have, in cases of municipal corporations, taken jurisdiction by injunction in equity to prevent the collection of taxes illegally assessed by such corporations, and that jurisdiction has been maintained by this court in some cases where the amount in controversy was less than $100. McClung v. Livesay, 7 W. Va. 329; Wells v. Board, 20 W. Va. 156; Christie v. Malden, 23 W. Va. 667; Williams v. County Court, 26 W. Va.

Digitized by Google

488. These cases would seem to hold that this court has jurisdiction to review the decrees of the circuit court concerning the right of a municipal or public corporation to levy taxes without regard to the amount in controversy. But in none of them was the question of jurisdiction, in the form it is raised in the case now before us, suggested or considered; so that they are not binding authority either for or against the jurisdiction in this case. I have been unable to find in our Reports or in Virginia any case in which the appellate court took jurisdiction concerning the right of a private or business corporation, like the one now in question, to levy tolls, where the amount in controversy was less than $100, and such right was not the direct matter in issue. But, as before stated, it is not necessary in this case to decide whether or not *quo warranto* is the only proceeding by which the right of a corporation to levy tolls can be directly assailed, or to decide whether or not the provision of our constitution authorizing this court to review matters of controversy concerning the right of corporations to levy tolls or taxes is useless for any purpose; for, if we were driven to the alternative of so holding, that would not justify us in overruling the repeated decisions of the courts of this state and Virginia, made both before and since the adoption of said constitutional provision, and thus settling the law that in a case like the one before us this court has no jurisdiction. I regard the law of this state as too firmly settled by the authorities hereinbefore mentioned to be now disturbed or questioned; and for that reason, as well as the inconvenience that would result from a contrary decision, I am of opinion that this court has no jurisdiction to review the judgment of the circuit court in this case, and that the writ of error must be dismissed.

GREEN, ENGLISH, and BRANNON, JJ., concurred.

(32 W. Va. 134)

CENTRAL LAND CO. v. LAIDLEY *et al.*

(*Supreme Court of Appeals of West Virginia.* Feb. 11, 1889.)

DEED — MARRIED WOMAN — ESTOPPEL — RATIFICATION — POSSESSION.

1. If a deed from husband and wife conveying land of the wife be void as to her because of defective certificate of her examination and acknowledgment, and after the death of her husband she convey the land to another with notice of the former deed, yet the second purchaser will not be affected by such notice, the former deed being void and passing no right, legal or equitable, and the second purchaser does not hold the land as trustee for the first purchaser, and equity will not compel him to convey to the first purchaser, nor will it enjoin the second purchaser from prosecuting an action of ejectment to recover the land from the first purchaser's possession or that of his vendee.

2. Nor will equity refund to the first purchaser or his vendee the consideration paid by the first purchaser by personal decree against second purchaser, or by charging it on the land. The covenant of warranty in the deed binds the woman no further than to pass her land even if valid.

3. Though during coverture the wife bring suit against her husband and others to assert her right to land acquired by her husband in his name with the consideration paid by such first purchaser, reciting in her pleading that she had executed such deed to such first purchaser and received the consideration, and obtained a decree giving her such land, and declaring it her separate estate, that will not estop her, or such second purchaser, from recovering the land from the first purchaser or his vendee.

4. Though in such suit she so recite her former deed, and though she and her husband make a deed to another person for one acre within the bounds of the tract mentioned in the void deed, and which that deed had reserved to her, describing it as the one acre reserved in the void deed, referring to that deed as a deed, yet this is no ratification of such void deed. During coverture she cannot ratify such void deed by mere admissions or recitals or other acts *in pais*, but only by acknowledgment of the void deed, or the execution of another instrument with privy examination, acknowledgment, and recordation, as prescribed by the statute.

5. Where by deed land was conveyed directly to a married woman prior to the Code of 1868, such conveyance did not create in her a separate estate, but the husband became entitled to a freehold estate in the land, which would continue at least during the joint lives of the husband and wife, with remainder in fee to the wife.

6. In such case, if the husband and wife, by a deed void as to her, for want of a proper certificate of her examination and acknowledgment, convey the land to a party, and put him in possession, such purchaser is entitled to hold that possession until the death of the husband, and the wife or her heirs, or any one claiming under them, have no right of entry until the husband's death, and right of action does not accrue to them, nor does the statute of limitations run against them, until his death.

(*Syllabus by the Court.*)

Appeal from circuit court, Summers county; HOMER A. HOLT, Judge.

Bill by the Central Land Company, a corporation, against John B. Laidley and others, to declare said Laidley a trustee for the benefit of complainant of certain land in Cabell county, W. Va., to enjoin him from prosecuting an action of ejectment therefor, and for other relief. The suit was brought in the circuit court of Cabell county, but transferred to Summers county, where the bill was dismissed on the hearing. Complainants appeal.

J. H. Ferguson and *Simms & Enslow*, for appellant. *Brown & Jackson* and *J. B. Laidley, in pro. per.*, for appellee Laidley.

BRANNON, J. By deed dated 18th August, 1865, Rebecca J Everett conveyed to Sarah H. G. Pennybacker, then a married woman, 240 acres of land, now within the city of Huntington. By a deed dated 25th February, 1870, Sarah H. G. Pennybacker and her husband, John M., united in a deed purporting to convey said land to C. P. Huntington; and by deed dated 16th October, 1871, Huntington conveyed it to the Central Land Company. Huntington took possession, and after him the Central Land Company, and it laid off a large part into lots, streets, and alleys, sold many lots, and buildings have been erected thereon. Mrs. Pennybacker's husband died 5th May, 1881, and she by deed dated 26th January, 1882, conveyed said land to John B. Laidley, who had full notice of

Digitized by Google

said deed to Huntington when he took his conveyance. In March, 1882, Laidley brought an action of ejectment against the Central Land Company and others, to recover this land, and on its trial there were a verdict and judgment for defendants. Upon a writ of error to said judgment it was reversed, and the action of ejectment was remanded for retrial to the circuit court of Cabell county, where it is now pending. On the decision by this court of the writ of error, as will be seen from the case of Laidley v. Land Co., 30 W. Va. 505, 4 S. E. Rep. 705, the said deed from Mrs. Pennybacker and her husband to Huntington was held void, because of defect of the certificate of the privy examination and acknowledgment of Mrs. Pennybacker. Pending said writ of error, the Central Land Company brought a chancery suit against Laidley and others, alleging the facts above stated; and, further, that Laidley procured his deed from Mrs. Pennybacker by misrepresenting to her that she was conveying a dower only, and had paid only $500 for it, whereas Huntington had paid $11,000, and the land was worth at date of Laidley's deed $30,000; and that it had sold divers lots to the Chesapeake & Ohio Railroad Company and others, who had built railroad tracks and houses thereon, and relying on adverse possession from the date of the deed to Huntington; and that Laidley when he took his deed had full knowledge of the deed from Pennybacker to Huntington, and from Huntington to the land company, and of the sales of said lots. It further alleged that, in 1872, Mrs. Pennybacker brought a chancery suit against her husband and others, in which she stated that she had, on payment to her of $11,000 consideration, conveyed the land to Huntington, that it was her separate estate, and that her husband had agreed to invest it in other land for her, but had wrongfully invested it in his own name in two farms, and seeking to have those farms declared her separate estate and conveyed to her; and that a decree had been rendered in said suit declaring her entitled to one of those farms,—the Noel farm,—by reason of the investment therein of money arising from said sale of her land to Huntington; and alleging that she and her husband had made a deed to one Parsons, duly acknowledged, conveying one acre which, in the deed to Huntington, she had reserved, and that in said Parsons deed she recognized the Huntington deed in describing the one acre by the language, "and more particularly described in a deed of the party of the first part to C. P. Huntington." The bill contended that by reason of said deeds, and the plaintiff's claim and possession of said land, and the claim of Mrs. Pennybacker through said chancery suit and decree therein, recognizing said sale to Huntington, and obtaining the benefit of its proceeds, and her recognition of the conveyance to Huntington in her deed to Parsons, and the knowledge on the part of Laidley of all the rights of all these parties when he took his deed, the said land company had good title, which was beclouded and disquieted by Laidley's claim and action of ejectment. It appeared that Mrs. Pennybacker had later suffered losses, and was insolvent, and her husband's estate likewise, and not good for the warranty in said deed. The bill claimed that Laidley held under his conveyance from Mrs. Pennybacker as trustee for the land company and others owning parcels of the land under it; and it prayed that he be required to convey said lands to them, and be enjoined from prosecuting said action of ejectment, and other actions which Laidley had instituted against vendees of said company; or, if such relief could not be had, that Laidley be required to refund the $11,000 which Huntington had paid Mrs. Pennybacker for the land, and the land charged with it.

Laidley filed an answer maintaining that, by the deed from Pennybacker and wife, John M. Pennybacker passed only a life-estate to Huntington, as the deed from Everett to Mrs. Pennybacker invested him with a life-estate, and her with a remainder in fee, and that Mrs. Pennybacker by the deed to Huntington did not convey her estate to him, and denied that she received the $11,000 consideration from Huntington, but that her husband received and squandered it. He denies that he represented to her that she had only a dower, but told her her deed to Huntington was void, and she could recover a fee-simple. He denies all right of the plaintiff, and contends that he is not to be deemed a trustee holding the title for the company, and in all respects relied on his title, and resisted at length the entire claim of the plaintiff. The plaintiff filed an amended and supplemental bill setting up the sales of other parcels of land to other parties, and stating that since the filing of the original bill said writ of error had been determined, reversing said judgment in ejectment, and granting a new trial, and alleging over again substantially the facts stated in the original bill, claiming the plaintiff had superior equity, while Laidley held the legal title, and praying the same relief as prayed for in the original bill. Laidley answered, contesting the plaintiff's case from first to last, alleging that the deed to Huntington had been held void by the supreme court, asserting his title, and insisting that the plaintiff's title was void. Mrs. Pennybacker filed demurrers to both bills, assigning various grounds. Laidley also filed demurrers to both bills, specifying various grounds. Voluminous depositions were taken by both sides. On the hearing, the bills were dismissed, and plaintiff took the appeal which we now decide.

This is a very important cause, involving the right to a large part of the growing city of Huntington. The deed from Pennybacker and wife to Huntington has been held by this court void as to the fee, because of defects in the certificate of the examination and acknowledgment of Mrs. Pennybacker. We must, in deciding this cause, start on our

Digitized by Google

road with that fact settled, and follow the logical, legal sequences, lead where they may. A line of decisions by this court holds that a married woman's deed with such defective certificate is not merely voidable, but utterly void *ab initio*. No power can now change this rule but that of the legislature. This paper, though it has the form and semblance of a deed, is no deed in law as to Mrs. Pennybacker, and as to her passed no title whatever,—not a shadow of title,—either legal or equitable, to Huntington; and, in the language of the Maryland court in Johns v. Reardon, 11 Md. 465, is to be dealt with as though Mrs. Pennybacker were no party to it. Therefore title remained in her notwithstanding said deed, and she could and did pass it to Laidley by her subsequent deed to him. Plaintiff admits that Laidley has the legal title, but contends that it has the equitable title, and that Laidley, taking his deed with knowledge of its rights, is in equity but a trustee holding title for the plaintiff's benefit, and should be compelled to convey to it. But the trouble that faces this position is that Huntington's deed, being void, conferred no title on him, and his vendee has no shadow of title which the law can see. To affect a second purchaser with a first purchaser's right, that first purchaser must have a right known to the law, valid and enforceable; not one void, unknown to the law, and outside of its recognition. How can he notice what does not exist,—a mere nonentity? Some right may exist *in foro conscientia* but the *forum legis* knows it not. The statute is intended to protect the woman, to enable her to retain her estate, unless she convey it in the mode by it prescribed; but what good would her estate do her if she could not, after such void deed, sell it? Under this argument, she could not sell it, for whoso would buy it would be affected with a trust for the first vendee. This would defeat the statute. The statute would thus in one breath say to her, "You shall not convey unless you convey in a certain mode," and in the next, "As you have conveyed, though not in the mode prescribed, you shall never hereafter sell to another." This would be a gross inconsistency. In the case of a married woman's void conveyance, (Mattox v. Hightshue, 89 Ind. 95,) it was held that "a right in equity cannot grow out of an illegal and void transaction." Mustard v. Wohlford, 15 Grat. 329, was a case where an infant sold land by title-bond to Mustard, and later, when of age, sold the same land by title-bond to Wohlford, with notice of the sale to Mustard, and later conveyed it to Mustard pursuant to his sale to him; Mustard having notice of the sale to Wohlford. Wohlford sued Mustard and the vendor to cancel Mustard's deed, and get title to himself, and succeeded. The court held that, if an infant convey land, he may convey to another when of age, and his deed will avoid the first conveyance; and that the disaffirmance of the first sale by the second sale after the infant has become adult rendered the first sale void, and extinguishes any interest in law or equity which the first purchaser may have acquired under it, and entitles the vendor or second purchaser in his name to recover possession of the land at law, and hold it free from any equity of the first purchaser. That case logically by analogy rules this case. An infant's conveyance is not void, but voidable, whereas a married woman's deed, without proper certificate, is void at the start. If a man may purchase the infant's land after he becomes of age, with notice of a prior sale to another during infancy, vesting the first purchaser with title until avoided, and the second purchaser takes a better title than the first, and call on equity to enforce his right by taking from the first purchaser his legal title, acquired after the infant obtained his majority pursuant to his sale in infancy, why cannot much more a second purchaser from a married woman acquire a better title than one who took from her a deed not voidable, but void at the instant of its execution? As Judge AGNEW said in Glidden v. Strupler, 52 Pa. St. 402, in speaking of a married woman's void deed: "Equity cannot breathe life into a legal nonentity." 1 Story, Eq. Jur. § 177, says, of married women's void acts: "Equity must follow the law, be the consideration ever so meritorious." Such void deed cannot be void in a court of law, and valid in a court of equity, for the statute binds both. "What immunity or protection would she have from her incapacity to alienate her property, if it could be removed by changing the form of action from law to equity?" asks Judge AGNEW in Glidden v. Strupler, cited above. And so the plaintiff's appeal to a court of equity from a court of law must be vain, for the iron rule of the statute in question binds both courts with its imperative power.

Another point is made by the able counsel of the plaintiff, based on the idea of estoppel; the argument being that, as she received the money under the sale to Huntington, and used it, and some of it having been paid for a farm in her husband's name, which she followed it up by suit, and secured and enjoys the farm, she cannot repudiate her conveyance to Huntington. The statute was meant for her protection. Were she herself suing for her land, would any one question her right to recover? To forbid her would be a virtual repeal of the statute by the court. Had she sealed and delivered the deed and received the money, and there were no appearance of a certificate of acknowledgment, would she not recover it? To forbid her would deny her the protection the common law and statute afford her. What is the difference between the two cases? This estoppel is based solely on or arises solely from the void deed, and is to bar a married woman. Herm. Estop. § 1099, says: "When an agreement is void for infancy or coverture, an estoppel founded solely on it must be equally void. The law throws its protection around infants

Digitized by Google

and *femes covert*, and they cannot be made liable to contract by their own representations." The supreme court of Indiana, in Mattox v. Hightshue, 39 Ind. 95, concerning a married woman's void deed, says "A party can never be estopped by an act that is illegal and void." In Glidden v. Strupler, cited above, Judge AGNEW says: "The next point is that of estoppel. If, through the administration of equity, we can produce a result which the law denies *ab initio* on grounds of public policy, then estoppel or compensation, its equitable equivalent, does what the law and policy have forbidden. But we have seen that in such a case equity does not overturn, but follows, the law." If Mrs. Pennybacker would not herself be estopped, neither would Laidley. In purchasing, he did no wrong in the eye of the law. He but purchased from her an estate which it was lawful for her to convey, and stands in her shoes, invested with all her rights. Rogers v. Higgins, 48 Ill. 211.

Again, it is said that in the suit of Pennybacker against her husband and others, wherein she referred to the deed to Huntington, and claimed the money as her separate estate, and sought its proceeds, and by her reference in her deed to Parsons to the deed to Huntington, she recognizes that deed, and ratifies it. So it was contended in Leftwich v. Neal, 7 W. Va. 569, that letters of the married woman and other evidence tending to show that she admitted the validity of the deed should be considered. Judge PAULL said: "We think the testimony wholly inadmissible for the purpose." He cited Elliott v. Peirsol, 1 Pet. 328, quoting from the case the language: "What the law requires to be done and appear of record can only be done and made to appear by the record itself." He quoted from Barnett v. Shackleford, 6 J. J Marsh, 532: "Parol evidence is not sufficient. It can only be proyed by the record. If parol evidence should be admitted to establish it, then an acknowledgment by a *feme covert* before witnesses *in pais* would be as good as an acknowledgment before the officer designated by law, and making up a record thereof in the manner prescribed, and thus the guarded provisions of our statutes might be substituted by a new branch of equity jurisdiction." In Glidden v. Strupler, supra, it is held that, "the contract of a married woman being void, it cannot be ratified unless by deed in the mode described by the statute."

The claim of plaintiff to compel Laidley by a charge on the land to repay the $11,000 purchase money paid by Huntington cannot be sustained. Laidley was not a party to the deed from the Pennybackers to Huntington, and the claim is purely a personal demand, and only against the husband of Mrs. Pennybacker; and as Huntington's deed was void, and he thereby acquired no interest in or concerning the land, his payment does not attach to the land, or follow it into Laidley's hands. Mustard v. Wohlford, 15 Grat. 329. Were the deed even valid, the covenant of warranty would not avail against Mrs. Pennybacker, as by section 6, c. 73, Code 1887, such covenant binds the woman no further than to pass her land. It could not charge the land, for that would measurably defeat the object of the law, declaring her deed not conforming to the statute void, and yet incumbering it with the purchase money. She could not by deed of trust charge it without privy examination, yet under this theory she can indirectly incumber it to its full value, by charging it with the purchase money received under a void sale. Out of an act utterly void, equity is to give birth to a lien that will sweep away her land, and thus indirectly do just what the act meant should not be done. In Scott v. Battle, 85 N. C. 185, it was held that the married woman's conveyance was a nullity, and the vendee had no lien on the land for purchase money, and no right of action against the woman personally. The court, after showing why the deed was void by reason of the acknowledgment not conforming to the act, added: "It would seem that the same reasoning must be a full answer to the defendant's demand for the restoration of the purchase money. * * * In no case will the law imply a promise on her part, and any one who deals with her is held to do so with a knowledge of her disability."

As to the claim of adversary possession under the statute of limitations, this court held that the deed from Pennybacker and wife to Huntington, having been made prior to the enactment of the Code of 1868, containing section 3 of chapter 66, did not confer on Mrs. Pennybacker a separate estate, but conferred on her husband a freehold estate, which would continue during the joint lives of husband and wife, with remainder to her. Huntington, by the deed to him, became vested with the freehold life-estate of the husband of Mrs. Pennybacker, and he and his vendees had right to possession as long as her husband lived, and she or Laidley had no right to that possession until his death, and therefore she or Laidley could not demand or sue for the land until his death, which occurred May 5, 1881. Thus her right of action did not accrue until then, and the ejectment was brought 28th March, 1882. The action is not barred. Bolling v. Teel, 76 Va. 487; Wood, Lim. 527, 528; 1 Rob. Pr. 508–510; Tyler, Ej. 923, 946; 3 Washb. Real Prop. 132, 133; Ball v. Johnson, 8 Grat. 285; Merrit v. Smith, 6 Leigh, 493. The case of Shivers v. Simmons, 54 Miss. 520, is greatly relied on by the appellant. The syllabus is: "A married woman who, on exchanging lands, received a perfect deed, but gave one the certificate of acknowledgment to which was fatally defective, is estopped, when nine years thereafter the defect is discovered, to assert her title, if she has sold the lands received, and with the proceeds purchased others." This was a case of exchange, it may be noted. The judge delivering the opinion says: "We do not say that a mere

Digitized by Google

reception of the purchase money would estop her where she has attempted to convey by an invalid deed, though it seems difficult to see how the purchaser's title is void in the one case, and not in the other. It is true, on the other hand, that a man who has made a conveyance wholly inoperative under the statute of frauds will not always be estopped by a reception of the purchase money, and that the remedy of the vendee ordinarily is by an action for its recovery. But that is not the case before us. Mrs. Shivers bargained for an exchange of lands with the appellee." So, according to that court, that case is not exactly in point here. The case of Warner v. Sickles, Wright, 81, is also urged by the appellant, wherein there was a sale of land by a married woman, who afterwards conveyed it to a third person, with notice of the first sale, and the second purchaser was held to hold for the first purchaser, and was decreed to convey to him. The court thought the title-bond of the *feme* void, and that it could not be enforced against her or her heirs, yet said she had no interest to protect, but had conveyed to a third person, and for that reason held that third person a trustee. How the instrument could be utterly void as to the *feme* and her heirs, and not enforceable against them, and yet valid against one who purchased from her by proper deed, and became vested with her estate, I cannot see. The conclusion seems illogical. We do not think these cases propound the law correctly, and we cannot follow them. As to the charge that Laidley obtained his deed by misrepresentation and fraud, and for inadequate price, we express no opinion as to that matter, for the Central Land Company, having no interest in the estate by reason of the void deed, cannot avail itself of such misrepresentation, fraud, and inadequacy, if that allegation were ever so well sustained.

The decree of the circuit court of Summers county is affirmed, with costs to appellee.

SNYDER, P., and GREEN and ENGLISH, JJ., concur.

(32 W. Va. 119)

COFFMAN *et al.* v. HEDRICK *et al.*

(*Supreme Court of Appeals of West Virginia.* Feb. 11, 1889.)

WILLS — UNDUE INFLUENCE — WITNESS — EQUITY — APPEAL.

1. The direction and trial of the issue of *devisavit vel non* is a proceeding under our statute to impeach or establish a will after a sentence or order made by the county court, or by its clerk and confirmed by the county court; but it is not an appellate proceeding, and the circuit court in such a proceeding does not pass upon the regularity or irregularity of the proceedings to probate said will before the clerk or county court.

2. Upon a bill in chancery to contest the validity of a will which has been admitted to probate, the functions of the suit are exhausted when that question is decided.

3. One of the attesting witnesses to a will, who is a brother to the party who is claimed to have made the will in controversy, and who is introduced by the contestees to prove the execution of the paper in the absence of the other subscribing witness, who cannot be found, after diligent inquiry, although said witness so introduced is a party to the suit brought to impeach the validity of said will, and would inherit a portion of the property devised in the absence of said will, yet, if he is unprovided for in said will, he is not incompetent, under section 28, c. 130, of the Code of West Virginia, to testify in support of said will as to its proper execution.

4. Where a party is shown to have mental capacity sufficient to make a will, in the absence of fraud or undue influence, the validity of the will cannot be impeached, however unreasonable or unaccountable it may seem to others.

5. Upon the trial of an issue of *devisavit vel non*, undue influence, in order to overthrow the will, must not only be alleged, but it must be proven by the contestants; it will not be inferred.

6. Instructions which are not based upon or applicable to the facts proven in the case should not be given to the jury, although they may be correct as abstract principles of law.

(*Syllabus by the Court.*)

Appeal from circuit court, Greenbrier county.

Bill by Mason D. Coffman and another against David Hedrick and others. Complainants appeal.

J. W. Davis and *J. W. Harris*, for appellants. *R. F. Dennis* and *J. A. Preston*, for appellees.

ENGLISH, J. This was a bill filed by Mason D. Coffman and David Coffman, Sr., and Rebecca, his wife, in the circuit court of Greenbrier county against David Hedrick and others, heirs at law of John Hedrick, deceased, contesting the validity of a paper purporting to be the last will and testament of John Hedrick, deceased, which appears to have been probated by the clerk of the county court of said county on the 14th day of July, 1885, and, on the 15th day of August, 1885, the county court of said county made an order confirming the action of said clerk in admitting said paper writing to probate as the last will and testament of said John Hedrick. Section 26, c. 77, Code 1887, provides as follows: "The clerk of any county court, during the recess of the regular session of said court, may admit wills to record upon the same proof, and with like effect, as the said county court could do in session, but no contest as to such probate or record shall be heard or determined by the clerk. * * * The probate of every will so made by such clerk shall be reported by him to the next regular session of the county court, when, if no objection be made thereto, and none appear to the court, the court shall confirm the same; but, if objection be made by any person interested, the court shall hear and determine the same," etc. Section 29 of the same chapter provides, that any person feeling himself aggrieved by an order or sentence of the county court confirming or refusing to confirm the action of the clerk of the county court as to the probate of any will, or in admitting or refusing to admit any will to probate, may within one year, or, if such person be under disability, within one year after such disability is removed, file his petition to the circuit court, and appeal

Digitized by Google

to said court from such order or sentence in the manner in said section prescribed; and said section also provides that "the clerk of the circuit court shall, upon the filing of such petition, issue the proper process thereon, and the case shall be proceeded in, tried, and determined in said court regardless of the proceedings before the county court or clerk thereof, and in the same manner in all respects as if the application for such probate had been originally made to the circuit court." Section 31 of said chapter provides that "every such order or sentence of a county court not appealed from, and every such order or sentence of the circuit court on such appeal, shall be a bar to a bill in equity to impeach or establish such will, unless on such grounds as would give to a court of equity jurisdiction over other judgments at law." This proceeding, however, was under the thirty-second section of said chapter, which provides that, "after a sentence or order made as aforesaid, a person interested, who was not a party to the proceeding, may within five years proceed by bill in equity to impeach or establish the will, on which bill, if required by either party, a trial by jury shall be ordered," etc., to determine the issue of *devisavit vel non*.

The appellants devote a considerable portion of their briefs to the discussion of the question as to whether the clerk of the county court has power to admit a will to probate in an *ex parte* proceeding, and, referring to section 31 of said chapter, which provides that every such order or sentence of a county court not appealed from shall be a bar to further proceedings, appellants' counsel asks: "How could one appeal unless he had been made a party before the county court?" This question is answered by reference to section 28 of said chapter, which shows that the parties interested must be convened when the original application is made directly to the county court. Section 26 provides that a petition must be filed before said court by any person desiring the probate of a will. When a will is presented before a clerk for proof no petition or process is required by the statute, and the action of the clerk will be confirmed by the county court without process or convention of the parties, if no objection be made thereto, and none appear to the court. Section 29 provides for an appeal from such order or sentence by any person feeling himself aggrieved by any order or sentence of the county court confirming or refusing to confirm the action of the clerk of the county court as to the probate of any will, and directs how such appeal must be taken; that the clerk shall issue process, and that the case shall be proceeded in, tried, and determined in said court, regardless of the proceedings before the county court or clerk thereof, and in the same manner in all respects as if the application for such probate had been originally made in the circuit court. If, then, the appellants in this case were aggrieved by errors committed by the clerk of the county court, or by the county court itself, in proceedings taken by either in the probate of the will in controversy, they had a plain, complete, and adequate remedy by appeal to the circuit court in the manner prescribed by statute; and, while the statute seems clear that when a will is presented to the clerk of the county court during the recess of the regular sessions of said court for probate, the proceeding is *ex parte;* and when a will is sought to be proved before the county court it must be done upon petition, and the persons interested must be convened, and when an order or sentence is made upon such proceedings before the county court it is final, unless appealed from as provided in the twenty-ninth section aforesaid,—yet in the proceedings now presented to this court on appeal, I am of opinion that the question as to the regularity or irregularity of the proceedings before the said clerk or county court is not material. It will be perceived that section 32, which provides for directing the issuing of *devisavit vel non*, commences as follows: "After a sentence or order made as aforesaid, a person interested, who was not a party to the proceeding, may within five years proceed by bill in equity to impeach or establish the will," etc., and, if no bill be filed within that time, the sentence shall be forever binding. And whether the order or sentence of the clerk of the county court and the order of the county court confirming the same were right or wrong, regular or irregular, it appears that an order was made by the clerk admitting said will to record, and the county court confirmed his action. These proceedings might have been appealed from by any person feeling himself aggrieved within one year, but it was not done, and the case is now presented to this court upon an appeal, not from the action of said clerk or county court, but from the rulings of the circuit court upon the trial of the issue out of chancery, directed in this cause; and the words of the order directing the issue plainly indicate that the trial is independent of any former action.

The first error assigned by the appellants, and contended for by them, is that David Hedrick, the brother of John Hedrick, who subscribed the paper purporting to be the will of said John Hedrick as one of the witnesses thereto, and who qualified as his administrator with the will annexed, was not a competent witness to prove the execution of said will under section 23, c. 130, Code 1887, because he is the administrator with the will annexed, and the bill prays that he may be required to settle his administration accounts before the commissioner of the court, (although he is not made party to the suit as administrator;) and, if he was, his administration accounts could not be settled in this suit; neither could the lands of said John Hedrick be sold, and the proceeds be divided among his heirs according to their respective

Digitized by Google

rights, as prayed; nor could the creditors of said John Hedrick be convened, as prayed for; and, after the payment of their debts, the surplus proceeds of the personal property could not be distributed among the heirs at law of John Hedrick, deceased. In the case of Dower v. Church, 21 W. Va. 23, this court held: "Upon a bill in chancery to contest the validity of a will which has been regularly admitted to probate the functions of the suit are exhausted when that question is decided; and if the will is declared invalid and null, it is not competent for the court to proceed in that cause further." No action then could be asked or enforced against said David Hedrick in this case. His evidence seems to have been in favor of the establishment of the will, while his interest would seem to lie in the other direction; for if the will is sustained he receives nothing, and if it is set aside he becomes one of the distributees of his brother's estate. It is, however, contended that because the will in controversy devises the property to the children and grandchildren of said David Hedrick that he is testifying in his own behalf, when his evidence tends to sustain the will. In the case of Seabright v. Seabright, 28 W. Va. 415, it was held that the word "against," as testifying against executors, administrators, heirs at law, etc., does not mean on opposite sides of a suit, but as having opposite interests in the suit. Under the head of "Competency of Witnesses to Will" (Code 1887, p. 642, c. 77, § 18) we find the following language: "If a will be attested by a person to whom or to whose wife or husband any beneficial interest in any estate is thereby devised or bequeathed, if the will may not be otherwise proved, such person shall be deemed a competent witness." Surely, then, David Hedrick would be no more incompetent when the property is devised to his children and grandchildren than he would be if such property were devised to himself; and by section 20 of the same chapter the fact of his being an executor would not disqualify him, and an administrator with the will annexed would occupy almost precisely the same attitude. Again, could the execution of the will of said John Hedrick have been otherwise proven than by admitting the evidence of said David Hedrick? It would seem not. He was one of the subscribing witnesses, and the other subscribing witness was absent, in some one of the western states, and his whereabouts could not be ascertained after diligent inquiry, and it does not appear that any other persons were present at the time said paper was executed besides said John Hedrick and the two subscribing witnesses; and under these circumstances the evidence of said David Hedrick was absolutely necessary to prove the execution of said paper writing, and his testimony was admissible under the statute. Was said David Hedrick a competent witness to prove the execution of said writing, under section 23 of chapter 130 of the Code of West Virginia? In the case of Kerr v. Lunsford, 8 S. E. Rep. 493, (31 W. Va. 659, pt. 4 of syllabus,) it was held: "One who would inherit a part of the testator's property but for the will, is, under section 23 of chapter 130 of the Code of West Virginia, incompetent to speak of the testator's capacity to make the will." In that case, it seems, however, that Thomas Lunsford, one of the children and heirs at law of the testator, was asked his opinion of the mental condition of the testator, and it was held that the court below properly refused to permit the question to be answered, holding that under the statute he was incompetent to speak on that subject, referring to Anderson v. Cranmer, 11 W. Va. 562. In that case, however, the witnesses were sworn in their own behalf, and it was held that such witnesses were incompetent to give any opinions as to the grantor's sanity based on any transactions or conversations had with him personally at that or any other time. In the case of Kerr v. Lunsford, supra, Thomas Lunsford, the witness who was questioned in regard to the mental capacity of his father, whose will was being contested, was left nothing by the will, but the entire estate was devised to the mother of witness, and his sisters or their children; and he was called as a witness by those contesting the will to testify as to the mental capacity of his deceased father, and was objected to by the proponents of the will, and the objection was very properly sustained. In that case he would not have been called by the contestants if his opinion had been favorable to the devisees under the will upon the question of the mental capacity of his father; and if he had been allowed to testify he would have been testifying in his own behalf, and against the devisees under the will. In the case under consideration, however, the witness, David Hedrick, was called by the proponents of the will, and the evidence given by him, which the circuit court was asked to exclude from the jury, was in support of the will and directly opposed to his own interests. In the case of McMechen v. McMechen, 17 W. Va. 692, this court holds that under the statute a witness is not prevented from giving evidence against his own interest, because there can be no inducement to a witness to swear falsely, to prevent which and its consequences to other parties is the object of the statute. Again, when the statute speaks of transactions or communication had personally with a deceased person, can it be that such a transaction as the attestation of a will was contemplated, or must it not be such a transaction or communication as the witness would derive some advantage or benefit from; some transaction or communication in reference to which the testimony of the witness would confer on him an advantage, pecuniary or otherwise, over the estate of the deceased, which could not be obtained if said decedent was in life, and had an opportunity to be heard in contradiction of the testimony?

Digitized by Google

David Hedrick's testimony is as follows: "I signed that will at my brother John's request, and George Raynes signed at the same time, at the request of my brother, and we were all three present at the time each signed." And again, "that said testator, just before he signed the will, read it over, and said that it was just as he wanted it." I do not think this testimony disclosed any such transaction or communication as was contemplated by the statute to disqualify the witness. So far from the evidence conferring any advantage in his favor against the estate of John Hedrick, but for this will, witness would have inherited one-fourth of the estate, and under the directions of the will he gets nothing. And the other evidence in the cause shows that the provisions of the will are in accordance with the previous declared intentions of the testator, which would indicate that he would have no disposition to contradict the testimony of said David Hedrick if he was in life, and had an opportunity to do so. In the case of McMechen v. McMechen, 17 W. Va. 692, the court uses the following language: "Mrs. McMechen declining to renounce the will, moving for the appointment of an administrator with the will annexed, and the will itself providing so liberally for her, as the evidence shows, convinces my mind that it was her individual interest to have the will sustained; her evidence, therefore, was not in her own behalf, but against her interest. It is no answer to say that her evidence was in favor of her children. That is not prohibited by the statute, but expressly allowed, notwithstanding the witness may be interested in the suit." In this case David Hedrick, in testifying in opposition to his own interest, seems to have been testifying in behalf of his children, which he had a perfect right to do.

The competency of Ann Hedrick, the wife of David Hedrick, is also brought in question by the third assignment of error. It appears from her evidence that she was the second wife of said David Hedrick, and had no children. She it was who drew the will for said John Hedrick on the 27th or 28th of April, 1885, at his request, and in his presence; and after she had written it he said it was just what he wanted; that said will so written by her was the one taken by her husband to Mr. Spotts, to be copied, and, when so copied, was afterwards signed by said John Hedrick. She states that she and her husband went to said John Hedrick's on the 5th of June, and that she remained there until the evening of the 6th; that she was there at the time the will was made, but was not in the room, or present, when it was signed; that said John Hedrick's mind was as clear on the 6th day of June as it ever was, and that he was as capable of making a will on that day as he ever was. The reason assigned for excluding her testimony is that she is the wife of David Hedrick, and that, if he is incompetent, she must be also. This witness is not interested in the establishment of the will, because neither she nor her husband are devised anything by the will. She is a stepmother to some of the devisees, and, so far as her testimony might be swayed by her interest, it would be natural to expect her inclinations would be against the establishment of the will. I can see no legal objection to the evidence detailed by either David Hedrick or his wife.

The will of said John Hedrick is attacked by the plaintiffs, first, because it was not written by him, or signed and acknowledged by him in the manner prescribed by law, or in such manner as to make the paper writing his will; and on the ground of alleged mental incapacity at the time said paper was signed by him; and on the further ground that if he ever gave any sort of assent to the provisions of said paper that it was through the procurement and by undue influence of the defendant David Hedrick and his wife. As to the first ground of objection to the will the Code (page 639, § 3) provides that "no will shall be valid unless it be in writing, and signed by the testator, or some other person in his presence, and by his direction, in such manner as to make it manifest that the name is intended as a signature." In the case of Webb v. Dye, 18 W. Va. 376, the court holds that a will must be subscribed by two attesting witnesses, but need not be proven by both of them; and although the witness Raynes was absent, and did not appear to testify before the jury in this case, yet David Hedrick swears positively that he signed that will at his brother John's request, and in his presence, and in the presence of said Raynes; that they were all three present at the time each signed; that when said Raynes went to sign the will as a witness he said he thought he ought to know what was in the paper before he signed it, and John Hedrick said, "that is none of your business." In the case of Webb v. Dye, supra, Judge JOHNSON, in his opinion, collates the authorities, citing several from Virginia and from other states bearing upon the question of the proper execution of a will, and, among others, the case of Cheatham v. Hatcher, 30 Grat. 56, holding that a will must be subscribed, but need not be proven by two attesting witnesses. Also, Jesse v. Parker's Adm'rs, 6 Grat. 57. In that case it seems one Dr. Tully wrote the will, signed the name of the testator to it, and also signed the names of himself, Jane Sanderson, and Sally C. Southall, as attesting witnesses to the will. Upon an issue of *devisavit vel non* the jury found in favor of the will. There was a motion to set aside the verdict, and grant a new trial, which was overruled in the court below. ALLEN, J., speaking for the whole court, said: "The court is of opinion that as the jury were the proper judges of the weight and credit due to the testimony of the witnesses, the verdict in favor of the will, sanctioned by the opinion of the court before which a trial of the issue was had, has concluded all mere questions of fact depending upon the credit to be given to

Digitized by Google

the witnesses. The court is therefore of opinion that upon this record it must be taken that all the requirements of the statute in order to establish a will were satisfactorily proved." In the case of Dudleys v. Dudleys, 3 Leigh, 436, it appeared that upon a question of probate the testimony of one of the attesting witnesses was contradicted by another. The county and circuit courts both gave credit to the witness for the will. On appeal from the sentence of probate it was held that the court of appeals, on a mere question of credibility of witnesses, will always presume that the inferior courts, which saw and heard the witnesses examined, decided correctly.

Upon the question as to the mental capacity of said John Hedrick on the 6th day of June, 1885, to make a valid will, we have the testimony of Mrs. Ann Hedrick, who says she drew the will at the request of said John Hedrick, and in his presence, who said it was just what he wanted; that the will written by her was the one her husband took to Mr. Spotts to be copied, and, after being so copied by Spotts, is the one in contest; that she was not in the room when the will was signed, but that said John Hedrick's mind was as clear on the 6th of June as it ever was, and he was as capable of making a will on that day as he ever was. This witness was not a party to this suit; neither would she have inherited anything if the will was held to be invalid. Dr. J. B. Spicer, a witness for the contestees, stated that he knew said John Hedrick since 1873; saw him on June 2, 1885; called to see him professionally; that said Hedrick knew him as soon as he saw him; that he found said Hedrick suffering from diseased liver, want of appetite, a bronchial affection, and weakness; that his mind was as clear as he ever saw it; that he conversed rationally, and was, in the opinion of witness, as competent to make a will as he ever was in his life; that he saw him again on the 19th of June, 1885, and found him more feeble in body, but entirely in his right mind, and competent to make a will; saw him again on the 23d of June, when he was still more weak in body, but had mind enough to make a will, etc. Austen Handley was sworn for the contestees, and stated that he had known John Hedrick all his life; was at his house in the middle of May, 1885, and talked with him a half hour; that he was entirely rational, understood what he was talking about, and from conversation, conduct, manner, and appearance witness thought him competent to make a will; thought his mind as clear as he had ever seen it. David Tuckwiler, a witness for contestees, testified that he had known John Hedrick all his life. Saw him in the month of April, 1885. Made a contract with him to graze some cattle. Saw him again about the 20th of June. Talked with him some little time. That said Hedrick talked rationally. Said if he (witness) would leave his cattle there until fall they would get fat. Witness had already spoken of taking them away; asked him how much he owed him for grazing said cattle, and he replied, $12, which was the correct amount due him for the grazing; that he was capable of mental exertion, and, in the opinion of witness, was competent at that time to make a will. Contestees had Rev. A. M. Chappel sworn, who testified that about the 20th of June, 1885, he conversed with John Hedrick about spiritual matters. That said Hedrick conversed rationally, knew what he was talking about. Saw him again about a week before he died. That said Hedrick was sane at both times he saw him. W. Anderson also testified that he saw John Hedrick in May, and made a contract with him to keep some cattle for him; that he went back on the 14th of June to settle with him for the pasturage of cattle; talked with him for some little time; he talked rationally, understood what he was doing and talking about; that he settled with him for the pasturage, and paid him the money due him; that he considered him on both occasions capable of making a will. John Leedy also testified that he was at John Hedrick's house on the 8th of June; was with him two hours; saw nothing wrong with his mind, and from his conversation and manner thought him competent to make a will. William Flack testified that he saw John Hedrick on the 3d or 4th of June, 1885; was with him some time. They walked up to the barn. The said Hedrick told him that David Coffman, the plaintiff, should never have any of his property; that before he should have a cent of his property he would give it to charitable purposes. That he saw nothing wrong with his mind; that he talked rationally, and from all witness saw of him he thought him capable of making a will,—as much so as ever he was. A considerable amount of testimony was introduced before the jury by the contestants, some of which was conflicting with the foregoing testimony, which was introduced on the part of the contestees; but in the case of Dower v. Church, 21 W. Va. 63, this court holds that "in trying this particular issue of *devisavit vel non*, the rule which governs a common-law court prevails in granting new trials, and that rule is that, in reviewing the action of the court below, when the evidence is all parol evidence, and it is conflicting, the appellate court will reject all the evidence of the exceptor which is in conflict with the other party; and upon the evidence of the appellee giving it full force and effect, and that of the appellant not in conflict with it, if the case is in favor of the appellee, the verdict of the jury, and the decree based upon it, will be approved and affirmed;" referring to Lamberts v. Cooper's Ex'r, 29 Grat. 61; Webb v. Dye, 18 W. Va. 376; Nicholas v. Kershner, 20 W. Va. 251, and many others.

The contestants in their bill allege "that if ever said John Hedrick gave any sort of assent to the provisions of said pretended

Digitized by Google

will it was through the procurement and by the undue influence of the defendant David Hedrick and his wife." In regard to undue influence, we find it stated in 1 Jarm. Wills, 133, that the influence to vitiate an act must be such as to amount to force and coercion, destroying free agency, and there must be proof that the act was obtained by this coercion; referring to Gardiner v. Gardiner, 34 N. Y. 155, and Gaither v. Gaither, 20 Ga. 709. Also: "In order to set aside the will of a person of sound mind it must be shown that the circumstances of its execution are inconsistent with any hypothesis but undue influence, which cannot be presumed, but must be shown, and in connection with the will, and not with other things;" referring to Brick v. Brick, 66 N. Y. 144; Eckert v. Flowry, 43 Pa. St. 46, and numerous other authorities. It is also held in the case of McMechen v. McMechen, 17 W. Va. 701, that "the burden of proof of fraud or undue influence exercised to induce a testator to execute a will is on him who alleges it; it is not on the propounder of the will." In the case under consideration, however, the contestants of the will have introduced no testimony which tends to prove that undue influence was exercised by David Hedrick or any other person towards or over said John Hedrick, to control the disposition of the property mentioned in his will; and, this being the case, as a matter of course, fraud or undue influence cannot be considered in determining the issue of *devisavit vel non*, as fraud or undue influence will not be inferred. The law recognizes the sovereign right of every man to dispose of his property as to him may seem best, and when it has been disposed of by a man of sufficient mental capacity to make a will, and without any undue influence or fraud practiced upon him, no matter how unreasonable or unjust the disposition may seem to others, a sufficient answer to all objections is found in the fact that such is his will, and the disposition therein made conforms to his wishes. Upon examination of the instructions given to the jury on motion of the contestees, comparing them carefully with the law, and considering them in connection with the evidence introduced upon the trial, they seem to me to propound correctly the law applicable to the testimony, and the circuit court did not err in giving them to the jury.

It is, however, assigned as error in this cause that the court below corrected the second instruction asked for by the contestants by striking out the words "jealous eye," and inserting "careful scrutiny," but the words, taken in connection with the language used in the instruction, are so nearly synonymous that either expression might have been used without creating a different impression on the minds of the jury. I do not, therefore, regard the correction as material. See Cheatham v. Hatcher, 30 Grat. 56; sixth section of syllabus.

The appellants also assign as error the refusal of the court below to give the instructions asked for by them, numbered from 3 to 19, inclusive. On examining these instructions, however, it will be found that instructions 3, 4, 5, 7, 8, 10, 11, 12, 14, 15, 16, refer directly to the question of undue influence; several of said instructions stating how and when undue influence upon the mind and actions of a testator may be inferred; and, as we have seen above, the burden of proof of fraud or undue influence exercised to induce a testator to execute a will is on him who alleges it, and it cannot be presumed, but must be shown. And, as there appears to be no evidence of undue influence in this case, I must regard said instructions as irrelevant, and calculated to mislead the jury, and that they were properly refused. As to instructions numbered 6, 9, 13, 17, 18, and 19, I am of opinion that the court below committed no error in rejecting the sixth instruction, because there must be clear evidence of a disposing mind at the time the will was made, whether the dispositions of the will are equal or unequal, as the court told the jury in instruction 1; and, as to instructions 9, 13, 17, 18, and 19, the court below acted properly in excluding them, because they are predicated upon a statement of facts which is not borne out by the testimony in the cause, and are calculated to mislead the jury. I am inclined to think the fourth instruction given by the court, to-wit, "that the propounders of the will must prove that John Hedrick executed the will as his own voluntary act, free from the fraud, coercion, or undue influence of those about him," does not propound correctly the law, as the burden of proof on those points rests upon the contestants; but this error is not one of which the appellants can complain.

Upon the case presented by the entire record, I am of opinion that the court below did not err in overruling the plaintiff's motion to set aside the verdict rendered by the jury upon the trial of the issue directed in this cause and granting them a new trial, and the decree rendered upon said verdict must be affirmed, with costs to the appellees.

GREEN and BRANNON, JJ., concurred. SNYDER, P., absent.

(32 W. Va. 148)

TAYLOR'S EX'RS *v.* COX *et al.*

(*Supreme Court of Appeals of West Virginia.* Feb. 11, 1889.)

PRINCIPAL AND SURETY—ATTACHMENT—APPEAL—CONTINUANCE.

J. O. C., W. C., and T. executed a note to one Susan Spiller, in which J. O. C. was principal, and the others were sureties. Suit was brought on said note, and satisfaction was obtained out of the property of T., in the county of Tazewell. During the pendency of proceedings to enforce the collection of said note, T. died, and W. C. and A. G. C. transferred to the executors of T. two several notes, made by M. to W. C., for $3,100 each, which purported to be secured by vendor's lien on certain lands which had been conveyed to M. by said W. C. and A. G. C., to indemnify the estate of T. for

Digitized by Google

the amount recovered from it by said Susan Spiller. Suit was brought by the executors of T. to enforce said vendor's lien, but it proved unavailing, for the reason that the proceeds of the land, when sold, were absorbed almost entirely by prior liens thereon, which existed against W. C. and A. G. C. Said executors obtained judgment on one of said notes in Washington county, where M. resided, and sought to prove said judgment, which was in the name of W. and A. G. C., for the use of said executors, in a chancery suit pending in said county, but it was rejected both by the commissioner and the court. Said executors and the devisees of T. then brought a suit in equity in the circuit court of McDowell county, in this state, in the nature of a foreign attachment, to subject the lands of J. O. C. therein situated to the payment of the amount the estate of T. had paid for him as surety, and also the amount which had been recovered from T. in his life-time. An attachment was sued out and levied on said lands, and an order of publication taken and executed against the defendants. W. C., one of the defendants, appeared, and required security for costs, which was given, made a motion to quash the attachment, which was sustained, demurred to the bill, and filed his answer in October, 1877; and at the October term, 1884, of said circuit court, a decree was rendered against the defendants for the amounts claimed in the bill, and the lands of J. O. C., which had been levied on under an attachment, were directed to be sold under the attachment lien. Afterwards the defendant J. O. C. appeared, petitioned for a rehearing, and said decree was set aside, and he filed his answer. The court sustained the demurrer, allowed the plaintiffs to amend at bar, gave a personal decree against the defendant J. O. C., and held that the plaintiffs had a lien by virtue of said attachment, and directed a sale of said lands to satisfy the plaintiffs' claim. *Held* (1) that the notes transferred to the executors of T. by W. C. and A. G. C. having proved worthless by reason of a failure of consideration, the question of diligence on the part of said executors is not material in this case; (2) although an attachment sued out in this case appears to have been quashed, yet, the decree of the court below reciting that the cause was heard upon the attachment duly levied upon the lands of J. O. C., in this court said attachment must be taken to have been in full force and effect, duly sued out, and levied as required by statute; (3) under the circumstances of this case, it was not incumbent on the executors of T. to appeal from the decision of the circuit court of Washington county, rejecting the judgment in their favor against M., before resorting to the property of J. O. C. for reimbursement; (4) the demurrer to the bill having been sustained, and the plaintiffs having amended at bar, and the defendants neither asking delay, nor demurring to the bill as amended, there was no good reason for delaying the hearing of the case.

(*Syllabus by the Court.*)

Appeal from circuit court, McDowell county.

Bill by John M. Smith and others, executors and heirs of John W. Taylor, deceased, against James O. Cox and others. Defendants appeal.

A. W. Reynolds, J. H. Fulton, and *J. W. Caldwell,* for appellants. *D. E. Johnston* and *Chapman & Gillespie,* for appellees.

ENGLISH, J. This is an appeal from the circuit court of McDowell county, which the appellants claim involves a question of proper diligence on the part of the plaintiffs below and appellees in the collection of certain notes which were placed in the hands of J. T. Frazier, one of the executors of J. W. Taylor, deceased, as collateral security for the payment of a judgment obtained by Susan Spiller against William Cox and J. W. Taylor for the sum of $2,613, with legal interest thereon from the 2d day of August, 1858, and costs, $11.93, credited by $600, paid May 1, 1859, and by $48.02, paid November 25, 1861, which judgment was obtained in the county court of Wythe county on the 16th day of August, 1867, and also to secure a judgment for the same amount rendered by said court in favor of Susan Spiller against James O. Cox on the 16th day of November, 1867; said parties having been sued jointly, but process having been served on them at different times. The collaterals above mentioned consisted of two notes executed by one T. G. MacConnell to Aug. G. Cox and William Cox, each for the sum of $3,100, dated the 12th day of January, 1872, and payable with interest from October 1, 1871, and falling due, respectively, on the 1st days of October, 1873 and 1874. It appears that a writ of *fieri facias* issued from the county court clerk's office of Wythe county, on said judgment, directed to the sheriff of Tazewell county, Va., and that by virtue of said writ the sheriff of Tazewell county sold personal property of John W. Taylor sufficient to realize the sum of $262.50, which was entered as a credit on said writ as of the 12th day of April, 1870; and on the 5th day of May, 1870, the said Susan Spiller instituted a chancery suit in the county court of Tazewell county against A. G. Cox, William Cox, and John W. Taylor, to subject the real estate of John W. Taylor, located in that county, to the payment of said judgment obtained by her against them in the county court of Wythe county, and such proceedings were had therein that a decree for the sale of the lands of said John W. Taylor was obtained to satisfy said judgment. Subsequent, however, to the rendition of said decree, and during the pendency of said suit, the said John W. Taylor died, and the same was revived against his executors and heirs at law, and on the 1st day of April, 1873, the lands of the estate of John W. Taylor, deceased, were sold to pay off said judgment of Susan Spiller obtained in the county of Wythe against said James O. Cox, William Cox, and John W. Taylor. On the 5th day of February, 1873, William Cox and A. G. Cox assigned and transferred to J. T. Frazier, one of the executors of said John W. Taylor, the collaterals above mentioned, with authority to him to use them so far as they would pay the said two judgments of Mrs. Spiller, rendered, as aforesaid, against James O. Cox, A. G. Cox, William Cox, and John W. Taylor. In order to recover from said James O. Cox and William Cox the amount which the estate of John W. Taylor was compelled to pay as surety for said James O. Cox, the executor and heirs at law of John W. Taylor, deceased, instituted this suit in the county court of McDowell county, W. Va., to subject two tracts of land alleged to be the property of said James O. Cox,—one containing 9,988 acres, and the other 1,780 acres,—situated in said

Digitized by Google

county of McDowell, to sale for the payment of said amount, and also the amount realized from the personal property of said John W. Taylor under said writ of *fieri facias*.

The defendants William Cox and James O. Cox both answered the plaintiffs' bill, and both claim that the plaintiffs have no right to subject the lands of James O. Cox to sale to satisfy the claim asserted in the plaintiffs' bill, because they say that after the death of said John W. Taylor, but before the sale of the lands descended from or devised by him to plaintiffs, A. G. Cox and William Cox transferred to J. T. Frazier, who was one of the executors of said John W. Taylor, and who qualified as such, two several notes above mentioned as collaterals, which notes were the second and third notes executed by said MacConnell for the purchase money of a tract of land situated in Wythe county, Va., on the waters of Cripple creek, which notes were so assigned as collateral security to indemnify the estate of said John W. Taylor for a certain amount of money which the estate of said John W. Taylor was liable for as security for said J. O. Cox; and the defendant J. O. Cox claims that, if due and proper diligence had been used in the collection of said collaterals, more than enough could have been realized than was necessary to reimburse the said estate of John W. Taylor for the amount afterwards paid in discharge of the liability of said John W. Taylor as surety for said J. O. Cox.

The evidence in this cause, in my opinion, does not disclose the fact that any want of diligence on the part of the personal representatives of John W. Taylor, deceased, prevented them from realizing the amount of money mentioned in the aforesaid notes executed by T. G. MacConnell to Augustus G. Cox and William Cox, and by them transferred as collaterals to J. T. Frazier, one of the executors of John W. Taylor. If it is true that judgments might have been obtained on these notes at an earlier day than they were obtained, yet the failure to collect these notes, or either of them, and to make them available for the purposes for which they were intended, to-wit, the reimbursement of the estate of John W. Taylor, deceased, to the extent of the amount paid by said decedent's estate to Susan Spiller, was not caused by delay in bringing said suits upon said notes. When judgments were obtained on said notes, T. G. MacConnell owned a large amount of real estate in the counties of Tazewell, Wythe, and Washington, in the state of Virginia, against which said judgment liens could have been enforced, and which were ample to pay off and satisfy said judgments, and all prior existing liens upon them, if said judgments were valid and binding. Judgment on the note for $3,100, which fell due on the 1st day of October, 1873, was obtained in the circuit court of Washington county, Va., where the defendant T. G. MacConnell resided, at the May term, 1874. Execution was issued upon the judgment, and returned, "No property found," by the sheriff of Washington county. In December, 1874, a chancery suit was brought in the circuit court of Wythe county against said MacConnell, by the executors of said J. W. Taylor, for the purpose of subjecting to sale the land sold said MacConnell by William and A. G. Cox, for the satisfaction of said judgment, and enforcing the vendor's lien as to said last note; and on the 6th day of March, 1875, a decree was obtained in said court in favor of said Taylor's executors for the sum of $6,200, and the sale of said land directed. It seems, however, that in the month of February, 1874, one Adam Groseclose brought a chancery suit in the circuit court of Wythe county, Va., to enforce certain liens against said tract of land sold by said William and A. G. Cox to said Thomas G. MacConnell, which liens existed against said MacConnell's land, and were prior to the sale made by said William and A. G. Cox to T. G. MacConnell, and the said suit in chancery brought by the executors of J. W. Taylor was consolidated therewith, and such proceedings were taken in said suits that a decree was rendered therein directing a sale of said land to satisfy said liens, which were prior and superior to the vendor's lien reserved by said Coxes in their conveyance to said MacConnell; that said tract of land was sold by a commissioner appointed by said court, and brought $4,000, and, after satisfying said prior liens which existed against said lands at the time said T. G. MacConnell purchased it, the entire purchase money was absorbed and consumed, with the exception of about $209. At that time said T. G. MacConnell was the owner of several other tracts of land situated in the county of Wythe, Va., and continued to own said lands for several years thereafter, as is shown by the deed of trust dated the 1st day of September, 1876, executed by said MacConnell to John G. Kreger, trustee, on the land conveyed to him by Isaac Painter and Eveline Painter. The land was afterwards sold on the 8th day of March, 1880, by said Kreger, trustee, and at said sale David G. Thomas, the *cestui que trust*, became the purchaser, and he afterwards sold the same to Crockett & Co., of Wythe county, for $6,000, which sales took place without objection on the part of any of the judgment creditors of MacConnell; and, if any objection had been made by the executors of John W. Taylor, they would have been unavailing, for the reason that the consideration for the obligations on which the judgments had been obtained by said executors had failed by reason of prior liens upon the land for which they were executed by said MacConnell to said Coxes, and this is mentioned merely to show that if the judgments obtained by said executors of Taylor had been valid there was plenty of property to satisfy them, and that they were not lost by want of diligence on the part of said executors. About this time, or shortly afterwards, the Lynchburg Insurance & Banking Company and others instituted a

Digitized by Google

chancery suit in the circuit court of Washington county, to subject the lands of said T. G. MacConnell in that county to the satisfaction of certain judgment liens set forth and described in their bill, and in January, 1878, said cases were referred to a commissioner to ascertain the liens existing thereon, and their priorities. L. T. Casby, one of the commissioners of said court, took said account, and during the time he was taking the same the judgment of William and A. G. Cox, for the Use of Frazier and Smith, Executors of the Estate of John W. Taylor, Deceased, v. T. G. MacConnell, obtained as aforesaid in the county of Washington at the May term, 1874, for the sum of $3,100, with legal interest from the 1st day of October, 1871, till paid, and costs, $10.77, was presented before said commissioner, and the plaintiffs sought to have it allowed in accordance with its date and priority in said account, but an exception was filed to the allowance of said judgment as a lien to be satisfied in said suit, "because said judgment was rendered against said MacConnell upon a note for the purchase price in part of a tract of land in the county of Wythe sold by said Coxes to him, and after said sale to said MacConnell the tract of land was sold for liens upon said land against the said Coxes, which were entitled to preference over the claim of MacConnell as purchaser, which prior liens were mostly for purchase money due from said Coxes on said land, and by reason of these liens said land was wholly lost to said MacConnell, and it would be inequitable to subject the lands of said MacConnell to the payment of said judgment;" and the record in the case of Groseclose v. Cox et al., from the circuit court of Wythe county, was presented before said commissioner in support of said exception, which exception was sustained by the commissioner, and his action was confirmed by the court by reason of the fact that the subject which was the consideration of such judgment had been lost to said MacConnell. On the 26th day of June, 1877, the executor and heirs at law of John W. Taylor, deceased, brought a chancery suit in the circuit court of McDowell county against James O. Cox and William Cox, the object of which was to subject two tracts of land situated in said county, and belonging to the defendant James O. Cox, to the payment of a debt due said executor of the estate of John W. Taylor, deceased, the sum of $262.50, with interest thereon from the 2d day of April, 1870, till paid, and also a debt due plaintiffs from said James O. Cox, for the sum of $3,663.79, with interest thereon from the 1st day of April, 1873, till paid. In said suit an order of attachment was sued out and levied upon the lands of said defendant James O. Cox, and, the defendants being non-residents, an order of publication was taken and published against them. The plaintiffs in their bill allege the facts with regard to the execution of the note by the defendants James O. Cox, William Cox, and John W. Taylor to Susan Spiller for $2,613, with interest thereon from the 2d day of August, 1858; also, as to judgment being taken upon said note against the makers thereof, they also allege that an execution on said judgment was issued and directed to the sheriff of Tazewell county; and that $262.50 were realized in said county out of the personal property of said John W. Taylor, and to which amount said judgment was credited as of the 12th day of April, 1870. They also state the facts with reference to the lands belonging to the estate of John W. Taylor, deceased, situated in the county of Tazewell, being sold at the suit of said Susan Spiller to satisfy her judgment against said J. O. Cox, William Cox, and John W. Taylor, and that said John W. Taylor died during the pendency of said suit, and that said land when sold was the property of the plaintiffs John M. Smith and Margaret, his wife, Jacob T. Frazier and Maria, his wife, James C. Moore and Sarah E., his wife, and Julia S. Taylor, as devisees of John W. Taylor, and that the judgment of said Susan Spiller for which said lands were sold amounted to $3,663.79. They also set forth the facts in regard to the transfer of said MacConnell notes to J. T. Frazier, one of the executors of said John W. Taylor, as collateral security, with authority to use them so far as they would pay said judgment of Susan Spiller against J. O. Cox, William Cox, and John W. Taylor; and they also state the efforts they made to collect said collaterals, and their failure to realize anything thereon. They then allege that the defendant J. O. Cox is the owner of two tracts of land lying in McDowell county,—one containing 9,988 acres, the other 1,730 acres; that said James O. Cox is insolvent, and is a non-resident residing in the state of Tennessee; and pray that said J. M. Smith, as executor as aforesaid, may recover of the said J. O. Cox the sum of $262.50, with interest thereon from the 12th day of April, 1870, and that the plaintiffs also recover the further sum of $3,663.79, with interest from the 1st day of April, 1873, being the residue of said judgment of said Susan Spiller for the payment of which the lands of plaintiffs were sold as aforesaid; that they have a right to attach the lands of said J. O. Cox lying in said county of McDowell for the payment of said debts, he being a non-resident, and that they have sued out attachments against the lands aforesaid, which have been levied thereon.

The bill in this cause was filed at July rules, 1877, and security for costs was then required from plaintiffs. At August rules following, the security for costs was given. At the October term, 1877, additional security for costs was required by the defendants, and promptly given by the plaintiffs, and a motion was then made to quash the attachment issued in this cause, which motion was sustained. The defendants then tendered their demurrer to plaintiff's bill, and the defendant William Cox tendered his answer to

Digitized by Google

the same. At the October term, 1884, of said circuit court, a decree was rendered in which it is recited that the cause came on to be heard upon the bill and exhibits filed therewith, the attachment duly levied on the lands of the defendant J. O. Cox, the answer of William Cox and exhibits therewith, the replication to said answer, and the depositions taken and former orders in the cause, etc.; and said decree proceeds to decree in favor of the plaintiff John M. Smith, as executor, the sum of $227.14, with interest from date of decree, and in favor of John M. Smith, in his own right, and the other plaintiffs, the sum of $3,663.79, with interest from the 12th day of April, 1873, till paid, and costs,—holding that the plaintiffs have a lien on the lands of the defendant James O. Cox, lying in McDowell county, by reason of their attachment, and directing a sale of said lands by a special commissioner. On the 9th day of April, 1885, James O. Cox appeared, and presented his petition, praying the court to restrain the plaintiffs and the commissioner from further proceeding under the decree of October term, 1884, and for a rehearing of the cause, which prayer was granted, and said petition was filed: and at the May term, 1886, said decree rendered at the October term, 1884, directing a sale of said lands, was set aside, and leave was granted said J. O. Cox to file his answer, which was accordingly done; and at a subsequent day the plaintiffs, after objecting to said answer, and having their objection overruled, replied generally thereto. The answers of both James O. Cox and William Cox filed in this cause make no contest as to the validity of the plaintiffs' claims originally, but, by way of avoiding and preventing a decree for the same, they claim that the executors of John W. Taylor's estate did not use due diligence in the collection of the MacConnell notes assigned to them as collaterals; that if the lands for which the MacConnell notes were executed as part of the purchase money were insufficient to pay the same, or were absorbed by the payment of prior liens, that they should have amended their bill filed in Wythe county, and proceeded against the other lands of MacConnell lying in said county; that they were not parties to the proceedings in the courts of Washington and Wythe counties, and that said executors should have appealed from the decree of the circuit court of Washington county rendered on the 20th day of January, 1880, or notified the defendants thereof, so that they could have appealed; and that the plaintiffs, while holding said collaterals, could not proceed on their original claim.

It will be perceived that the judgment of the circuit court of Washington county for $3,100, with interest from the 1st day of October, 1871, till paid, and costs, $10.77, which bears date May, 1874, and was docketed October 21, 1874, and which was rejected by Commissioner L. T. Casby in ascertaining the liens upon the lands of T. G. MacConnell in the chancery suit in Washington county, and whose action was confirmed by the court, was a judgment in the names of William Cox and Augustus G. Cox, who sued for the benefit of Jacob T. Frazier and John W. Smith, executors of John W. Taylor, deceased, against said T. G. MacConnell and William Cox, one of the defendants in this suit being the assignor of said MacConnell; and in the case of Goodall v. Stuart, 2 Hen. & M. 105, it was held that a return of "No property found" on an execution against the obligor was sufficient to charge the assignor. In the case of Wilson's Adm'r v. Barclay's Ex'r, 22 Grat. 534, it was held that it was the duty of the assignee to diligently pursue a specific lien before he can have recourse upon the assignor. In this case there was a vendors' lien, and that was diligently pursued until it was exhausted. It is, however, claimed by the defendants that the executors of the estate of said Taylor should have appealed from the action of the circuit court of Washington county in refusing to allow said judgment against said MacConnell to be proved in the case of Lynchburg Ins. Co. v. MacConnell and others, in Washington county. That this was not a condition precedent to the right of recovering said judgment against the defendants seems to have been decided in the case of Arnold v. Hickman, 6 Munf. 15, where it is held, if a judgment of a county court be assigned, and afterwards reversed by a superior court of law, the assignee may thereupon sue the assignor, without carrying the case to the court of appeals. It appears that the circuit court of McDowell county in its decree rendered at the October term, 1886, sustained the demurrer of James O. Cox to the plaintiff's bill, and on their motion they had leave to amend at bar, which was accordingly done, and there was no demurrer or objection to the bill as amended; and the decree recites that the cause came on to be heard upon the bill as amended, and exhibits therewith filed, the attachment duly levied upon the lands of the defendant James O. Cox, the answers of William and James Cox, and exhibits therewith filed, and the replications thereto, etc. Counsel for the appellants, however, insisted in their argument of this case that the court should have continued said case for one term, when the defendants' demurrer was sustained, and the plaintiffs were allowed to amend at bar. A sufficient reply to this claim consists in the fact that no such delay was asked, and I do not understand such a delay to be in accordance with the practice in this state.

The defendant James O. Cox had already filed an answer which was responsive to the allegation inserted in the bill by way of amendment,—at least, the defendants seemed to so consider their answers, as they tendered no demurrer or answer to said bill as amended,—and the cause came on to be heard upon the bill as amended and the answers, etc. Under the circumstances detailed, I do not consider that the circuit court of McDowell

Digitized by Google

county erred in hearing said cause when it did, without further delay.

A question of some difficulty, and about which there has been considerable controversy, both in the state of Virginia and in this state, is suggested by the fact that the attachment sued out in this case, and which was levied on the lands of the defendant James O. Cox, mentioned and described in the bill, was quashed by the court several years before the final decree was rendered, and, so far as appears from the printed record, no other affidavit was filed and no other attachment issued, and yet the final decree recites that the cause came on to be heard upon the attachment duly levied upon the lands of the defendant James O. Cox, and holds that the plaintiffs have a lien by reason of their said attachment on the 9,988-acre tract of land of the defendant James O. Cox lying in McDowell county, and directs that unless the sums therein decreed be paid within 30 days, that the lands be sold by a commissioner therein named, upon the terms and provisions therein set forth. In the case of O'Brien v. Stephens, found in 11 Grat. 610, the court of appeals of Virginia, acting upon a statute passed April 3, 1852, which is almost identical with ours, holds that, "if an absent defendant does not appear in the cause, there cannot be a personal decree against him, but the attached effects can alone be subjected; but, if he does appear, there may be a personal decree only against him, or there may be both a personal decree and a decree subjecting the attached effects." This is the language used in the fourth section of the syllabus in that case. Judge SAMUELS, however, in delivering the opinion of the court in that case, on page 613, says: "The defendants, however, appeared and made defense; thereby putting themselves fully under the control of the court for every legitimate purpose in the cause. The attachment was intended to perform two several and distinct functions,—one to give the absent defendant notice of the suit brought against him. This mode of giving notice by levying on property was formerly in familiar use. In the case before us it became unnecessary to resort to this mode of notice, inasmuch as the absent defendant appeared and defended himself. The other function of the attachment is to give complainants security for the payment of their demand. This operation of the attachment is wholly for the benefit of the complainants; if waived or omitted, it can in no wise injure the defendant, seeing that he has already had notice to defend himself and has acted accordingly. The complainants, if they elect to do so, may waive a part of their remedy and rely upon another part. They may therefore take a mere personal decree against the defendants before the court, which decree the court in virtue of its jurisdiction over the parties now before it may lawfully render, or they may hereafter resort to the remedy by attachment, seeing that the statute authorizes such resort after the suit is brought." Again, on page 613, he says: "I am therefore clearly of opinion that the only decree complainants could have had against Stephens, if he had not appeared and made defense, would have been for satisfaction out of his property attached under the process provided by the statute of 1852." Now, it will be perceived that the claim asserted in the case of O'Brien v. Stephens was purely legal in its character, it being a suit upon a forfeited forthcoming bond; but the court holds that the nature of the claim asserted, the residence of the defendant Stephens, and the location of his property gave to the circuit court jurisdiction of the subject. In this case no attachment had been sued out or levied, but the court held that the case stated in the bill was such that the affidavit might be made and the attachment sued out after the bill was filed, and that the affidavit and attachment were not essential to the jurisdiction of the court at the time the cause was heard on demurrer. In the case of Cirode v. Buchanan, a report of which is found in 22 Grat. 205, it seems that a bill was filed in the circuit court of Smith county, Va., by an administrator, in which he sets out a money decree obtained in the district court of chancery for the Northern district of Alabama, against one Frank A. Sanders, for $12,271.49 and costs, in which bill the plaintiff sets up that said defendant has no property in Alabama out of which said decree can be satisfied, but he has a large and valuable real estate in the state of Virginia, and within the jurisdiction of the court, describing it as being an undivided interest in certain tracts of land situated in said county, and alleging that said Frank A. Sanders is a non-resident of the state of Virginia, and stating the object of said suit to be to subject said undivided interest in said land to sale to pay said debt. This suit was contested by W. Y. Cirode, the assignee in bankruptcy of said Frank A. Sanders. This proceeding was under the act of 1852, amending the Code of 1849, by adding these words at the commencement of section 11 of chapter 151, to-wit: "A claim to any debt or to damages for breach of any contract against a person who is not a resident of this state, but who has estate or debts due him within the same, may, if such claim exceed $20, exclusive of interest, be maintained in any court of equity for a county or corporation, in which there may be any such estate, or a defendant owing any debt to such non-resident;" and Judge MONCURE, in delivering the opinion of the court, (page 215,) says: "The effect of this amendment was to give to a creditor having a legal claim against a debtor residing out of the state, and owning estate or effects therein, the same right to bring a foreign attachment suit in equity as he would have had before the Code of 1849; the only difference being that since the amendment he has had an election to sue at law or in equity in such a case, whereas be-

Digitized by Google

fore the Code of 1849 he could sue in equity only."

Now, to the first section of chapter 106 of the Code of West Virginia, which provided when and how an attachment might be sued out in a suit at law or in equity, and what affidavit was required to be made at the commencement of the suit, or at any time thereafter and before judgment, an amendment was made, which was passed February 27, 1871, in these words: "Section 1 of chapter 106 of the Code of West Virginia is hereby amended by adding at the end thereof the following: 'A claim, whether legal or equitable, for any debt or liability arising out of contract against a foreign corporation or a non-resident of this state, may be sued for and recovered in a court of equity, and an attachment in any action at law or suit in equity may be sued out as provided in this section, whether the debt or demand be due or not; but the affidavit, in case the debt or demand be not due, shall show at what time it will become due.'" It will thus be perceived that the statute under which the bill was filed and proceedings taken in the case at bar is very similar, if not identical, with the statute which Judge MONCURE is discussing in the case of Cirode v. Buchanan, and on page 216 he says: "The grounds for equitable relief in such a case are threefold: (1) That a debt is due to the plaintiff; (2) that the debtor is a non-resident of the state; (3) that he has estate or effects within the state." All of these matters seem to have been clearly and properly alleged by the plaintiffs, J. M. Smith and others, and in addition thereto they allege that they are entitled to recover the debt in the bill described, and that the only means they have of realizing said debt is to resort to the lands of James O. Cox, who is a non-resident of the state, and that they have a right to attach and subject said real estate belonging to said J. O. Cox lying in the county of McDowell to the payment of said debts. These allegations, if true, clearly entitle the plaintiffs to relief in a court of equity. In the case of Coleman v. Waters, 13 W. Va. 278, which was a suit in the nature of a foreign attachment, this court held that, "when a court of equity has properly taken jurisdiction of a cause against an absent defendant, it must proceed to give relief according to the principles of equity, and, if the absent defendant appear and answer, there may be a personal decree only against him, or there may be both a personal decree and a decree subjecting the attached effects." In that case, it is true, an order of attachment was sued out and levied, but a personal decree was taken against the absent defendant, without subjecting to sale the estate attached. Judge HAYMOND, in delivering the opinion of the court in that case, quoted with approval the case of O'Brien v. Stephens, above referred to, holding that if the absent defendant does appear there may be a personal decree only against him, or there may be a personal decree, and a decree subjecting the attached effects; and if the debtor appears, and the attachment has not been sued out or levied, there may still be a personal decree against him; or the plaintiff may, after the debtor's appearance, make the affidavit, sue out an attachment, and have it levied on the effects of the debtor, and have them subjected; holding that, "at the time said suit was commenced, to-wit, on the 7th of October, 1872, and since, the law of this state relative to foreign attachments in equity against non-residents was and is the same substantially, as to matters in question in that case, as the law in Virginia under which said case of O'Brien v. Stephens was decided."

In the light of these decisions, then, I am of the opinion, upon the case presented by the record, that, notwithstanding the fact that the attachment issued in the cause was quashed, the circuit court of McDowell county had a right, even if there was no attachment, after the appearance of the defendant James O. Cox to render a personal decree against him for the sum of $6,507,40, in favor of John M. Smith in his own right, and Margaret S. Smith, his wife, Jacob T. Frazier and Maria V., his wife, James C. Moore and Sarah E., his wife, and Henry Harrison, administrator of India Moore, deceased, with legal interest from the date of the decree, and costs. But can it be held by this court that there was no attachment in this case sued out and levied subsequent to the date of the decree at the October term, 1877, of the circuit court of McDowell county, which appears to have quashed the first attachment which was sued out in the case, in the face of two decrees rendered in said cause at subsequent dates, both of which recite that the cause came on to be heard upon the attachment duly levied upon the lands of the defendant James O. Cox? It is true that the clerk of the circuit court in copying said record does not copy an affidavit or attachment of subsequent date to the decree quashing said first-named attachment, but the statute allows an attachment to be sued out after the institution of the suit, and at any time before judgment. Is it to be presumed that the circuit court of said county would in two successive decrees recite the fact that the case came on to be heard upon the attachment sued out and levied, if there was no such attachment? I think not. In the case of Moore v. Holt, 10 Grat. 284, it is held that, "where the decree states that the order of publication against the absent defendant had been duly published, it is to be taken in an appellate court that everything required by the statute has been done;" and in this case, the decrees stating that the case was heard upon the attachment duly levied upon the lands of the defendant James O. Cox, it is to be taken that there was an attachment regularly sued out and properly levied upon said lands. I am therefore of opinion to affirm the decree of the circuit

Digitized by Google

court of McDowell county rendered in this case, except so far as it holds that the sum of $262.50 paid by John W. Taylor in his life-time on the judgment of said Susan Spiller is barred by the statute of limitations, and ought not to be recovered by John M. Smith, executor of said John W. Taylor, and in that respect said decree is reversed, as no plea of the statute of limitations seems to have been pleaded or relied on in this case; and, this court proceeding to render such decree as should have been rendered by the court below in reference to the amount so paid by John W. Taylor in his life-time, it is ordered, adjudged, and decreed that the defendant James O. Cox do pay to said John M. Smith, executor of John W. Taylor, deceased, the sum of $522.11, the amount paid by said John W. Taylor in his life-time as aforesaid, with interest added to the 6th day of October, 1886, the date of said decree, with interest thereon from that date, and that said sum be paid out of the proceeds of said land when sold; and this cause is remanded to the circuit court of McDowell county for further proceedings to be had therein, and the appellants must pay the costs of this appeal.

SNYDER, P., and GREEN and BRANNON, JJ., concurred.

(32 W. Va. 124)

KEY *et al.* v. HUGHES' EX'RS *et al.*

(Supreme Court of Appeals of West Virginia. Feb. 16, 1889.)

LIABILITY OF TRUSTEE — LIMITATION OF ACTIONS.

1. A trustee, acting strictly within the line of his duty, and exercising reasonable care and diligence, will not be held responsible for the loss or depreciation of the trust fund, or the insolvency or misconduct of any person who may have possessed it; but if that line of duty be not strictly pursued, and any part of the fund be invested upon securities not authorized, or be put within the control of persons who ought not to be intrusted with it, when there is no necessity for so doing, and a loss be thereby eventually sustained, such trustee will be liable to make it good, however unexpected the result, however little likely to arise from the course adopted, and however free such conduct may have been from any improper motive.

2. An executor is directed by will to invest a specified sum of money in interest-bearing bonds, and pay the interest thereon to a legatee for life, and after her death to divide the fund among her children. The executor applied to the cashier of a bank, who agreed to sell him United States bonds, but without seeing the bonds, or knowing that they were in the bank, paid the cashier for them with the understanding that they were to be held by the bank subject to his order. No bonds were in fact ever put in the bank on special deposit in the name of the executor, or as his property, but the cashier paid to him, as the interest matured on such bonds, a sum equal to their interest. No inquiry was made by the executor for the bonds until after the failure of the bank, nearly two years thereafter, when it was ascertained that there were no bonds there; and if such bonds had ever been deposited there, they had been appropriated by the cashier long before the failure of the bank. *Held*, the executor is liable for the trust fund.

3. Where the relation of parties is that of trustee and *cestui que trust*, the statute of limitations does not commence to run until there has been an open denial and repudiation of the trust by the trustee, brought home to the *cestui que trust* in such a manner as will require the latter to act as upon an asserted adverse title.

(Syllabus by the Court.)

Appeal from circuit court, Ohio county.

Suit by Mary Key and others against Thomas Hughes' executors and others. Defendants appeal.

H. M. Russell, for appellants. *John H. Holt*, for appellees.

SNYDER, P. Appeal from the decrees of the circuit court of Ohio county, pronounced in a suit brought September 11, 1886, by Mary Key and her children against the executors of Thomas Hughes, deceased. The plaintiffs' bill avers that Mary Leech, late of the city of Wheeling, by her last will directed her executor, the said Thomas Hughes, to set apart $5,000 of her estate, and invest the same in interest-bearing bonds, and pay the interest or dividends derived therefrom to Mary Key during her life, and at her death to divide the principal equally among the children of said Mary; that said Hughes, on July 13, 1868, duly qualified as such executor, set apart said $5,000, and, after paying the United States succession tax, there remained in his hands as a trust fund for the plaintiffs $4,807.76, which he in July, 1869, invested in United States bonds of the par value of $4,500, the premium thereon being at that time $307.76; that from time to time the executor paid to the plaintiff Mary Key the interest on said bonds, but since the year 1873 she has never received any statement of account from the executor, nor has he made any settlement before any commissioner or court, showing such account; that he claimed to have deposited said bonds for safe-keeping in the Wheeling Savings Institution, a bank doing business in the city of Wheeling up to about the month of February, 1871, when it became insolvent, and ceased to do business; that the executor claimed by the failure of said bank the said bonds had been wholly lost, but this claim was not made until April, 1873, more than two years after the alleged loss; whether said bonds were in fact ever deposited in said bank or not the plaintiffs have no information other than the mere statement of the executor, and they insist that until it is shown that said bonds were lost without the fault of the executor, his estate is liable therefor; that in April, 1873, said executor represented that he had procured from the treasurer of said bank some securities from which something might be realized, and that he would advise the plaintiff Mary Key as to the facts, but he wholly failed to do so; that notwithstanding the claim of the executor that said fund had been lost, he has from year to year paid to the plaintiff Mary Key, at various irregular times, sums of money on account of said trust fund, his last payment being made in November, 1885; that in March, 1886, the said executor died testate, and the defendants, on March 19, 1886, duly qualified as his executors. The prayer of the bill is that the

Digitized by Google

estate of said Thomas Hughes, executor as aforesaid, may be held liable for said trust fund; that a trustee may be appointed to hold and invest and dispose of said fund, as directed by the will of said Mary C. Leech; and for general relief. The defendants answered the bill, and admitted the trust fund came into the hands of their testator as executor of Mrs. Leech in the manner stated in the bill; that the trust fund had been invested in United States bonds of the issue known as "ten-forties," and deposited in the Wheeling Savings Institution, a bank of good repute and financial standing, and they had been feloniously abstracted therefrom by A. C. Quarrier, the treasurer of said bank, without the knowledge or authority of said Hughes, and wholly lost without the fault of said Hughes, and in such manner as to relieve his estate from any liability therefor. The defendants also plead the statute of limitations, and claim that the laches of the plaintiff in the assertion of their alleged demand have been such as to forbid any relief in this case. The cause was finally heard on June 2, 1888, on the depositions filed, the report of a commissioner, and the exceptions thereto, and the court held and decreed that the estate of Thomas Hughes, deceased, was chargeable with the principal sum of $4,500, and $316.57 accrued and unpaid interest thereon, and appointed James P. Rogers trustee to collect and administer said sums according to the will of the said Mary C. Leech. The defendants obtained this appeal.

The important inquiry is, are the facts and circumstances appearing in this cause of such a character as to relieve the trustee, Thomas Hughes, and his estate, from liability for the loss of said trust fund? The record shows that said Hughes, prior to July, 1869, deposited the whole trust fund, $4,807.76, to his credit as executor in the Wheeling Savings Institution, a bank of good credit and reputation in the city of Wheeling, of which A. C. Quarrier, a man of good reputation and business qualifications, was then the treasurer or cashier. On July 10, 1869, the executor drew his check in these words: "Pay to ——— 10-40 bonds, $4,500, or bearer, forty-eight hundred and seven 76-100 dollars,"—and passed it to said A. C. Quarrier, who, in his deposition, says: "To the best of my recollection Mr. Hughes informed me that he wished to purchase as executor forty-five hundred dollars in United States ten-forty bonds, and desired me to procure them for him. I thereupon agreed to sell him the bonds at the then existing market price, and I did then and there deliver to him a bill of sale for said bonds, and received from him in payment thereof his check for $4,807.76; it being understood by Mr. Hughes at the time that the bonds were in New York city, to the credit of the Wheeling Savings Institution." Quarrier further says that this transaction occurred at the banking-house of said savings institution, and that the said bonds were to remain under the control of said savings institution, subject to the order of Mr. Hughes as executor; that Mr. Hughes never, until after the failure of said bank, asked for or received any such bonds from said bank; that on one occasion the interest was paid to Mr. Hughes in coupons of ten-forty bonds; and whether the witness detached them from bonds that were in the bank, or whether he bought them, he does not remember, and on all other occasions the said bank paid to him the value of the interest coupons in money. This witness further says that the probabilities are that he did not have the bonds in the bank awaiting Mr. Hughes' demand for them to give the order to purchase them in New York, they being held subject to his demand or order; but no demand was ever made for them, nor was Mr. Hughes ever informed that the bonds had been purchased. After the failure of the said bank, its books showed that under date of July 10, 1869, the sum of $4,874.76 had been credited to the American Exchange National Bank of New York on account of bonds purchased for said savings bank, and on November 2, 1869, the said New York bank is charged with $4,845.45 on account of 10-40 bonds sold to it by said savings bank. Soon after its failure the said savings bank made an assignment of all its assets to D. Lamb, trustee, for the benefit of all its creditors, without preference. Its indebtedness, principally to depositors, amounted to about $350,000, and its assets realized less than $100,000. It was indebted to Hughes over $2,000, on account of deposits, in addition to his aforesaid claim as executor. Mr. Lamb, the trustee, in April, 1871, issued the Hughes certificates for the amount found by the books of the bank to be due him in his own right, and on March 30, 1872, he issued a certificate to Hughes in these words: "This certifies that upon adjustment there is due to Thomas Hughes forty-eight hundred and forty-five dollars, upon certif. No. 2,556, $1,000, and U. S. ten-forties, misappropriated by treasurer, $4,845.45, entitled to such dividends as may be made from the assets of the institution." The books of the bank show that certificate No. 2,556, above mentioned, was given to Hughes by Quarrier, cashier, on February 15, 1871, for a deposit of $3,000, with a credit for $2,000 indorsed thereon, leaving $1,000 due on the certificate. This would seem to indicate that only $3,545 in United States 10-40 bonds had been misappropriated by Quarrier.

These are all the material facts appearing in the record in respect to the management and loss of the said trust fund; and the question presented is, do they show such care and diligence on the part of the executor or trustee as to relieve him from liability for its loss? The law is stated in 2 Lomax, Ex. 482, (293.) as follows: "The result of the best authorities on this subject was thus stated by Lord COTTENHAM: 'Although a personal representative, acting strictly within the line of his duty, and exercising reasonable care and diligence, will not be respon-

Digitized by Google

sible for the failure or depreciation of the fund in which any part of the estate may be invested, or for the insolvency or misconduct of any person who may have possessed it, yet, if that line of duty be not strictly pursued, and any part of the property be invested by such personal representative in funds, or upon securities not authorized, or be put within the control of persons who ought not to be intrusted with it, and a loss be thereby eventually sustained, such personal representative will be liable to make it good, however unexpected the result, however little likely to arise from the course adopted, and however free such conduct may be from any improper motive. * * * Necessity, which includes the regular course of business in administering the property, will, in equity, exonerate the personal representative. But if, without such necessity, he be instrumental in giving to the person failing possession of any part of the property, he will be liable, although the person possessing it be a co-executor or a co-administrator.'" Clough v. Bond, 3 Mylne & C. 496; Langford v. Gascoyne, 11 Ves. 333; Salway v. Salway, 11 Eng. Ch. 215; Challen v. Shippam, 30 Eng. Ch. 555; 2 Williams, Ex'rs, 1648.

In the opinion of the court in Elliott v. Carter, Judge LEE, after reviewing a number of cases, says: "Many other cases and opinions of learned judges might be cited tending to the same conclusions; and the fair result of the views which they present and the reasoning they adopt is that, where a trustee has acted in good faith in the exercise of a fair discretion, and in the same manner in which he would probably have acted if the subject had been his own property, and not held in trust, he ought not to be held responsible for any losses accruing in the management of the trust funds." 9 Grat. 559. And then, after adverting to the fact that in Virginia executors and other trustees are allowed compensation, which is not the case in England, and expressing the opinion that this fact ought not to make the rule more stringent as to the measure of their responsibilities, the same judge, on page 560, says: "As at present advised, therefore, I should not feel disposed to extend the responsibilities of trustees beyond the limits by which they would seem to be bounded in the cases to which I have referred; and where they have intended to discharge their duties fairly, I think they should be treated with tenderness, and due caution taken not to hold them liable upon slight or uncertain grounds, lest, by a different policy, men of integrity, and who would be actuated by the proper views, may be deterred from taking upon themselves an office so necessary in the concerns of life from fear of the anxiety, trouble, and risk which it involves." It is plainly shown by these views of Judge LEE and other Virginia decisions that the degree of responsibility of trustees has never been supposed to be any less rigid in Virginia than it is in England. There are, however, some Virginia cases in which the general rule has been relaxed, but they involve the acts of trustees during the late civil war. These cases are anomalous and exceptional, and are not to be considered as qualifying the settled law in cases not peculiar in their nature. 2 Minor, Inst. (2d Ed.) 219; Myers v. Zetelle, 21 Grat. 733; Davis v. Harman, Id. 194. The case at bar involves nothing eccentric or unusual, either in the condition of the country or the terms of the trust. In all the essentials it is very similar to the cases of Matthews v. Brise, 6 Beav. 239, and Rowland v. Witherden, 3 Macn. & G. 568. In the former it was decided that, where a trustee had properly invested trust funds in exchequer bills, and then left them in the hands of his broker, by whom they were misappropriated, the trustee was personally responsible. And the syllabus in the latter case is as follows: "Trustees of stock sold it out, and committed the proceeds to their solicitor for investment, by whom it was misapplied and lost. Held, that the trustees were liable for a breach of trust, and that the *cestuis que trustent* were entitled to relief against both the trustees and the solicitor, and that they might sue either the trustees alone, or the trustees jointly with the solicitor." The lord chancellor in that case says: "The trustees were bound to satisfy themselves in some other way than by the mere assurances of their solicitor, and by the payments made by him as for interest, that the money was really advanced on mortgage. But they did not even require a sight of the mortgage deed." In both of these cases the fund was properly placed in the hands of a third party, but because the trustee failed to see that such third party had done his duty by actually making the investment, the trustee was made responsible. So, in the case at bar, if we concede that Quarrier had the bonds on hand at the time he agreed to sell them to Hughes, that would not relieve Hughes from responsibility, because it was his duty to see that the title and possession of the bonds had vested in him, or at least that he had acquired the title, and that they had been placed on special deposit in the bank in his name, and as his bonds, so that neither Quarrier nor the bank could convert or misapply them without committing a felony. But Hughes wholly failed to do this. He simply paid for the bonds, and subsequently collected the interest on them, without ever once even inquiring whether the bonds had been, in fact, purchased, or whether they had been deposited in the bank as his property. Instead of discharging this plain duty, he left the whole matter to Quarrier, and trusted to his assurances. There was no necessity for this. The most ordinary prudence would have required the trustee to see that the investment had been actually made, and that the bonds were in fact in the bank as his property. But it seems that Quarrier never even represented or gave Hughes any assurance that the bonds were in the savings institution. All that appears is that Quarrier agreed to sell to him

Digitized by Google

bonds which were then alleged to be in New York city. It is true, the record shows that on the day Hughes paid for the bonds the savings bank purchased bonds in New York, but there is nothing to show that this purchase was for Hughes. But it is also shown that these bonds were, on November 2, 1869, sold in New York on the private account of Quarrier. But, be this as it may, there is a still more significant fact in the record, which tends strongly to show that Hughes must have known that the whole trust fund had not been invested in United States bonds. The certificate given to him by Lamb, trustee for the trust fund, dated March 30, 1872, shows on its face that only a part of said fund—that is, $3,845.45—was represented to be for bonds misappropriated by Quarrier; the other $1,000 being, as shown by said certificate, for a balance on a certificate of deposit dated February 15, 1871, held by Hughes in his own right. This latter certificate was for $3,000, with a credit thereon for $2,000, leaving the said balance of $1,000, which was included in Lamb's certificate as a part of the trust fund. It thus distinctly appears that the whole of the trust fund was not in United States bonds at the time the bank failed, and that Hughes must have been cognizant of this fact. While I am not at all disposed to affirm that there was any bad faith or intentional misconduct on the part of Hughes, I cannot, under all the facts and circumstances of this case, and the principles of law before stated, discover any ground upon which he can be relieved from responsibility for the loss of said trust fund.

The grounds upon which the responsibility of Hughes has been placed, render it unnecessary to say much in regard to the refusal of the circuit court to allow the defendants to retake the deposition of A. C. Quarrier. The only new fact which the defendants claim they could prove by Quarrier is that he would testify that at the time he agreed to sell the United States bonds to Hughes the said bonds were in the custody of the Wheeling Savings Institution. It is not pretended that he would testify that any bonds were ever delivered to Hughes, or that they had been selected and deposited in the bank for safe-keeping, as the property of Hughes. The fact that they may have been in the bank as the property of the bank or of Quarrier would not relieve Hughes from responsibility, in view of the other facts appearing in the record. The *gravamen* of Hughes' default, and the ground on which he is made responsible, is his failure to have said bonds placed on special deposit as his property, and in his name, so that they could not be controlled or used by any person other than himself without the commission of a felony, or at least doing something more wrongful than a mere breach of trust and confidence.

It is, however, insisted for the appellants that the claim of the plaintiffs is barred by the statute of limitations. On April 4, 1873, Hughes wrote a letter to the plaintiff Mary Key, addressed to Baltimore, where she resided, in which he stated that he had invested the trust fund in United States bonds, and deposited the same in the Wheeling Savings Institution for safe-keeping, and that they had been lost by the failure of the bank in such a manner as to make that bank liable for them; that he had waited to see what would be realized from the assets of the bank, and had already received two dividends on the said fund, amounting to $518.46; that there would likely be other dividends on said fund, and he would probably realize something from other securities which he had obtained from the treasurer of said bank, but how much he could not tell, and that he would inform her of results. It is contended that this letter was such a repudiation of the trust as would start the running of the statute of limitations in favor of Hughes, the trustee. It is admitted that in a case of this character, where the relation of the parties is that of trustee and *cestui que trust*, the statute of limitations will not commence to run until there has been an open denial and repudiation of the trust by the trustee brought home to the *cestui que trust* in such a manner as will require the latter to act as upon an asserted adverse title. Ang. Lim. § 166; Cooey v. Porter, 22 W. Va. 120; Decouche v. Savetier, 3 Johns. Ch. 190. According to these authorities, it seems to me very clear that this letter was plainly insufficient to inform Mrs. Key that Hughes intended to repudiate his trust relation.

It is further contended that the laches of the plaintiffs has barred their right to relief in this cause. The record shows that Hughes continued to pay to the life-tenant the interest upon the trust fund, or an amount nearly or quite equal to such interest, up to the time of his death, which did not occur until March, 1886, a few months before this suit was commenced. It is true, there was a difference in the form of the receipts which he took from Mrs. Key for the payments made prior to 1873 and those he took for payments made thereafter. In the former he is mentioned as "Thomas Hughes, trustee," and in the latter as "Thomas Hughes" simply. But whether the payment was made in the one form or the other, it was a payment in fact, and a satisfaction of the only claim Mrs. Key had against him. There was no default in the payment, and consequently she had no cause of action, unless she had notice of the repudiation of the trust by him. The only pretense of such notice is the letter of April 4, 1873, which we have already considered, and hold insufficient for any such purpose. The fact that the receipts did not describe him as trustee, or state that the payment was on account of interest, did not, in the face of the actual payment of the interest, even tend to prove a denial of the trust. The laches, if there is any involved in this cause, is on the part of Hughes himself in failing to legally notify his *cestuis que trust ent* of his repudiation of the trust. Until

Digitized by Google

he did that, or refused to pay the interest on the trust fund, neither the life-tenant, Mrs. Key, nor the remainder-men, her children, had any cause of action. So far as this record discloses, there is not sufficient evidence to warrant any positive statement that Mr. Hughes ever intended to repudiate this trust, or refuse to pay or account for this trust fund. But whatever may have been his undisclosed intention, it is certain he never gave the plaintiffs any legal notice of it, and therefore they are not chargeable with laches for not intuitively discovering it. As soon as the appellants, as the executors of Hughes, notified the plaintiffs of their repudiation of the trust, and refused to pay the interest thereon, the plaintiffs promptly brought this suit. It is therefore apparent that the doctrine of laches has no application in this suit.

The appellees have made a counter-assignment of error. They claim that because the answer of the defendants denies the allegations of the bill that the payments made by Hughes to Mrs. Key, after the loss of the United States bonds, were paid as interest on the trust fund, that said payments must be treated as mere gratuities or gifts, and as such it was improper to allow the defendants credit for them, as was done by the decree of the circuit court. From the views we have taken of facts in this cause in the preceding portions of this opinion, it is clear that this claim of the appellees cannot be sustained. We have treated all the payments made by the trustee, Hughes, to Mrs Key, both before and after the alleged loss of the trust fund, as payments on account of the interest on said fund. For the reasons hereinbefore stated, I am of opinion that the decree of the circuit court should be affirmed.

ENGLISH and BRANNON, JJ., concurred. GREEN, J., absent.

(32 W. Va. 195)

WEST v. SHAW'S ADM'R.

(*Supreme Court of Appeals of West Virginia.* Feb. 16, 1889.)

BILL OF REVIEW—VENDOR AND VENDEE.

A sale is made under a deed of trust of a tract of land situated in Barbour county containing 16 acres. S. bids in the property, but H., the *cestui que trust*, contends that it was bid in by S. at his (H.'s) request, and paid for with his money. S. transferred his equity acquired by his bid to different parties, for valuable consideration, but with the express understanding and agreement that S. should obtain possession of said land, and hold it against H. The equity aforesaid being transferred to W., he sued S. for a deed, and S. sued him for the purchase money. The cases were heard together, and a decree was rendered that W. pay to S. $200, the purchase money for said equity, with interest from April 15, 1856, and that S., before receiving the same, should procure the legal title to said 16 acres. H. then brought a suit to establish his title to said 16 acres, in which he succeeded; said three cases being heard together. S. then waived his right to proceed against the land, but the court allowed him to sue out execution against the property of W. W. then filed a bill, reciting what had been done in the three cases, praying that S. be prevented from enforcing said execution, that the papers in said cases might be looked into, and that general relief might be granted him. *Held*, (1) that the bill filed by W., under all the circumstances, will be treated and considered as a bill of review; (2) that, the title of S. to the 16 acres of land in the bill mentioned having proved worthless, it would be inequitable and unjust to enforce a decree against W., his vendee, for the purchase money; (3) that a decree in favor of S., awarding execution upon a decree against W., which was conditioned upon his (S.'s) obtaining and holding the legal title of a tract of land, will be set aside when a court of competent jurisdiction has decided the said legal title not to be in S., but in some other person.

(*Syllabus by the Court.*)

Appeal from circuit court, Taylor county; JOHN A. DILLE, Judge.

John Bassel and *Edwin Maxwell*, for appellant. *Frank Woods*, for appellee.

ENGLISH, J. On the 28th day of December, 1845, Thomas Hoffman executed a deed of trust upon 36 acres of land, which had been conveyed to him on the same day by William Powell and others, situated in Taylor county, then Virginia, now West Virginia, to secure to William Powell the payment of $238. In this deed of trust one Charles W. Newlon was the trustee, and, default having been made in the payment of the money secured by said trust deed some time in the year 1848, 16 acres of said tract of land was sold by said trustee at public auction under said trust, at which sale said land was bid in by one William Shaw for the sum of $106. It appears from the record that Thomas Hoffman from and after the time of said sale claimed that said William Shaw purchased said 16 acres of land at the request of said Hoffman, and that he (Hoffman) paid part of the money to the trustee himself, and furnished the residue of the money to said Shaw to enable to pay for the same. On the 21st day of November, 1853, an agreement in writing was entered into between said Shaw and one William Powell, whereby said Shaw contracted to sell said Powell said 16-acre tract of land; and in said agreement it was expressly stipulated that in case the said Shaw should obtain possession of said land, and be able to hold the same against the claim of said Hoffman, that said Shaw should convey said 16 acres of land by deed of special warranty, with relinquishment of dower unto said Powell on or before the 15th of April, 1856. In consideration whereof the said Powell agreed to pay said Shaw the sum of $200 at the time of the delivery of such deed. At the date of this agreement said Hoffman seems to have been in possession of said 16 acres of land by his tenant, the said William Powell, who on the same day took a lease from said Shaw for two years, commencing from the 15th day of April, 1854, for said tract of land; and in the face of said lease it is stipulated between the said Powell and the said Shaw that the said Shaw should in no event be held responsible for the sum of $25, the cash rent paid for said term, whether the said Powell should be able to obtain or retain possession of said land for or during said term or not. A short

Digitized by Google

time afterwards said West sold said land to said Powell in consideration of $200, and said West transferred the same to William H. Shields, who in turn transferred it to one Thomas Newlon, but no purchase money seems to have been paid upon any of these transfers. Out of these proceedings four suits originated, all of which are so intimately connected that they were heard together eventually. In the first place, in 1856, said Thomas M. West brought a suit against said Shaw to obtain a deed in pursuance of the contract of November 21, 1853. Said Shaw then sued said West for the purchase money for said tract of land. In 1865 these two suits were brought on and heard together, and a decree was rendered, on the 25th day of November in that year, in said consolidated cases, directing said Thomas M. West to pay to the complainant, William Shaw, the sum of $200, with interest thereon from the 15th day of April, 1856, until paid, and costs; and said decree further provided that the said William Shaw, before receiving the same, should procure from the defendant, Charles W. Newlon, trustee as aforesaid, the legal title to the land in the said bills and proceedings mentioned, and should execute and acknowledge for record a deed with covenants of special warranty, with his wife's relinquishment of dower therein, and file the same in the papers of the cause conveying to the said Thomas M. West the said tract of land containing 16 acres. In 1866 said Thomas A. Hoffman brought a chancery suit against said Thomas M. West, William Shaw, William Powell, William H. Shields, Thomas Newlon, and Charles W. Newlon, reciting the proceedings that had been taken in the two first-named cases, and praying that the decree obtained in the cause of Thomas M. West against William Shaw and William Shaw against William Powell might be set aside, and be rendered of no effect, and that a decree might be entered compelling the said Charles W. Newlon, trustee as aforesaid, by deed to reconvey said 16 acres of land to plaintiff, and that all conveyances, leases, and shifts between the said parties relative to said land be annulled and canceled. On the 21st day of September, 1868, the three cases of Thomas M. West v. William Shaw et al., William Shaw v. William Powell et al., and Thomas Hoffman v. William Shaw et al. were consolidated and heard together, and a decree was therein rendered, in which it was held that said Hoffman in the last-named suit was entitled to the legal title to the land named in said causes; and, said title having been conveyed to and then being in said Thomas M. West, it was decreed that said West do by deed, with covenant of special warranty, convey said 16 acres of land to said Thomas A. Hoffman, and upon his failure to do so in 10 days directing a special commissioner therein named to convey the same to said West; and the said William Shaw by his counsel in court waived the right to obtain satisfaction of the amount decreed to be paid him by the decree rendered in the case of Shaw v. West et al. on the 25th day of November, 1865, by resorting to the sale of said land therein decreed to be sold for that purpose,—a waiver and concession which it occurs to me could be very easily and cheaply made by said Shaw, for the reason that the land which had been decreed to be sold as the property of West did not really belong to said West, but belonged to the plaintiff, Thomas A. Hoffman, and said decree had just directed the legal title to said land to be conferred on Hoffman. Said decree proceeds, however, and on motion of said Shaw he has leave to sue out against said Thomas M. West such writ or writs of *fieri facias* as might be necessary to obtain satisfaction of the amount decreed to be paid by said West to said William Shaw by said decree rendered on the 25th day of November, 1865, together with the costs of suing out said executions. In October, 1869, the said Thomas M. West filed a bill in said court against the administrator of said William Shaw and others, in which he recites a history of the transactions between these parties with reference to said 16 acres of land, setting out briefly what had been done in said former suits, and the fact that Hoffman had been decreed to have the best claim to the legal title to said land, and that he had conveyed the same to him in obedience to the direction of said former decree; and claiming that as the title of said Shaw to said 16 acres of land had been set aside on the ground of legal, if not actual, fraud, that he should release his decree against said West, but that, instead of discontinuing his decree and claim for purchase money after his title to said land proved worthless, he had sued out a writ of *fieri facias* on his decree, and had the same levied on the cattle and other property of plaintiff, and will make the money, if not restrained by the order of a court of equity. He prays that the papers and decrees in the three suits thereinbefore mentioned and described be made and taken as proof in and part of his bill; that the collection of said execution may be restrained and enjoined; that when the whole matter can be heard, said Shaw may be perpetually enjoined; and, when the whole matter can be heard, that he may have general relief, etc.

Can this bill, filed by said Thomas M. West, be regarded and treated as a bill of review? "The causes for which a bill of review may be maintained are limited to these: (1) There must be error in law apparent upon the face of the decree; or (2) the party seeking to review the decree must allege and prove the discovery of new matter which could not have been used at the time of making the decree, in consequence of the party's ignorance that such matter existed." Sand. Suit in Eq. § 631. This bill, if a bill of review at all, is based upon error in law apparent upon the face of the decrees; and in 4 Minor, Inst. § 1253, it is stated that "no previous leave of the court is requisite in order to file a bill of review for

Digitized by Google

error of law apparent on the face of the proceedings." When we examine the bill, we find that, although it does not state concisely the errors of law relied upon, it does in general terms call attention to the errors of law apparent on the face of the record. In the first place, it calls attention to the fact that, as a condition precedent to the right of recovery of the $200 purchase money from Powell, under whom appellant took as assignee, said land was to be paid for when said Shaw should make a deed for the same, and that there was a further condition that the sale should become valid only if he (said Shaw) could hold the land against the claim of said Hoffman. Said bill recites the proceedings had in the chancery suit of appellant against said Shaw and others, and also in the suit of Shaw against appellant and others; that these cases were heard together; and that the court decreed that said Shaw should convey said 16 acres of land to appellant, and that appellant should pay $200, the purchase money, and interest from the 15th day of April, 1856, till paid, and costs, and that said land should be sold if the purchase money was not paid. He states that this decree was satisfactory, as he supposed the title of Shaw was settled and good. He then states that Hoffman brought his suit against Shaw and others, which resulted in determining that said Shaw never had any equitable right to said 16 acres of land, but that the purchase was made for and with the money of Hoffman, and that neither Shaw nor appellant could hold the same against the better claim of said Hoffman, and that appellant was directed to pass the legal title which he had obtained under the decree in his suit against Shaw to said Hoffman, which decree he complied with by conveying said title. This statement shows an utter failure of consideration, and appellant claims in his said bill that said Shaw's decree against him should be released, as his title was set aside on the ground of legal, if not actual, fraud; but, instead of discontinuing his decree and claim for purchase money, he has sued out a writ of *fieri facias*, and levied it upon his personal property. He then prays that the papers and decrees in the three suits thereinbefore described and on file among the papers of the court be considered as part of his bill, that when the whole matter can be heard said Shaw be perpetually enjoined from collecting the execution aforesaid, and for general relief. Now, if this prayer be allowed, it would result in reversing and annulling the only portion of said decrees that appellant cared to complain of, and the only part of the decree that was affecting his interests, and said prayer is in effect the same as if he had prayed that said decree be reviewed and reversed so far as it directed said judgment to be enforced against him after the consideration proved worthless. In the case of Sturm v. Fleming, 22 W. Va. 404, it is held that, "in chancery pleadings, it is the disposition and practice of courts of equity to regard substance rather than mere form or name, and to so mould and treat the pleadings as to attain the real justice of the case; consequently a complaint styled by the pleader a "petition," which has all the elements of a bill in the nature of a bill of review, will be treated as such if it has the necessary parties, with sufficient averments and prayer for relief." In the case of Goolsby v. St. John, 25 Grat. 163, in which there was a decree perpetuating an injunction, setting aside a judgment, and remanding the case to rules, St. John filed a bill of review for errors apparent in the decree, and the court made a decree in the bill of review case, reversing and annulling said decree, and directing the case to stand upon the docket as it did before said decree; and on the same day the original case of Goolsby & Rector against St. John was reinstated on the docket, and on motion of St. John it was decreed that the injunction be dissolved. The appellate court held (1) that it was a proper case for a bill of review; (2) that the court should not only have dissolved the injunction, but should have dismissed the bill; (3) that the bill of review was a continuation of the original suit, and there should not have been two decrees, but the whole should have been embraced in one decree, and the appellate court will so regard them; (4) that, if the case had not been a proper one for bill of review, still an appeal from that decree brings up the whose case, and the appellate court will go back to the first error, and reverse the decree complained of. In the case of Middleton v. Selby, 19 W. Va. 168, third point of syllabus, it is held that, "in determining what is error of law apparent on the face of the decree, the court cannot look into the evidence in order to see if the decree is erroneous, as that is the proper office of the court upon appeal; but in determining this question it is necessary to look at the whole record, including the testimony, to ascertain whether upon the whole case error of law has been committed." In the case of Martin v. Smith, 25 W. Va. 579, a bill of review was treated and considered as a petition for a rehearing, and the decrees complained of were reviewed. In that case (page 583) SNYDER, J., in delivering the opinion of the court, says: "In many other cases in this state and in Virginia, it has been held that a literal compliance with forms is not required by courts of equity. They regard substance rather than mere form, and so mould and treat pleadings as to attain the justice of the case. Under this rule, a petition for a rehearing has been treated as a bill of review, when the facts made it necessary to so regard it, and a notice to correct a decree on a bill taken for confessed has been treated as a petition for a rehearing;" citing numerous authorities. So, in the case under consideration, I must conclude that the bill filed by appellant in the circuit court of Taylor county, although praying an injunction, must be considered and treated as a bill of review; and it will be seen that section 5, c.

Digitized by Google

133, Code, provides that a court or judge allowing a bill of review may award an injunction to the decree to be reviewed.

In this case, I am of opinion that this court would be fully warranted in holding and treating the last bill filed by appellant as a bill of review, and, treating it thus, there can be no question as to the error existing in the decree of September 21, 1868, in awarding execution against the property of appellant on a decree which had been obtained upon a claim which had proved utterly worthless, and instead of issuing execution upon said decree the court should have canceled and annulled the same. Treating, then, the bill filed by appellant, not as an injunction bill, but as a bill of review, the decree rendered therein by the circuit court of Taylor county on the 31st day of March, 1888, must be reversed and annulled; and the decree directing appellant to pay the said William Shaw the sum of $200, with interest thereon from April, 1856, and costs, being dependent upon said Shaw's obtaining the legal title to the 16 acres of land in the bill mentioned, and he having failed to obtain said legal title, said decree, and the decree of September 21, 1868, awarding execution on said former decree, are reversed, so far as they give said decree for $200 and interest and costs, and award execution upon the same, and the appellant must recover from the estate of said William Shaw the costs of this appeal.

SNYDER, P., and GREEN and BRANNON, JJ., concurred.

(32 W. Va. 174)

DAVIS v. LIVING *et al.*

(Supreme Court of Appeals of West Virginia. Feb. 16, 1889.)

TAX DEED—EVIDENCE.

Under the provisions of the Code of 1868 of this state, a tax deed for land, executed in 1870, by a deputy-recorder, and duly acknowledged by him in his own name as such deputy, is admissible in evidence in an action of ejectment for said land.

(Syllabus by the Court.)

Error to circuit court, Ritchie county; THOMAS I. STEALEY, Judge.

Thos. E. Davis, for plaintiff in error. *Cyrus Hall*, for defendant in error.

SNYDER, P. Action of ejectment instituted in the circuit court of Ritchie county in May, 1885, by Thomas E. Davis against Jacob Living and others, to recover 4,000 acres of land lying in said county. David MacGregor and O. M. Brown were on their motion made defendants in an action in the place and stead of said Living and others. The case was tried by jury on the issue of not guilty, a verdict returned for the defendants, on which the court entered judgment. During the trial the plaintiff took two bills of exceptions, in the second of which all the evidence produced on the trial is made part of the record. The plaintiff obtained this writ of error. The only question argued and insisted upon by the counsel for the plaintiff in error in this court is presented by the first bill of exceptions. The plaintiff offered in evidence to the jury, as a part of his chain of title, a deed executed by G. H. Caldwell, deputy-recorder of Wirt county, to Peter P. Runyan and Johnson Litson, dated November 24, 1870, and duly admitted to record in said county on the same day by C. D. Fisher, recorder. Upon objection by the defendants the court refused to permit this deed to go to the jury as evidence, on the ground that "a deputy-recorder has no authority to make a deed for land sold for taxes." From the recitals in the said deed it appears that the tract of land thereby conveyed, to-wit, 3,000 acres, situated in Wirt county, was on November 12, 1869, sold by the sheriff of said county for delinquent taxes charged thereon in the name of the Dutchman Oil Company, for the years 1867 and 1868, and purchased by W. V. Vernon for $125.82, the amount of said taxes, etc. The said Vernon assigned his said purchase to the said Peter P. Runyan and Johnson Litson, to whom the land was conveyed as aforesaid. The grantor is described as "George Caldwell, deputy-recorder of Wirt county," and the deed is signed, "G. W. CALDWELL, Deputy-Recorder of Wirt County," and the acknowledgment is by said Caldwell as deputy-recorder. The Code of 1868 of this state, (chapter 13, § 16) provides: "When a statute requires an act to be done by any officer or person, it shall be sufficient if it be done by his agent or deputy, unless it be such as cannot lawfully be done by deputation." And section 11 of chapter 7 of said Code empowers the recorder, with the consent of the court or judge, to appoint any person his deputy; and then provides that "the deputy, during his continuance in office, may discharge any of the official duties of his principal;" and by section 13 of said chapter declares that, where a recorder dies during his term of office, his deputy in office at the time "may continue to discharge the duties of the office in the name of the deceased, until the qualification of his successor." And section 14 is as follows: "The duties of the recorder, of a judicial character, shall not be performed by deputy, notwithstanding anything above contained to the contrary." In Pendleton v. Smith, 1 W. Va. 16, it was decided that all writs, process, and attachments must be signed by the clerk or by his deputy, and, if by the latter, he must sign the name of the principal for the clerk. In this case, BROWN, J., dissented, he being of the opinion that it was sufficient for the deputy to sign the writ in his own name. It seems to me that the conclusion of Judge BROWN is the correct one, as it is not only in harmony with the statute law, but in accordance with the general usage and practice in all cases of the acts of deputy-clerks. But, be this as it may, all the judges in this case agreed that the act might be done by the deputy-clerk. The statute law above quoted gives the deputy recorder plenary power to discharge any of the official duties of his principal, with the

Digitized by Google

single exception that he shall not do so when the duties are of a judicial character. The form in which the deputy shall designate his acts or sign official papers is not defined, except, when he acts after the death of his principal, he is required to discharge the duties of the office in the name of the principal. If this latter requirement can be understood to require the deputy to sign official papers in the name of his principal, it could only apply to acts done when the principal was dead; because, if the statute required such signing in all cases, there was no necessity or propriety for this special requirement. It is very certain that the execution of a tax deed is a ministerial, and not a judicial, duty, and therefore a duty which may under the statute be done by a deputy-recorder. Under the statute law of Virginia, which was at that time substantially the same as our statutes in regard to the powers of a deputy to act for his principal, the court of appeals of that state, in Flanagan v. Grimmet, 10 Grat. 421, held a tax deed made by a deputy-sheriff for land sold by the sheriff of the county was legally executed and admissible in evidence in an action of ejectment for the land conveyed by such deed. It is insisted by the defendant in error that this deed was properly rejected, because the plaintiff failed to prove that G. W. Caldwell was in fact the deputy-recorder at the time he executed the deed. The statute covers this objection. It declares that the deed, when executed, shall be conclusive evidence, against all persons other than the former owner of the land sold for taxes, that the person named in the deed as recorder was such. Code 1868, § 29, c. 31. For the reasons aforesaid, I am of opinion that the judgment of the circuit court should be reversed, the verdict of the jury set aside, and the case remanded for a new trial.

ENGLISH and BRANNON, JJ., concurred. GREEN, J., absent.

(32 W. Va. 177)

STATE v. GOODWIN.

(*Supreme Court of Appeals of West Virginia.* Feb. 16, 1889.)

WITNESS—IMPEACHMENT.

1. To impeach a witness by proving statements on another occasion inconsistent with or contradicting his statements on the trial, the statement must be material to the cause, not collateral.

2. If the statement be collateral to the case, and it be drawn out on cross-examination, and not in chief, the party drawing it out is bound by the answer, and cannot introduce evidence to contradict it.

3. Before such evidence to impeach can be admitted, a foundation must be laid by an examination of the witness touching the fact of his having made such statements.

(*Syllabus by the Court.*)

Error to circuit court, Wood county; J. M. JACKSON, Judge.

J. F. Laird, Jas. Hutchinson, and *W. C. Mann*, for plaintiff in error. *Alfred Caldwell*, Atty. Gen., for the State.

BRANNON, J. This is a writ of error to a judgment of the circuit court of Wood county, sentencing James Goodwin to the penitentiary for two years upon an indictment against him, R. J. Goodwin, and John Freed, for breaking into a spring-house of J. A. Murray, with intent to commit larceny, and committing it. The state introduced evidence to show that the spring-house had been broken into, and some butter, some milk, a crock, a china dish, and a china saucer, stolen and carried to a house-boat lying in the Ohio river, occupied by John Freed with his family, James Goodwin and his wife and children, and Richard Goodwin and his wife; Freed occupying one end, Goodwins the other; and and that some of the butter, the dish, the saucer, and some milk were found on this boat. The breaking occurred in the night. On the trial, Mrs. Frances Freed was a witness for Goodwin, who was tried alone, and her evidence in chief was as follows: "I am the wife of John Freed. James Goodwin, my little son, and my husband left the boat about sundown, to go down to the fish-line. I was there when they returned home about dark. James Goodwin brought two rolls of butter. His wife gave me one of the rolls next morning. I recognize this meat-dish. We have owned it for some time. I was on the boat when Mr. Beckwith searched it. They got parts of two rolls of butter, this meat-dish, and two saucers. They found about one pint of milk, which was in a bowl. They found no butter except the two rolls." On cross-examination she stated: "My husband did not leave the boat that night. James Goodwin and my husband returned about 8 o'clock or half-past 8. Jim reached the butter to his wife. I saw no milk. They had no milk with them when they came back. I sent my little boy after milk for my baby. I don't know from whom he got it. He would go and get it as I wanted it." Prisoner claimed and stated that he left the boat with the boy and Freed to go to a fish-line, and his wife had given him some money, telling him to buy some meat or butter, and while gone from the boat he met a man who sold him two rolls of butter of about one pound each, for 50 cents, which he took to the boat. The state, on cross-examination, asked Mrs. Freed whether she had a conversation with Lucy Smith, and whether she did not tell her that she (Freed) had said to her husband, after he and Jim Goodwin came back that night with the butter, that "that was a dang big lot of butter for 50 cents," and that he had told her to hush; that he did not buy the butter, but that Jim Goodwin and the little boy went out and got the butter and milk while he watched the skiff; to which question the prisoner obejcted, but the court allowed it, saying it was proper in order to lay foundation to impeach the credibility of the witness in regard to facts testified to by witness in chief, and for no other purpose. The witness stated that she had never had any such conversation with Lucy

Digitized by Google

Smith. The state then asked her if she did not tell Lucy Smith, in the presence of Mrs. Rider, that those damned Goodwins had got her son Charlie drunk, to make him tell, and that Jim Goodwin and Dick Goodwin were going to turn state's evidence and get out, and then send her husband to the penitentiary; and whether she did not say in same conversation that her husband was an innocent man, and that that damned Jim Goodwin had left her husband in charge of the skiff, and that Goodwin had taken her son and gone and stolen the butter and milk, and that her husband had nothing to do with it, and that she thought they ought to punish the guilty, and let her husband go. Prisoner objected to the question, but the court allowed it on the ground that the question was proper to lay ground to impeach Mrs. Freed, as it went to credit of witness, but for no other purpose. The witness then emphatically denied that she ever had any such conversation with Lucy Smith. The state then asked her if she did not have conversation with Mrs. Rider in regard to her troubles, and if she did not state that Jim Goodwin and Dick Goodwin were going to turn state's evidence, and send her husband to the penitentiary, and if she did not say to Mrs. Rider that her husband was innocent, and that nigger, Jim Goodwin, and her son Charlie stole the butter and milk; and if she did not at the same time state that she dropped the crock the milk came in into the river, and it was a good thing she did; that she could prove the dish was hers, and Mrs. Goodwin would claim the saucer, and they could not have the crock there in evidence against them in court. The prisoner objected, the court allowing the question for the same reason stated above, and prisoner excepted. The witness, Mrs. Freed, answered that she had never made any such statements to Mrs. Rider. The state introduced Lucy Smith, who stated that Mrs. Freed came to her house crying, and in great trouble, and said they had been getting Charlie drunk, and that they were going to get him into trouble; that her husband was innocent; that Jim Goodwin had stolen the butter and milk; that when they came home that night she called her husband to one side, and said, "That's a danged lot of butter to get for 50 cents," and that she was afraid she would get into trouble; that her husband then told her that he did not buy the butter or milk, but that Jim Goodwin and Charlie had gone and got the things while he watched the skiff; that she (Mrs. Freed) said they threw the milk crock into the river, and they could not find anything to hurt them much; that Mrs. Goodwin claimed the china saucer as hers, and she (Mrs. Freed) would prove the other dishes were hers; that the crock was out of the way, or they would have it in evidence against them; but she heard Jim and Dick Goodwin were going to turn state's evidence, and send her husband to the penitentiary. Prisoner objected to this evidence, but the court allowed it for the purpose of impeaching and contradicting her as to her testimony in chief, and for no other purpose, and prisoner excepted. The state introduced Mrs. Rider, who stated she was at Lucy Smith's, and heard the talk between them; that in a day or two she went down to see her (Mrs. Freed;) that she told her all her troubles; that she said they had brought the butter and milk to the boat, but her husband had nothing to do with it; that Jim Goodwin and her boy had gone and got the things, and her husband did not leave the skiff; that they had thrown the crock into the river, but that Jim Goodwin had stolen the things, and he and Dick were going to turn state's evidence, and send her husband to the penitentiary. Prisoner objected to this evidence. The court allowed it, saying it was proper to impeach Mrs. Freed as to facts testified to by her in chief. The prisoner asked, but was refused, the following instruction, for which he excepted: "The jury are instructed that the testimony of Miss Lucy Smith and Mrs. Rider in regard to the conversation with Mrs. Frances Freed, in the absence of James Goodwin, is not evidence of any fact mentioned by them, and only relevant as to the credibility of Mrs. Freed, and cannot be considered as proving any fact bearing upon the guilt of the defendant."

Lucy Smith's evidence is not admissible. Her statement that Mrs. Freed said her husband was innocent, and that Jim Goodwin stole the butter and milk, was simply Mrs. Freed's expression of opinion. Her statement that Mrs. Freed said that when they returned to the boat that night she called her husband aside, and said, "That's a danged lot of butter to get for 50 cents," is not admissible. True, Mrs. Freed stated in her evidence that Goodwin brought to the boat two rolls of butter, but did not say whether they were large or small, whether one pound each, or whether they would make up the quantity lost. They might have been large,—sufficient to make up the quantity. Here was no clear contradiction of her own evidence. Mrs. Freed's statement to Lucy Smith that her husband responded that he had not bought the butter or milk, but that Jim Goodwin and Charlie had gone and got the things while her husband watched the skiff, was improperly admitted, because it was simply a declaration of Freed, in the absence of the prisoner, after the commission of the act; and, were Freed and Goodwin co-conspirators, the declaration of one, made after the consummation of the act, would not be admissible. 1 Greenl. Ev. § 111. To impeach a witness by showing that on another occasion he made a statement contradicting one made on the trial, that statement must relate to a matter material to the case,—must concern a fact involved in the evidence There was not, and properly could not have been, involved in the case, or in the evidence given, any question as to what Freed said as to the transaction after its consummation

Digitized by Google

The witness had stated nothing in chief as to it to make it fall under the rule of Forde's Case, 16 Grat. 547, that a witness may be impeached as to a matter, though collateral, if the statement be made in chief; nor could the state have introduced, to support the issue on its side, as evidence independent of impeachment purposes, proof of the declaration so made by Freed; and for that reason it could not be let in to contradict a witness as to this collateral and irrelevant matter, for when a witness is cross-examined on a matter collateral to the issue, his answer cannot be subsequently contradicted by the party putting the question. The test of whether a fact inquired of on cross-examination is collateral, is this: Would the cross-examining party be entitled to prove it as a part of his case tending to establish his plea? This limitation, however, only applies to answers on cross-examination. It does not affect answers to the examination in chief. Whart. Crim. Ev. § 484; Forde's Case, cited above; Nuckols v. Jones, 8 Grat. 267.

There is in Lucy Smith's evidence other matter objectionable, and that is the language: "That she (Mrs. Freed) said they threw the milk crock overboard into the river, and they could not find anything to hurt them much; that Mrs. Goodwin claimed the china saucer, and she (Mrs. Freed) would prove the other dishes were hers; and that the crock was out of the way, or they would have it in evidence against them." This matter would, *per se*, be competent as inconsistent with her statements on the trial, and the general drift of her testimony of the prisoner's innocence, and particularly tending to contradict her statement that, when they returned to the boat, they brought no milk, and, inferentially from other statements, no dishes, by proving that she said the crock had been there, but was disposed of as evidence, and the presence of the dishes would be explained; but the objection is that no foundation for this evidence had been laid by an examination of Mrs. Freed as to the fact of her having made such statements, which is indispensable. 1 Greenl. Ev. § 462; Unis v. Charlton, 12 Grat. 484. True, a foundation was laid as to a part of her statement, but not as to the particular part specified, which is separable from the other part. A foundation was laid as to this matter in examining Mrs. Freed as to her conversation with Mrs. Rider, but not in examining her as to her conversation with Lucy Smith. A foundation should be laid as to all the substantial or material matters as to which it is proposed to contradict a witness, not merely a part of such matters, leaving a material part without the preliminary foundation. Mrs. Rider's evidence as to the conversation in Lucy Smith's evidence is, for reasons stated as to the latter's evidence, incompetent. Her statement that Mrs. Freed said they brought the milk to the boat is incompetent. Her statement that Jim Goodwin and her boy went and got the things s incompetent. Her statement that they had thrown the crock in the river is admissible, but not her statement that Jim Goodwin had stolen the things, and that he and Dick were going to turn state's evidence, and she thought they ought to send the guilty persons who stole the things. Mere opinion is not admissible in such cases. The evidence so improperly admitted was calculated to injure the prisoner's defense.

The instruction refused, while not couched in very plain or accurate language, yet, properly construed, was unobjectionable, and as an additional guard against the misuse by the jury of the evidence of Lucy Smith and Mrs. Rider in applying it, not merely on the question of the credit of those witnesses, but to establish the main fact of the prisoner's guilt, should have been given; but as the court had, in admitting the evidence of these witnesses, distinctly stated that it was to be used only on the question of the credibility of Mrs. Freed, the judgment would not for that cause be reversed.

As to the motion for a new trial because the verdict was contrary to the evidence. The case was tried by a jury, and depended on the weight of testimony, credibility of witnesses, and inferences and deductions from facts proven, of which the jury, and not the court, were the proper judges; and this court will not set aside a verdict in such cases except in cases where there is a plain deviation from right and justice, not in a doubtful case. State v. Cooper, 26 W. Va. 338. We could not for this cause set aside the verdict. For reasons, however, above given, the judgment and verdict are to be reversed and set aside, and a new trial awarded, wherein, if the same matters shall arise, the principles herein indicated shall be applied, and the cause is to be remanded to such circuit court for such new trial.

SNYDER, P., and ENGLISH, J., concurred. GREEN, J., absent.

(32 W. Va. 215)

HESCHT *et al.* v. CALVERT *et al.*

(*Supreme Court of Appeals of West Virginia.* Feb. 25, 1889.)

GUARDIAN AND WARD—ACCOUNTING—COMPENSATION.

1. C. is appointed a guardian for A. and G., infant children of J. H., who enlisted in the United States army, and was killed in 1863, leaving a widow, who married a widower with eight children in the latter part of the year 1863, and by him she became the mother of eight more children. The guardian applied for and obtained a pension for his said wards, after considerable delay, in November, 1875. In December, 1875, the mother of said wards and her second husband presented a claim to said guardian for keeping, clothing, and schooling said wards for 11 years up to December 4, 1875, amounting to $1,056, which was paid by said guardian out of said pension money as of that date, he taking their receipt for the amount so paid. Said guardian also paid said parties $105 on the 28d day of June, 1877, and $100 on the 6th day of January, 1879, for boarding, schooling, and clothing said wards, taking receipts for the amount so paid, but neither receiving nor requiring the production of an itemized account of the claim so presented; and upon a settlement of his accounts before a

Digitized by Google

commissioner on the 20th day of December, 1882, said guardian was charged with $1,505.53 as received in January, 1876, although really received in December, 1875, and $30 every three months thereafter until February, 1878, making the aggregate amount received $1,715.53, and credited with $1,056 as of December 4, 1875, $105 as of June 23, 1877, and $100 as of June 6, 1879, and $10 as of December 10, 1877, paid by said guardian to said parties as aforesaid; said commissioner charging said guardian with no interest upon the amounts so received by him. Upon a bill filed to surcharge and falsify said account and the proceeding had therein, *held*, that the claim presented by the mother and step-father of said wards stands on no different footing than it would if presented by a stranger.

2. That the money so received by said guardian for said wards should have been invested or loaned within 30 days after it was received, and he should have been charged with interest thereon after that time, unless he should have sooner loaned or invested the same.

3. An account of this character against an infant should not only be itemized, but should be sustained by satisfactory proof; and a guardian, although duly authorized to disburse the principal of his ward's estate for education and maintenance, should require such proof before paying the same.

4. Said guardian having failed to lay before a commissioner of accounts a statement of receipts during the several years he had the money of his said wards in his possession, and not accounted for, should have no compensation for his services during the years he has thus failed to settle his accounts.

5. If the recovery of such claim, or any portion of it, could be prevented by illegality of consideration or lapse of time, or by any other fact within his knowledge, the guardian must avail himself of such defense, or he can obtain no credit for the amount paid.

6. A guardian who has more than one ward should keep their accounts distinctly, and settle them separately, showing his receipts and disbursements, and the balance in favor of or against each.

(*Syllabus by the Court.*)

Appeal from circuit court, Wetzel county.

Action by Albert M. Hescht and Gracilla B. Hyder against A. G. Calvert, plaintiffs' late guardian, and Wilfred Moore, surety on said guardian's bond, to set aside a settlement made by the guardian before a commissioner. Judgment was favorable to defendants, and plaintiffs appeal.

S. B. Hall and *L. N. Tavenner*, for appellants. *W. S. Wiley* and *Robt. McEldowney*, for appellees.

ENGLISH, J. On the 16th day of July, 1870, one A. G. Calvert was appointed guardian for Albert Marion Hescht and Gracilla Belle Hescht, infants, and only children of Jacob Hescht and Mary Ellen, his wife, and entered into bond in the penalty of $600, with one Wilfred Moore as surety, conditioned for the faithful performance of all the duties of said office and trust, and to well and truly pay and deliver, or cause to be paid and delivered, unto said Albert Marion Hescht and Gracilla Belle Hescht, orphans of Jacob Hescht, deceased, all such estate as then was or thereafter should appear to be due the said orphans; the said Jacob Hescht having enlisted in the service of the United States in 1862, and having been killed in said service during the year 1862, leaving said Mary Ellen, his widow, and the said Albert Marion and Gracilla Belle, his only children, surviving him. Some time in the year 1863 his said widow intermarried with one Isaac Newton Hubbs, who was a widower with eight children, and in the course of time said Mary Ellen became the mother of eight children by her said second husband, Isaac N. Hubbs. The appellants, Albert M. Hescht and Gracilla B. Hescht, at the time of their mother's marriage with said I. N. Hubbs, were respectively of the ages of 4 and 2 years. It appears that they made their home for the first year after their father's death with their mother, and in the next March they went and lived with their grandfather, until their mother intermarried with said Hubbs, in July, 1863, and then they went and lived with their step-father and mother as a family, sometimes working out from home, and sometimes working on the farm. On the 3d day of August, 1879, said Gracilla B. Hescht intermarried with one J. F. Hyder, and at once left the home of her step-father, and went to live with her husband.

It seems from the deposition of Albert M. Hescht, filed in the cause hereinafter mentioned, that he and his mother and step-father and seven of the children lived together until he was 20 years of age, except that a part of the time when he was small he lived with his grandfather, Cornelius Vorhees, in Wetzel county, W. Va., and part of the time with his uncle, Charles Smith, and part of the time with another uncle, David Harland. He was with his uncle Charles Smith about a year, and with his uncle David Harland two or three different times, and with his grandfather several times. After this he went to live with his step-father and the family, who were farming, and worked on the farm for Mr. Hubbs until he was about 16 years of age. He then went to work in the Pittsburgh stave factory, and worked for about two years. While working at said factory he lived at home, and took what he could save after buying his clothes, and gave it to his mother and step-father for the support of the family, or bought supplies for the family and took them home. When he was 18 his step-father had bought a farm on the waters of "Proctor," and moved onto it, and he went with them, and worked on the farm for one year. When he was 19 years of age he went to work at the carpenter's trade, with one David Windgrove, and worked with him that fall and that winter; that when he was 20 years of age he went to Jackson county, W. Va., where he remained with his cousin for about five months, when, returning to Wetzel county, he lived with Henry Hubbs. In the month of November, 1875, when said Albert M. Hescht was not quite 17 years of age, and his sister was about 15 years of age, a pension was granted them by the United States government upon the application of their said guardian, A. G. Calvert; and, according to the statement of said guardian, he received for his said wards, in December,

Digitized by Google

1875, the sum of $1,505.53. On the 20th day of December, 1882, said A. G. Calvert seems to have gone before one W. S. Wiley, a commissioner of accounts, and made a settlement of his accounts as guardian for appellants, and said commissioner found that said guardian had received altogether for his said wards the sum of $1,715.53, and that he had paid out for their use and benefit $1.335.55, leaving a balance due them of $379.98 when they arrived at the age of 21 years. Said commissioner, however, further reported that in his opinion said guardian should be allowed for his commissions and services in attending to the interests of his said wards from the time of his appointment the sum of $115, and, deducting that sum from the balance in said guardian's hands at the time said Albert M. Hescht arrived at the age of 21 years, being $379.98, shows a balance due said wards of $264.98. and, deducting costs, $7, would leave a net balance due said wards at the time they arrived at 21 years of age of $257.98. That one-half of that sum was due Albert M. Hescht, and one-half due Gracilla B. Hescht, being $128.99 due each of them; and that after said Albert M. Hescht arrived at the age of 21 years he had been paid by his said guardian $178, which would leave a balance due said guardian of $49.01; and that Gracilla B. Hescht, after she arrived at the age of 21 years, had been paid by her said guardian $175, leaving a balance due said guardian from her of $46.01. To surcharge and falsify this account settled as aforesaid before Commissioner W. S. Wiley this suit was brought to February rule, 1886, in the circuit court of Wetzel county, and plaintiffs allege that they at no time had any settlemen with their said guardian; that the accounts laid before said Commissioner Wiley are by no means correct, and they charge the same to be incorrect; that said account does not contain the true amount of money received by said Calvert as their guardian, or paid out by him; that he sought only to account for $1,715.53, instead of $1,741.46, with which he was properly chargeable; that the charges allowed said Calvert in said report are unjust and incorrect; that he has charged the plaintiffs with $1.056 paid by him to their mother as of December 4, 1875, when there was no such just charge against them, and none such could have been properly made against them; that in support of said charge said guardian presented a pretended voucher, dated January 25, 1876, for said sum of $1,056, purporting to be an account in favor of Isaac Hubbs and Mary E. Hubbs for keeping, clothing, and schooling plaintiffs for 11 years up to December 4, 1875, which purports to be receipted by said Isaac and Mary E. Hubbs as of the 15th day of January, 1876. The plaintiffs charge that said item is erroneous in that the same, or the greatest proportion thereof, was barred by the statute of limitations at the time it was paid, if ever paid, in that said Calvert had no right as such guardian to pay out for the support, keeping, clothing, or schooling of the plaintiffs any thing more than the annual income of their estate, the rents, issues, and profits thereof, without an express order from a court of competent jurisdiction, which they deny was ever obtained by him, because there never had been any such indebtedness incurred by said guardian; that the same was without consideration moving from the mother or from said Hubbs, as they had more than paid for any and all expense to which their mother and said Hubbs had ever been put to in such keeping, etc.; that the further items of $105 as having been paid June 23, 1877, and $100 as having been paid June 6, 1879, were erroneous and improper for the same reason; that instead of taking care of said estate, and rendering an account thereof during the infancy of appellants, he paid them various sums of money, which he had no right to do, and which amounts were allowed as credits to said Calvert upon his said settlement before said commissioner, and were erroneous charges, which said several unjust charges amount in the aggregate to the sum of $1,356. They further allege that it was the duty of said guardian to have loaned out the said sum of money so coming into his hands, and to have preserved the same for them; that since their arrival at the age of 21 years the said Calvert had paid to the said Albert M. Hescht the sum of $113, and to the said Gracilla B. Hescht the sum of $145, but no other sum, and that there is still due the plaintiffs the sum of $1.668.01, with interest from January, 1876; and that the said Calvert, having failed to make and return a settlement before a commissioner, as required by law, forfeited all right to any commissions for his services; and that the report of Commissioner Wiley is erroneous in that it allows credit for such services, amounting to $115.

The defendants A. G. Calvert and Wilfred Moore, at the September term, 1886, of said circuit court, demurred to plaintiffs' bill, pleaded the statute of limitations, and the defendant A. G. Calvert filed his separate answer to the plaintiffs' bill. The defendant Calvert, in his answer, admits the allegations of plaintiffs' bill as to his appointment and qualification as guardian for plaintiffs, and as to his executing bond as such guardian, with one Wilfred Moore, his co-defendant, as surety; also as to the age of plaintiffs, the time and manner of the death of their father, Jacob Hescht, and also that plaintiffs were his only heirs at law. That in the latter part of the year 1875 a pension was granted them and their mother, Mary Ellen Hescht, widow of said Jacob, by the government of the United States, but claims that said pension was not for the sum of $1,530.50, as stated in the bill, or at least that he only received $1,505.53 with a stipend or allowance of $30 every three months; and he denies that he received every three months $30.93, as charged in the bill, but only the sum of $30 each quarter. He says that at the time said money was so

Digitized by Google

received said Albert M. Hescht was 16 years of age, or about that age, and his sister, Gracilla B., was about the age of 14 or 15 years. He denies that they were constantly employed in the labors of the family, or that they were compelled to and did earn their livelihood by rendition of any services to their mother or any one else, and alleges, on the contrary, that they were idle, and of a roving disposition; that they were not disposed to attend school, and could be compelled to do so with difficulty by their mother and stepfather. He denies that the plaintiffs had no notice of the settlement with W. S. Wiley, commissioner of accounts, but claims that he notified them personally as to the time when said settlement would be made, and that they were fully aware that their mother would prove her demand, and agreed that the said demand was correct and just. He claimed that the same was not barred by statute, in whole or in part; that no such objection was then urged by them against said claim, nor at the time when said report was presented to the proper court for confirmation; that they did not make such objection at the time the various sums of money were paid to them after they became of age; that all of the charges made in said account are lawful and proper charges against the estate of his wards, and the report was lawfully confirmed by the county court of Wetzel; that the charges made by Ellen Hubbs, mother of his said wards, was for boarding, clothing, and books for schooling, and were necessary, proper, and lawful charges; that he furnished to said Albert M. Hescht the sums of $20 and $45 before the majority of said Albert M.,—the first was for borrowed money, which he agreed afterwards should be charged to his estate, and the second was for a horse colt, which he much needed, and which he agreed should be charged to his estate after he came to his majority; that the money furnished Gracilla B. Hyder was at the time of and after her marriage, but before she was 21, except the $145, —this was given her after she was 21 years of age. Said Calvert also files as part of his answer a letter from the commissioner of pensions of the United States government, to show that he acted in good faith towards plaintiffs, and also to show that they are properly chargeable with an account for food, clothing, and tuition, and that such a charge is proper, according to the intent of the statutes of the United States regulating the matter of the application of pension money for the benefit of the children of deceased soldiers.

Upon this state of pleading, on the 2d day of October, 1886, a decree was entered in said cause, requiring J. W. Newman, one of the commissioners of the court, after giving personal notice to the parties of the time and place at least 10 days previous, to take an account, and state and report it to the court, together with the evidence: *First.* What sum of money, if anything, came into the hands of A. G. Calvert, guardian of Albert M. Hescht and Gracilla B. Hescht, now Gracilla B. Hyder, by virtue of the pension certificate named in the bill, and received by him, for which he executed the said voucher No. 575; and what sum or sums were thereafter received by him from the government of the United States for the benefit of his said wards, including in this account all sums of money received by him as such guardian from the month of December, 1875, until the year 1882, inclusive. *Second.* What sum of money was paid out and expended by him for the benefit of said Albert M. Hescht and Gracilla B. Hyder, and when, where, and to whom, and for what purpose said money was paid, and any other matter deemed pertinent, or required by any party in interest. And it was provided that depositions of the complainants theretofore taken and filed in the cause should be considered by the commissioner without exception, except that the same might be contradicted by competent testimony, and that the report of the commissioner of accounts sought to be surcharged and falsified by the complainant's bill should be taken as *prima facie* evidence of the correctness of said account, but liable to be surcharged and falsified by proper testimony in any particular specified in complainant's bill. On the 17th day of January, 1887, said commissioner J. W. Newman returned his report in pursuance of said decree, and with it a notice, which seems to have been served upon him, "that the complainants would ask and insist that said commissioner take into account in his report in this cause to the court the respective amounts due each of the complainants, Albert M. Hescht and Gracilla B. Hyder, based upon the evidence in this case, and a letter filed before said commissioner from the pension department of the United States showing that there was paid to said A. G. Calvert, guardian, etc., for the use of Albert M. Hescht, the sum of $767.93, and for the use of Gracilla B. Hyder, $973.53, respectively, instead of upon the basis of an equal amount due each one, as was done by the commissioner of the county court." Said commissioner, in making up his report, credited said A. G. Calvert as guardian as aforesaid with $1,056 paid Mary E. Hubbs as of December 4, 1875, also with $100 as of January 6, 1879, for boarding and caring for said wards, also $105 as of June 28, 1878, for clothing, etc., and $10 as of December 10, 1887, paid to her to procure books for said wards; aggregating the sum of $1,271; and, after allowing other minor sums, the entire amount allowed said guardian for expenditures for said wards while they were minors aggregates $1,335.55; and after charging him with $1,715.53, the amount received by him for said wards, and crediting him with the amounts paid by him to said wards since they attained their majority, he finds a balance due said guardian from Albert M. Hescht of $49.01 and a balance due said guardian from Gracilla B. Hyder of $46.09. The complainants by counsel excepted to said report be-

Digitized by Google

cause: (1) Instead of following the direction of the order of reference it "finds and reports the result of his investigations," and that report is not in accordance with law, equity, or the evidence in the cause. (2) No evidence is returned or referred to to support the report. There is not evidence to support the item of $1,056, paid December 4, 1875, to Mary E. Hubbs, or of $100 paid January 6, 1879, to Mary E. Hubbs, or $105, paid June 23d to Mary E. Hubbs; but they are all shown to be improper and unjust. (3) In that there is allowed guardian for services from time of his appointment for all services rendered $115, while it is charged and fully proven that the defendant forfeited all claim to any compensation by not making annual settlements as required by law. (4) It allows credit to guardian for $20, paid A. M. Hescht in February, 1880, and $45 paid him May 20, 1880, in cash, as having been paid him after he attained his majority, while the evidence shows it was paid during his minority, which were improper and illegal charges or credits. (5) Report allows credit to guardian for $10 paid July 5, 1879, and for $20, paid November 8, 1880, to Gracilla B. Hyder, after she became 21 years old, while the bill charges, and the evidence shows clearly, and it is not denied in the answer, that these sums were paid to her while a minor and infant, in money, and are improper and unjust charges or credits. (6) The commissioner ignores the plea of the statute of limitations, and allows credit to guardian for moneys claimed to have been paid to Mary E. Hubbs, aggregating $1,261, without any verified account of same, when the greater part was barred. These plaintiffs, owners of other estate, made no attempt to collect it from lands, and that, too, when the money so paid was pension money exempt from execution, that could be held by them and should have been so claimed and held by their guardian. (7) Because the findings of commissioners are contrary to the weight and preponderance of the testimony and unsupported by evidence, and for the many errors apparent upon its face. (8) Because it is evident that partiality or undue influence has prompted the commissioner. (9) In not crediting Albert M. Hescht and Gracilla B. with work performed for the family of Isaac and Mary Ellen Hubbs. (10) Because commissioner did not adjust the accounts so as to show the amounts received by the guardian for each ward, to-wit, $973.53 for the use and benefit of Gracilla B., and $767.93 for the use of Albert M. (11) For not reporting that subsequently-acquired property is not subject to the payment of claims for maintenance, etc., of wards, especially claims in favor of parents. (12) Because commissioner did not charge the guardian with interest, as the law requires. Whereof they pray that the report be not confirmed, but corrected by the court, or recommitted to some other commissioner of the court, with directions to ascertain, state, and report a correct and true account.

On the 11th day of June, 1887, this cause came on to be heard upon the bill and exhibits, the answers of defendants, general replication by complainants, former orders and decrees, plea of the statute of limitations, filed by defendants, and issue thereon by complainants, and upon the report of James W. Newman, the commissioner to whom the same was referred, and the depositions therewith returned filed in the cause on the 17th day of January, 1887, and the exceptions of complainants to said report, and upon the motion of the defendants to dismiss the suit because T. B. Harness was not made a party, which last-named motion the court, as I think, properly overruled. The court then, by its decree, proceeded to overrule said exceptions to said commissioner's report, and, after overruling the same, held that the said report should be reformed and amended so as to state the accounts of said Albert G. Calvert as guardian of Albert M. Hescht, and as guardian of Gracilla B. Hescht, now Hyder, separately, and that for this purpose the said account of the said Albert M. Hescht should be credited with the sum of $767.93, that being the amount of the pension money allowed him, and charged with the sum of $12.50, that being the one-half of the attorney's fee allowed in the pension case by law; and the further sum of $667.78, being one-half of the credits allowed the said Albert G. Calvert in his settlement with W. S. Wiley, the commissioner of accounts; and also the sum of $57.50, being one-half the sum allowed by said commissioner of accounts to the said Albert G. Calvert, guardian, for his services in procuring said pension; and the sum of $3.50, being one-half the charge of costs of settlement with said commissioner of accounts; and the further sum of $178, paid to him by his said guardian, A. G. Calvert, before final settlement on the 20th day of December, 1882,—which account thus stated shows a balance due from said complainant A. M. Hescht to the said defendant A. G. Calvert, on the 20th day of December, 1882, of $151.35, which, with interest computed thereon to the 20th day of May, 1887, amounts to the sum of $191.40, which the defendant A. G. Calvert was entitled to recover of the complainant A. M. Hescht; and that the account of said complainant Gracilla B. Hyder, formerly Gracilla B. Hescht, should be credited with the sum of $973.53, that being the amount of pension money allowed her, and charged with the sum of $12.50, that being one-half of the attorney's fee allowed in the pension case by law; and the sum of $667.78, being one-half of the credits allowed said Albert G. Calvert by W. S. Wiley, commissioner of accounts, on settlement; and also the sum of $57.50, being one-half the sum allowed by the said commissioner of accounts to the said Albert G. Calvert, guardian, for his services in procuring said pension; and the sum of $3.50, being one-half the charge for costs of settlement with said commissioner of accounts; and the further sum of $175, paid to her by

Digitized by Google

the said A. G. Calvert, guardian, before final settlement on the 20th day of December, 1882,—which account thus stated shows a balance due from the said defendant A. G. Calvert, to said complainant Gracilla B. Hyder, on the 20th day of December, 1882, of $57.25, which, with interest computed to the 20th day of May, 1887, amounts to the sum of $72.51, which the complainant Gracilla B. Hyder was entitled to recover of the defendants Albert G. Calvert and Wilfred Moore. From this decree of the circuit court of Wetzel county overruling the exceptions to the report of Commissioner J. W. Newman, filed by the complainants, and stating the account between said guardian and his wards in the manner in said decree set forth, this appeal was taken by the plaintiffs in said bill.

The questions to be determined in this case are raised by said exceptions filed to Commissioner Newman's report. Did the court below commit an error in overruling and disregarding said exceptions? At the time the bulk of the pension money was received by said guardian, amounting to $1,505.53, his wards were respectively 17 and 15 years of age, and the residue of said pension money was received between that date (January, 1876) and February, 1878. This money came into the hands of said guardian as any other money to which they were entitled would come, and the very reason why a guardian is required by law to be appointed for infants is that their estates may be protected, not only from strangers, but, as experience indicates, more frequently from the avaricious designs of their nearest relatives. The guardian in this case evinced some prudence and caution by consulting the commissioner of pensions for instructions as to the disposition he should make of the pension money received for his wards, but, unfortunately for him, it seems that this letter of inquiry was not written until the 15th day of January, 1876, and, according to his own voucher, returned before the commissioner of accounts, he had taken the responsibility of paying to Mary E. Hubbs, the mother of his said wards, $1,056 of said pension money on the 4th day of December, 1875, more than a month before he wrote said letter, and was credited with that amount as of that date; and it will be seen by reference to the reply sent him by H. M. Atkinson, commissioner of pensions, that he did not follow the advice and instructions therein contained as to the residue of the money received by him as pension money for said wards. Said commissoner says: "The design in granting pensions to children under 16 years of age unquestionably was that this bounty of the government should be used in supplying them with a home, food, clothing, books, tuition, and other necessaries during their helpless infancy and minority, and, if all the pension money is needed for these purposes, it should all be used without hesitation. Whoever furnishes these supplies, the mother included, should be paid for them what is just and equitable upon a properly stated and itemized account, allowed and approved by the court having probate jurisdiction, which then becomes a voucher for you in the settlement of your account as guardian. In cases where the pension is not all needed for the comfortable support of the children, any surplus should be safely invested for their benefit, and paid only to them. The mother has no claim upon such surplus, nor does her claim upon the children's pension money differ in any respect from that of a stranger." This letter of advice seems to vary but little from the terms of our statute in regard to the duties of guardians, (chapter 82, § 8, of the Code,) which provides that "no disbursement shall be allowed to any guardian where the deed or will under which the estate is derived does not authorize it beyond the annual income of the said ward's estate, except * * * when (although old enough to be bound out as an apprentice) it shall be deemed best for the ward that the principal of his personal estate, or a portion thereof, should be applied towards his education or maintenance. But the guardian shall, before thus applying any part of such principal, file his petition before the circuit court of the county in which he was appointed for the permission thus to apply the whole or a portion of said principal, in which petition he shall state the facts relied on by him to induce the court to grant the prayer of the petition. * * * Upon the hearing of the case the court may grant or refuse the petition, as to it may seem judicious and proper. No credit shall be allowed the guardian in the settlement of his accounts for expenditures for his ward under this section except for disbursements of the annual income of his ward's estate, and for such amounts as the said court shall have first authorized to be expended of the principal of his personal estate, as hereinbefore provided." If said guardian had availed himself of the provisions of this statute, his disbursements, made in pursuance of an order of the court thus obtained, would have been properly allowed by the commissioner; but, in the absence of such an order, and under the circumstances disclosed by the evidence in this case, I can arrive at no other conclusion than that neither the commissioner of accounts, W. S. Wiley, nor J. W. Newman, commissioner of the circuit court, were authorized to allow said guardian credit for the sum of $1,056, paid Mary E. Hubbs December 4, 1875, the $100 paid her June 6, 1879, the $105 paid her June 23, 1877, or the $10 paid her December 10, 1877; and I am of opinion that the court below erred in reforming and amending said guardian's account, as it did, upon the basis of the credit allowed him by W. S. Wiley, commissioner of accounts. Said decree is correct in crediting to Albert M. Hescht the sum of $767.93, that being the amount of the pension money allowed him; and in crediting Gracilla B. Hyder, formerly Gracilla B. Hescht, with the sum of $973.53, that being the

Digitized by Google

amount of the pension money allowed her; but the court erred in ascertaining the amount with which said wards should be respectively charged by dividing the credit allowed said guardian in his settlement with Wiley, commissioner, and charging one-half to each. That would seem to be wrong, if for no other reason, because there is no itemized account, and no evidence in the cause that the expenses of schooling, clothing, and maintenance of said wards were equal. There was two years' difference in their ages; and, while both worked away from home a considerable part of the time, and both helped to support the family while at home and away, yet there is nothing to indicate that the costs of supporting and schooling them were the same, but, on the contrary, many things which would indicate that the amount of assistance they received from their mother and step-father were widely different. As to the credit, then, of $1,056, with which said guardian is credited as of December 4, 1875, there seems to have been no itemized account, and no proof sufficient to sustain it.

Mrs. Mary E. Hubbs, the party to whom said amount seems to have been paid by said guardian, in giving her deposition, when asked to state who furnished the clothing for Albert until he was 21, answered: "His clothing was furnished by different ones. My father furnished some, and a good part they got themselves." When asked: "Who furnished for Gracilla B.?" she answered: "She got a good many herself, and Mr. Hubbs furnished some, and my father some." When asked: "How was it as to board?" she answered: "When they were at home they boarded there, and when they worked away they boarded where they worked, except when Albert worked at the stave factory he then boarded at home." When asked: "When so working out did they contribute to the expenses of the rest of the family?" she answered: "Albert sometimes got some things for the rest of the family." When asked what they did when at home, she answered: "They helped work in the field, when there was work to do raising crops; both Albert and Belle." When asked where and for whom Gracilla B. worked when away from home, she answered: "She worked away from home for Mrs. Yoho; also for Mrs. Harlands, most of one winter; at Gilbert Vorhees about three months. She also stayed a while with Mrs. Greene, and Mrs. Buchanan; a while at Jack Moores', John Cochran's, Mrs. Dunlap's, and with a man living in Dunlap's house, at Simmon's, and at W. Wingrove's." And she also stated that Albert worked at the stave factory while he was away from home, one winter, with his uncle Charles Smith; was with his grandfather for some time after her marriage with Hubbs; worked at a job for Mr. Alexander; worked some at the carpenter's trade; and was in Jackson county part of one winter; and that they sometimes did not go to school because their clothes were not fit. That she never made out any account. She thought the account was for $1,000; the $56 she knew nothing about. It seems that the voucher produced before the commissioner was merely a receipt bearing date December 25, 1875, annexed to an account which reads as follows:

"A. G. Calvert, guardian of the minor children of Jacob Hescht, deceased, private of Co. F, 15th Ohio Vol. Inf'ty in the war of 1861, in account with Isaac Hubbs and Mary E. Hubbs, Dr. To keeping, clothing, and schooling Albert M. Hescht and Gracilla B. Hescht for eleven years up to Dec. 4, 1875, $1,056.00.

"Jan. 25, 1876, received the above $1,056 from A. G. Calvert, guardian of Albert M. Hescht and Gracilla B. Hescht, infant children of Jacob Hescht, late private of Co. F, 15th Ohio Vol. Infan'ty.

[Signed] "ISAAC HUBBS.
"MARY E. HUBBS."

The sum of $105 was allowed as of June 23, 1877, and $100 as of January 6, 1879, on similar vouchers. Under section 4702 of the United States pension laws it seems that the child or children of certain deceased soldiers are entitled to a pension which, under the law, goes into the hands of the guardian, to be administered. The commissioner of pensions in his letter of January 15, 1876, instructs the guardian that "the design in granting these pensions to children under sixteen years of age was to supply them with home, food, clothing, books, tuition, and other necessaries during their helpless infancy, and, if all the pension money is needed for these purposes, it should all be used; that whoever furnishes these supplies, the mother included, should be paid for them what is just and equitable upon a properly stated and itemized account, allowed and approved by the court having probate jurisdiction, which then becomes a voucher for you in the settlement of your accounts as guardian. In case the pension is not all needed for the comfortable support of the children, any surplus should be safely invested for their benefit, and paid only to them. The mother has no claim upon such surplus, nor does her claim upon the children's pension money differ in any respect from that of a stranger." Now, it seems that the application for this pension was delayed for some five or six years, and in the mean time the wards arrived at the ages of 16 and 18. Whatever assistance had been rendered to said wards by Mary E. Hubbs and her husband in the way of keeping, clothing, and schooling could only be properly ascertained by an investigation of the manner in which they had been reared and cared for during a good many years, but these claims seem to have been presented to the guardian, not in the shape of an itemized account, not verified by affidavit, and not having received the sanction or approval of any court. If, then, the mother's claim upon the children's pension does not differ from that of a stranger, as the commissioner

Digitized by Google

of pensions indicated in his letter,—and I think he is correct in that,—I cannot see how this pension money as to debts which have already accrued differs from any other money belonging to said wards which may be in the hands of said guardian, and it seems to me that the guardian should require as full proof in regard to claims of this character as any other; and if the recovery of said claim or any portion of it could be prevented by illegality of consideration or lapse of time, or by any other fact within his knowledge, the guardian must avail himself of such defense, or he can obtain no credit. The letter of instructions above referred to from the commissioner of pensions indicates that such claim should be paid by a guardian upon a properly itemized account, allowed and approved by the court having probate jurisdiction. Under our statute, before applying the principal, or any part thereof, the guardian must file his petition before the circuit court of the county in which he was appointed, for permission thus to apply it, (see section 8, c. 82, of the Code,) otherwise he can only disburse the annual income; and this guardian should have presented his petition under this section before disbursing the principal of his ward's estate. Again, section 7, c. 87, of the Code is clear and explicit that "any such fiduciary who shall wholly fail to lay before such commissioner of accounts a statement of receipts for any year within six months after its expiration shall have no compensation whatever for his services during said year." Under this provision of the statute I am of opinion that the court erred in allowing said guardian the sum of $115 for his services, and directing the same to be paid equally by his wards. Said guardian, however, should have been allowed any reasonable expenses incurred by him as such. See section 17, c. 87, Code W. Va. See, also, Strother v. Hull, 23 Grat. 670; 1 Minor Inst. 458, 459. I am further of opinion that said guardian should not be credited with cash paid his wards during their minority, unless the proof is clear that said wards ratified said payment by some act or assent of theirs after attaining their majority, and the said guardian should have been charged with interest as prescribed in section 10, c. 82, Code W. Va., upon balances of money in his hands at the end of any year. The decree of the circuit court of Wetzel county, rendered on the 11th day of June, 1887, in this cause must be reversed, and the cause remanded to said circuit court for further proceedings to be had therein, and the appellants must recover their costs in this court.

SNYDER, P., and BRANNON, J., concurred. GREEN, J., absent.

(30 S. C. 207)

SANDERS *v.* SANDERS.

(*Supreme Court of South Carolina.* Feb. 28, 1889.)

NEGOTIABLE INSTRUMENTS—PLEADING—TRIAL.

The complaint, in an action on a note, admitted part payment, and the answer admitted the allegations of the complaint, except as to the amount paid, and alleged partial failure of consideration, and payment of more than the balance of the note. *Held*, that plaintiff's case was not so admitted as to entitle him to a judgment, if neither party had given evidence, and that defendant was therefore not entitled to open and close the argument and evidence, under rule 49, Circuit Ct. S. C.

Appeal from common pleas circuit court of Barnwell county; FRASER, judge.

Action by J. F. Sanders, executor, etc., against F. J. Sanders. Defendant appeals.

Robert Aldrich, for appellant. *J. C. Davant*, for respondent.

McGOWAN, J. This was an action by the plaintiff, as executor, upon a note given to his testator in his life-time for $370.68. The complaint, after stating the death of testator, and that letters testamentary had been granted to plaintiff, alleged as follows: "That no part of said note has been paid, except $174 to the plaintiff; wherefore this plaintiff demands judgment against the defendant for $335.80, with interest from December 25, 1879." The defendant answered, admitting all the allegations of the complaint, except that as to the amount stated to have been paid; as to which he alleges "that heretofore, on December 25, 1879, he paid upon said note to J. F. Sanders, executor, as aforesaid, the sum of $350, which was duly credited upon said note at the time; which, after allowing a proper deduction for a partial failure of the consideration of the note, (unsoundness of a mule,) more than paid the note in full, to the amount of $52.12;" for a second defense, a counter-claim for board of himself and horse, etc., to the amount of $113; and claimed judgment for both sums, viz., $52.12, and the counter-claim, $113. Upon the pleadings being read, the defendant's attorney claimed the right to open and close in evidence and argument, which was not allowed by the judge; and he now appeals to this court, upon the ground "that the defendant, having so fully admitted the plaintiff's case by his answer as to entitle the plaintiff, in the absence of affirmative defense, to his judgment, was entitled to open and reply in evidence and argument, as claimed by him upon the trial, and the denial of this right to the defendant, as it is respectfully submitted, was error," etc. It is somewhat remarkable—possibly showing the value attached to the privilege—that the question as to the right to open and reply should have arisen so often under a rule of court so long established, and in its terms seemingly so plain. The rule is as follows: "And on all motions or special matters, either springing out of a cause or otherwise, the actor or party submitting the same to the court shall, in like manner, begin and close; and so shall the defendant, where he admits the plaintiff's cause by the pleadings, and takes upon himself the burden of proof, have the like privilege." The only question was whether the defendant in his answer "admitted the plaintiff's cause." It is true the

Digitized by Google

character in which the plaintiff sued, as well as the execution of the note, were admitted, but was that the whole of the "plaintiff's cause?" The complaint alleged also that only a part of the note had been paid, leaving unpaid and still due a balance of $335.80, and interest. This allegation was certainly not admitted, but, on the contrary, the answer denied expressly that it was due and owing, but insisted that it had been paid in full. In this state of the pleadings we cannot agree that, if the case had gone to the jury without evidence on either side, the plaintiff would have been entitled to the verdict; that being claimed as the test of the defendant's right to open and reply, according to the case of Boyce v. Lake, 17 S. C. 484. This case, cited by the appellant, does not, as it seems to us, support his view, for it holds "that the forty-ninth rule of the circuit court entitles the defendant to open and reply, when he admits the plaintiff's whole case; when the admission is so full, as upon that alone, in the absence of other defense, the plaintiff would be entitled to the judgment." As it seems to us, the plaintiff's whole case, as stated in the complaint, was not so admitted as to entitle him to the verdict, but, on the contrary, it was denied, and upon the pleadings the verdict would be for the defendant. It was necessary, in order to sustain his case, that the plaintiff should make proof at least as to the credits. As was said by DENMAN, C. J., in the case of Mercer v. Whall, 5 Adol. & E. (N. S.) 447: "The law, however, has by some been supposed to require that the defendant, by admitting the cause of action stated on the record, and pleading only some affirmative fact which, if proved, will defeat the plaintiff's action, may entitle himself to open the proceeding at the trial. * * * I never doubted that the plaintiff was privileged and required to begin whenever anything was to be proved by him. The simplicity and easy application of this mode of practice would recommend it to adoption, if the question were new, and would raise a great probability that the common sense of old times had sanctioned it as a part of our system." See Burckhalter v. Coward, 16 S. C. 443; McConnell v. Kitchens, 20 S. C. 430. The judgment of this court is that the judgment of the circuit court be affirmed.

SIMPSON, C. J., and MCIVER, J., concur.

(30 S. C. 215)

ADAMS *et al.* v. RICHARDSON.

(*Supreme Court of South Carolina.* Feb. 28, 1889.)

EXECUTION—REVIVAL—ISSUES TO JURY.

1. To a summons to renew an execution defendant returned that judgment was rendered without service of process on him. An affidavit by the sheriff stating that the service of the original writ was made by his deputy, and setting out proof of such service by the oath of the sheriff alone, was introduced in evidence. *Held*, that it was error to refer an issue to the jury as to whether the defendant had been served, as the sufficiency of the cause shown was for the judge; and, besides, the issue was one of law as to the effect of proof of service by the sheriff, and not identical with the issue as to whether as a matter of fact defendant had been served.

2. The defendant also returned that prior to the date of the judgment he was declared a bankrupt, and that no execution had been issued on the judgment, which, marked "Suspended," had remained dormant for 19 years; that no return had been made on it; and that by reason thereof defendant was not indebted, etc. *Held*, that it was error to refer an issue as to whether the judgment had been paid. If by "payment" was meant presumption of satisfaction from lapse of time, the issue was one of law; if payment in fact was meant, no such issue was raised.

Appeal from common pleas circuit court of Barnwell county; ALDRICH, Judge.

Summons by Adams, Frost & Co. against W. T. Richardson, to renew an execution. From an order directing issues plaintiffs appeal.

George H. Bates, for appellants. *J. O. Patterson*, for respondent.

MCGOWAN, J. This was a summons to renew an execution issued October 11, 1887. The judgment in the principal case was entered November 16, 1868, and was marked in the handwriting of Mr. Hutson, the plaintiffs' attorney, "Suspended." The defendant made return (1) that the judgment was rendered without service of process upon him; (2) that prior to date of said judgment he was declared a bankrupt, and no execution had ever issued upon the judgment, which, marked "Suspended," had been dormant for 19 years; that no "return" had ever been made on it; "and, by reason of the matters and things hereinbefore set forth, he is not indebted to the plaintiffs in any sum whatever," etc. It appeared that the judgment was rendered in the usual way by default, and that an execution was issued thereon. There was no objection to the record, except the word "Suspended" written across it, and the manner in which service of the original writ was proved by the affidavit of the sheriff, stating that the service was made by his deputy as follows: "By my special deputy, D. C. Can, I did, on the 2d day of March, 1867, deliver to the defendant, W. T. Richardson, a copy of this writ, with a proper notice indorsed thereon. W. W. WOODWARD, S. B. C. I swear to the truth of this return. Before A. V. EAVES, C. C. P. & G. S." It also appeared that the defendant was declared a bankrupt in the United States court on May 22, 1868, before the judgment was entered, but it did not appear that he had ever been discharged in bankruptcy. The circuit judge, being of opinion that the return of the defendant raised two questions of fact, directed "issues" as follows: "(1) Was the defendant, W. T. Richardson, served with the writ in the case? (2) Is the said judgment paid? It is ordered that the said issue be referred to a jury for trial at the next term of the court, and the case is transferred to calendar No. 1 for that purpose." From

Digitized by Google

this order the plaintiff appeals upon the following grounds: "*First*, because his honor erred in referring to a jury the question of service of the writ, when he should have determined that question himself from the face of the record; *second*, because his honor erred in referring an issue of 'payment' to a jury, when no such issue is raised by the return of the defendant; *third*, because his honor erred in refusing to renew the execution." The judgment and execution were entered November 16, 1868, before the Code, and therefore the judgment had a lien for 20 years. The execution, however, had lost its active energy, and this was a "summons" to renew it, "requiring the judgment debtor to show cause, if any he may have, why the execution should not be renewed; and, if no sufficient cause be shown, the same may be renewed," etc. As we understand it, the sufficiency or insufficiency of the cause shown was to be determined by the judge before whom the summons was returnable. Alsobrook v. Watts, 19 S. C. 544; Carroll v. Tompkins, 14 S. C. 228. The proceeding was in the nature of an action at law, certainly not a "suit in chancery," and therefore not a case for anything like "issues from chancery." See Fowler v. Wood, 26 S. C. 172, 1 S. E. Rep. 597; Reams v. Spann, 28 S. C. 532, 6 S. E. Rep. 325. Besides, as it seems to us, the "issues" referred to a jury were not issues of fact raised by the pleadings.

First, as to the "issue" whether the defendant, Richardson, was served with process in the principal case. The point was whether a service made by the deputy-sheriff could be sufficiently proved by the oath of the sheriff himself, which was not at all identical with the "issue" whether, as a matter of fact, the defendant, Richardson, was or was not actually served with process. The sole question was as to the sufficiency or insufficiency of the record. Whether the proof of service by the sheriff was regular according to the then existing law, or a mere irregularity, or totally defective, and therefore fatal, was a pure question of law for the judge to determine upon inspection of the record; and in no view, in this collateral proceeding, was parol testimony admissible to contradict the record. Clark v. Melton, 19 S. C. 498; Turner v. Malone, 24 S. C. 328.

Second, as to the issue of "payment" ordered. If by "payment" was meant the presumption of satisfaction or payment which arises from lapse of time, the question, like that as to the statute of limitations, was one of law, and for the judge. But, if payment in fact was intended, we do not see that any such claim was made. On the contrary, the respondent alleged that he never owed the judgment, for the reason that he was in bankruptcy at the time it was recovered, and that no proceedings had been taken to enforce it for 19 years. Nor was there any question proper for a jury connected with the record "Suspended" written across the judgment by the plaintiff's attorney, (Mr. Hutson.) As the defendant was then in bankruptcy, that entry was properly made, as the bankrupt law provided "that suits at law or in equity shall, upon the application of the bankrupt, be stayed to await the determination of the court in bankruptcy on the question of discharge, provided there is no unreasonable delay on the part of the bankrupt in endeavoring to obtain his discharge," etc. See Pyles v. Bell, 20 S. C. 368, and the authorities cited. The judgment of this court is that the judgment of the circuit court be reversed, and the cause remanded to the circuit for such further proceedings as may be necessary or the parties may be advised.

SIMPSON, C. J., concurs. MCIVER, J., concurs in result.

(30 S. C. 218)

WHITE v. AUGUSTA & K. R. Co.

(*Supreme Court of South Carolina.* March 1, 1889.)

RAILROAD COMPANIES—ACCIDENT AT CROSSING.

1. In an action against a railroad company for injuries by being run over by one of its trains, the court charged that gross contributory negligence would be necessary to exempt the company from responsibility, where it had failed to comply with certain requirements, and that "a man might lie down on the track, and rely on being warned of the approach of the train by the sounding of the whistle and the ringing of the bell; whereas, if the law did not enjoin specifically those precautions on the part of the railroad company, the man might be guilty of negligence," etc. *Held* an invasion of the province of the jury.

2. Defendant requested the court to charge "that if the jury found from the evidence that the injury to plaintiff was the result of an accident, without fault on the part of the railroad company, then the company is not liable." The court gave the charge, but added: "That is, if there was no negligence at all established against the railroad company, the railroad is not liable." *Held*, that the charge should have been given as asked, since the jury may have inferred from the added words that it must appear that the company was free from all fault, as well such as might have caused the injury as from all others.

Appeal from common pleas circuit court of Edgefield county; KERSHAW, Judge.

Action by Henry White against the Augusta & Knoxville Railroad Company, to recover damages for injuries sustained by being run over by one of defendant's trains. There was a verdict and judgment for plaintiff, and defendant appeals.

Jos. Gavahl and *Gary & Evans*, for appellant. *Sheppard Bros.*, for appellee.

SIMPSON, C. J. The respondent, while driving a two-horse wagon, at a crossing of a highway over the defendant's railroad track near a place known as "Modock," was seriously injured in person, also in the destruction of the wagon, and great damage done to the horses by collision with the train, and the action below was brought to recover compensation for the damages done. The verdict was for $4,000 in favor of the plaintiff. The defendant has appealed upon exceptions to the charge, and to modifications of requests to charge. It will not be necessary to state these exceptions in full here.

Digitized by Google

They can be found in the record. We have read the charge very carefully, and, when considered as a whole, it is an admirable presentation of the law of negligence, both generally and with reference to our statute, requiring certain things on the part of railroad companies at crossings; also as to contributory negligence in such cases. We think it was erroneous, however, in one or two particulars, which, though apparently slight, yet are sufficient, in our opinion, to demand a new trial in a case like that before us here.

His honor in charging the jury as to the degree of contributory negligence by the plaintiff, where the railroad had failed to comply with certain requirements necessary to exempt the company from responsibility after stating that it should be gross negligence, said "that a man might lie down on the track, and rely on being warned of the approach of the railroad train by the sounding of the whistle and the ringing of the bell; whereas, if the law did not enjoin specifically those precautions on the part of the railroad company, the man might be guilty of negligence, and would not be on the lookout when he knew he was approaching a railroad crossing." This was, in substance, a charge, as matter of law, that the kind of negligence which would relieve the company should be grosser than that indicated in the case stated by him; in other words, it set up a standard to the jury with which they were to compare the case in hand, and by which they were to determine the degree of grossness which would exempt the company. Now, the statute provides that the contributory negligence necessary to exemption should be gross, but it nowhere specifies a state of facts which would amount to the degree required. Gross negligence is the absence of that kind of care which even the careless and indifferent would be expected to exercise under the existing circumstances. And this much might be charged as matter of law, but whether or not a particular state of facts would show the absence of this kind of care would be a matter for the jury. It seems to us that the judge invaded the province of the jury when he presented to their minds the state of facts mentioned as a standard for their government, in determining the question whether or not gross negligence by plaintiff was present in the case before them. Suppose the injury complained of by the plaintiff had happened under a state of facts like those mentioned by the judge. Would it not have been error for the judge to have stated to the jury that this did not amount to gross negligence? Would not such a statement have been an invasion of the province of the jury? We think so. Suppose that the testimony below had shown that the plaintiff, after driving upon the track of the railroad, had deliberately stopped and remained thereon, relying upon the ringing of the bell or the sounding of the whistle to warn him of the approach of the train. Would the judge have been warranted to charge either that this did or did not amount to gross negligence,—such as would inculpate the plaintiff or exculpate the defendant? Certainly not; because such a charge would have taken from the jury the very question at issue,—a question of fact,—to-wit, whether gross negligence was absent or present. For the same reason we think the charge under discussion was erroneous, its tendency being to hamper the jury in its unquestioned right to determine the question at issue for itself. Again, the defendant requested the judge to charge "that if the jury found from the evidence that the injury to the plaintiff was the result of an accident, without fault on the part of the railroad company of its servants, then the railroad company is not liable." This was a correct proposition of law, and the defendant had the right to have it charged as requested, but his honor added the words: "That is, if there was no negligence at all established against the railroad company, the railroad is not liable." It is not entirely clear what his honor meant by these added words. He may have meant in substance, as stated in the request, to-wit, that, if the company was without fault in causing the injury, the matter was an accident, and no responsibility attached. But he may have meant that it should appear that the company was free from all fault, as well such as might have caused the injury as from all other; and this may have misled the jury. At all events, we think the defendant had the right to have his request charged as made. We see no error as imputed in the other exceptions. It is the judgment of this court that the judgment of the circuit court be reversed for the reasons stated above, and that the case be remanded.

McIVER and McGOWAN, JJ., concur.

(30 S. C. 229)

SANDERS v. SANDERS.

(*Supreme Court of South Carolina.* March 1, 1889.)

BONDS—CONTEMPT.

1. Judgment by default was vacated on condition that defendant file an undertaking, with sufficient security, to pay whatever might be recovered of him should the plaintiff finally prevail. The plaintiff again recovered judgment, from which defendant appealed. *Held*, that it was proper to refuse an order directing the clerk to issue execution for the amount recovered, and costs, as there was no final determination until the appeal had been disposed of.

2. Nor was it error to refuse a motion for an attachment for contempt against the surety on the undertaking. Apart from the appeal, no order had been entered requiring him to do anything. The order requiring the execution of the bond had been complied with. The failure to pay according to the terms of the obligation may have been a breach of contract, but was not such a disobedience of an order of court as to warrant an attachment for contempt.

Appeal from common pleas circuit court of Barnwell county; ALDRICH, Judge.

Action by J. F. Sanders, executor, against F. J. Sanders. From an order refusing to

Digitized by Google

direct the clerk to issue an execution, and from an order denying a motion for a writ of attachment for contempt against Mike Brown, defendant's surety, plaintiff appeals.

J. C. Davant, for appellant. *Robt. Aldrich*, for respondent.

MCIVER, J. In this case it appears that on the 14th of April, 1885, the plaintiff recovered a judgment by default against the defendant F. J. Sanders, which was vacated and set aside by the order of Judge COTHRAN, bearing date 31st of March, 1886, which provided, as a condition precedent to its taking effect, "that the defendant file with the clerk an undertaking in the sum of six hundred dollars, with ample surety, to be approved by the clerk, to pay whatever may be recovered of him for debt, interest, and costs herein, should the plaintiff finally prevail in the suit." In pursuance of this order the said F. J. Sanders, with his co-defendant herein, Mike Brown, as his surety, on the 1st of April, 1886, executed the required undertaking, which was filed with the clerk. The original action of J. F. Sanders, executor, against F. J. Sanders, was subsequently tried, and in November, 1887, the plaintiff again recovered judgment, but for a less amount than his former recovery. From said last-mentioned judgment the said F. J. Sanders appealed, and that appeal is now pending in this court. On the 20th of March, 1888, the plaintiff, by his attorney, gave notice to Mike Brown, defendant, that, upon the order of Judge COTHRAN and the undertaking above mentioned, and on the clerk's certificate of the recovery of judgment in November, 1887, together with the affidavit of one Kirby, deposing to certain fruitless negotiations with said Mike Brown for the settlement of said judgment, a motion would be made "that attachment issue against you to bring you before the court to answer for your misconduct in disobeying the said order by refusing to pay the amount recovered against the defendant, and to impose such penalties therefor as to the court shall seem proper; and for an order authorizing and requiring the clerk of this court to test execution against your property for the amount recovered against the said defendant, with interest thereon, and the costs assessed in the said case." This motion was heard by Judge ALDRICH, who, by an order, bearing date 29th March, 1888, refused the motion, in the following language: "This is a motion against an official surety for contempt. The undertaking was ordered by his honor, Judge COTHRAN. I will not grant this harsh and summary order, because, in the *first* place, the practice is novel, and I am not satisfied that it is provided for under our Code of Procedure; *secondly*, the order granting the undertaking is now under appeal; and, *third*, an action is now pending in this court to test the validity of the order granting it. The motion is refused, with ten dollars costs." In the mean time we suppose, from what is said in the order of Judge ALDRICH, that an action had been commenced and was then pending on the undertaking, as we find in the case a copy of a complaint, by the clerk of the court against the defendants herein, with their answer thereto, based on the undertaking, which, together with an affidavit of Mike Brown, were used in opposition to the motion. From the order refusing his motion the plaintiff appeals, upon the following grounds: Because (1) the process of execution against the surety is the plaintiff's resulting right from the order allowing the undertaking, and the executing of it, upon recovery against defendant; (2) the question of contempt or of right to process is not affected by the Code of Procedure; (3) there is misapprehension in holding that "the order granting the undertaking is now under appeal," and that "an action is now pending in this court to test the validity of the order granting it."

The first ground raises a point which does not seem to have been considered by the circuit judge, as he manifestly treated the motion simply as an application for an attachment for a contempt; but, as the notice of the motion covered this point as well as the matter of contempt, it is properly before us under this appeal. Without considering, at this time, the question whether a simple motion is the proper proceeding to obtain an execution in a case like the present, without an action, reference, or other proceeding to ascertain the damages sustained by reason of the breach of the condition of the undertaking, it is sufficient for us to say that in this case we think it clear that there was no error in refusing that branch of the motion requiring the clerk to issue execution, for the reason that there could be no "final determination of the action" in which the judgment was recovered until the appeal from such judgment had been finally disposed of. Judge COTHRAN'S order required that the defendant in that case should enter into an undertaking, with ample surety, to pay whatever might be recovered of him "should the plaintiff finally prevail in the suit;" and the undertaking into which the defendants herein entered was so conditioned. It is very manifest, therefore, that, until the appeal which the defendant F. J. Sanders had taken from the judgment had been finally disposed of, the obligation created by the undertaking could not be enforced by execution or any other mode of proceeding.

It is true that it was contended, in the argument of this appeal, that the records of this court, which, however, were never incorporated into the case, would show that, at the time of the application for the order which was refused by Judge ALDRICH, the appeal from the judgment recovered by the plaintiff against the defendant F. J. Sanders, had been waived by a failure to perfect the appeal within the time required by law; but aside from the fact that it does not appear that such records were before Judge AL-

Digitized by Google

DRICH when he refused the motion, and cannot, therefore, be considered in determining whether he committed any error in refusing the motion, these records do not show that such appeal had ever been finally disposed of, and, on the contrary, they do show that the appellant was permitted to perfect his appeal, and the same is now pending in this court.

We will next consider whether there was any error in refusing the other branch of the motion for the attachment for contempt. While it is true that the circuit judge seems to have fallen into an error in stating, as one of his grounds for refusing his motion, that "the order granting the undertaking is now under appeal," as there is nothing to show that there ever was any appeal from Judge COTHRAN'S order, yet, inasmuch as the order refusing the motion may be sustained upon another ground, such error is wholly immaterial; for, as has been often held, it is quite immaterial whether the reasons given for making an order or rendering a judgment are well founded, the point for us to determine being whether there is any error in the order or judgment appealed from. The appellant, however, is mistaken in supposing that the circuit judge erred in stating, as one of his reasons for refusing the motion, that an action was then pending to test the validity of the order requiring the undertaking; for it appears from the answer to the complaint by the clerk on the undertaking that one of the defenses distinctly set up was that the undertaking was null and void. But this too, under the view which we take of this appeal, is wholly immaterial.

The application for the attachment was based solely upon the ground that the order of the court had been disobeyed, and the notice of the motion was addressed to Mike Brown alone, and not to his co-defendant, F. J. Sanders. To sustain such an application, two things must be shown: (1) That there was an order requiring Brown to do something; (2) that he had disobeyed such order. But we look in vain for an order requiring Brown to do anything whatever, and, of course, it would be absurd to charge him with disobeying an order which never existed. The only order which we are able to find in the case is one requiring F. J. Sanders to execute a specified undertaking, with security to be approved by the clerk; and at the same time we find that such order has been fully complied with by the execution of the required undertaking by Sanders with Brown, as his surety, which appears to have been approved by the clerk. While, therefore, it may be true that Brown has violated the obligation of his contract evidenced by the undertaking, we do not see how it is possible to say that either he or Sanders has disobeyed any order of the court, for precisely what the order required has been done. The order did not require Sanders, and whoever might become his surety, to pay the amount which might finally be recovered in the original action, but it simply required them to enter into an obligation or undertaking to pay such amount; and this was done promptly. An order requiring a party to pay a given sum of money at a specified time is a very different thing from an order requiring a party to enter into an obligation, with good and sufficient security, to pay such sum of money at the time specified. For example, nothing is more common than for the court, in ordering a sale of property, to insert in the order a requirement that the purchaser shall give bond and mortgage to secure the payment of the purchase money at a specified time, and when such bond and mortgage have been executed that is always regarded as a full compliance with the order. If the obligor fails to pay the bond at the time specified, such failure has never been regarded, so far as we know, as a disobedience of the order of the court, warranting an attachment for contempt. We do not see how it is possible to distinguish, in principle, such a case from the one now under consideration. Even if it should be assumed that Brown, by executing the undertaking, made himself a party to the action, in which it was required, and thus brought himself within the purview of Judge COTHRAN'S order, we do not see how it is possible to charge him with any disobedience of that order, as the very thing which it required has been done.

It seems to us clear, therefore, that, in any view of the case, even stripped of all considerations growing out of the appeal from the judgment recovered by the plaintiff against the defendant F. J. Sanders, and regarding the case as if there never had been any such appeal, there was no error in refusing the motion for attachment. The judgment of this court is that the order appealed from be affirmed.

SIMPSON, C. J., and MCGOWAN, J., concur.

(30 S. C. 234)

REHKOPF v. KUHLAND *et al.*

(*Supreme Court of South Carolina.* March 1, 1889.)

MASTERS IN CHANCERY—LIMITATION OF ACTIONS.

1. When, upon the refusal of a purchaser of land at judicial sale to comply with the terms of sale on the ground of defective title, the sole question is whether those whose estate is sold and their privies have had such possession as to perfect their title, which depends wholly on parol evidence, it is error to overrule the purchaser's motion to refer the question of title to a master.

2. The amendment to the statute of limitations, Acts S. C. 1873, reducing the period from 20 to 10 years in actions for land, is prospective, and does not apply to an ouster made before its passage.

Appeal from common pleas circuit court of Charleston county; PRESSLY, Judge.

Action by F. G. Rehkopf, in his own right and as administrator, etc., of J. F. Kuhland, deceased, against Anton George Kuhland, and others, to settle the estate and sell the land of plaintiff's intestate. C. W. Kuhland became the purchaser of land, but refused to comply with the terms of sale, or the

Digitized by Google

ground of defective title. From a judgment declaring the title good, and requiring the purchaser to comply with his bid within 15 days, otherwise the land to be sold at his risk, the purchaser appeals.

Mr. Burke, for appellant. *Simons & Cappelmann*, for respondents.

McIVER, J. Under proper proceedings for the settlement of the estate of J. F. Kuhland, who died intestate, a lot of land in the city of Charleston, as part of the estate of intestate, was offered for sale by the master, and bid off by the appellant, who declined to comply with his bid upon the ground of alleged defects in the title of the intestate. At the instance of the parties to the action, a rule to show cause why he should not be required to comply with the terms of the sale was issued against appellant. To this rule he made a return, setting forth the alleged defects in the title, and praying a reference to the master to inquire into and report as to the condition of the title. To this return the plaintiff in the action filed what is called a "traverse," setting forth facts supported by an affidavit of Mrs. D. S. Brandt, tending to show that, while upon the face of the papers the title of the intestate might not be good, yet it had been perfected by possession. Upon hearing this return and traverse the circuit judge, without giving any reasons for his conclusion, or stating any facts which he had found to be established, granted an order making the rule absolute, adjudging that the title was good, requiring the appellant to comply with the terms of sale within 15 days, and upon his failure so to do requiring the master to resell at his risk. The order of the circuit judge, as set out in the case, makes no reference to or ruling upon the demand of appellant for a reference to the master as to the title, but it is stated in the case that he declined to order such reference. From the order and judgment below this appeal was taken upon the several grounds set out in the record. But from the view which we take it will only be necessary to consider the fifth, sixth, and seventh grounds, in which the single question presented, in various forms, is whether there was error in declining to grant the reference to the master as to the title.

There are certain of the facts which appear to be undisputed, to-wit: That the premises in question were formerly owned by one Robert Limehouse, who died in August, 1851, having previously executed his will, whereby he devised this lot, together with other property of a similar character, to his seven children, one of whom was Sarah Stall, wife of John R. Stall; that on the 30th of September, 1851, the said devisees, by mutual deeds, undertook to partition the property of their father among themselves, and on that day a deed was made to Sarah Stall by her co-devisees of a large quantity of property, and that the premises in question, known as "Lot No. 1," on the plat of the lands of the estate of Robert Limehouse on the south side of Line street and east side of Meeting street, is not mentioned in said deed, yet lot No. 1, on said plat on the north side of Line street and west side of Meeting street, is twice described therein; that the lot now in question is not mentioned or described in any of the deeds between the devisees of Robert Limehouse, and the records of the proper office show no conveyance or other paper indicating the exercise of ownership over this lot by any of the devisees of Robert Limehouse, except a deed from Stall and wife, bearing date 2d February, 1871, to one D. Apeler, who conveyed the same to the intestate in February, 1885. The disputed facts are as to the nature, extent, and character of the possession of the lot by Mrs. Stall; whether it was of sufficient length of time to afford a presumption of a conveyance to her from her co-devisees; and, if not, whether she had acquired a title by adverse possession. The evidence upon which respondents rely to establish the nature, extent, and character of Mrs. Stall's possession is derived principally from the affidavit of Mrs. Brandt, set out in the case, as well as from a policy of fire insurance, covering the building on the lot, issued to John R. Stall for one year from the 15th of August, 1885. The affidavit of Mrs. Brandt purports to have been made on the 27th of March, 1871, for what purpose, or in the course of what proceeding, does not appear, but it certainly could not have been made for the purposes of the present inquiry; and whether it was competent evidence in this case we shall not now inquire.

From this condensed statement of the facts as presented to the circuit judge, it is quite clear that the paper title to the lot is defective, as the deeds on their face only show a title in the intestate for one undivided seventh of the lot. If, therefore, the title is good, it must rest upon possession, which is a question of fact as to which the parties are at issue; for the appellant in his return distinctly says that "he denies that there are any facts sufficient to warrant a presumption in law of a conveyance to Mrs. Stall by the other parties in interest, or that she has any title under the operation of the statutes of limitations of actions." When this is the case, it seems to us that the proper practice is to order a reference to the master, when the testimony can be taken in a regular way, the witnesses subjected to cross-examination, and a full record made of the evidence. Gordon v. Sims, 2 McCord, Eq. 151; Jenkins v. Hiles, 6 Ves. 646; Ror. Jud. Sales, § 150; 2 Jones, Mortg. § 1648. Where, however, the facts are undisputed, or rest entirely upon record evidence, there is no necessity for a reference. It seems to us therefore that there was error in declining to order a reference in this case, as the question of title depended upon parol evidence as to possession.

It is contended, however, that the possession of D. Apeler from the date of the conveyance to him (2d February, 1871) to the time of his conveyance to intestate, in Feb-

Digitized by Google

ruary, 1885, which is not disputed, was sufficient to give him a title which he could convey to the intestate. Whether the circuit judge rested his conclusion upon this ground, or whether it was even considered by him, does not appear; but as this ground, if maintainable, would be sufficient to sustain the judgment below, it becomes necessary for us to consider it. We do not think that this ground can be sustained. The right of action against Apeler accrued when he took possession, in February, 1871, at which time the statutory period was 20 years, and, as he held possession for only 14 years, it is quite clear that he had not acquired a title by possession when he conveyed to the intestate, unless it be by virtue of the amendment of 1873, reducing the statutory period to 10 years. But the amendatory act contains no words giving it a retroactive effect, and, on the contrary, it is inserted as part of chapter 2, tit. 2, Code Proc., and must therefore be read in connection with the first section of that title, which expressly declares that "the provisions of this title shall not extend to actions already commenced, or to cases where the right of action has already accrued, but the statutes then in force shall be applicable to such cases." Now, as in this case the right of action had already accrued when the amendment was adopted, such amendment could not extend to this case, but the statute in force at the time the right of action accrued, which was 20 years, was applicable. Nichols v. Briggs, 18 S. C. 473. The judgment of this court is that the order and judgment appealed from be reversed, without prejudice as to any question not herein considered, and that the case be remanded to the circuit court for such further proceedings as may be necessary to carry out the views herein announced.

SIMPSON, C. J., and MCGOWAN, J., concur.

(30 S. C. 262)

MURPHY v. VALK.

(*Supreme Court of South Carolina.* March 5, 1889.)

MECHANICS' LIENS.

1. Rev. St. S. C. § 2354, as amended in 1884, (18 St. 823,) relating to mechanics' liens, provides that the lien shall be dissolved unless the claimant file, within 90 days, in the office of the register of mesne conveyances, a true statement of the account, with all just credits, description of property, etc., which statement shall be subscribed and sworn to by the person claiming the lien, and shall be recorded by the register. *Held*, that a compliance with this statute is sufficient to entitle the statement to be recorded, and it is not necessary that its execution be proved by the affidavit of a subscribing witness, as is required by the general registry law (Rev. St. §§ 1776, 1777) before an instrument in writing can be recorded.

2. In an application to enforce a mechanic's lien, the fact that the court orders the master to ascertain whether there are other creditors having liens of the same kind as plaintiff, though not required so to do, is harmless error; the master having reported that by the certificate of the register no other liens were found in his office, and the case having been proceeded with as if no such reference had been made.

MCIVER, J. dissents.

Appeal from common pleas circuit court of Charleston county; NORTON, Judge.

Action by John D. Murphy against Elizabeth W. Valk, to enforce a mechanic's lien. Judgment for plaintiff, and defendant appeals.

Smythe & Lee, for appellant. *J. E. Burke*, for respondent.

MCGOWAN, J. This was a proceeding to enforce a mechanic's lien, and, as several preliminary questions were raised, principally as to form of procedure, it will contribute to clearness to make a short statement, and that of the appellant is substantially adopted.

The plaintiff filed his petition, alleging that, in pursuance of an agreement made with the defendant, he had built a house for her on a lot in Charleston; that he had done certain extra work, and had been to extra expense, because of the effects of the earthquake, which the defendant had agreed to pay; that he had completed the building and ceased to labor on it on June 18, 1887, and on August 10, 1887, filed his mechanic's lien in the registry of mesne conveyance office, a copy of which he annexed. He claimed as a balance due him $1,612.42, and asked that said sum be adjudged a lien on the property, and that the same be sold under the order of the court for the satisfaction thereof, etc. The paper called "mechanic's lien" was sworn to on August 10, 1887, but its "execution" was not proved by the affidavit of a subscribing witness. It was, however, left in the office of the register, and copied by him in the books of that office on the day it was dated. The defendant filed her answer, denying the allegations of the petition not specifically admitted. As a *first* defense, as matter of law, she denied the plaintiff's right to bring the action, because of his having no lien; that, if he ever had one, it had been dissolved, because he had failed to have his statement "recorded," in accordance with the provision of law. *Second.* She admitted that she was the owner of the premises, but that the agreement between her and the plaintiff was in writing, of which she exhibited a copy. She denied that she was indebted to him in the amount claimed, or in any amount. She denied that he had fulfilled his contract, or even completed the building. *Third.* She set up, by way of counter-claim, that a very large portion of the work was so poorly done that it would have to be done over; that she had already expended large sums in the effort to make the house weather-tight and inhabitable; and that the plaintiff was in fact indebted to her in the sum of $1,000, for which she asked judgment. The plaintiff replied, denying the allegations of the counter-claim, and, as matter of law, averring that no counter-claim was admissible in a proceeding to enforce a mechanic's lien. The cause being on calen-

Digitized by Google

dar No. 2, the plaintiff moved that all the issues of fact be referred to a jury at the then term of court, which was refused. But the judge ordered a reference to one of the masters, Charles Richardson Miles, Esq., to ascertain and report to the court, with all convenient speed, whether or not there were other liens of the same kind upon the estate described in the petition. To this order the defendant excepted, on the grounds (1) that the cause had not been on the calendar 14 days before the court; and (2) because the case was called out of its regular order, and that the order of reference was made irregularly and without notice. On July 9, 1888, the master filed his report, stating, among other things, "that the register of mesne conveyances, in his certificate attached, states that, having examined the indices of his office, he finds no lien there but the plaintiff's," etc. To this report the defendant put on file exceptions, as follows: "(1) Because the order of reference was without warrant of law, for the reasons given in the exceptions filed thereto. (2) Because the master proceeded under said order of reference, and made his report to the court, without notice of any kind to the defendant or her attorneys. (3) Because neither the defendant nor her attorneys had any knowledge whatever of the proceedings by the master under the order, or that any proceedings at all were being or had been had, or that any report had been filed, until casual information reached her attorneys of the filing of the report three days after. (4) Because the master erred in his report in quoting the allegations of the petition, unsupported by any testimony and denied in the sworn answer; the same not being testimony, nor furnishing him any ground upon which to base his report. (5) Because the master erred in assuming and reporting that the building in question was completed on a certain day, or was completed at all; there being no testimony whatever to warrant such a finding. (6) Because the master erred in reporting that he had no means of ascertaining whether or not any other mechanic's lien had been created, etc.; whereas, the master could easily have ascertained that fact, by taking the testimony of parties in position to know, or by adopting the method prescribed by the act and publishing therefor. (7) Because the certificate of the register of mesne conveyances, attached to the master's report, is not conclusive proof that no other liens than that of the petitioner exists," etc. When the case was reached the circuit judge—stating that the reference had been ordered simply for his own information as to whether there were other creditors claiming like him with that of the plaintiff—declined to consider the above exceptions, but heard the following questions of law: (1) Whether or not the alleged statutory lien had been so "recorded" as to make it in that particular valid; as to which he held that the lien was legally recorded. (2) Whether the defendant was entitled to set up her counter-claim in the action; as to which he held that the defendant had the right to set it up to the extent that she may be able to prove the same. "It then appearing to the court that material questions of fact arise in the case, and a trial of the same by jury having been required," he ordered the case transferred to calendar No. 1, for the trial by jury of certain "issues," which are set out in the record and need not be restated here.

From this order the defendant appeals to this court upon the exceptions: (1) "Because his honor erred in not disposing in some way of the report of the master, duly made and filed in the cause, after a reference duly ordered. (2) Because his honor, having by order in due and ordinary form referred it to the master to inquire into and report upon certain facts arising in the cause, should have first received and disposed of the report of the master before proceeding further in the cause. (3) Because, a reference having been ordered in due form, and a report made by the master, it was the right of the defendant to file exceptions thereto, and his honor erred in refusing to consider such exceptions, duly filed and brought to his attention. (4) Because there is nothing in the record to indicate that the reference ordered was to be governed by any other than the ordinary rules of practice prevailing in the court, and, even if the reference was ordered for the information of the court, this did not do away with the necessity of receiving and acting upon the report, or with the right of either party to except thereto. (5) Because his honor erred in holding that the paper claimed by the plaintiff as constituting his lien upon the defendant's property had been legally recorded, so as to give the plaintiff a valid lien under the statute. (6) Because his honor erred in holding that the plaintiff was entitled under the facts of the case, as stated in his order, to have a statutory lien upon the property of the defendant," etc.

The first four exceptions make complaint of the mode of procedure adopted by the circuit judge in regard to the inquiry whether or not there were other creditors having liens of the same kind with that of the plaintiff on the estate described in the petition. Under the reference made, the master was not authorized to decide anything, and he did not undertake to do so, but simply referred to the petition of the plaintiff and the statute law upon the subject as to the necessity for recording, and reported as follows: "The register of mesne conveyance of Charleston county, in his certificate hereto annexed, states that, having examined the indices to the records of his office from 1880 to July 9, 1888, he finds only the mechanic's lien on the premises [describing them] of J. D. Murphy v. Elizabeth W. Valk, recorded August 10, 1887, in Book K," etc. "I have, of course, no means of ascertaining whether or not any other mechanic's liens may have been created since the building was com-

Digitized by Google

pleted, the time for recording which has not expired," etc. It did not appear that any claim was made that there were other lien creditors, or motion to bring in other parties, or that any have since appeared. The judge was not required by law to make publication for them. But doubtless, seeing the direction in section 2363, Rev. St., as to giving notice of the filing of the petition "to all other creditors who have a lien of the same kind upon the same estate," he probably ordered the inquiry as to the existence of other lien creditors simply as a precaution, and "to make assurance doubly sure." We have no doubt it was done in an earnest desire to administer the law fully and faithfully, but it was not necessary; neither of the parties had a right to it, or moved for it, and the trial could have gone on without any such reference. The judge seems to have been satisfied with the information received, and proceeded with the case. We are unable to see that this prudent course of the judge was either error of law, or in any way whatever injured the defendant. "The party alleging an error of law must make it clearly appear not only that some erroneous ruling has been made, but that he has been prejudiced thereby as to the merits of his case." Trotter v. Robinson, 6 S. C. 410; Devereux v. Cotton-Press Co., 17 S. C. 66.

Then, as to whether the judge erred in holding that the paper claimed by the plaintiff as constituting his lien upon the defendant's property was "legally recorded so as to give the plaintiff a valid lien under the statute." The law as to the mechanic's lien is purely statutory, and therefore in that sense the rights given by it may be called legal; but the act which brought them into existence also provided certain machinery for enforcing them, which in general character partakes somewhat of the nature of equitable proceedings. The rule in such case is believed to be that in enforcing the rights so given the special machinery provided for that purpose must be strictly followed. See Kennedy v. Reames, 15 S. C. 548; Ex parte Lewie, 17 S. C. 156. Section 2350, Rev. St., provides as follows: "Any person to whom a debt is due for labor performed or furnished, or for materials furnished and actually used in the erection, alteration, or repair of any building or structure upon any real estate, by virtue of an agreement with or by consent of the owner, * * * shall have a lien upon such building or structure, and upon the interest of the owner thereof in the lot of land upon which the same is situated, to secure the payment of the debt so due to him," etc. Section 2354, Rev. St., as amended in 1884, (18 St. 823,) provides that "such lien shall be dissolved, unless the person desiring to avail himself thereof, within ninety days after he ceases to labor on or furnish labor or materials for such building or structure, files in the office of the register of mesne conveyance of the county in which the same is situated a statement of a just and true account of the amount due him, with all just credits given, together with a description of the property, * * * which certificate shall be subscribed and sworn to by the person claiming the lien, * * * and shall be recorded in a book kept for the purpose by the register, who shall be entitled to the same fees therefor as for recording mortgages of equal length. The delivery to the register for filing, as hereinbefore provided, shall be and constitute the delivery contemplated with regard to such liens in section 1776 of General Statutes," etc.

These provisions show that the mechanic's lien arises from doing the work, etc., but that it will be dissolved unless the party wishing to avail himself of it does certain things described in the act in a particular way, and within a given time. It seems that the claimant here did all that the act expressly required of him, and in the manner directed. The statement or certificate subscribed and sworn to was filed in the register's office, and by him copied into the proper book, and within the time limited. But it is contended that, although the paper was copied into the proper book, it was not properly and technically "recorded," so as to prevent the dissolution of the lien; for the reason that it was not thereby "proved" so as to entitle it to registry, under the general registry law of 1876, (sections 1776, 1777, Rev. St.,) which provides that, "before any deed or instrument in writing can be recorded in the proper office, the execution thereof shall be first proved by the affidavit in writing of a subscribing witness to such instrument," etc. Upon this subject it might be sufficient to say that the claimant proceeded, as we think he was bound to do, in accordance with the special provisions of the act under which he claimed his lien. But we incline to think that there is no conflict between the provisions of the mechanic's act and the registry law, in regard to the proof necessary to entitle a mechanic's lien to registry. It is true that the first section of the registry law, (§ 1776, Rev. St.,) which specifies the papers necessary to be recorded within 40 days, so as to affect subsequent creditors or purchasers, is, in its terms, very general,—"all instruments in writing now required by law to be recorded," naming, among others, "certificates of renunciation of dower," "statutory liens on buildings, lands," etc. But, in reference to the instruments required to be recorded, the language is "delivered or executed," and afterwards in different form repeated, "delivery or execution;" indicating, as it seems to us, two classes of cases to be recorded: one "executed," that is to say, merely signed by the parties,—signed, sealed, and delivered, and of course needing sworn proof of "execution," such as deeds, mortgages, etc.; and the other ready for recording on mere "delivery," as "certificates of renunciation of dower," "mechanic's liens," etc. This view is strengthened by the context of the second

Digitized by Google

section, (§ 1777, Rev. St.,) which relates exclusively to the "probate" necessary for recording the different instruments. It will be observed that it entirely omits and drops the word "delivered," providing that, "before any deed or instrument in writing can be recorded, the execution thereof shall first be proved by affidavit," etc., but making no reference to the proof of those papers which need no further "execution," and are ready for recording upon mere "delivery." This view is still further supported by the mechanic's act itself, one section of which, as amended in 1884, expressly declares "that the delivery to the register for filing, as hereinbefore provided, shall be and constitute the "delivery" contemplated with regard to such liens in section 1776 (registry act) of the General Statutes." What did this express reference to the "delivery" in section 1776 of that act mean, unless it was, as to the matter of recording, to put the mechanic's lien therein declared into that class of cases which, although required by that section to be "delivered" for registry, yet was not covered by section 1777, prescribing the mode of "probate" only in cases where the instrument is signed, sealed, and delivered by the parties, and therefore needs sworn proof of "execution." But if we are mistaken in this, and there is real conflict between the acts as to the proof necessary for recording a mechanic's lien, we suppose that there can be no doubt that the amendment of the mechanic's act, (1884,) being subsequent to the registry law, (1876,) repealed any provision in that law which was inconsistent with it. The second section of the amendment declares "that all acts and parts of acts inconsistent with this act are hereby repealed." The special provisions of this act, as to the manner of recording a mechanic's lien, is the law which must govern, and, as we think, this has been the unvarying practice heretofore in all such cases. We cannot say that the judge below committed error in holding that the lien was legally "recorded." The judgment of this court is that the judgment of the circuit court be affirmed.

SIMPSON, C. J., concurs.

MCIVER, J. I dissent, and hope hereafter to be able to find the time to give my reasons.

(30 S. C. 613)

HOLLIDAY *v.* HOLLIDAY.

(*Supreme Court of South Carolina.* March 6, 1889.)

TRESPASSING ANIMALS—LANDLORD AND TENANT.

Under Rev. St. S. C. § 1186, providing that "any freeholder or tenant of land, his agent or representative, may seize and hold" hogs "trespassing upon his premises," and recover compensation of the owner, a tenant in possession under a lease alone has the right to recover for animals trespassing upon the leased premises.

Appeal from common pleas circuit court of Clarendon county; ALDRICH, Judge.

Action by Alfred J. Holliday against Shields P. Holliday, to recover compensation for seizure of trespassing animals. From an order dismissing an appeal by defendant from a judgment of a justice of the peace, defendant appeals.

Haynsworth & Dinkins, for appellant. *B. Pressley Barron*, for respondent.

MCGOWAN, J. The case agreed on states that certain stock (swine) owned by the defendant trespassed upon a tract of land which was owned by the plaintiff. One Plowden occupied and cultivated a part of the land as tenant of plaintiff. Plowden, as agent or representative of the plaintiff, and by his directions, seized the defendant's swine. The plaintiff brought his action before a trial justice to recover $3.50 for each of the hogs as compensation for such seizure. The action was tried by a jury. There was testimony on behalf of the defendant, tending to show that the hogs were seized on that part of the tract which was in the occupancy of Plowden as tenant, and there was testimony on behalf of the plaintiff, tending to show that the animals were seized on that part of plaintiff's tract which was outside of the land rented to Plowden. The trial justice was requested by the defendant to charge the jury—*First*, that "if the jury believe that the trespassing stock were taken up by Plowden on the lands in possession of and controlled by him, then the plaintiff, the owner of the land, had no right to charge for Plowden's seizure;" and, *second*, "that a party in possession of and having control of land alone has the right to take up stock trespassing upon it." The trial justice refused these requests, and, on the contrary, charged the jury: "If you find that the hogs were on the land of A. J. Holliday, the plaintiff, you will find for the plaintiff; and, if you find they were not, you will find for the defendant." Under this charge the jury found for the plaintiff, three dollars. The defendant appealed to the court of common pleas; and, Judge ALDRICH having dismissed the appeal, it comes to this court upon the following grounds: (1) Because his honor erred in sustaining the trial justice, in refusing to charge "that, if the jury believe that the trespassing stock were taken up by Plowden on the lands rented to him, the plaintiff and owner had no right to charge for Plowden's seizure." (2) Because his honor erred in sustaining the trial justice in refusing to charge "that a party in possession of and having control of land alone has the right to take up trespassing stock, and to charge for the seizure." (3) Because his honor erred in sustaining the charge of the trial justice "that if you find the hogs were on the land of A. J. Holliday, the plaintiff, you will find for the plaintiff; and, if you find they were not, you will find for the defendant."

The single question is as to the construction of section 1186 of the Revised Statutes, which is as follows: "Any freeholder or tenant of land, his agent or representative, may

Digitized by Google

seize and hold possession of any of the foregoing animals, [among others, swine,] which may be trespassing upon his premises, and as compensation for such seizure may demand of the owner," etc. It was manifestly the intention of the act to give the right to a tenant as well as to the owner of lands; and the term "freeholder" was used by the lawmakers, not with any reference to the extent of his interest in the lands trespassed on, but simply to describe a person as contradistinguished from a "tenant." There can be no doubt that either the "freeholder" or "tenant" may seize stock "trespassing upon his premises;" that is to say, the tenant may do so upon the lands leased, which, during the continuance of the lease, are "his premises." This being so, it could hardly have been the intention to give a double remedy, both to the tenant and the owner, for the same trespass. The confusion has arisen from the use of the word "freeholder," the meaning of which, it is said, is extensive enough to include leased lands; and therefore, notwithstanding the lease for a limited time, the "freeholder" is still the owner, and the lands may be said to be "his premises." We do not think that is what was intended, but that, in the sense of the act, the lands leased are "the premises" of the tenant, who alone has the right to seize stock for trespassing upon them. For all the purposes of the act the tenant, during the continuance of his lease and possession, is the owner of the premises. The judgment of this court is that the judgment of the circuit court be reversed, and that the case be remanded to the circuit for such further orders as the parties may be advised.

SIMPSON C. J., and MCIVER, J., concur.

(30 S. C. 613)

DAVIS v. RICHMOND & D. R. CO.

(*Supreme Court of South Carolina.* March 8, 1889.)

TRIAL—INSTRUCTIONS.

In an action against a railroad company to recover damages for stock alleged to have been killed by the negligence of the defendant, the refusal of an instruction that if the stock was killed accidentally, and not by reason of negligence on the part of the defendant, then plaintiff cannot recover, is ground for a new trial, although the trial court subsequently gave other instructions in which it intended to embody the one refused; such intention not being manifest from the phraseology of the other instructions, and no explanation being given of such refusal.

Appeal from common pleas circuit court of Fairfield county; KERSHAW, Judge.

Action by Qually Davis against the Richmond & Danville Railroad Company. Judgment was given for plaintiff, and defendant appeals.

John C. Haskell, for appellant. *J. C. James*, for respondent.

SIMPSON, C. J. In this action the respondent sought to recover damages for certain stock alleged to have been killed on the track of defendant's railroad. The action was brought before a trial justice, and its basis was negligence. At the trial the defendant requested the trial justice to charge the following requests, to-wit: "(1) That if the stock was killed accidentally, and not by reason of negligence on the part of the defendant, then plaintiff cannot recover. (2) That if the train was running at a lawful rate, and had the customary appliances, and the customary force of train-men, and the stock, when seen by the engineer, or might with due care have been seen, was so close that the train could not be stopped in time to avoid striking it, then the plaintiff cannot recover. (3) That much less care is required of railroad companies, in providing against stock on its track, since the passage of the stock law than before. (4) If you are satisfied that the injury did take place, as alleged, then the inquiry will be, was the injury the result of an accident which could not be avoided by the use of due care on the part of defendant's employes? If so, plaintiff cannot recover. If the injury did take place as alleged, and might have been avoided by the use of due care by the defendant's agents, the defendant would be liable, unless the injury was the result of the plaintiff's negligence. If the stock was killed, as alleged, but was on lands of the defendant at the time of injury, and it has not been shown that the accident was the result of want of ordinary care and prudence on the part of the defendant's agents, the plaintiff cannot recover. (5) Negligence is the absence of due care,—such care as the circumstances require to be employed by the party. Reasonable care is such as would be exercised by a person of ordinary intelligence and prudence. Some circumstances call for the exercise of extraordinary care and prudence. If the stock, at the time of the injury, were at a place they ought not to be, and could not reasonably be expected to be, then the company could only be liable for want of ordinary care and prudence. (6) If there were no evidence in the case, except that the cattle were found on the railroad under such circumstances as to justify the belief that they were killed by a collision with the defendant's cars, the law would presume that such killing was the result of negligence; but, upon defendant's introducing evidence to explain the killing, that then, whether the presumption of negligence, arising from the plaintiff's proof of ownership and the fact of killing, was overthrown, would depend upon the preponderance of the evidence. (7) That if the jury should find for the plaintiff, and that he took the beef and used or sold it, he can only recover the difference between the value of the beef and the stock. (8) That if the jury believe that the cattle were not inclosed in a pasture, but running at large on the railroad track, where there was no crossing, that plaintiff is guilty of contributory negligence in so allowing them to stray at large; and, if the jury believe this to be the proximate cause of

Digitized by Google

killing, the plaintiff cannot recover." The trial justice refused the first, but allowed all the others. The jury found $30 for the plaintiff. The defendant appealed to the circuit court on the ground of the refusal to charge as mentioned. The circuit judge affirmed the judgment below, on the ground, as it is stated, that although the legal proposition contained in the request of defendant was a correct one, yet that it was substantially charged in allowing the other requests, and therefore its refusal in the first instance was cured; and, though it was error to refuse it, yet that the evil had been remedied. The first request contained a short and concise proposition, and one easily understood; and if, as is stated, it was distinctly refused, such refusal, we think, was well calculated to mislead the jury, especially when other matters were intermingled with the other requests, and there was no explanation of, or withdrawal of, the refusal. The refusal to charge this request as made, and then subsequently allowing it as embodied in another request, even if it was clearly contained in the subsequent request, would at least be an inconsistency, and contradictory, and therefore misleading. Thomp. Char. Jur. 97. But even if the trial justice intended to remedy the error of his refusal of the first request by allowing the others, in which he supposed the substance of the first was contained, it is doubtful whether the jury could have seen that such was his intent, simply from the phraseology of the others with no reference to the first, nor any explanation of its refusal. We think a new trial should be had, and to this end it is the judgment of this court that the judgment of the circuit court be reversed.

McIVER and McGOWAN, JJ., concur.

(30 S. C. 302)

YOUMANS v. WAGENER *et al.*

(*Supreme Court of South Carolina.* March 7, 1889.)

DOWER—MERGER.

Where a married woman acquires, during coverture, the fee in her husband's lands, her inchoate dower right ceases to exist, in analogy with the doctrine of merger; and her conveyance to a third person passes the title free from the incumbrance of dower.

Appeal from common pleas circuit court of Hampton county; PRESSLEY, Judge.

A. M. Youmans, for appellant. *James W. Moore*, for respondents.

SIMPSON, C. J. This appeal involves the question whether the appellant is entitled to dower in certain real estate, denied her by the circuit court for Hampton county, on appeal from the probate court, which had decreed for her. The following seem to be the facts upon which the claim was made: The husband of the demandant owned the tract of land in question during the coverture, and during said coverture it was sold at sheriff's sale under execution against said husband. Afterwards, and still during the coverture, the purchaser at said sale sold and conveyed the land to the demandant, who conveyed to the defendants F. W. Wagener & Co. After this sale the husband died, and the appellant instituted the proceedings below in the probate court, demanding dower therein. The probate court, as stated above, sustained the claim, but on appeal to the circuit court this decree was overruled, his honor, Judge PRESSLEY, holding that, the demandant having become the owner in fee-simple of the land, her estate in dower became merged therein, and that in conveying to Wagener & Co. she conveyed an absolute estate, free from the incumbrance of dower. He therefore reversed the judgment of the probate court.

The appeal assails this ruling as error, and the respondent defends the judgment below —*First*, on the ground upon which it is based by the circuit judge above, to-wit, merger; and, *secondly*, he urges, in the argument, the doctrine of estoppel, as sufficient to sustain said judgment. When a greater and a less estate meet in the same person without any intermediate estate the less estate is merged in the greater, or, to use the language of the old law, is "drowned," and ceases to exist. This is merger. 2 Rap. & L. Law Dict. 815; Mangum v. Piester, 16 S. C. 316. So, too, by operation of law, where one right unites in the same person with another right of greater legal worth, the first right is extinguished. For instance, where one acquires a remedy or security of a higher nature, in legal estimation, than the one he already possesses for the same right, then his remedies in respect of the minor right or security merge in those attaching to the higher one. An instance is a bond taken for a simple contract debt or a bond reduced to judgment; the principle in all these cases, both as to the merger of estates and the extinguishment of rights, being that the larger estate or right of which the party becomes possessed puts him in possession of the lesser as completely as though it had been enforced by itself, and therefore there is no longer any reason to claim it. Now, it is true that in the case before us there is no union of two estates, (an inchoate right of dower not being an estate,) nor is there a coinciding of two rights in the sense referred to above; the claim for dower being a mere inchoate right, and the estate a fee-simple estate. There is therefore, technically, no merger of estates or of rights. But the principle upon which it has been established that a merger in such cases takes place is present here. The demandant, when she purchased the land, became the owner in fee, with an incumbrance of an inchoate right of one-third to herself as dower. Had her husband been dead at that time, and her right to dower been consummated, there is no doubt but that the dower would have been merged,—drowned in the fee,—because the fee would have

Digitized by Google

given her possession of the dower as well. Why not, then, the same result as to her inchoate right? This is a new case, it is true; no question of dower having ever been before this court, or courts elsewhere, upon the precise state of facts here, so far as our researches have gone, or so far as references of counsel have been made. In the absence of all authority upon the precise point involved, we conclude from the analogy of merger established as above that his honor was correct in holding that merger had taken place here, and that, in conveying the land in question to F. W. Wagener & Co., she conveyed an absolute estate, free from the incumbrance of dower.

As to the question of estoppel, his honor below did not, in terms, express himself upon that subject, and, the respondent not having given notice that he would claim to support the decree upon that ground, it is not properly before us. And even if it was, it would be unnecessary to consider it, as the decree must be affirmed upon the ground already stated. It does not need the estoppel. It is the judgment of this court that the judgment of the circuit court be affirmed. Let this be certified to the probate court for Hampton county.

McGOWAN, J., concurs.

McIVER, J. I concur upon the ground that the warranty in the deed to Wagener & Co. operated, by way of estoppel, as a conveyance of the subsequently vested estate of dower, upon the well-settled doctrine that where one conveys an estate, with warranty, to which, at the time, he has no title, or a defective title, and subsequently acquires a good and complete title, such title passes to the grantee through the estoppel raised by the warranty. Wingo v. Parker, 19 S. C. 16, and cases there cited. In the case of Townsend v. Brown, 16 S. C. 91, cited by appellant, the deed contained no clause of warranty, but was a simple quitclaim deed, and hence that case is not applicable. It does not seem to me that we are precluded from considering this question by reason of the omission of counsel for respondents to give notice, as required by the proper practice, that he would endeavor to sustain the judgment below on this ground, for this question was distinctly made in the appeal from the decree of the judge of probate, and therefore it is one of the questions "fairly arising upon the record of the case," and was, in fact, argued by counsel for appellant.

(30 S. C. 296)

WAGENER *et al.* v. SWYGERT *et al.*

(Supreme Court of South Carolina. March 7, 1889.)

MORTGAGES—VENUE—VACATING JUDGMENT.

1. Where a defendant, not shown to be mentally incapable of understanding and taking care of his business affairs, was duly served with summons, and sent the copy left with him to his son, his co-defendant, and the latter employed counsel who, by his instructions, put in an answer for both defendants, the court properly refused to vacate the judgment on the ground that such counsel had no authority to act for the father, or on the ground of excusable neglect on his part.

2. Under Code S. C. § 144, providing that actions for the foreclosure of mortgages shall be brought in the county in which the subject of the action, "or some part thereof," is situated, and section 146, providing that "in all other actions the action shall be tried in the county in which one or more of the defendants reside," an action to foreclose a mortgage, brought in the county where a part of the property is situated, and in which one of the defendants resides, gives the court jurisdiction of the whole matter, including judgment for deficiency against a defendant residing and served in another county.

Appeal from common pleas circuit court of Fairfield county; I. D. WITHERSPOON, Judge.

Action to foreclose a mortgage, brought by F. W. Wagener & Co. against John S. Swygert, Jr., John S. Swygert, Sr., and James H. Yarborough, as assignee of the estate of Swygert, Jr. Defendants appeal on the grounds fully stated in the opinion.

W. S. Monteith and *Meetze & Muller*, for appellants. *A. S. Douglass*, for respondents.

SIMPSON, C. J. The defendants John S. Swygert, Jr., and John S. Swygert, Sr., in 1883, executed a joint mortgage of certain lands,—one or more tracts being located in Fairfield county, and the remainder in Lexington county,—John S. Swygert, Jr., owning individually the lands in Fairfield, and a portion in Lexington, and John S. Swygert, Sr., owning a tract in Lexington,—to secure a certain joint bond of these parties to the plaintiffs, for a very large amount, some $40,000. John S. Swygert, Jr., resided in Fairfield, and John S. Swygert, Sr., in Lexington, on his tract thus mortgaged. It seems that John S. Swygert, Jr., was engaged in business in Fairfield, and John S., Sr., his father, became his surety on this bond for advances, etc., made by the plaintiffs. In 1887 a suit was instituted in Fairfield county to foreclose said mortgage, and for judgment for any deficiency which might remain after appyling the proceeds of the land sought to be sold; and the defendant Yarborough, to whom John S. Swygert, Jr., had made an assignment for the benefit of creditors, after the date of the mortgage, was made a party. The defendants Swygerts were both served with summons, and it appears that Swygert, Sr., sent the summons served on him to his son in Fairfield, who employed Messrs. Ragsdale, attorneys at Winnsboro, to appear and answer, and a joint answer for these defendants was put in by their attorneys. Upon the hearing, a judgment of foreclosure was ordered, with leave to enter execution for any deficiency. This judgment or decree was obtained upon the report of a referee, to whom the question of the amount due on the bond and mortgage had been referred. After the sale of the lands of John S. Swygert, Jr., in Fairfield county, under this judgment, and it had been transferred

Digitized by Google

to Lexington county to be enforced there, on motion, the attorneys now representing John S. Swygert, Sr., were substituted in the place of Messrs. Ragsdale, whereupon they gave notice of a motion to vacate said judgment in so far as the said John S. Swygert, Sr., was concerned, and for leave to withdraw the answer alleged to have been originally filed in his behalf. The grounds upon which this motion was based seem to have been (1) that Messrs. Ragsdale had no authority to represent Swygert, Sr.; and (2) excusable neglect on the part of the said Swygert. His honor, Judge WITHERSPOON, dismissed the motion, after full hearing upon numerous affidavits for and against. The appeal alleges error in the findings of fact by his honor as to the employment of Messrs. Ragsdale as attorneys for John S. Swygert, Sr., and also in reference to the excusable neglect relied on. "(2) That his honor erred in not vacating the judgment allowing the defendants to answer setting up a plea of jurisdiction; it being apparent to his honor that the court in which the alleged judgment was rendered was without jurisdiction over the defendants." And because "his honor erred in not deciding, upon the facts presented before him, and on this motion, which are set out in the body of the decree, that the court was without jurisdiction, and said judgment therefore void." We have read the affidavits submitted on the hearing of the motion, and we concur in the findings of the circuit judge, for the reasons fully stated in the decree. Swygert, the father, was duly served with a summons. This gave the court jurisdiction of his person, and, although he appears to have been quite an old man, yet he was in charge of his own affairs, giving his personal attention and supervision thereto, including a saw-mill near Columbia; and the evidence was not sufficient to warrant the court in finding that he was mentally incapacitated from understanding the nature of the proceedings instituted against him, and of the requirements of the summons served upon him. But even if this matter was doubtful, in the absence of error of law in connection with the findings of fact, this court would not interfere. Le Conte v. Irwin, 19 S. C. 557; Higgins v. Wait, 5 S. E. Rep. 363. If he had a defense to the action it was his duty to see that it was set up, and if he chose to rely upon his son, (which it appears he did by sending the summons to him,) and the son failed in properly protecting him, this was misplaced confidence, for which he must take the consequences. The plaintiffs certainly could not be held responsible. If he did not intend to authorize his son to conduct the defense for him, including the employment of attorneys, it was his duty to attend to this matter himself; and, not having done so, he must have known, or should have known, that the judgment would go against him by default. We see no ground for relief to him now, neither because Messrs. Ragsdale were not authorized to appear for him, nor from excusable neglect on his part.

As to the question of jurisdiction. The Code provides that "in all other actions [and this includes actions for the recovery of money] the action shall be tried in the county in which one or more of the defendants reside." Code, § 146. "And for foreclosure of mortgages in the county in which the subject of the action or some part thereof is situated." Id. § 144. See, also, Code, § 188, as to the power of the court in foreclosure proceedings to direct payment of any residue, after applying proceeds of the sale of the mortgaged premises. John S. Swygert, Jr., resided in Fairfield county, where the action was brought. John S. Swygert, Sr., was summoned to appear and answer in that county. A part of the subject of the action, to-wit, of the mortgaged real estate, was situate in that county, and we think therefore that the court below had jurisdiction of the whole matter, including the foreclosure directed, and the judgment for the residue, after sale of the lands, and the application of the proceeds thereof. Barrett v. Watts, 13 S. C. 441. It is the judgment of this court that the judgment of the circuit court be affirmed.

McIVER and McGOWAN, JJ., concur.

(30 S. C. 284)

RICHARDS v. MUNRO.

(*Supreme Court of South Carolina.* March 7, 1889.)

GIFTS—EVIDENCE—WITNESS—JURY.

1. In an action by the executor of a father against the administrator of his son, on a note executed by the son and indorsed by the father, and which the father had paid, taking an assignment thereof, it is competent, in order to show a gift, to show that the father said when he paid the note that he never expected to call for it, such statement being an admission against interest. The fact that the father had made a will, though it disposed of this note, could not affect the competency of the statement.

2. Code S. C. § 400, which prohibits testimony by a party in interest of any conversation or transaction with a party deceased at the time of the trial, does not render incompetent testimony by the son's administrator that he had had frequent conversations with the father in relation to the settlement of the son's estate, and that the father, though knowing that he was administrator, never made any demand upon him for the note, where he does not undertake to testify to what the conversations were.

3. Where the court states the testimony on both sides, and presents the questions to be considered, referring to the evidence, which, if believed, might bear upon these questions, but neither indicates his opinion as to the truth of the testimony, nor as to what the verdict should be, the province of the jury has not been invaded.

Appeal from common pleas circuit court of Union county; ALDRICH, Judge.

Action by John C. Richards, as executor of James A. Tucker, deceased, against James Munro, administrator of W. J. Tucker, deceased. Judgment for defendant, and plaintiff appeals.

I. G. McKissick and *D. A. Townsend*, for appellant. *Munro & Munro*, for respondent.

SIMPSON, C. J. The plaintiff, appellant, as executor of James A. Tucker, deceased,

Digitized by Google

brought the action below to recover the amount of a certain note given by his son, the respondent's intestate, to the said James A. Tucker, for $1,993.70, payable at the Merchants' & Planters' Bank of Union, and indorsed by the said James A. Tucker. The son died before the maturity of the note, and the father took it up from the bank, having it assigned to him. He subsequently died in possession of the note. The respondent administered upon the estate of the son, and had nearly completed his administration during the life-time of the father without this note being brought to his notice. The father then died, leaving a will of which the plaintiff, appellant, was appointed executor, and the action below was brought by the executor to recover the amount thereof. The defense set up was that the payment of the note was intended as a gift or an advancement by the father to the son, and therefore never to be collected; and *plene administravit*, the respondent having settled the estate in the life-time of the father without any demand made by him upon the respondent. The verdict was for the defendant, and this appeal involves the consideration of alleged errors to his honor, the circuit judge, (1) in admitting certain testimony claimed by appellant to have been incompetent; (2) in excluding certain other testimony claimed to have been competent; and (3) to the charge, as invading the province of the jury by charging upon the facts, in violation of the constitutional provision on that subject.

The exceptions on the ground of alleged incompetent testimony admitted, were as follows: "(1) In allowing the witness Goss to detail a conversation with James A. Tucker, tending to show what disposition the said James A. Tucker intended to make of his property, there being a will which alone could speak in that respect; (2) in allowing the witness James Munro, who is the defendant in said cause, to testify that James A. Tucker had knowledge of said witness' administration of W. J Tucker's estate; (3) in allowing James Munro to testify that James A. Tucker never made any demand upon witness as administrator of W. J. Tucker for the debt involved in this action; (4) in allowing James Munro to testify that he had conversations with James A. Tucker in relation to the settlement of the estate of W. J. Tucker." It appears that the witness Goss testified that he was near the bank when James A. Tucker paid off the note in question, and that after some short conversation, not material here, Tucker said to him "that he had just paid off a note for his son at the bank, and that he never expected to call for that." Plaintiff's attorneys objected, on the ground that there was a will, and that it alone should speak as to the disposition of the testator's property. Defendant's attorney urged competency, as a part of the transaction of payment *res gestæ*, and also that it was the purpose of the defense to show a gift, and, if a gift, the testator could not dispose of that which he did not own. His honor ruled the testimony competent. We think the testimony was competent, as belonging to that class of declarations of parties not immediately before the court styled "admissions against interest." Here was a party who had just paid off a note upon another, his son, out of his own funds. Upon this payment he had the right to hold it for reimbursement, if he chose to do so, and he had the right, also, to hold it as a gift or advancement to his son; and the declarations made to the witness were a statement of his intent, which was against his pecuniary interest. And besides, the relation in which Richards, the executor in the action below, stood to Mr. Tucker, the testator, was that of privy by representation, which we think would also render the declarations of the testator of the character introduced competent. 1 Greenl. Ev. § 189. It did not appear that this testimony contradicted the will, but even if it had, and if its provisions embraced a direct disposition of this note, we do not see how that fact could have excluded the evidence. The fact that a party has made a will disposing of certain property could not preclude a claimant of said property from proving that the testator had acknowledged in his life-time that the property did not belong to him, but belonged to the claimant. The testimony may have been very weak in its tendency to prove a gift, but, as we have said, we think it was competent and admissible to the jury for what it was worth.

The testimony of James Munro, the defendant, administrator, was objected to under section 400 of the Code. Upon reading the testimony of Mr. Munro, referred to, we do not think that the objection was tenable. The section of the Code relied on inhibits testimony by a party in interest of any conversation or transaction with a party deceased at the time of the trial. Mr. Munro, as it appears to us, did not undertake to detail any conversation, or give an account of any transaction had by him with the deceased testator. He stated the fact that he had had repeated conversations with the testator, and in relation to the settlement of W J. Tucker's estate, but he did not state what was said. He stated, also, that James A. Tucker had knowledge of his administration, and that he never had made demand upon him for this note; but this was not an infringement of the rule, as he neither testified to a conversation nor to any transaction.

The exceptions as to alleged competent testimony offered and refused by his honor are as follows: "(1) In not admitting the testimony of John C. Richards as to the substance of conversations with James A. Tucker about the note and debt involved in this action; (2) in refusing to allow John C. Richards to testify as to whether James A. Tucker gave him any directions about said note." To have admitted the testimony, the refusal of which is the foundation to the first exception above, would clearly have vio-

Digitized by Google

lated section 400 of the Code, as its purpose was to give the substance of a conversation between the witness, a party to the action, and James A. Tucker, deceased, in reference to a matter at issue in the suit,—the very kind of testimony which the section expressly inhibits. As to the second exception above, we do not find that his honor ruled that it was incompetent for the witness to state that he had a conversation with Mr. Tucker as to this note, but he ruled that what was said was incompetent. See folio 60 of the reported testimony. He was subsequently asked by plaintiff's attorney if he had any directions given him about this note as to what to do with it. This was excluded. As this was a question calling for the statement of a fact merely, and not involving what the directions, if any, were, it might have been admitted, in so far as section 400 is concerned, but it could not have been followed up by a call for the directions. It was therefore irrelevant, as not bearing on the matters in issue, and its exclusion was harmless.

As to the exception alleging error to his honor's charge, as violative of the constitutional inhibition in reference to charging on the facts. The rule, as laid down by this court in several cases on this subject, is that this constitutional provision is violated where the trial judge allows his opinion to reach the jury by his charge upon any contested point in the case, whether unintentionally or otherwise. It is the exclusive province of the jury to determine the truth of the facts alleged and at issue, and they must be left to do so without any expression or indication of opinion on the part of the judge. Now, we have read the charge of his honor here under the light of this rule, and when read as a whole, as it was delivered, we cannot say that the rule was violated. His honor stated what had been testified to on both sides, and presented the questions to be considered by the jury, and referred to the evidence which, if believed, might bear upon these questions; but we do not find that he either indicated his opinion as to the truth of the testimony, or as to what the verdict should be. On the contrary, he distinctly stated that it was a question of fact, of which the jury were the sole judges, and as they determined so should be their verdict. Nothing was said in the argument as to the impaneling of the jury. We suppose that it was abandoned, but, in any event, we see no ground for a new trial on that account. It is the judgment of this court that the judgment of the circuit court be affirmed.

MCIVER and MCGOWAN, JJ., concur.

(30 S. C. 270)

HALEY *et al.* v. THAMES *et al.*

(Supreme Court of South Carolina. March 6, 1889.)

EXECUTOR DE SON TORT — PROBATE PRACTICE — ACCOUNTING.

Rev. St. S. C. § 1906, (which embodies the act of 1839,) provides that the probate judge of a county in which a person has died shall have power of his own accord, or at the instance of any one interested in the estate, to cite before him any one in possession of the chattels of such decedent who has not been appointed executor or administrator, and require a discovery and account, charging him "as executors in their own wrong are made liable at common law." The act of 1839 also gave the ordinary, now probate judge, power to collect derelict estates, and settle the same; but this provision was repealed, and Rev. St. § 1908, makes it the duty of the clerk of the court to administer on such estates. Section 1905 substantially declares that the conduct which will make one liable as executor *de son tort* must be illegal. *Held*, that the probate court had no power, on the application of persons claiming merely as distributees of the estate of an intestate, of which no administrator had been appointed, to compel other distributees in possession of the property to "discover and account" for such property.

Appeal from common pleas circuit court of Clarendon county; ALDRICH, Judge.

Application in the probate court of Clarendon county by Friendley W. Haley and others, to compel Rufus M. Thames and Henrietta E. Ridgeway to appear and account for property in their possession. The judgment of the probate court for plaintiffs was reversed on appeal to the circuit court, and plaintiffs now appeal to this court.

B. Pressley Barrow, for appellants. *Joseph F. Rhame*, for respondents.

MCGOWAN, J. On December 20, 1884, Huldale H. Thames, of Clarendon county, departed this life intestate, seised and possessed of a tract of land and some personal property, such as stock, household and kitchen furniture, etc. The intestate left no lineal descendants, but next of kin and collateral heirs, as follows, viz.: Her husband, Rufus M. Thames, and a sister, Henrietta E. Ridgeway, the defendants; and also the plaintiffs, (nephews and nieces,) children and grandchildren of a predeceased sister, Margarette M. Haley, namely, Friendley W. Haley, Isaac A. Haley, Rachel A. White, Margaret V. Hodge, Edgar Haley, and Preston Haley. There has been no administration upon the estate of the intestate, but it seems that, the defendants (husband and sister) being still on the tract of land and in possession of the personal property of the deceased, the nephews and nieces, (the plaintiffs,) instituted proceedings against them in the probate court, alleging that there were debts of the estate unpaid, and "that the said Rufus M. Thames and Henrietta Ellen Ridgeway took charge and possession of the said real and personal property and estate of the said intestate, neither of them having been appointed administrator of the same, and thereupon proceeded to appropriate to themselves, as their own property and goods and chattels, the entire estate, real and personal, disregarding and utterly ignoring the rights of the plaintiffs, or the rights of creditors, and have ever since been and are now using and disposing of said property, and the profits of the same, as if they were the sole owners thereof, etc. Whereupon the plaintiffs demand that the defendants be cited to appear before the court," etc.,

Digitized by Google

and then and there "discover and account for all the personalty of said estate, as well as the rents and profits of the land," etc. The probate judge issued the citation as demanded, requiring the defendants to make a full discovery of all and singular the personalty, and the annual income of the realty, of the said estate. The defendants pleaded to the jurisdiction (1) that they were not brought into court in accordance with law; (2) that the proceeding is without warrant of law; (3) that the probate court is without jurisdiction to hear and determine any of the issues that may arise thereunder, or to make any order or decree concerning the matters so alleged; and answered, admitting that Huldale Thames died intestate, "and that they are in possession of a tract of land of which she died seised and possessed, and of some chattels of which she died possessed, but not considerable in quantity or value, and they allege that their possession as aforesaid is lawful," etc. The probate judge overruled the pleas to the jurisdiction, and ordered the defendants to proceed to make a discovery, which they declined to do. Thereupon the judge of probate, adjudging that the defendants were in contempt, ordered them to be attached and committed to jail, and made a formal order to that effect, and had it delivered to the sheriff. From these orders and judgment of the probate court the defendants appealed to the circuit court. Judge ALDRICH reversed the judgment and orders of the probate court, and the case is now before this court on appeal upon the following exceptions by the plaintiffs: "*First*, because it was error in the circuit judge to hold that the defendants were lawfully in possession of the effects of the deceased; *second*, because it was error in the circuit judge to sustain the plea of the defendants to the jurisdiction of the probate court," *etc.*

This is certainly a case of novel impression, and at least demonstrates, if further proof were necessary, the wisdom of the policy which requires that there shall be a responsible representative of the estate of every one who dies possessed of property. Upon the death of Mrs. Thames intestate, her land descended to her heirs, who have rights in regard to it; but her personal property was derelict, and there should have been an administrator appointed, with legal title to it, for the purposes of administration; and, if those entitled to it declined to take administration for six months, the clerk of the court for the county should have done so. See section 1908, Rev. St. The novelty of the case arises from the fact that, although there has been no administration, the action is brought in the probate court by persons claiming to be distributees of the intestate, against other distributees of the same estate, requiring them "to make a discovery and account of all and singular the personalty of said estate, and of all matters and things pertaining to the same, necessary to be done for the full and lawful administration and distribution of the same;" not as regular executors or administrators of said estate, but as executors *de son tort* thereof, upon the allegation that they had intermeddled with and taken into their possession the said personal property without proper authority. We have looked with some care through our cases upon the subject of executors *de son tort*, as to what is necessary to establish that character, its incidents, liabilities, etc., and we find that in all our cases, where the party charged was held liable as such executor in his own wrong, the action was brought by a creditor or administrator of the deceased, and in the higher jurisdiction of law or equity. We have not been able to find a single case in which mere distributees, without administration, have in the probate court charged co-distributees as executors *de son tort*. The plaintiffs are not regularly appointed administrators, and, while the complaint does make a statement that there are liabilities still unsettled, they certainly do not claim as creditors; but, if they did, the court of probate is not the proper tribunal in which creditors may sue to judgment either their debtors while living or their personal representatives after their death. Gregory v. Rhoden, 24 S. C. 97. It is also quite clear, we think, that the proceeding in the probate court cannot be sustained, as a regular citation to legal representatives, for an account, settlement, and distribution of the estate; for it is well settled that, while executors in their own wrong are subjected to certain onerous liabilities, they have not all the rights of executors duly appointed; their liability is in its nature essentially different. Such executors have no right to reduce assets, and are therefore not chargeable for not reducing and administering them. "When a man has so acted as to become in law an executor *de son tort*, he thereby renders himself liable, not only to an action by the rightful executor or administrator, but to be sued as executor by a creditor of the deceased or by a legatee; for an executor *de son tort* has all the liabilities, though none of the privileges, that belong to the character of an executor." 1 Williams, Ex'rs, (7th Ed., with Perkins' notes,) 307, and note *s*. "But persons chargeable as executors *de son tort* are not liable to account to the next of kin, but to the duly-appointed executor or administrator of deceased;" citing authorities, and among them our own case of Haselden v. Whitesides, 2 Strob. 353.

It is probably true, as argued, that the court of probate may *ex officio* grant letters *ad colligendum bona defuncti*, to gather up the personal property of the deceased. The plaintiffs, however, do not claim that they have any such appointment, but simply as distributees demand judgment of the probate court that their co-distributees, the defendants, "discover and account for the property of the estate in their possession;" and, upon their denying such liability to the plaintiffs, they obtain from the probate judge an order declaring them to be in contempt, and direct-

Digitized by Google

ing them to be attached and committed to jail. There being no administrator with title and right to the possession, it is not easy to see what the probate court would do with it, if delivered up. We suppose the court could not keep possession of it, and the defendants being at least as much entitled to it as the plaintiffs, to whom would it be delivered? The court of probate does not in modern times itself take charge of intestates' estates, but acts through officers appointed by itself, for the purposes of administration. It was held in State v. Mitchell, 2 Bailey, 225, that "the ordinary has no jurisdiction to order the seizure out of the hands of persons in possession and claiming title of goods said to belong to an intestate's estate, although there has been no administration," etc.

But it is insisted that the proceeding in the probate court is authorized by the act of 1839, which is substantially embodied in section 1906 of the Revised Statutes, which declares that "the judge of probate of the county in which a deceased person may have died shall have power (either of his own accord or at the instance of any creditor or other person interested in the estate of the deceased) to cite before him such person or persons as, neither having been appointed executor, nor having obtained administration of the effects of such deceased person, shall nevertheless possess himself or themselves of the goods and chattels, rights and credits, of such person deceased; and, upon such person or persons being cited as aforesaid, the judge of probate shall require of him a discovery and account of all and singular the goods and chattels, rights and credits, of the deceased, and shall proceed to decree against him or them for the value of the estate and effects of the deceased which he or they may have wasted, or which may have been lost by his or their illegal interference, charging them as executors in their own wrong are made liable at common law, as far as assets shall have come into their hands," etc. We always have inclined to think that this act was passed in the view and upon the assumption that there was in existence a regular administrator of the estate, or one capable of receiving and administering the property. As was said of a somewhat similar Massachusetts law by Chief Justice SHAW, in the case of Arnold v. Sabin, 4 Cush. 46, cited at the bar: "It is argued that the petition may be sustained * * * if he is a creditor within the seventh section of the Revised Statutes, c. 65, which provides for complaint made 'by any executor, administrator, heir, legatee, creditor, or other person interested in the estate of any person deceased,' etc. It is very questionable whether this is not limited, by necessary implication, to the case of a deceased person whose estate is under administration; that is, one on which letters testamentary or letters of administration have been granted. How else is the jurisdiction of this process, which is in its nature subsidiary and interlocutory, to be determined by the judge of probate, if it is not by the fact that the estate is in the process of settlement before him? Further, to what useful end would it conduce to inquire and ascertain if any person has property concealed or withheld, if there be no person qualified and authorized to demand it, or even to take it into custody and give a legal acquittance for it, if voluntarily surrendered? From whom can it be said to be concealed, embezzled, or withheld?"

These just observations, in their application to our law of 1839, receive absolute vindication in the fact that the very act which originally gave us the section under consideration also contained another provision, (section 7, act 1839, "Concerning the Office and Duties of Ordinary," 11 St. 40,) which directed that the ordinary, now probate judge, should "collect and take charge of all derelict estates for six months, and, if within that time no administration was applied for, to sell the same, and, after payment of the debts of the estate, to deposit the funds in the bank of the state, or some of its branches," etc. So it clearly appears that, at the time section 1906 originally became law, the ordinary was made the legal representative of derelict estates, and had the right and title to demand "discovery and account" from any person in possession of property belonging to the estate. In connection with this provision vesting the title of the property in the ordinary or judge of probate, the section relied on was consistent and capable of practical enforcement. But that section of the act of 1839 was afterwards repealed; and, as before stated, it is now made the duty of the clerk of the court to apply for and take out regular administration upon such estates—the authority of the judge of probate being the same in respect to them as to all other intestates' estates—simply upon proper application, to grant letters of administration, and have them administered according to law. This change of the law as it stood in 1839 should not, as it seems to us, be overlooked in attempting to give proper construction to section 1906, in respect to the persons and jurisdiction of the probate judge. But, if there is nothing in this view, we think that section 1906 must be construed in connection with the one immediately preceding, (1905,) which, as we understand it, substantially declares, in accordance with the old statute of 43 Eliz. c. 8, that the conduct which will make one liable as an executor *de son tort* must be illegal in character. See Cook v. Sanders, 15 Rich. Law, 64. The old books give this as the definition: "If a stranger takes upon himself the office of executor by intrusion, not being so constituted by the demand nor appointed administrator," etc. See 1 Toml. Law Dict. tit. "Executor." We agree with the judge below that the defendants, as heirs at law and distributees of the intestate, were not, *quoad* the plaintiffs, unlawfully in possession, and that they were not liable as trespassers under the summary

Digitized by Google

proceedings of the probate court. This disposes also of the question as to the contempt. The judgment of this court is that the judgment of the circuit court be affirmed.

SIMPSON, C. J., and MCIVER, J., concur.

(30 S. C. 277)

STATE *ex rel.* FOUCHE *v.* VERNER, Comptroller General, *et al.*

(*Supreme Court of South Carolina.* March 7, 1889.)

PENSIONS—WIDOWS—MANDAMUS.

1. Act S. C. Dec. 24, 1887, (19 St. 826,) providing for the pensioning of soldiers and sailors of the war between the states, and their widows, after prescribing who shall be entitled to receive the bounty intended, and the kind of evidence—affidavits and certificates—required to show that the applicant is one of those entitled, provides (section 7) that the application, with the accompanying papers, shall be forwarded to the comptroller general, who, with other named officers, "shall constitute a board to approve or disapprove such application." *Held* that, as the board in the examination of an application is required to exercise discretion, its judgment, approving or disapproving it, cannot be controlled by *mandamus*.

2. Section 8, which declares that "the widow of any soldier, * * * while she remains unmarried, shall be entitled to receive the benefit of this act," does not include a widow of a soldier who has remarried, though her second husband is also dead.

Application for *mandamus*.

Benet & McGowan, for petitioner. *Atty. Gen. Earle*, for respondents.

MCIVER, J. By this petition this court is asked, in the exercise of its original jurisdiction, to issue a writ of *mandamus*, directed to John S. Verner, as comptroller general, Joseph H. Earle, as attorney general, and J. Q. Marshall, as secretary of state, requiring them to approve the application of the petitioner for a pension, under the provisions of the act of December 24, 1887, (19 St. 826,) entitled "An act to provide for the relief of certain soldiers, sailors, and widows of soldiers or sailors, of the late war between the states." This act, after prescribing the conditions upon which relief may be obtained, and the manner in which applications therefor shall be made, in the seventh section provides that the public officers above specified "shall constitute a board to approve or disapprove such applications," and then provides how pensions are to be paid to persons whose applications have been approved by the said board. The facts upon which the petitioner bases her claim for a pension are undisputed, and, so far as necessary to be stated for the purposes of this case, are as follows: That she was the lawful wife of one William MacCole, who lost his life while in the military service of the Confederate states, during the recent war between the states, on the 24th of March, 1863; that in August, 1865, she intermarried again with one Benjamin F. Fouche, who died in September, 1877, leaving no property. Under this state of facts petitioner contends that she is still the widow of said MacCole, and as such entitled to a pension under the provisions of section 8 of the above-mentioned act. That section reads as follows: "The widow of any soldier or sailor from the state of South Carolina, now residing in this state, who lost his life while in the service of the state or Confederate states, in the war between the states, while she remains unmarried, shall be entitled to receive the benefit of this act, subject to the same conditions as to property and income as hereinbefore provided, and may make her application, setting forth in detail the facts which entitle her to make such claim, and verified by affidavits and certificates hereinbefore provided, except the affidavits of physicians; and, upon the approval of her claim, such widow shall be entitled to receive the same amount, and in the same manner as hereinbefore provided." The respondents, in their return, admit that they, acting as the pension board constituted by said act, "did disapprove the application of the petitioner for pension on the ground that she has remarried, and is not now the widow of William MacCole, and they submit that it was their duty as such pension board to disapprove said application, under the terms of the act of the general assembly above set forth."

From this it is apparent that the real controversy between petitioner and the respondents is as to the proper construction of the eighth section of the act above quoted; and, this being so, the first question to be determined is whether this is a proper case for *mandamus*. It is true, this question is not raised by the respondents, either in their return or in argument; but, as this is a case presented to this court in the exercise of its original jurisdiction, it seems to us that we are bound to consider it before ordering the writ asked for to be issued. The general rule is that *mandamus* goes to a public officer to enforce the performance of some plain ministerial duty, but not for the purpose of controlling or guiding his judgment or discretion. It may be used for the purpose of requiring the officer to act, but it cannot be used for the purpose of directing him how to act in the performance of a duty involving the exercise of judgment or discretion. In Mose. Mand. 78, the author, after stating that the principles which apply in cases of *mandamus* to the heads of the various departments of the executive branch of the federal government are also applicable to cases of *mandamus* to all other officers of the government, states the rule thus: "It cannot issue in a case where discretion and judgment are to be exercised by the officer, nor to control him in the manner of conducting the general duties of his office. It can be granted only where the act required to be done is imposed by law,—is merely ministerial, and the relator without any other adequate remedy." So, in High, Extr. Rem. § 62, quoted with approval in Ex parte Barnwell, 8 S. C. at page 271, the rule is stated as follows: "That in all matters requiring the exercise of offi-

Digitized by Google

cial judgment, or resting on the sound discretion of a person to whom a duty is confided by law, *mandamus* will not lie, either to control the exercise of that discretion, or determine upon the decision which shall be formally given." The rule thus laid down by these text writers is fully supported by the decisions in the supreme court of the United States, as well as in this state. In Decatur v. Paulding, 14 Pet. 497, the widow of Commodore Decatur claimed a pension, not only under the general law, but also under a special resolution of congress, and the secretary of the navy, whose duty it was to pass upon applications for pensions, refused to allow her a pension under both the general law and the special resolution. She applied for a *mandamus* to compel him to do so, and the court held that a *mandamus* could not be issued to compel the secretary of the navy to perform an executive act, not merely ministerial, but involving the exercise of judgment. TANEY, C. J., delivering the opinion of the court, in speaking of the nature of the duties imposed upon the secretary of the navy in relation to this matter, says: "He must exercise his judgment in expounding the laws and resolutions of congress, under which he is, from time to time, required to act." And adds that the court cannot, by *mandamus*, "act directly upon the officer, and guide and control his judgment or discretion in matters committed to his care, in the ordinary discharge of his official duties." This appears to be a leading case, and has been repeatedly recognized and affirmed in many subsequent cases, among which may be mentioned Brashear v. Mason, 6 How. 92; U. S. v. Seaman, 17 How. 225; U. S. v. Guthrie, Id. 284; Gaines v. Thompson, 7 Wall. 347. And in Litchfield v. Register, etc., 9 Wall. 577, Mr. Justice MILLER says that the principle has been so repeatedly decided that it must now be regarded as settled. The same doctrine has been held in this state. State v. Bruce, 1 Tread. Const. 165; Grier v. Schackleford, 2 Tread. Const. 642; Morton v. Comptroller General, 4 S. C. 430; Ex parte Barnwell, supra; and Ex parte Lynch, 16 S. C. 32. The counsel for petitioner has, however, cited three cases to show that this is a proper case for *mandamus*, viz., State v. Hagood, 13 S. C. 46; State v. Commissioners of Pilotage, 28 S. C. 175; and State v. Courtenay, Id. 180. In the first place, it will be observed that in each one of these cases the application for *mandamus* was refused, and therefore whatever may have been said in regard to the point now under consideration can scarcely be regarded as an authoritative decision. But, waiving this, let us see if either of these cases support the position which they are cited to sustain. In the first case—State v. Hagood—the question was not raised, or even alluded to; and in the last case—State v. Courtenay—the question was not discussed, but the court simply referred to the preceding case. So that we have only to consider the decision in the case of State v. Commissioners of Pilotage. In that case the application was for a *mandamus* to compel the commissioners of pilotage to vacate an order which they had made suspending the relator as pilot of the port and harbor of Port Royal, upon the ground that the charge upon which the relator was suspended was not of such a character as authorized his suspension. The application was, in effect, based upon the ground that the commissioners had no jurisdiction, and not upon the ground that the commissioners had committed an error, either of law or fact, in the exercise of their jurisdiction. This is manifest from the fact that the court was careful to say that they could not go into any investigation of the merits of the case, "because that is a matter of judicial investigation, and cannot be reviewed by *mandamus* proceedings." This is also shown by the nature of the principal authority relied upon,—Geter v. Commissioners, 1 Bay, 354,—for the decision in that case clearly rested upon the ground of lack of jurisdiction, as did also the subsequent case of State v. Commissioners of Roads, 2 Brev. 293. But what puts the matter beyond all dispute is the fact that the chief justice, in delivering the opinion of the court, expressly recognizes the rule as we have laid it down above, for, in speaking of the writ of *mandamus*, he says: "It cannot, however, issue either to a public officer, or to an inferior court, as to matters requiring the exercise of official judgment, or resting on judicial investigation and discretion." So that it is quite clear that neither of the cases cited conflicts with or impinges upon what we regard as the well-settled rule, as above stated.

Now, as it is quite clear that the pension board, in disapproving the petitioner's application for a pension, have not acted without jurisdiction, as that is one of the very things for which the board was constituted,—"to approve or disapprove such applications,"—the inquiry is whether the duty imposed upon the board was a mere ministerial duty, or was it one requiring the exercise of judgment or discretion. It seems to us that it was, plainly, the latter. To approve or disapprove the application necessarily implies the duty of examination—both of questions of law and fact—for the purpose of determining whether the application should be approved or disapproved; and this necessarily implies the exercise of judgment. The act, after prescribing what class of persons shall be entitled to receive the bounty intended, and the kind of evidence—affidavits and certificates—required to show that the applicant is one of those entitled, which, with the application in writing, shall be addressed to the comptroller general, provides, in the seventh section, that "the application, with the accompanying papers, shall be forwarded to the comptroller general, who, with the attorney general and the secretary of state, shall constitute a board to approve or disapprove such applications, any two of whom shall have

Digitized by Google

authority to act." Now, for what possible purpose could the legislature have required that these public officers should constitute a board, except for the purpose of examining and determining whether a given applicant had brought himself within the class of beneficiaries provided for by the act? And how could such purpose be effected except by inquiry into the terms of the act, and examination of the evidence submitted, which necessarily implies the exercise of judgment. If the intention of the legislature had been that the pension should be allowed to any person who might file with the comptroller general the evidence prescribed, which is most minutely specified in the act, there certainly would have been no propriety in requiring the application accompanied by such evidence to be submitted to the board for approval or disapproval. It seems to us, therefore, that this is not a proper case for *mandamus*. If the respondents had refused, upon demand, to perform the duty required of them by the act,—to approve or disapprove the application of the petitioner,—then the court could by *mandamus* compel them to act, but it cannot by that writ guide or control their judgment. To use the language of COLCOCK, J., in State v. Bruce, supra, the court "can only say they shall act, but will not say how." The court by this writ can only compel them to approve or disapprove a given application, but will not say which they shall do, for that is a matter which has been left to the judgment of the board; and, even if they have erred in the exercise of their judgment, *mandamus* is not the proper remedy for such error.

But as the board, charged with an important public duty, are anxious to have the instructions of this court as to the proper construction of the act, we will, for the purposes of this case, assume that *mandamus* is the proper remedy, and consider the case upon its merits. The sole question is as to the proper construction of the eighth section of the act, which has been hereinbefore set out in full. It will be observed that under the terms of that section it is not every widow of a soldier who is entitled to a pension, but it is only such widow "while she remains unmarried" who is entitled to receive the benefit of the act. It is conceded that the petitioner, after the death of her first husband, under or through whom she claims a pension, did not remain unmarried, for she married again just after the close of the war. It would seem, therefore, that she cannot be regarded as one of the class provided for by the eighth section. The word "remains" implies the idea of continuity, and the petitioner certainly did not continue unmarried after the death of her first husband. Conceding that she is still the widow of her first husband, notwithstanding her second marriage, and thus fulfills one of the conditions prescribed by the section, yet, as she did not remain unmarried, the other condition is not fulfilled and therefore she cannot claim. The analogy sought to be drawn from the case of dower, where a woman who marries a second time may still claim dower out of her first husband's estate as his widow, does not seem to us to hold good. Dower is a right which, inchoate during coverture, becomes a vested estate upon the death of the husband, to which the wife has as good a title as she could have under a grant from the state, or a conveyance from some third person, and of which she cannot be deprived except by her own deed, or by operation of law. Her remarriage does not divest her of this estate, and hence, notwithstanding her second marriage, she may recover such estate, just as she might recover any other estate. While it is true that she acquired such estate by virtue of her marriage with her first husband, after his death she has the same right to it as if she had bought and paid for it in money. Hence, to preserve her title, it is wholly immaterial whether she remains a widow or marries again. Here, however, the petitioner, when she contracted her second marriage, had no vested right to a pension, as the act bestowing that bounty was not passed until many years after that event. It does not seem to us that there is any analogy to the case of dower. While, therefore, we freely admit that the construction of the act is not free from doubt, we are not prepared to say that the pension board have erred in the construction which they have placed upon the act. The fact that it is doubtful is, of itself, sufficient to prevent the issuing of the writ of *mandamus*, for, as was held in Ex parte Barnwell, 8 S. C. 264, *mandamus* does not lie to compel an officer to perform an act where it is at least doubtful whether it is his duty, under the terms of the law which is claimed to have created the duty, to perform it. The judgment of this court is that the rule be discharged, and the petition dismissed.

SIMPSON, C. J., and MCGOWAN, J., concur.

(30 S. C. 238)

TAYLOR v. BARKER *et al.*

(*Supreme Court of South Carolina.* March 1, 1889.)

MORTGAGES — SEPARATE ESTATE — ATTORNEY AND CLIENT — APPEAL.

1. In a suit to foreclose a mortgage given by a married woman on her separate estate, where it appears that more than two-thirds of the amount of the note secured represented a debt from the husband to plaintiff, as to which the wife's mortgage would be invalid, and that there had been other transactions between the husband and plaintiff, making it impossible to ascertain how much, if any, of the residue represented the wife's debt, plaintiff is not entitled to any judgment against the wife.

2. Defendant sold to B. certain machinery, and took his notes for the price, containing a stipulation that until paid the title to the machinery should remain in defendant. Plaintiff, through whose agency the machinery was sold, and who had actual notice of the above stipulation, having had the notes in his hands as defendant's attorney for collection, after their maturity took a mortgage on the machinery to secure his own debt, and

Digitized by Google

recorded it. Defendant subsequently took new notes from B. in lieu of the first series, and took a mortgage on the machinery as security. *Held* that, as when plaintiff took his mortgage the title to the machinery was in defendant, B. had no power to give that mortgage, and it could not be asserted as a lien prior to defendant's.

3. If taking the new notes by defendant be regarded as a payment of the old, thus extinguishing the lien conferred by them, the latter transaction must be regarded as a resale of the machinery to B. at that time, and the mortgage as given to secure the purchase price; and such mortgage would be a superior lien to that previously given to plaintiff, at a time when the mortgagor had no title.

4. Besides, the relation of attorney and client, existing between plaintiff and defendant at the date of the former's mortgage, prevented him in equity from thus subordinating his client's rights and interests to his own.

5. The constructive notice derived from the recording of plaintiff's mortgage did not amount to such full disclosure as was required from plaintiff to defendant, in view of the fiduciary relation he occupied.

6. Where there is a direct conflict upon a material question of fact, between the trial judge and the referee, the appellate court is at liberty to look carefully into the testimony to ascertain where the error lies.

Appeal from common pleas circuit court of Pickens county; W. H. WALLACE, Judge.

Action by George W. Taylor against J. S. Barker and wife and the Geiser Manufacturing Company, to foreclose a mortgage. Judgment for plaintiff, and defendants appeal.

Keith & Hollingsworth and *Brown & Tribble*, for appellants. *James P. Carey*, for respondent.

MCIVER, J. For a proper understanding of the questions raised by this appeal it will be necessary to make a brief statement of the several transactions between the parties out which this controversy has arisen. In December, 1881, the plaintiff sold and conveyed to the defendant Evaline Barker, who was then, and still is, the wife of her co-defendant J. S. Barker, a tract of land containing 541 acres, for the sum of $1,900, taking her notes, payable in one, two, and three years, with interest from date, together with a mortgage of the premises; and also a mortgage on another tract of land, containing 117 acres, known as the "Dacusville Tract," to secure the payment of the purchase money. On the 1st of June, 1882, the defendant company sold and delivered to defendant J. S. Barker certain machinery for the sum of $1,408, taking his four notes, each for the sum of $352, and payable, respectively, four, eight, twelve, and sixteen months after date, with interest from date. On the first of these notes the plaintiff was the surety of said J. S. Barker, and soon after it fell due, to-wit, on 25th October, 1882, it was paid by the plaintiff; the note then amounting to $363. On the back of this note there is an indorsement, showing that on the 2d December, 1882, J. S. Barker paid on it to plaintiff the sum of $163. On the 5th of March, 1883, the defendant Evaline, not having paid any portion of the debt of $1,900 above referred to, reconveyed the 541-acre tract to the plaintiff, and at the same time conveyed to him the 117-acre tract, known as the "Dacusville Land," which the testimony shows and the referee finds was worth $800, and the plaintiff conveyed to said Evaline another tract of land, containing 362 acres, worth $400, and surrendered to her the three notes for the $1,900, and also surrendered to J. S. Barker the note which plaintiff had paid for him as his surety to the defendant company, upon which there was a balance of $200, besides interest due to plaintiff by J. S. Barker. In this transaction Barker and wife gave their note to plaintiff for $280, the payment of which was secured by a mortgage on the 362-acre tract of land, given by Mrs. Barker to plaintiff, as well as by a mortgage given by J. S. Barker to plaintiff on the machinery which he had bought from the defendant company. On the 19th of April, 1883, the defendant company took from J. S. Barker three new notes, designated by the referee as "green" notes, signed by both Barker and wife, in lieu of the three unpaid notes given for the purchase money of the machinery, which were secured by J. S. Barker's mortgage on the machinery, as well as by Mrs. Barker's mortgage on the 362-acre tract of land, and the original notes, marked, "Settled by making new notes, April 19, '83," were delivered to J. S. Barker. These green notes, as well as those originally given to secure the payment of the purchase money of the machinery, each contained a stipulation that the machinery should remain the property of defendant company until said notes were paid in full. This action was brought to foreclose the mortgage given by Mrs. Evaline Barker on the 362-acre tract of land, as well as the mortgage given by J. S. Barker on the machinery to secure the note of $280 in favor of plaintiff, and the Geiser Manufacturing Company was made a party defendant, as holding junior mortgages on the said property. The referee to whom it was referred to take and report the testimony, together with his conclusions of fact thereon, made his report, accompanied with the testimony, which is set out in the case. After finding the facts substantially as above stated, he found that the debt for $280, represented by the note, was not a contract in reference to the separate estate of Mrs. Barker, but was the debt of her husband, J. S. Barker. He does not seem to have made any specific findings as to the issues arising between the plaintiff and the defendant company, except that he does say that the mortgages taken by plaintiff were not taken with any intent, either on the part of the plaintiff or the defendant J. S. Barker, to defraud said company. To this report the plaintiff alone excepted, on the grounds set out in the case, and on hearing the report and exceptions the circuit judge sustained the exceptions, overruled the report, and rendered judgment that the mortgaged property be sold, and the proceeds, after deducting costs and expenses, and any lien for taxes, be applied to plain-

Digitized by Google

tiff's debt; directing the clerk first to apply the proceeds of the sale of the land, and, if that should prove insufficient to pay plaintiff's debt in full, then that so much of the proceeds of the sale of the machinery as may be necessary be so applied, and the balance, if any, to the defendant company; and that, if the proceeds of the sale of the land should prove to be more than sufficient for the payment of the debt due plaintiff, then such excess be paid over to defendant Evaline Barker. From this judgment the Geiser Manufacturing Company and Mrs. Evaline Barker appeal upon the several grounds set out in the record, which need not be stated here, as we propose to consider the several material questions which these grounds raise.

The material question raised by the appeal of Mrs. Barker is whether the contract upon which plaintiff bases his action was a contract in reference to her separate estate; for although one of her grounds of appeal seems to raise the question whether she ever in fact signed the note and mortgage, and, if so, whether she was not overreached by the plaintiff and her husband, and whether there was any consideration for the note, yet these questions do not seem to be seriously pressed in the argument, and could not well be, for the evidence to show that she signed these papers was quite sufficient for that purpose, and there is an entire absence of any evidence that either the plaintiff or her husband used any improper influence to induce her to execute the papers, and, so far as the consideration is concerned, the seal is quite sufficient. The real inquiry then is as to whether the contract sought to be enforced against her was a contract in reference to her separate estate. We think it must be regarded as the settled law of this state, at the time the contract here in question was entered into, that, in an action to enforce a contract executed by a married woman, it is necessary to show that such contract was made with reference to her separate estate. Habenicht v. Rawls, 24 S. C. 461; Aultman v. Rush, 26 S. C. 517, 2 S. E. Rep. 402; Gwynn v. Gwynn, 27 S. C. 525, 4 S. E. Rep. 229. The burden of proof, then, being on the plaintiff, the real inquiry is whether he has shown that this contract was made in reference to the separate estate of Mrs. Barker. This he has attempted to do solely by his own testimony, tending to show that the note was given for the difference in the exchange of lands, or, as it is expressed in the testimony, for "boot in the land trade." It is true that the plaintiff does so say in his testimony, but we think it is most abundantly shown, not only by the circumstances surrounding the transaction, but by his own statements made in a letter to the agent of the defendant company only two days after the exchange of lands,—on the 5th of March, 1883,—that he is mistaken in so testifying. In that letter, which was put in evidence, he says, in speaking of this transaction: "We swapped even, or nearly so. He gave me a little boot, so I have taken a mortgage on his new place to secure what he owes me on the machinery and the boot, amounting in all to $280." This language of the plaintiff himself, deliberately put in writing only two days after the transaction, when the matter was fresh in his memory, shows conclusively that much the larger part of the consideration of the $280 was the individual debt of this appellant's husband, for which she could not be made liable; as the undisputed testimony shows that the amount which J. S. Barker owed plaintiff on the machinery was at least $200, besides interest, as shown by the indorsements on the note which plaintiff had paid as the surety of Barker to the defendant company, which note the plaintiff says in his testimony he turned over to J. S. Barker in the transaction of the 5th March, 1883, when the $280 note was given. It is beyond question, therefore, that the consideration of that note was, in large part at least, the individual debt of J. S. Barker, and, as there were other transactions between J. S. Barker and the plaintiff, it is impossible to ascertain how much, if any, of the consideration of the $280 was for boot in the exchange of lands; and this it was incumbent upon the plaintiff to show before he could recover any judgment against Mrs. Barker. The letter of the plaintiff to the agent of the defendant company also shows that the plaintiff's memory was at fault in another particular; for in his testimony he says that he has no recollection of ever having had in his possession any of the notes of J. S. Barker to the defendant company; thinks he would have remembered it if he had had them; that no such claims were entered on his collection book; and that, though he kept files of his letters, he has been unable to find any letter showing that such notes had been sent to him. Yet the letter above referred to, dated 7th March, 1883, only two days after the exchange of lands, shows conclusively that he did have at that time, in his hands for collection, at least one of these notes, and that he had endeavored to get the same secured by a mortgage of real estate; and this is fortified by the positive testimony of Dr. Divber, the agent of defendant company, that he had lodged such note with the plaintiff for collection or to be secured. In addition to this, the undisputed circumstances surrounding the transaction go to confirm the view which we have taken. In the outset Mrs. Barker was the owner of a tract of land containing 117 acres, which the testimony shows was worth at least $800, upon which, so far as the evidence shows, there was then no incumbrance. In December, 1881, but on what precise day is not shown, though, in favor of the plaintiff, we will assume it was the 1st day, she bought 541 acres from plaintiff, at the price of $1,900, payable in three equal installments, in one, two, and three years. On the 5th of March, 1883, when only one of these installments had become payable, the trade is recanted, and she not only reconveys

Digitized by Google

the same land to the plaintiff, but also conveys to him her $800 tract of land, and receives in exchange a conveyance for the 362-acre tract, shown to be worth only $400; and that, too, incumbered by a mortgage to nearly three-fourths of its value. The bare statement of this transaction would be sufficient to show that either the grossest imposition was practiced upon this lady, which we are very unwilling to believe, or that the indebtedness of her husband to the plaintiff entered into the transaction; for, even if the interest on the notes for $1,900 be calculated from the 1st December, 1881, to the 5th March, 1883, at the rate of 10 per centum per annum, the rate which plaintiff says they bore,—though as the law then stood they could have legally borne only 7 per cent.,—and the value of the 362 acres then conveyed to Mrs. Barker be deducted from the value of the tract reconveyed, together with the value of the 117 acres then conveyed to plaintiff, the balance would be in favor of, instead of against, Mrs. Barker, viz.:

Value of tract of 541 acres reconveyed	$1,900 00	
Value of tract of 117 acres then conveyed	800 00	
		$2,700 00
By 3 notes of Mrs. Barker to plaintiff for	$1,900 00	
By interest on same from 1st December, 1881, to 5th March, 1883, @ 10 per cent.	240 14	
By value of tract of 362 acres conveyed to Mrs. Barker	400 00	
		2,540 14
Leaving balance in favor of Mrs. Barker		$159 86

It seems to us, therefore, clear that the plaintiff has failed to show what portion, if any, of the note sued upon constituted a debt for which Mrs. Barker could be held legally liable, and hence there was error in rendering any judgment against her, for the plaintiff was bound to show, not only some liability, but the amount of such liability, before he is entitled to recover judgment. While, therefore, it may be possible, though we must say that we do not think it likely, that a portion of the consideration of the $280 note was boot in the land trade, yet the evidence wholly fails to show the amount of such liability, but, on the contrary, most abundantly shows that much the greater portion of the consideration was the individual debt of the husband, for which the wife could not be held legally liable, notwithstanding the fact that she signed the note and mortgage. Inasmuch as it is conceded that Mrs. Barker cannot be held liable on the mortgage to the defendant company, as that was unquestionably given to secure her husband's debt, there is no ground upon which any judgment could have been rendered against her, and hence, so far as she is concerned, the judgment below should be reversed, and the complaint as her should be dismissed.

In reaching this conclusion we have not been unmindful of the well-settled rule that a finding of fact by the circuit judge will not be disturbed unless it is without any evidence to sustain it, or against the manifest weight of the testimony. But it will be observed that in this case there was a direct conflict upon the material question of fact between the referee and the circuit judge; and, when that is the case, we are at liberty to look carefully into the testimony, with the view of ascertaining where the error lies. A careful examination of the testimony satisfies us that the manifest weight of the evidence sustains the conclusion which we have adopted. The decree of the circuit judge does not indicate the grounds upon which he reached his conclusion, but, after an unusually careful examination of the testimony, we are unable to discover any evidence tending to support his conclusion, except the testimony of the plaintiff himself, which is conclusively shown by his own letter, written when the facts were fresh in his memory, to say nothing of the other testimony and circumstances, to have been a mistake.

We come next to the appeal of the defendant company, in which the material inquiry is whether it or the plaintiff has the prior lien upon the machinery. This question, so far as the case discloses, seems to have received but little attention at the hands either of the circuit judge or the referee. Indeed, the referee does not appear to have made any distinct finding in regard thereto, except by fixing the dates of the several mortgages; but the circuit judge has distinctly accorded the priority to the plaintiff, and we must therefore consider whether there is any error in such adjudication. There is no doubt that, so far as the dates of the formal mortgages are concerned, the plaintiff has the priority; his mortgage being dated 5th March, 1883, while that of this appellant is dated 19th April, 1883, and both recorded in due time. It appears, however, from the testimony in the case, that each of the notes given by J. S. Barker to the defendant company on 1st June, 1882, when he purchased the machinery through the agency of the plaintiff, contained a stipulation that the title to the machinery was to remain in defendant company "until this note is paid in full." Each of these notes was therefore an instrument in the nature of a mortgage, which, however, could not affect the rights of subsequent creditors or purchasers without notice. But of this lien the plaintiff clearly had notice, for he was surety on one of these notes, and they were all of the same tenor; and, after paying the note upon which he was surety, he held it against Barker from the date of the payment (25th October, 1882) until it was settled in the transaction of the 5th March, 1883, when it was surrendered to Barker. But, more than this, we think that plaintiff's own letter of the 7th March, 1883, conclusively shows that, at the time he took his mortgage on the machinery, he had in his possession, as attorney for the defendant, the second note, then past due, to be col-

Digitized by Google

lected or secured, the terms of which showed that the defendant company then held a lien upon the machinery, the condition of which was broken, the effect of which was to vest in defendant company not only the title to but the right of possession of the machinery. It seems to us that for an attorney, intrusted with the duty of collecting or securing a client's claim, to take a mortgage on property to secure his own debt, at the expense of his client, is such a transaction as cannot be sanctioned by a court of equity, which always scrutinizes closely dealings between parties occupying fiduciary relations towards each other, and requires the utmost good faith,—*uberrima fides*. In addition to this, the plaintiff, when communicating to the agent of the defendant company, by his letter of the 7th March, 1883, his failure to secure their claim by a mortgage on real estate, not only omits to give the company any intimation of the fact that he had taken a mortgage on the machinery, but, on the contrary, his language was well calculated to convey the impression that his claim had been secured in another way, to-wit, by a mortgage on land; for he says: "So I have taken a mortgage on his new place to secure what he owes me," etc.

It is argued, however, that when the defendant company subsequently, on the 19th April, 1883, took new notes, with additional security, and surrendered the old notes, the same were paid, and the lien arising from the stipulations therein contained was then extinguished, and the new lien then created by the formal mortgage to the company must be regarded as junior to that created by the mortgage to the plaintiff of the 5th of March previous. But it must be remembered that at the time the plaintiff took his mortgage the title to, as well as the right to the possession of, the machinery had revested in the defendant company, by reason of the breach of the condition of the lien, which was, in effect, a mortgage, of which, as we have seen, the plaintiff had notice. Hence when Barker undertook to mortgage the machinery to the plaintiff he had no right to do so, as he then had neither the title to, nor the right of possession of, the property sought to be mortgaged. So that, even if the giving the new notes be regarded as payment of the old, which is always a question of intention, as to which there is no distinct finding below, and about which there might be some question, the plaintiff could not have acquired a prior lien by his mortgage of the 5th of March, 1883. If the taking of the new notes on the 19th of April, 1883, be regarded as a payment of the old notes originally given for the machinery, whereby the lien of the old notes was extinguished, then the transaction of the 19th of April, 1883, must be regarded as a resale of the machinery to Barker at that time; as the title to, as well as the right of possession of, the machinery had then been revested in defendant company by reason of the breach of the condition of the original lien, which was in effect a mortgage, and, such resale being accompanied with a mortgage to secure the payment of the purchase money, such a mortgage became a superior lien to that which the plaintiff undertook to place upon the machinery by his mortgage of the 5th of March, 1883, when the mortgagor had no power to create a lien upon property which had then reverted to the defendant company. Besides, in view of the fact that, at the time the plaintiff took his mortgage, the relation of attorney and client existed between the plaintiff and the defendant company, he was not at liberty to subordinate the rights and interests of his client to his own until he had severed the relation, or given to defendant company full and distinct notice of his purposes, so that such company might provide for its own interests. This he not only did not do, but on the contrary, as we have seen, the language of his letter above referred to was well calculated to throw the company off its guard, by creating the inference that the claims of the plaintiff against Barker had been secured in another way. While, therefore, we are not disposed to impute to the plaintiff any intentional wrong-doing, we do not think that a court of equity, which scrupulously requires the utmost good faith and fullest disclosures in all dealings between persons occupying fiduciary relations towards each other,—especially between attorney and client,—will permit a person to retain an advantage which his position enabled him to acquire at the expense of his client, whose interests he was bound to protect. It is true that the defendant company, at the time it took its mortgage of the 19th April, 1883, had constructive notice derived from the recording of plaintiff's mortgage of the 5th of March, 1883, and, but for the fiduciary relation existing between the parties when plaintiff took his mortgage, that would have been conclusive in favor of the plaintiff; but we do not think such notice amounts to that full disclosure required of a party who occupies a fiduciary relation towards another. It seems to us, therefore, that the circuit judge erred in according to the plaintiff's mortgage on the machinery priority over the mortgage to the defendant company, and that in this respect, also, the judgment below should be reversed. The judgment of this court is that the judgment of the circuit court be reversed, and that the case be remanded to that court for such further proceedings as may be necessary to carry out the views herein announced.

SIMPSON, C. J., concurs. MCGOWAN, J., concurs upon the authority of the decided cases.

Digitized by Google

(30 S. C. 249)

CALLAHAM *v.* ROBINSON.

SAME *v.* CALLAHAM *et al.*

(Supreme Court of South Carolina. March 1, 1889.)

DEVISE IN LIEU OF DOWER.

Testator died seised of about 774 acres of land, and devised to his wife 216 acres, including the homestead and improvements thereon, besides giving her a large amount of personalty, and directed that on her remarriage, or death without remarrying, her land was to be sold, and the proceeds distributed, one-third to her or her heirs, and one-third to each of testator's children or their heirs. Other lands given to the children of testator's deceased son were directed to be sold by the executors, of whom the wife was one, in such manner as they might think for the best interest of the children, and lands devised to testator's daughter were to be sold in the same way, on her death, for the benefit of her children. *Held*, that the provision for the wife was intended to be in lieu of dower, though such intention was not expressed.[1] MCIVER, J., dissenting.

Appeal from common pleas circuit court of Abbeville county; W. H. WALLACE, Judge.

Proceedings in the probate court for dower, by Eliza Ann Callaham against Mary Jane Robinson, and by the same against Basil Callaham and others. Demandant appealed to the circuit court from a decree for defendants. The decree was affirmed, and she now appeals to this court.

Perrin & Cothran, for appellant. *Benet & Cason*, for respondents.

MCGOWAN, J. Basil Callaham, Sr., departed this life on June 5, 1887. He left a widow, Eliza A. Callaham, (the demandant,) and, by a former marriage, a daughter, Mary J., wife of Hugh Robinson, and three children of a predeceased son, John W. Callaham, (Carrie Chapman, Basil Callihan, Jr., and Julia Callaham.) The lands of the deceased consisted of several small tracts, as follows: (1) The home place, 186 acres; (2) The Burton place, adjoining the homestead, 30 acres; (3) Scuddy tract, now Loundsville, 269 acres; (4) part of the Stuckey tract, 104 acres; (5) the Shaw parcel, 60 acres; and (6) Haddon tract, 125 acres,—making in the aggregate about 774 acres. By his last will and testament he provided as follows: First, after making a handsome bequest to his wife of such personal property as was necessary to make her comfortable, he devised his lands as follows: "I give and bequeath to my beloved wife, Eliza A. Callaham, my home tract of land, containing 186 acres; also a tract of land adjoining, known as the 'Burton' tract, containing about 30 acres,—to have and to hold, to use and possess during her natural life or widowhood; but in the event that she should marry, or if she lives single until she dies, in either case it is my will that the above-named land be sold by my executors, * * * and the proceeds of the sale of the land be divided in the following manner: one-third to her or her heirs, one-third to the children of my son, John William Callaham, now dead, and one-third to my daughter, Mary Jane Robinson, or, if she be dead, to her children that may be living, all to share and share alike." The testator gave to the children of John W., the "Scuddy" place, 268 acres, to be sold at such time and in such manner as his executors might think for the best interest of the children; the proceeds to be equally divided among the children, all to share and share alike. He also gave to Mrs. Robinson three small tracts—the Stuckey parcel, 104 acres; the Shaw parcel, 60 acres; and the Haddon tract, 125 acres—during her natural life; and at her death to be sold by the executors, and the proceeds equally divided between her children, share and share alike. The will directed that the remainder, if any, should be equally divided between the children of John and Mrs. Robinson. The widow, Eliza A., was named one of the executors, and qualified as such. She accepted the provisions of the will in her favor, and afterwards instituted these proceedings in the probate court of Abbeville,—one case against the children of John W. deceased, and the other against Mary J. Robinson,—demanding dower in all the lands of which her husband died seised and possessed, except what was given to herself. The probate judge, after argument, held that, although the testator did not expressly declare that the provision made for his wife was in lieu and bar of dower, the whole will, properly construed, shows that such was his intention; its provisions being manifestly inconsistent with the claim of dower in the lands devised to the children of John W. and to Mrs. Robinson; citing the case of Hair v. Goldsmith, 22 S. C. 566, with the remark that as to the intention of the testator "that case was not as strong as this." He dismissed both cases. The demandant appealed to the court of common pleas, and Judge WALLACE affirmed the decree, and dismissed the appeal. The case is now before us on appeal, upon the following exceptions: "(1) That the probate judge erred in admitting the appraise bill of the estate of Basil Callahan, deceased, in evidence; (2) in holding that the claim of dower is manifestly repugnant to the intention of the testator; (3) in holding that the provision made for the widow in the will was in lieu and bar of dower; (4) in dismissing demandant's petitions; (5) in holding it to be apparently true that the bequest to petitioner is greater than she would have received if testator had died intestate; (6) in holding that this is a case where the widow was called upon to make her election; (7) in stating that the devise to Mrs. Robinson was 191 acres, whereas the will devises to her 289 acres," etc. As to the last exception we think there must be some mistake, as we have not been able to find in the case any

[1] As to when a devise will be held to be in lieu of dower, and the widow put to her election, see Langley v. Mayhew, (Ind.) 6 N. E. Rep. 317, and note; Snook v. Snook, (N. J.) 12 Atl. Rep. 715, and note; Endicott v. Endicott, (N. J.) 8 Atl. Rep. 157, and note; Smith's Appeal, (Mich.) 27 N. W. Rep. 80, and note.

Digitized by Google

such statement as that attributed to the probate judge in reference to the number of acres devised to Mrs. Robinson.

It seems that the record of administration of the testator's estate in the office was considered by the probate judge to be in evidence, showing that the demandant had accepted and taken possession of the provision made for her by the will, including also the appraisement of the property of the estate, from which it appeared that the value of the lands given to the three devisees (the children of John W. representing their father) were about equal, the value of the widow's share being slightly greater than that of either of the children. But it nowhere appears that the probate judge rested his decision on that evidence, but, on the contrary, upon the provisions of the will itself, considered as a whole. The right to dower is undoubtedly a clear legal right, but it is peculiar, in this: that it is inchoate until the husband's death. While it is beyond the control of the husband, he may give property as a substitute for it, which, if accepted, bars the right. If the testator expressly declares that a provision for his wife is intended to be "in lieu and bar" of her dower in his lands, there can be no difficulty, for a case of election has been created, and the widow may take the provision made for her or dower, but not both. When, however, there is no such express declaration, the intention can only be reached by construction, and, as that must depend upon the peculiar provisions of each will, there has been much discussion, and possibly some difference of opinion, as to what is necessary to exclude the right. While each case must be decided upon its own facts, we think the proper rule to be observed in determining the question was stated by the chief justice in the case of Hair v. Goldsmith, 22 S. C. 566, cited both by the probate and circuit judge. He said: "There is no express declaration in the will that the devise to his wife was in lieu and bar of dower. The question, then, is presented, did the testator intend this devise as such bar? This must be determined by the fact whether the two are so manifestly repugnant that they cannot stand together. This being determined, the intention of the testator is reached, and must govern," etc. Now, applying this principle, how does this case stand? It seems to us that the provisions of the will, considered together, show that the testator had in his mind a settled scheme for the division of his property among his wife and two children, which was based on the view (as he was providing a substitute for the dower) that he had the absolute right to dispose of the property as his own,—the whole interest in it,—without taking further account of his wife's inchoate right to dower in his lands; and, this being the case, the operation of such right now would inevitable derange and destroy that scheme by increasing the share he intended for his widow, and reducing those he intended for his children, respectively. It will be observed that the testator disposed of, by his will, several small tracts of land, aggregating in quantity about 774 acres. The third of this (the full extent of the dower interest) would be about 258 acres. The will shows that, besides a handsome legacy of personalty, the testator gave his wife the homestead and the little "Burton Place" adjoining, (216 acres,) which of course carried the improvements on the homestead. This was given for life or widowhood. If she married again, or at her death without marriage, in either case the lands were to be sold, and the proceeds distributed, one-third to her or her heirs forever, and the same to each of his children. Is it not quite clear, without any reference to extrinsic evidence, that this provision alone, nearly one-third in mere acres, was at least equal in value to her dower interest; and, if so, does not the character of the property given, (the homestead,) as well as the manner in which it was given, indicate unmistakably that he intended the provision to be a substitute for, and in lieu and bar of, her legal right to dower in his lands? We cannot doubt it. As to the exception that the "appraise bill" was not competent evidence as to the value of the different parcels of land, it will suffice to call attention to the familiar doctrine that a decree will not be reversed if it can be sustained upon any ground which appears in the record. Coleman v. Chester, 14 S. C. 286; Weinges v. Cash, 15 S. C. 44. It will be further noticed that the lands devised to the children of John W., were directed to be sold "at such time and in such manner as my executors may think will be for the best interest of my children." It was clearly the intention of the testator that the whole lands should be sold for the best interest of the children, and not what might remain after one-third by metes and bounds had been assigned to the widow as her dower. Besides, that sale was directed to be made by the executors, of whom the demandant is one. The claim of dower in the lands by her would be not only repugnant to the intention of the testator, but absolutely inconsistent with her sworn duty, as one of the executors, to sell the lands at such time as would be "for the best interest of my children." Substantially the same may be said as to the lands devised to Mrs. Robinson, which, at her death, the executors are directed to sell, and divide the proceeds among her children. Upon the whole we concur with the probate and circuit judges that the allowance of dower to the demandant in these cases would be inconsistent with the provisions of the will, and manifestly repugnant to the intention of the testator. The judgment of this court is that the judgment of the circuit court in both the cases stated be affirmed, and that they be remanded to the probate court for such orders as may be necessary to carry out the conclusion herein announced.

SIMPSON, C. J., concurs.

Digitized by Google

McIVER, J., (*dissenting.*) Not being able to concur in the conclusion reached by the majority of the court in these cases, I propose to state as briefly as practicable the reasons for my dissent. According to all the text writers, as well as the cases upon the subject, dower is a highly favored right, which, inchoate during coverture, becomes a vested estate in the wife immediately upon the death of her husband, over which he has no more control than he has over the wife's estate of inheritance, or any other separate estate to which she may be entitled. Hence, when a husband undertakes to devise his real estate, it must be presumed that such devise is made subject to his wife's right of dower, as it would be absurd to presume that he intended to dispose of that over which he has no control. But while these principles are universally recognized, the law also recognizes the power of the husband, by proper provisions for that purpose in his will, to put his wife to her election whether she will take the provision made for her in the will, or insist upon her legal right of dower; and if, in such a case, she elects to take the provision made for her in the will, she loses her right of dower, not by any act of her husband, but only by reason of her voluntary surrender of such right. This is upon the principle that the provision in the will is regarded as made upon the condition that she will surrender her right of dower, and she is not permitted to accept the provision without complying with the condition. It is, however, well settled that to put a wife to her election it must appear on the face of the will, either in express terms or by necessary implication, that the testator intended to annex as a condition to the provision made for the wife that she should surrender her right of dower. As is said by Lord REDESDALE in Birmingham v. Kirwan, 2 Schoales & L., at page 452: "It is, however, to be collected from all the authorities that as the right to dower is, in itself, a clear legal right, an intent to exclude that right by voluntary gift must be demonstrated either by express words or by clear and manifest implication. If there be anything ambiguous or doubtful,—if the court cannot say that it was clearly the intention to exclude,—then the averment that the gift was made in lieu of dower cannot be supported; and, to make a case of election, that is necessary, for a gift is to be taken as pure until a condition appears. This I take to be the ground of all the decisions." So, in Gordon v. Stevens, 2 Hill, Eq. 46, JOHNSON, J., after affirming the rule thus laid down by Lord REDESDALE, adds: "And this implication must arise from some provision in the will inconsistent with the assertion of the claim." In Cunningham v. Shannon, 4 Rich. Eq., at page 140, DARGAN, Ch., in his circuit decree, which, upon this point, was affirmed by the court of appeals, says that every devise which a testator makes of land, upon which the right of dower attaches, "is presumed to be given subject to the legal estate [of dower] unless the contrary appears on the face of the will in express words, or by the strongest kind of implication." To the same effect see Adsit v. Adsit, 2 Johns. Ch. 448, where Chancellor KENT reviews the authorities. See, also, the dissenting opinion of DARGAN, Ch., in Bailey v. Boyce, 4 Strob. Eq. 92, which of course is not referred to as authority, but simply because it presents a more thorough review of the authorities than I have been able to find in any other case.

Now to apply these well settled, and, as I understand it, undisputed, principles to the case under consideration. Inasmuch as it is quite certain that there are no express words in the will indicating the testator's intention that the provision made for his wife should be in lieu of her claim of dower, the real inquiry is whether such intention must necessarily be implied from the provisions of the will, read as a whole; for that is the proper mode of ascertaining the intention of a testator. So far as I have been able to discover, the cases do not furnish us with any general rule upon this subject, but each case must be governed by the particular provisions of the will which is under consideration. The cases, however, on the one hand, do furnish us with instances in which certain provisions have been held insufficient to afford a necessary implication of an intention to put the wife to her election, while, on the other hand, there are cases which furnish instances in which particular provisions have been held to afford such a necessary implication. As illustrations of the first class may be mentioned the case of Gordon v. Stevens, 2 Hill. Eq. 46, where the claim of dower was allowed notwithstanding it was insisted in one of the grounds of appeal that the allowance of such claim would defeat the equality which would otherwise exist between the provisions made for the widow and the children; and where it was held that a devise of lands to trustees to sell, or with directions to the executors to sell, would not defeat the claim of dower, as such a devise is understood to pass the real estate subject to the claim of dower. So, also, the case of Adsit v. Adsit, supra, as to the effect of a devise with directions to the executors to sell, where Chancellor KENT uses this strong language: "All the cases, however irreconcilable they may be in other respects, agree in this: that a devise of the lands to trustees to sell, or a direction to the executors to sell, is understood to pass the estate subject to dower;" and in that case the claim of dower was allowed notwithstanding such a devise, as well as the provision made for the wife by the will. So, too, the case of French v. Davies, 2 Ves. Jr. 572, where a devise to the wife and others to sell was held insufficient to put the wife to her election. As illustrations of the second class may be mentioned the case of Bailey v. Boyce, 4 Strob. Eq. 84, where a testator gave to his wife and an only daughter each one moiety of all his estate,

Digitized by Google

both real and personal; and it was held that the claim of dower should be rejected as inconsistent with the provisions of the will, and conflicting with the evident intention of the testator to make an equal partition of his property. So, also, the case of Hair v. Goldsmith, 22 S. C. 566, where a testator devised four-tenths of all his real estate to his wife for life, with remainder to her daughter; three-tenths to the children of his son; and the remaining three-tenths to the children of another daughter; and it was held that this provision for the wife was inconsistent with her claim of dower. It will be observed that in both of the cases last cited the devises were of undivided fractional portions of testator's real estate, and not devises of separate and distinct parcels of land, and hence the land devised passed to the devisees as co-tenants, each being seised *per my* and *per tout* of the entire premises, and therefore the widow's seizure by virtue of the devise, extending over every part of the land, was inconsistent with her claim of dower. It seems to me that it is upon this principle alone that these two cases can be made consistent with the numerous authorities cited in the cases above referred to. This principle, however, cannot be applied in the present case, for here the devisees do not take as co-tenants, but, on the contrary, separate and distinct tracts of land are devised to each, and none of the devisees have any interest or share, by the terms of the will, in the tracts devised to the others.

I am unable to discover anything in the terms of this will which necessarily implies that the testator intended to put his wife to her election. Such an intention cannot be implied from the fact that the devisees take as co-tenants, for such is not the fact. It cannot be implied from the directions to the executors to sell, as is seen by the cases of Gordon v. Stevens, Adsit v. Adsit, and French v. Davies, above referred to. It certainly cannot be implied from the fact that the allowance of dower would reduce the value of the devises to the other devisees, for that happens in every case; and I think the assertion may be safely ventured that not a single case can be found in which that fact has been regarded as sufficient, but, on the contrary, such an idea has been distinctly repudiated in many cases. Whilden v. Whilden, Riley, Eq. 208; Braxton v. Freeman, 6 Rich. Law, 35. In fact, every case in which dower has been allowed in addition to the provision of the will, necessarily repudiates such an idea. And, finally, it certainly cannot be implied in this case from the fact that to allow the dower would disturb the equality provided for in the will, for the simple reason that no such equality is there provided for. So far as I can discover, there is not a word or phrase in the will which warrants the inference that the testator intended to make an equal division among his wife and children or grandchildren. He simply gives to her certain specific property, and certain other specific property to his children and grandchildren, without the slightest intimation as to what he regarded the value of such devises or bequests. Even the number of acres of the several tracts of land devised to the several beneficiaries is not equal, and there is nothing whatever to show that the idea of equality was present in the testator's mind at the time he was making his primary dispositions. But when he comes to dispose of the remainders, after the life-estates created, the intention of equality was not only entertained but plainly expressed, showing that when testator intended equality he took care to so express his intentions. The idea, therefore, that the testator intended to make the provision for his wife equal to those made for the other objects of his bounty most certainly cannot be derived from the terms of the will, and, if it have any foundation at all, it must rest upon extraneous evidence.

Assuming for the purposes of this case only that such evidence would be competent, let us inquire into the nature of the evidence adduced. So far as the record submitted to us shows, the only evidence submitted on this point was what is called in the decree of the judge of probate "the appraise bill of testator's estate," in which the value of the two tracts of land devised to the wife during life or widowhood is set down at $1,422; the value of the three tracts to Mrs. Robinson, at $1,388; the value of the tract to children of John at $1,345. By what authority these appraisers undertook to put a valuation upon the real estate of the testator it is difficult to conceive. The will did not direct any such valuation, and their authority, under the statute, was confined to an appraisement of the personal estate. Their act, therefore, in making this valuation of the real estate, was clearly unofficial, and must be regarded as simply the estimate of private individuals, and as such "the appraise bill" was clearly incompetent evidence in this case for any purpose. It seems to me, therefore, that upon this ground, even if there were no other, the judgment below should be reversed. It is said, however, that the judge of probate does not appear to have rested his decision upon this evidence; and hence, I suppose, even if the evidence was incompetent, it was immaterial, and did not affect the result. With all deference, it seems to me this is a mistake. The decree of the judge of probate is set out in the "case," and in that decree he says this "appraise bill" was in evidence; and upon the valuations of the several tracts therein found he proceeds to make a calculation for the purpose of showing that to allow the widow dower in addition to the provision made for her in the will would give her great advantages over the other devisees. What influence this may have had in inducing the conclusion to which the judge of probate arrived I shall not undertake to conjecture. I find it in his decree apparently as one of the reasons for his conclusion, and feel bound so to regard it. What view the circuit judge

Digitized by Google

took of this matter does not appear, as he simply affirmed the decree of the judge of probate, in a short order, without alluding to this question, basing his conclusion upon the case of Hair v. Goldsmith, supra. But, even if this testimony should be regarded as competent, it seems to me that, so far from showing that the testator intended equality among the objects of his bounty, it shows exactly the reverse. What was the value of the testator's personal estate does not appear, nor is the value of the personalty bequeathed to the widow shown by any evidence whatever. The judge of probate says in his decree: "As to the personal property, although there is no valuation placed upon it, yet it is apparently true that the bequest to petitioner is worth more than the share she would have received provided testator had died intestate, his debts being first paid." If there was no valuation placed upon the personal property, it is difficult to conceive how it could appear that the bequest to the widow was of greater value than her share would have been if her husband had died intestate, especially as the record furnishes no intimation even as to the amount of testator's debts. But, waiving this, and taking the valuation of the real estate as set down in the "appraise bill," there is no equality either in the number of acres or in their value. But when, in addition to this, it is seen that by the terms of the will the tracts of land devised to the widow are only given to her during widowhood, and that she acquires by such devise an absolute estate in only one-third thereof, or about one-ninth of the entire value of the real estate, it would seem to be conclusive that the idea of equality was not in the mind of the testator. It seems to me, therefore, that in no view of the case can the petitioner be deprived of her right of dower by the provision made for her in the will; and that the result of this decision, from which I have ventured, with great deference, to dissent, will be to establish the rule that, whenever a husband, by his will, makes provision for his wife, this, if accepted, will exclude her right of dower.

(82 Ga. 46)

GIBSON v. CARRAKER.

(*Supreme Court of Georgia.* Feb. 20, 1889.)

NEW TRIAL—DESCENT.

1. The overruling of a demurrer is not ground for granting a new trial.

2. W., a married woman, died, leaving land, which her husband and minor children, her heirs at law, took possession of and worked. There was no administrator at the time. *Held*, that the crops belonged to the husband, subject to a charge against him for rent.

3. W. owed $187.15 balance of the purchase money for the land on a title-bond. The price of the land was $500. The husband paid the $187.15 from the proceeds of the crops of the land, after her death. *Held*, in a suit by W.'s administrator against the maker of the title-bond for a breach of condition, that, the intestate having paid $312, the recovery should be 312-500 of the value of the land at the time of the breach, with interest.

4. W. gave her note for $300 to one G., which she was to take up in trade, but died when she had only taken up $30. She gave G. a deed to certain land as security, he giving a bond to reconvey on payment of the note. The husband of W., after her death, took up the balance of $270, and afterwards paid the $300. *Held*, in an action by W.'s administrator for breach of the bond, that he was entitled to recover the value of the premises at the time of the breach, with interest thereon, less the $30.

5. In an action for breach of bond to convey title, if plaintiff alleges a demand he must prove it, or amend his declaration, alleging some sufficient excuse for not making demand; and, if defendant had before suit brought put it out of his power to comply with the demand, this would be sufficient excuse, if alleged.

6. Under Code Ga. § 2949, providing that on a breach of the bond for title to land the value of the premises at the time of the breach, with interest thereon, should be the measure of damages, the form of the verdict should be the total amount of the value of the land, and the interest *in solido*.

Error from superior court, Talbot county; GRIGSBY E. THOMAS, Jr., Special Judge.

Action by A. P. Carraker, as administrator of E. M. Wimberly, deceased, against T. N. Gibson, for breach of a bond for title made by him to Wimberly. Judgment for plaintiff, and defendant brings error. The fifth ground of motion for new trial was made to the following portion of the court's charge: "If, from the testimony, you should believe that defendant did make, execute, and deliver to Mrs. E. M. Wimberly, when in life, the two bonds aforesaid, as alleged in plaintiff's declaration; that Mrs. Wimberly died in the possession of these lands, holding under these bonds for titles, and leaving A. P. Wimberly, her husband, and her children in possession of the same, and her children at the time being minors,—then, at her death, whatever title Mrs. E. M. Wimberly had to these lands, it immediately descended to her heirs at law. Her heirs at law held the same as tenants in common, the husband of intestate being one of said co-tenants, and the natural guardian of his minor children, in the absence of a legal guardian; and if, as such co-tenant and natural guardian, he with the crops and effects raised on said lands paid said notes due said Gibson by the estate of said E. M. Wimberly, then such payment was payment by the estate of E. M. Wimberly, and defendant should have made titles to said lands to the heirs of said E. M. Wimberly. The court requests you, gentlemen, to look to the written and oral testimony, and say from the evidence in what capacity and with whose effects said A. P. Wimberly paid off said indebtedness of E. M. Wimberly to T. N. Gibson. If, from the testimony, you should find that A. P. Wimberly, as co-tenant in common and natural guardian of his minor children, paid off said indebtedness of E. M. Wimberly to T. M. Gibson with the money and effects raised from these lands, then that was payment by her estate and heirs, and Gibson, under his condition in his bonds for titles, should have made the titles to the same to the heirs at law of E. M. Wimberly, to be administered, if required, under the laws of this state."

J. M. Matthews and *C. J. Thornton*, for

Digitized by Google

plaintiff in error. *Martin & Worrill* and *Peabody & Brannon*, for defendant in error.

SIMMONS, J. A. P. Carraker, as the administrator of the estate of Mrs. E. M. Wimberly, brought suit in Talbot superior court against T. N. Gibson, to recover damages arising from the breach of two bonds for titles to land, made by Gibson to his intestate, Mrs. Wimberly, in her life-time. It appears from the testimony in the case that on the 26th day of November, 1877, Gibson sold to Mrs. Wimberly 82 acres of land in and adjoining the village of Centreville in said county, for the price of $500. All of the purchase money was paid except $187.15, for which Mrs. Wimberly gave her note, and at the same time Gibson gave her his bond for titles in the sum of $1,000, conditioned to make her titles to the land upon the payment of the note of $187.15. Gibson brought suit on this note, and recovered judgment at the September term, 1879, for the principal, interest, and costs, which judgment remained unpaid at the date of the death of Mrs. Wimberly, in March, 1880. On the 3d of February, 1880, Mrs. Wimberly, desiring to obtain supplies from Gibson to run her farm for that year, made and delivered to Gibson a note for $300, and to secure the payment of the same executed and delivered to him a deed to 100 acres of land, known as the "east half of the Johnson lot," adjoining the land previously purchased by her from Gibson. At the same date Gibson executed and delivered to her his bond for titles in the sum of $600, conditioned to make her a quitclaim title to said land when she should pay the note for $300. In about one month thereafter, Mrs. Wimberly died, having taken up only about $30 worth of supplies on the $300 note. After the death of Mrs. Wimberly, her husband and nine minor children remained upon the farm, and ran the same, and in the fall of the year 1880 paid up the judgment which was outstanding against Mrs. Wimberly at her death, and which was for the balance of the purchase money of the 82 acres of land purchased in 1877, with the cotton raised on the farm, and in the fall of 1881 paid up the note for $300, which she had given to get supplies in February, 1880, and to secure which she had given a deed to the Johnson land, and also paid interest thereon at the rate of 18 per cent. per annum. In 1882, Gibson purchased an execution against A. P. Wimberly, who was the husband of Mrs. E. M. Wimberly, which had been sued out against A. P. Wimberly by Salsbury, Respess & Co. in the year 1876, for about $1,000 principal and interest, Gibson paying therefor about $100. In order to secure its payment to him by A. P. Wimberly, Gibson agreed to and did execute to said A. P. Wimberly deeds to both tracts of land, to-wit, the 82 acres which Mrs. Wimberly purchased from him in 1877, and the 100 acres which she had deeded to him in 1880 to secure the $300 note for supplies; and, at the same time that Gibson conveyed, Wimberly made a deed to one E. N. Stanley, who furnished the money with which to pay off the Salsbury, Respess & Co. execution which Gibson held against Wimberly; and it is alleged that at the same time Gibson got pay a second time for the judgment of $187.15 and interest, which he recovered against Mrs. Wimberly in her life-time. In February, 1885, N. P. Carraker, who was the public administrator of the county, was duly appointed and qualified as administrator on the estate of Mrs. E. M. Wimberly, and took charge of her estate, including the lands before mentioned. A. P. Wimberly having failed to pay Stanley the money borrowed, the latter had brought suit in the United States court, and recovered judgment, and sold the lands at marshal's sale. Soon after Carraker took possession of the lands, ejectment was brought against him by Stanley, and on the trial of the case judgment was rendered in favor of Stanley, and Carraker, as administrator, was ousted; whereupon he brought his suit against Gibson for the breach of his bonds made to Mrs. Wimberly, his intestate. After the filing of the suit, Carraker resigned his office of county or public administrator, but did not resign as administrator of the estate of Mrs. Wimberly. Under the charge of the court, the jury returned a verdict for the plaintiff for $1,420, with interest from March 7, 1883. The defendant made a motion for a new trial on the several grounds set out therein, which motion was overruled by the court, and he excepted.

1. One of the points made in the motion for a new trial is that the court erred in overruling the demurrers to the declaration. We have repeatedly decided that the overruling of the demurrer to the declaration is not a good ground in a motion for a new trial. If we were called upon, however, to decide upon these demurrers, we would say that the court did right in overruling them. We do not think that a public administrator, when he resigns that office, thereby resigns his administratorship upon an estate of which he has been appointed administrator, but that he continues as administrator on that particular estate until he is removed by the ordinary, or resigns the administration upon that particular estate, and his resignation is accepted by the ordinary. We also think that he had a right to bring this action for damages on the breach of this bond. It is a personal action which survived his intestate, and should have been brought by her administrator, and not by her heirs at law.

2. We think the exception taken to the charge of the court in the fifth ground of the motion is well founded. The court instructed the jury, in substance, that if Gibson had made to Mrs. Wimberly a bond for titles to the Jones place, and, after her death, her husband took charge of said land, and made crops thereon, and with the proceeds of this crop paid the balance due on the land from Mrs. Wimberly to Gibson, this was a pay-

Digitized by Google

ment by the heirs of Mrs. Wimberly; and, if Gibson refused to make her heirs the deed to the lands, this was a breach of his bond, and her administrator could recover the whole amount of damages, with interest. Under the facts of this case, we think this instruction was erroneous. It appears from the evidence that Mrs. Wimberly, when she died, owed Gibson $187.15 on the Jones place, having paid $312.85. After her death, Wimberly, by his own labor and that of his minor children, made a crop, and paid this balance. The court instructed the jury that the proceeds of this crop belonged to the estate of Mrs. Wimberly. We do not think so. After her death, her husband and children were her heirs at law, and, there being no administrator at that time, had a right to take possession of these lands, and to work the same. Johnson v. Johnson, 5 S. E. Rep. 629, (October term, 1887.) All the children being minors, their father was entitled to their labor, and whatever was made by their labor and his belonged to him, subject, of course, to the charge against him for rent. The facts alleged in this declaration, properly construed, make this an equitable action, and the administrator is only entitled to recover upon equitable principles. If, therefore, with the proceeds of this crop, the father paid the $187.15,—the balance of the purchase money of the Jones place,—the administrator, in an equitable suit against Gibson for the breach of the bond, would not, in our opinion, be entitled to recover the whole amount, as charged by the court, but should recover in proportion to the amount which had been paid by his intestate; or, in other words, the amount to be apportioned is the value of the land at the time of the breach. The share of the plaintiff in that value is regulated by the proportion of the purchase money which the plaintiff's intestate paid, as compared with what she did not pay. Thus, the whole purchase money being $500, and she having paid $312, the recovery should be 312-500 of the value of the land at the time of the breach, with interest thereon from the time of the breach.

3. It appears also that, before the death of Mrs. Wimberly, she gave her note to Gibson for $300, which she was to take up in trade; but when she died she had only taken up $30. It seems, however, that Gibson kept the note, and allowed Wimberly, the husband, to take up the balance,—$270,—and that Wimberly afterwards paid Gibson the whole $300. In a suit for the breach of the bond given to reconvey the Johnson land, we do not think that the estate of Mrs. Wimberly should be charged with more than $30; $270 was clearly the debt of Wimberly, the husband. Gibson had no right to charge that amount to the estate of Mrs. Wimberly, nor ought he to have credit for it in this suit. All the credit that he should be allowed is the $30 which Mrs. Wimberly had taken up before she died. Mrs. Wimberly not having purchased the Johnson land from Gibson, but having made him a deed thereto to secure the note of $300, and having drawn only $30 on the note, we think that the measure of damages in this branch of the case, under the facts disclosed by this record, is the value of the premises at the time of the breach of the bond, with interest thereon, less the $30 to be deducted therefrom. With this rule applied by the court on the next trial, we do not think there will be any difficulty in arriving at a just and proper verdict.

4. The general rule as to the necessity of a demand in cases like this is as stated by the court in its charge to the jury. In this case, however, the plaintiff, in his declaration, alleged a demand, and he should be compelled to stand on that allegation, or to amend his declaration, if he is unable to prove the demand, and allege some sufficient excuse why no demand was made. Of course, if the defendant had put it out of his power, before this suit was brought, to comply with the demand, and this should be alleged in the declaration, it would be sufficient.

5. The jury found in their verdict $1,420, with interest from March 7, 1883. The plaintiff in error excepted to this form of verdict. While we would not grant a new trial in this case if this were the only error, yet, as it is complained of in the motion for a new trial, we will say that the form of the verdict is wrong. This is not a suit for a debt, where it is sought to recover principal and interest. It is a suit for damages by reason of the breach of a bond; and, while the Code says (section 2949) that "upon a breach of a bond for title to land, the value of the premises at the time of the breach, with interest thereon, should be the measure of damages," it does not mean thereby that the two amounts shall be returned separately by the jury. It means that the jury shall ascertain the value of the land at the time of the breach, and calculate interest thereon from the time of the breach to the verdict, and return the total amount *in solido*, as a measure of damages. The plaintiff is entitled to recover the value of the land at the time the defendant refuses to make title, and, as additional damages, the interest on that value up to the time of the verdict, and the whole should be returned by the jury in one amount, as damages. This, in our opinion, is the proper form of verdict in such a case as this. Judgment reversed.

(82 Ga. 449)

JACKSON *v.* STATE.

(*Supreme Court of Georgia.* March 18, 1889.)

MURDER—MANSLAUGHTER—INSTRUCTIONS.

On a murder trial, defendant's theory was, that deceased was the aggressor, and defendant accidentally stabbed him, and that the offense was involuntary manslaughter, or at least not higher than voluntary manslaughter. The court charged that if defendant stabbed intentionally, though not intending to kill, it was not voluntary manslaughter, but he was responsible for the consequences; and that, if the stabbing killed, the law would hold him to the intention to kill, unless the evidence showed that there was no such intention,

Digitized by Google

etc. *Held* error, as ignoring defendant's theory, since, if deceased attempted to inflict a serious injury on defendant, or if there were circumstances to justify excitement of passion, or to exclude all idea of deliberation or malice, defendant would not be guilty of murder, even if he intended to kill.

Error from superior court, Decatur county; BOWER, Judge.

One Jackson, convicted of murder, brings error.

Donaldson & Hawes, for plaintiff in error. *W. N. Spence*, Sol. Gen., for the State.

SIMMONS, J. Jackson was convicted of the crime of murder. The evidence for the state shows that he and one Williams had a quarrel, and that Jackson stabbed Williams, who died, two or three weeks thereafter, from the effects of the wound. The state's evidence would seem to indicate that Jackson was not justifiable in the stabbing, and there were not such mitigating circumstances as to reduce the offense from murder to manslaughter. The evidence for the defendant shows that Williams, the deceased, was the aggressor, and passed the first insult, and that he made an assault upon Jackson, and threw him out of the house, and caught him around the body, and endeavored to throw him upon the ground, and that during this scuffle he was stabbed by Jackson. Jackson, in his statement, said that in his effort to free himself from Williams he unintentionally stabbed him. The court charged the jury as follows: "If the defendant did the stabbing intentionally, though he may not have intended it to kill Williams, yet if he intended to stab him, and it killed him, it would not be voluntary manslaughter, but he would be responsible for the consequences of the stab, though he might not have intended for the stab to kill Williams. If one stab another intentionally, he must take the consequences of the stab, whether he intended to kill or not. If the stabbing he did killed, the law would hold him to the intention to kill, unless there be evidence that would fully satisfy the jury that there was no such intention. It is contended by the defendant that he made a back-handed lick at Williams, and, if he cut him, he cut him in that way, and that he had no intention of cutting or of killing him. If he made a back-handed lick, and intended thereby to stab Williams, and did stab him, he would be responsible for the consequences of the stab, whether he intended for it to kill or not. Persons are not allowed to form a secret intention, not to kill a man, and stab him in a fatal place, and produce death, and not be responsible for it; they must take the consequences of their acts. If the jury believe that he intended to stab him, he could not be found guilty of involuntary manslaughter, but would be responsible for the consequences of the stab, under the rules given in charge." We think the charge was erroneous. The theory of the defendant was that the offense was involuntary manslaughter, at least not of a higher grade than voluntary manslaughter. This theory was entirely ignored by the court in its charge. We think that if Williams, the deceased, had made an actual assault upon Jackson, or had attempted to commit a serious personal injury on Jackson, or if there were other equivalent circumstances to justify the excitement of passion, and to exclude all idea of deliberation or malice, either express or implied, and Jackson had stabbed him, and he had died from the wound thus inflicted, it would not have been murder, but voluntary manslaughter; although Jackson had intended to kill Williams when he stabbed him. Under these circumstances a man may kill another intentionally, and not be guilty of murder. This view of the law the court, in the charge above set out, excluded entirely from the consideration of the jury, instructing them, in substance, that if Jackson stabbed Williams intentionally it would not be voluntary manslaughter, and intimating that it would be murder. These views not having been presented to the jury by the court, the defendant was deprived of the theory of his defense. The view presented by the court, in the abstract, is correct, viz., that if a man without any provocation wantonly and recklessly stab another without any intention to kill him, he would be responsible for the consequences of the act; but we think that this principle ought to have been qualified by the court in the charge above excepted to, when he was applying this principle to the real facts in the case. Judgment reversed.

(82 Ga. 149)

COLES *et al.* v. CENTRAL RAILROAD & BANKING CO.

(*Supreme Court of Georgia.* March 1, 1889.)

VENUE OF ACTIONS—CARRIERS.

1. An action for the refusal by a railroad company to issue a through bill of lading over its road and to a point on the line of a connecting carrier should be brought in the county where the refusal occurred, that is, the point of shipment, or in the county of the defendant's residence.

2. The amended petition alleged that defendant agreed to carry the goods to the terminus of its line; that, after they had been shipped in car-load lots plaintiffs requested defendant's agent at its terminus to have the goods transferred in the same cars to the road of the connecting carrier, to be by it carried to their destination, which request was refused. *Held* that, as the defendant had completed its contract, the petition showed no breach of a contract at the terminus of the road that would give the court of that county jurisdiction of an action.

Error from superior court, Dougherty county; BOWER, Judge.

Action by Coles, Simpkins & Co. against the Central Railroad & Banking Company of Georgia. Judgment for defendant, and plaintiffs bring error.

Goodyear & Kay and *D. H. Pope*, for plaintiffs in error. *Lawton & Cunningham*, *Lyon & Estes*, and *W. T. Jones*, for defendant in error.

SIMMONS, J. The plaintiffs in error were merchants doing business in the city of

Digitized by Google

Brunswick. They purchased a large quantity of cotton in the interior of the state, along the line of the defendant's railroad. They sought to have this cotton shipped in car-load lots, from the stations where purchased, to-wit, Americus, Cuthbert, and other places along the line of the defendant's road, and over the Brunswick & Western Railroad to Brunswick. The defendant would only give a bill of lading over its own line to Albany, the terminus of its road, and charged local rates therefor. On this state of facts, the plaintiffs brought their action for damages against the defendant in the county of Dougherty, the terminus of the defendant's road. The action seems to have been based upon the refusal of the defendant to issue to the plaintiffs a through bill of lading over its own line, and over the Brunswick & Western Railroad, to Brunswick. The defendant demurred to this declaration, and one of the grounds of the demurrer was that, under the facts alleged in the declaration, the superior court of Dougherty county had no jurisdiction. The plaintiffs then amended their declaration, and alleged, in substance, that after this cotton had been shipped in car-load lots, and before its arrival at Albany, they had notified the agent of the defendant at Albany that said cotton was coming, and requested that said cotton should be transferred in the same cars from the defendant's road to the Brunswick & Western Railroad, so that it might be carried in the same cars over the latter road to Brunswick; that after said cotton arrived in Albany, the same request was made, and that the defendant, through its agents, refused to comply with said request. The defendant objected to this amendment on the ground that it was a new cause of action; but the court overruled the objection, and allowed the amendment. The defendant renewed its demurrer to the action for want of jurisdiction. The court sustained the demurrer and dismissed the case. The plaintiffs excepted to the ruling and judgment of of the court, and brought the case here for review. The defendant filed a cross-bill of exceptions, and alleged that the court erred in allowing said amendment, because it was a new cause of action. The gist of this action, in the original declaration, was the refusal of the defendant to issue a through bill of lading over its own line and the line connecting its road with Brunswick. According to the allegations in the declaration, this refusal did not occur in the county where the suit was brought, but in other counties, and we agree with the trial judge that the suit ought to have been brought either in those counties where the defendant refused to make a contract with the plaintiff, or in Chatham, the residence of the defendant. There was no allegation in the original declaration which would give jurisdiction to the court in Dougherty county, nor do we think that the amendment alleged such facts as would give the court jurisdiction. If the defendant had made with the plaintiffs a contract whereby it had agreed to ship this cotton from Americus to Brunswick, and, when the cotton arrived at Albany in Dougherty county, had failed and refused to transfer the cars from its road to the Brunswick & Western, that would have been a breach of its contract, and an action could have been brought in Dougherty county on that breach. But there was no contract of that kind made between these parties, and therefore there was no breach of a contract in the county of Dougherty. The defendant had carried out its part of the contract by transporting the cotton from Americus and other cities to the city of Albany. The amendment, therefore, did not cure the defect in the original declaration.

As the judgment in the original bill of exceptions is affirmed, it is unnecessary to pass upon the question made in the cross-bill.

Judgment affirmed.

(82 Ga. 241)

BURNETT *et al. v.* NEVES.

(*Supreme Court of Georgia.* March 1, 1889.)

NEW TRIAL.

It is within the discretion of the trial court to grant a new trial for newly-discovered evidence; and where no point is made that the newly-discovered evidence would not have been admissible under the pleas as they stood at the trial, his decision will not be disturbed.

Error from superior court, Clay county; CLARKE, Judge.

Scott & Dillard, for plaintiffs in error. *J. D. Rambo* and *Harrison & Peeples*, for defendant in error.

SIMMONS, J. Burnett and Ingrham, for the use of Travers & Co., sued J. C. Neves on a promissory note. The jury returned a verdict for the plaintiffs. The defendant moved for a new trial, upon the several grounds set out in his motion. Among the grounds was one upon the newly-discovered evidence of one Brown. On this ground the court below granted a new trial, and the plaintiffs excepted, and brought the case here for review.

The only pleas of the defendant in the court below were the general issue and failure of consideration. The newly-discovered evidence of Brown is that the guano was not branded and tagged as the law requires, and this evidence would not have been admissible under the pleas in the case. This point, however, was not made before us. As it is within the discretion of the trial judge to grant a new trial upon newly-discovered evidence, and no point being made as to his power to grant it upon newly-discovered evidence which would not have been admissible under the pleas as they stood at the time of the trial, we affirm the judgment in this case.

Query: Has the judge power to grant a new trial upon newly-discovered evidence which would be inadmissible under the pleas pleaded at the time of the trial? See Landry

Digitized by Google

v. Baugnon, 36 Amer. Dec. 606; Cox v. Bethany, 5 Mart. (N. S.) 471.

Judgment affirmed.

(82 Ga. 229)

SAVANNAH, F. & W. R. Co. v. WATTS.

(*Supreme Court of Georgia.* March 1, 1889.)

RAILROAD COMPANIES—INJURY TO PASSENGER.

In a suit against a railroad company for personal injuries, it appeared that plaintiff was a passenger on defendant's train. Just before the train reached plaintiff's station, the conductor called out the name of the station, and notified him that the train would stop there. When the train had passed by the platform 165 yards, plaintiff jumped off on an embankment, and broke his leg. After he jumped, the train stopped, and ran back on a side track. *Held*, that a nonsuit should have been granted.

Error from superior court, Thomas county; HANSELL, Judge.

Action by one Watts against the Savannah, Florida & Western Railroad Company, to recover damages for personal injuries sustained in jumping from defendant's train. Judgment for plaintiff, and defendant brings error.

A. T. McIntyre, for plaintiff in error. *W. M. Hammond*, for defendant in error.

SIMMONS, J. Watts sued the railroad company for damages. On the trial he testified to the following state of facts: "On October 6, 1884, I was a passenger from Thomasville to Cairo, and had paid for a ticket to Cairo. Was going there to go home. Was going to my place of business. The train reached Cairo about 3 P. M. I was hurt in getting off the train at Cairo. A bone in my left leg, just above my ankle, was broken. The hurt happened by my jumping off. I made an effort to get off, to get home. As we approached the station, signal to stop was made with the bell. The conductor called out 'Cairo.' Didn't stop still. After I got off, train had slacked, but got a little faster. It was going about three miles an hour when I got off. Thought I wouldn't hurt myself by jumping. I was compelled to get off for business. Train was going west towards Chattahoochee. From the rate it was going at the time, and all the circumstances around me, I thought it prudent for me to get off when I did. I was careful in doing so, and would have done so safely, but I jumped on the slant of a little embankment about four feet high, and my leg was broken. When we neared Cairo, the conductor called out 'Cairo.' Conductor notified me they were going to stop at Cairo. I got up, and walked to the platform. After the train was 165 yards from the platform, I jumped off on the embankment. After I jumped, the train stopped, and backed back on the side track. It went to the other end of the switch, and backed back. If I had waited a minute or so I could have gotten off without injury. This was a fast mail train. The fast mail train met there and passed. This train I jumped from only went 50 or 100 yards; then backed on the side track, and in a minute or so the east-bound train passed on the main track. No one told me to jump. I did it of my own accord. Don't know how fast it runs. Ain't got any judgment on that train. May go 60 miles an hour for all I know. Have traveled in trains often, but don't know how fast they go." On this state of facts the defendant below moved a nonsuit, which was refused by the court. The case was submitted to the jury on this testimony, and the jury returned a verdict for the plaintiff. A motion for a new trial was made by the defendant, and was overruled. Defendant also excepted to the refusal to grant a nonsuit. We think the court should have granted a nonsuit on the motion of the defendant, and, after the refusal to grant a nonsuit, should have granted a new trial. It is useless to argue the question. A mere statement of the evidence is sufficient, in our opinion, to show that the court erred in not granting the nonsuit, and in refusing the motion of a new trial. Judgment reversed.

(85 Va. 901)

HAMBLETON *et al.* v. GLENN *et al.*

(*Supreme Court of Appeals of Virginia.* March 14, 1889.)

CORPORATION—DISSOLUTION — PARTIES—SUBSCRIPTION—ASSIGNMENT—EQUITY.

1. The stockholders of an insolvent corporation are not necessary parties to a bill by a creditor against the corporation, its president and directors, and the trustees to whom it has conveyed all its property for the benefit of creditors, filed to enforce collection of the unpaid subscriptions to the capital stock, they being represented by the corporation and its officers; as under Code Va. 1873, c. 56, § 31, a corporation, though dissolved, or though its powers may have expired, may be sued to enforce its liabilities.

2. Under Code Va. 1873, c. 57, § 26, an assignor of shares of stock is still liable for unpaid subscriptions, whether the installments accrue before or after the assignment.

3. The deed of trust providing that the unpaid subscriptions shall be payable to the trustee, the right to collect the same passes thereby, and they may be enforced in a suit for that purpose, brought by a creditor.

4. Whether the right to collect the subscriptions passes by the deed of trust or not, the right of the corporation to them passes to creditors under said chapter 57, § 28, which requires stockholders to pay their subscriptions upon call by the president and directors, and provides that they may be recovered by action, warrant, or motion.

5. Though the debts secured by the deed of trust are barred by limitation, they are not thereby extinguished, and the property of the corporation, including the unpaid subscriptions, having been conveyed to secure said debts, equity will aid in enforcing their payment.

Appeal from circuit court, Henrico county.

Bill by W. W. Glenn, a creditor of the National Express & Transportation Company, who sues as well for himself as all other creditors, against said company, its president and directors, and the trustees, under a deed of trust for the benefit of creditors, executed by said corporation. The object of the bill was to assess and collect the unpaid subscriptions to the capital stock of said cor-

Digitized by Google

poration, and to apply the avails to its debts. The deed of trust conveyed all the property of the company of whatever kind, including by name the unpaid subscriptions, and made the latter payable to the trustees. Hambleton and others, stockholders, filed a petition asking to be made parties to the cause, and that the decrees rendered therein might be reheard. From a decree denying their petition defendants appeal. For a fuller statement of the facts, see 6 S. E. Rep. 806, 866, and many other cases there cited, involving the same matters.

Leigh R. Page and *Pegram & Stringfellow*, for appellants. *Chas. Marshall* and *John Howard*, for appellees.

LACY, J. This is an appeal from a decree of the circuit court of Henrico county, rendered on the 22d day of December, 1887, in the suit of Glenn's Adm'r, etc., v. National Exp. & Transp. Co. The said suit is a suit by the creditors of the said National Express & Transportation Company, seeking the payment of their debts; the said company having conveyed its property of every sort to trustees for this purpose. The suit having progressed in the said court to the point where it was deemed necessary to compel the payment of 80 per cent. of its capital stock, an assessment was made for 30, then 50, per cent., and its payment demanded; which being neglected, suit was instituted against the said appellants in the court of common pleas in Baltimore city, state of Maryland, the place of their residence, for the said stock assessments. They appeared in the circuit court of Henrico county, in this state, where this suit was pending, and on the 3d day of November, 1887, presented their petition, and asked leave of the court to file the same in the said suit of Glenn v. National Exp. & Transp. Co.

The history of this suit of Glenn v. National Exp. & Transp. Co. is to be found so fully set forth in the opinion of Judge RICHARDSON, speaking for a majority of this court, in the case of Lewis v. Glenn, which is reported in 6 S. E. Rep. 866, that it is not deemed necessary to go again so fully into a statement of that cause. See, also, opinion of HINTON, J., in Vanderwerken v. Glenn, Id. 806. That was a suit at law upon a stock assessment. This is upon the motion to file a petition by the appellants to be made parties in the said chancery suit. In their said petition they claim that while they were stockholders at one time, by assignment of the said assessed stock from the original subscribers, they had before decree in the said cause assigned the said stock to others in 1866, and as assignors thereof had been sued for an assessment thereon, and were so interested in the suit of Glenn v. National Exp. & Transp. Co.; that they were not served with any process in the suit, were not made parties defendant, and had no notice of the pendency of the proceedings therein, until after the rendition in the cause of the decree of December 14, 1880, by the chancery court of Richmond, in which court the said cause was then pending; and that by the authority of the said decree they had been sued by Glenn, trustee, for an assessment of $30 on every share of the said stock, making an aggregate of $6,300; and that since the removal of the said cause to the said circuit court of Henrico by the decree therein of March 26, 1886, there had been a further assessment of $50 on each share of the said stock, which decree had authorized the said Glenn, trustee, to collect the same of them.

They presented their petition, and prayed that the said cause might be reheard, and the manifest injustice of the said decrees corrected as to them, and as to all others similarly interested, who might unite with the petitioners under the proper orders of the court; and that said Glenn, trustee, might be restrained and prohibited from further prosecuting his said suit against them, the said petitioners, which is now pending in the court of common pleas of Baltimore city, in the state of Maryland; and that he be restrained from collecting the assessment called for by the decree of the court of March 26, 1886, above mentioned. And, as the grounds for the rehearing asked for, they set forth: *First.* That in the suit of Glenn, Trustee, v. National Exp. & Transp. Co. the bill lacked substantial parties; that in that suit, which was a suit to wind up and settle the affairs and pay the debts of a defunct corporation, the substantial relief prayed for was against the stockholders of said defendant corporation, and that the assets of said corporation consisted exclusively of what might be raised by assessments on its stockholders, and that there were numerous stockholders holding many thousands of shares of capital stock resident in the state of Virginia, and yet not one of said stockholders was made a party defendant, as such; that no stockholder appeared and defended, and that the class against whom the only relief was decreed was not sued, nor served with any process, nor by any representative appeared and defended, and that there was in fact no appearance of any of the defendants in said cause against whom substantial relief was prayed, and no relief decreed against any defendant in said cause who did appear. *Second.* That by the decree of the 14th December, 1880, the report of the commissioner of said court was confirmed, in which was a finding of an immense indebtedness, which was decreed against the company, which was *prima facie* barred by the statute of limitations; that the corporation was dead, and powerless to interpose the plea, or any defense whatever, all of its property having been transferred to assignees; whereas, if a single stockholder had been made a party as such, he would have been allowed to interpose the bar of the lapse of time. *Third.* That when the trust deed was made, the liability of the stockholders at once became absolute, and the statutes began to run. *Fourth.* That the uncalled-for sub-

Digitized by Google

scriptions of stock did not pass by the deed in trust. *Fifth.* That the delay and laches of the creditors barred them in a court of equity. They pray that the petitioners might be made parties defendant in said cause, and the plaintiffs summoned to answer their petition, and that an injunction be awarded to restrain John Glenn, trustee, from the further prosecution of his suit in the court in Baltimore, Md., and from collecting the assessment of March 26, 1886. The creditors of the company whose claims were established by the decree of December 14, 1880, appeared, and moved the court to reject the said petition, which was ordered accordingly; whereupon an appeal was applied for to this court, and allowed.

The first question raised in this court is that the appellants are entitled to be made parties to the suit of Glenn v. National Exp. & Transp. Co. because the relief sought is against them. The suit of Glenn v. National Exp. & Transp. Co. is a creditors' suit against a corporation, and by the terms of its charter, and the laws of this state applicable to said company, it was lawfully sued as such by its corporate name, and the individual stockholders were not proper parties to such a suit; the president and directors being, by their selection, their representatives for this purpose. The appellants admit this as to any live and going corporation, and claim that, as the corporation is dead, by its deed in trust it assigned to trustees and ceased to exist; that in a suit by a creditor, or by creditors generally, the suit against the corporation is in fact one not against the corporation, but against them as stockholders, and they are not represented by the company, nor by the trustees. By the law of this state, (Code 1873, c. 56, § 31,) "when any corporation shall expire or be dissolved, or its corporate rights and privileges shall have ceased, all its works and property and debts due to it shall be subject to the payment of its debts due by it, and then to distribution among the members according to their respective interests; and such corporation may sue and be sued as before, for the purpose of collecting debts due to it, prosecuting rights under previous contracts with it, and enforcing its liabilities, and distributing the proceeds of its works, property, and its debts among those entitled thereto;" by which it is provided that, notwithstanding its death, it stands, for the purpose of being sued by creditors, just as it did while live and going, and may sue and be sued as before; and that the directory has assigned to trustees alters the case only so far as to make the trustees necessary parties.

But they further claim that they have assigned their stock, and are not liable as assignors, having been originally assignees. The statute, however, includes them, (chapter 57, § 26, Code,) and provides that on any assignment the assignee and assignor shall each be liable for any installments which may have accrued, or which may thereafter accrue, and may be proceeded against in the manner before provided. They were first assignees, and were liable because their assignor had not paid up the stock, and now they are assignors, and are liable as such because they have not paid up the stock before assignment, and so are their assignees. This is the obvious meaning and purpose of the law. By the twenty-third section of the same chapter (chapter 57, Code 1873) they are required to pay the unpaid stock as required by the president and directors, or the same may be recovered by action, warrant, or motion. The right to collect the unpaid subscriptions of the stock when called for passed under the law by the assignment to the trustees, and is properly enforceable in a suit brought for that purpose by a creditor.

The second question is as to the statute of limitations, and their right to be made parties in order to interpose this. The lien of the trust deed is not barred by any period short of that sufficient to raise a presumption of payment; the property of this company, including their dues, has been conveyed to secure these debts; and, although the remedy at law be barred, the debt is not thereby extinguished. Bowie v. Society, 75 Va. 304, and cases cited.

The third question raised is disposed of by the foregoing.

The fourth is that the unpaid subscriptions did not pass by the trust deed. Whether this be so or not, the right of the company to call for it survives to the creditor under the law cited above, and is properly enforceable in a court of equity. If there be any hardship in the situation of these appellants, it grows out of their own acts and undertakings. Their subscription to the capital stock of this company was voluntary altogether, and under the law nothing can be exacted from them beyond what they agreed to pay, and this, under numerous decisions, they cannot escape until the debts of the company are paid. The law had provided all this before hand, as the fruit of experience, and, as the assignment by the company is vain to escape this inevitable responsibility as to it, so the assignment by the individual stockholder likewise is a vain and futile endeavor to escape his responsibility. After assignment he owes it as well as before, and the assignee who accepts an assignment of unpaid stock takes nothing but an obligation to pay until all is paid up. But all this only enforces a contract voluntarily entered into for the payment of *bona fide* debts, and, after the stock is once paid up, the contract being fulfilled, responsibility ceases. Section 53, c. 57, Code 1873.

This disposes of all the questions raised and relied on here, and the result is that the decree of the circuit court of Henrico must be affirmed.

RICHARDSON, J., absent.

Digitized by Google

(85 Va. 857)

VIRGINIA FIRE & MARINE INS. CO. *et al.* v. COTTRELL.

(*Supreme Court of Appeals of Virginia.* March 14, 1889.)

JUDICIAL SALES—RESCISSION.

A sale of land in which plaintiff was interested as tenant in common was ordered by the court, and a bid made by the defendant was accepted, and the sale absolutely confirmed, the terms of the sale being part cash and two deferred payments. *Held*, that a petition by the plaintiff for the rescission of the sale should not be granted because the terms of the sale had not been complied with upon its confirmation, or because the value of the land had considerably increased before such compliance on account of the discovery of certain mineral deposits in adjacent land, no fraud being shown on the part of the defendant, and the latter tendering, the day before the first deferred payment fell due, the cash payment, with interest from the date of the sale, and offering to comply with the requirements as to the deferred payments.

Appeal from circuit court, Henrico county.

This was an appeal from a decree of the circuit court of Henrico county, rendered in a suit wherein the Virginia Fire & Marine Insurance Company and another were plaintiffs and John W. Cottrell was defendant. The suit, which was removed to that court from the circuit court of Goochland county, was brought for a partition of a certain tract of land situate in the last-mentioned county, known as "Sycamore Grove," and of which the plaintiffs and defendant were seised as tenants in common. The tract contained 388 acres, and adjoined another tract of land known as "Carbon Hill," which was owned by the appellee the Richmond Coal Mining & Manufacturing Company, being separated therefrom by Tuckahoe creek. It appearing in the progress of the cause that partition of the land was impracticable, a decree was entered for its sale, and John H. Guy and A. K. Leake, Esqs., were appointed special commissioners to make the sale. The commissioners, in their printed advertisements of sale, described the land as "situate in the coal basin of Virginia, and said to be rich in minerals." And as an additional inducement to bidders the land was further described as adjoining "the Carbon Hill coal mines which are now in operation." The sale was made on the 31st of May, 1887, at public auction, all the parties in interest being present. The commissioners reported to the court that the land had been knocked out at the sale to the Richmond Coal Mining & Manufacturing Company, at the price of $2,650. The report then proceeds as follows: "Although the purchaser has not yet complied with the terms his [its] counsel state that they will be fully complied with, and as the term of the court is drawing to a close, and the sale is an excellent one in the opinion of your commissioners, they advise that the sale be confirmed, and your commissioners be authorized to carry out its terms." Those terms were one-third of the purchase money to be paid in cash, the balance on a credit of six and twelve months, to be evidenced by the negotiable notes of the purchaser, bearing interest from the day of sale, and the title to be retained until the purchase money should be fully paid. The report, to which there was no exception, was filed, and by consent was acted upon at a special term of the court on the 23d of July, 1887, when the report was absolutely confirmed. The language of the decree of confirmation is that "the court doth confirm the said report and the sale therein mentioned to the Richmond Coal Mining & Manufacturing Company, and said special commissioners are directed to carry out the sale by collecting from the purchaser the cash installment of the purchase money, and taking its notes for the deferred payments." And then the decree goes on to provide that, "should the purchaser fail to comply with the terms within twenty days from the date of this decree, then the clerk of this court shall, upon the application of said special commissioners, issue a rule against the purchaser, returnable to the first day of the next term of the court, requiring it to appear and show cause why the land should not be resold at its risk." This rule was executed by delivering a copy thereof to the secretary and treasurer of the Richmond Coal Mining & Manufacturing Company, but no further action appears to have been taken upon it. It is admitted, however, that on the return-day of the rule the counsel of the company appeared in court, and announced his readiness to answer, although no offer to comply with the terms of sale was then made. On the 29th of November, 1887, the company, through its agents, tendered to the commissioners the cash payment, with interest thereon to that time, and also the amount of the first deferred payment, in lawful money, and its note for the amount of the second and last deferred payment, dated May 31, 1887, and payable 12 months after date, to the order of the commissioners, but the tender was not accepted. On the following day the court, not having been informed of the tender that had been made, issued another rule against the company, returnable on the 5th day of December, 1887, requiring it to appear and show cause why the sale should not be rescinded. To this rule the company filed its answer, averring its readiness to fully comply with the terms of sale, and making to the court the same tender that had been previously made to the commissioners. It was also averred that the company, by its counsel, appeared on the first day of the term to comply with the terms of sale, but that, in the absence of the plaintiffs, nothing was done, and that it would have complied with the terms at any time after the confirmation of the sale, if it had been required to do so.

The plaintiffs filed a written application in the nature of a petition, praying that the property be again exposed for sale at public auction. It was averred as the ground of the application that since the confirmation of the sale there had been discovered on the Carbon Hill property, a vein of coke of great value, which it was believed extended to the

Digitized by Google

Sycamore Grove property only a few hundred yards distant, and that it was the belief of the plaintiffs that this discovery had led to the then proposed application of the purchaser to be allowed to complete its purchase after its long standing delinquency. And they offered to furnish such security as the court might require that at another sale, if ordered by the court, they would make a bid equal to the amount of the first sale, with interest and costs added. Sundry affidavits were filed to the effect that the discovery of the vein of coke above mentioned had enhanced the value of the Sycamore Grove tract to an extent far beyond the price for which it had been sold. The court, however, when the cause came on to be heard, entered a decree allowing the purchaser to complete its purchase, and discharging the rule, whereupon the Virginia Fire & Marine Insurance Company, one of the plaintiffs, obtained an appeal to this court.

W. W. & B. T. Crump, for appellant. *Guy & Gilliam*, for appellees.

LEWIS, P., (*after stating the facts as above.*) One of the modes by which a purchaser at a judicial sale may be compelled to complete his purchase is by a rule to show cause why the property should not be resold at his risk; and in such a case, when a resale is ordered, the former sale is not set aside, but the property is sold as the property of the purchaser. If it brings more than the debt, he is entitled to the surplus; if it brings less, he is held responsible for the deficiency. Clarkson v. Read, 15 Grat. 288. But a proceeding to rescind a sale which has been absolutely confirmed ought to be not less formal than by a petition in the cause setting forth distinctly the grounds upon which the application is based, in order that the purchaser or other adverse parties to the proceeding may see clearly what they have to meet. A summary rule to show cause is not sufficient. In the present case, however, according to the liberal practice which prevails with us in courts of equity, the written application, as it is termed in the record which was filed by the plaintiffs in the court below, praying that the property be again offered for sale, may be treated as a petition, and we will therefore consider the case upon its merits.

And, first, it is to be observed that the principles which apply to a case like the present are very different from those which govern in applications to open the biddings before confirmation. Until the sale has been confirmed, the proceeding is *in fieri;* the bidder is not considered as a purchaser, and he is therefore not liable for loss to the property by fire or otherwise in the interim; nor is he compellable before confirmation to complete his purchase. But as soon as the sale is absolutely confirmed, then the contract becomes complete; the bidder, by the acceptance of his bid, becomes a purchaser, that is to say, the equitable owner of the property, with a lien upon it for the unpaid purchase money, and he may be compelled by the process of the court to comply with his contract. 2 Daniell, Ch. Pr. (5th Ed.) 1275; Hurt v. Jones, 75 Va. 341; Blossom v. Railroad Co., 3 Wall. 196. It is by no means, therefore, a matter of discretion with the court to rescind a sale which it has once confirmed; nor is the sale to be rescinded for mere inadequacy of price, or for an increase of price alone; but some special ground must be laid, such as fraud, accident, mistake, or misconduct on the part of the purchaser or other person connected with the sale, which has worked injustice to the party complaining. After confirmation the purchaser at a judicial sale is as much entitled to the benefit of his purchase as a purchaser *in pais*, and the sale in the one case can be set aside only on such grounds as would be sufficient in the other. There is no principle upon which any distinction between the two classes can be drawn, and if there be anything in the opinion of the court in Bank v. Campbell, 75 Va. 455, which can be construed as holding a contrary doctrine, the proposition has been overruled by subsequent decisions. In Watson v. Birch, 2 Ves. Jr. 51, Lord Commissioner ASHHURST said that biddings are not to be opened after confirmation of the report unless under particular circumstances; that increase of price alone is not sufficient, but that, if fraud appears, that suspends the operation of the general rule, though he did not mean to say that fraud was the only exception. In Morice v. Bishop of Durham, 11 Ves. 57, Lord ELDON said that the only case in which the bidding can be opened after confirmation of the report is where there is some fraud or misconduct in the purchaser, or fraudulent negligence in another person as the agent, of which it is against conscience that the purchaser should take advantage. And in White v. Wilson, 14 Ves. 151, he said that surprise generated by the conduct of the purchaser is good ground for setting aside a sale after it has been confirmed, but that, where there has been no fraud or unfairness, the purchaser is entitled to the benefit of his purchase, and that, in his opinion, a more mischievous thing could not be done to suitors than to relax further the binding nature of contracts in the master's office.

We need not, however, look beyond the decisions of this court for authority upon this subject. In Berlin v. Melhorn, 75 Va. 639, a sale which had been confirmed was summarily set aside during the same term, upon the offer of an advance bid, without any reason for so doing being assigned. This court, upon appeal, reversed the decree, and the ground upon which it proceeded was thus stated by Judge BURKS: "We think," he said, "it may be safely laid down as a general rule deducible from the authorities that after a judicial sale has been absolutely confirmed by the court which ordered it, it will not be set aside, except for fraud, mistake, surprise, or other cause for which equity would give like relief, if the sale had been made by the

Digitized by Google

parties in interest, instead of by the court. But where the objection," he added, "is to the confirmation, the rule is more liberal." This rule, which is an eminently just and salutary one, has been repeatedly recognized by this court, and public policy, which looks to the stability of judicial sales, requires that it be adhered to. Langyher v. Patterson, 77 Va. 470; Withers v. Coles, 5 S. E. Rep. 673; Todd v. Mills Co., Id. 676. Viewed in the light of these principles, the decree complained of must be affirmed. The sale, which was sought to be set aside, was not confirmed conditionally, as the appellant contends it was, but absolutely. The unequivocal terms of the decree leave no room for doubt upon this point. And, unless there was *mala fides* on the part of the purchaser, the fact that the terms of sale had not been complied with when the sale was confirmed does not affect the case. The equivocal title passes to the purchaser at a judicial sale, not by virtue of his compliance with the terms of sale, but by the confirmation of the sale by the court; and while it is usual and proper to require compliance with the terms of sale before the report is acted upon, yet, if this is not required and the sale is confirmed, the rights of the purchaser are the same as if it had been complied with, provided his conduct has been fair, and not to the injury of any party in interest. And so, reciprocally, he may be compelled to complete his purchase as fully in the one case as in the other.

It is contended, however, that the purchaser in the present case has not dealt fairly with the court; that its bid was made with the sinister purpose of making compliance with its contract contingent upon the result of certain experiments to be made on its own land adjoining the property in question, and therefore that the sale ought to be rescinded. But this position is not supported by the record. Those operations were begun and publicly conducted before the sale was made. Indeed, the fact was published to the world in the printed advertisements of sale, as one of the inducements to the purchase of the land, and it is not unreasonable to suppose that it favorably affected the sale to the advantage of the appellant. At all events the sale was reported as an excellent one, and promptly confirmed, there being no exception to the report. Moreover, fraud or misconduct, when relied on as a ground for rescinding a contract, must not only be clearly proved, but it must be distinctly charged in the pleadings. As was decided in Thompson v. Jackson, 3 Rand. (Va.) 504, if not so charged, evidence to prove it is irrelevant, and will be suppressed as improperly taken, no matter how strong a case it may show. And the same doctrine has been held in numerous subsequent cases. Southall v. Farish, 7 S. E. Rep. 534, and cases cited. The application of this rule is decisive here. The "petition," as we will call it, which was filed by the plaintiffs in the court below, merely alleges the fact of a discovery of a valuable vein of coke by the purchaser on its own land since the confirmation of the sale, and that it was the belief of the plaintiffs that in consequence of this discovery an application would be made by the purchaser to the court to be allowed to complete its purchase. But this, at most, is only a vague and inferential charge, which falls far short of the requirements of the rule above mentioned, and besides we have been unable to discover any evidence in the record upon which fraud or bad faith can be imputed to the purchaser. Fraud, even when charged, must be conclusively proved. Hickman's Ex'r v. Trout, 83 Va. 478, 3 S. E. Rep. 131. "If the fraud is not strictly and clearly proved as it is alleged, although the party against whom relief is sought may not have been perfectly clear in his dealings, no relief can be had." Hord's Adm'r v. Colbert, 28 Grat. 49; Houghton v. Graybill, 82 Va. 573; Matthews v. Crockett, Id. 394. Nor does it appear that the purchaser was not able to perform its contract when the sale was confirmed; and, as no personal security was required by the terms of the sale, no injustice is shown to have been done by the confirmation of the sale before the terms were complied with, for, had they been previously complied with, the security would have been substantially the same as it is. It is evident that the sale was considered at the time a good one by the parties in interest, and that they were not only willing, but anxious, it should be confirmed, although the report expressly stated that the terms had not been complied with, but that the counsel for the purchaser had stated that they would be. The value of the property, however, has since increased, and the sale is now sought to be rescinded. But we are constrained to say that we perceive no more reason, under the circumstances of the case, for rescinding the sale than there would be to discharge the purchaser from its contract, if the result of the experiments above mentioned had been opposite of what they were.

The appellant lays much stress on the delay of the purchaser in complying with the terms of sale, but we think that circumstance in the case is fairly explained by the record. On the return-day of the rule to show cause why the land should not be resold, the purchaser, by its counsel, appeared in court, and, although its readiness to answer was announced, no action upon the rule was taken. Why does not appear, but the inference is that its delinquency up to that time was condoned. And before the second rule was directed to issue the whole of the first deferred payment was tendered to the commissioners, (the day before it fell due,) together with the cash payment and accumulated interest thereon, and also the note of the purchaser for the second and last deferred payment, to fall due as directed by the decree of sale. The tender, however, was not accepted, and without knowledge of the fact that it had been made, the court directed the rule to issue. To this rule the purchaser filed its answer,

Digitized by Google

renewing the tender it had made to the commissioners, and averring that it would have complied with its contract at any time after the confirmation of the sale, if it had been required to do so. The court thereupon accepted the tender, and discharged the rule, and in this there was no error. In the absence of fraud or misconduct the payment of interest on the cash payment was equivalent for the default of the purchaser, and hence no one has been injured. Smith's Ex'x v. Profitt's Adm'r, 82 Va. 832, 849, 1 S. E. Rep. 67. Ordinarily in such cases time is not of the essence of the contract, and to justify the rescission of an executed contract, or a sale which has been confirmed, there must be some objection which goes to the very substance of the contract. Thompson v. Jackson, supra. It is hardly necessary to add, after what has been said, that there is no analogy between the present case and Bank v. Campbell, 75 Va. 455, relied on by the appellant. In that case the purchasers, before confirmation of the sale, discovered underneath the land for which they had bid, a cave of vast proportions and beauty, which enormously added to the value of the property. And after making the discovery, they carefully stopped up the entrance to the cave, and falsely reported that it was nothing but a mud hole. This was a palpable fraud, as the court held, and upon that ground the sale was rescinded. We not see how any other conclusion could have been reached, nor do we understand the court as intending to go further than to announce the doctrine as well established, both in England and this country, that for fraud, misrepresentation, or injurious mistake, a sale, whether confirmed or not, will be set aside, and the property again sent into the market and resold,—a proposition in harmony with what has been already said. See, also, Talley v. Starke, 6 Grat. 339. It follows, as there is no ground for rescinding the sale, that the purchaser was rightly allowed to complete its purchase. The decree of the circuit court is accordingly affirmed.

(103 N. C. 59)

JORDAN v. BRYAN.

(*Supreme Court of North Carolina.* March 4, 1889.)

LANDLORD AND TENANT—LIENS—RENT.

1. By Code N. C. § 1754, all crops raised on leased lands shall be deemed vested in possession of the lessor or his assigns until the rents shall be paid, and the remedies in an action on a claim for the delivery of personal property are given to the lessor, against the lessee or cropper, who shall remove the crop without the consent of the lessor. *Held* that, though the constructive possession is vested in the lessor to protect his lien, the remedy upon claim and delivery cannot be resorted to by the lessor before the time fixed for division of the crop, unless the tenant is about to remove or dispose of the crop, or abandon a growing crop.

2. When land is cultivated for a year on shares, the lessor agreeing to furnish the team and agricultural implements and supplies, and the lessee to furnish the labor, the right of the lessor to demand his rent and pay for advancements is when the crops are gathered and ready for division.

3. A crop of corn raised by the lessee was divided by the lessor and lessee each taking his share, and the lessee removed his share from lessor's premises. *Held*, that this was an assent on the part of the plaintiff to the appropriation, possession, and removal of his share by the defendant, and a recognition of his right thereto.

Action by E. T. Jordan against John W Bryan, to recover personal property, unde ancillary proceedings of claim and delivery Judgment for defendant. Plaintiff appeals

W. R. Allen and *J. F. Dortch*, for plaintiff. *W. H. Kitchin*, for defendant.

DAVIS, J. Civil action tried before AVERY J., at October term, 1888, of the superior court of the county of Wayne. The action is brought to recover cotton, cotton-seed, corn, and fodder, of the aggregate value of $117.50, as alleged in the complaint, which were taken under the ancillary proceeding of claim and delivery, but returned to the defendant, he having given the requisite undertaking. There was a reference, under the Code, to W. C. Munroe, whose report of findings of fact was, in substance, that the defendant, John W. Bryan, cultivated the land of the plaintiff, E. T. Jordan, for the year 1887, on shares; the plaintiff agreeing to furnish the team and agricultural implements, and to furnish Bryan with supplies, and Bryan to furnish the labor. The defendant raised on the land during the said year a crop of corn, cotton, etc., (set out in full in in the report,) and the plaintiff advanced to the defendant the sum of $41.47. The plaintiff and defendant divided the corn, each taking his share thereof, and the defendant removed his part from the premises of the plaintiff before the bringing of this action. The plaintiff has received no other part of said crops. All the crops, except the defendant's part of the corn, were on the premises of the plaintiff at the time of bringing this action, and a part of the crop was ungathered. The defendant, after the bringing of this action, offered to the plaintiff his part of the fodder, cotton, and cotton-seed. The time agreed on when the advances made for 1887 should be due and demandable was when all the crops were gathered and divided. There was no agreement as to the time when the crops should be divided. The plaintiff, before bringing this action, demanded the crops mentioned in the complaint of the defendant. The referee found, as conclusions of law, that, conceding that the agreement created the relation of "landlord and tenant" between the plaintiff and defendant, "the rent which the defendant was to pay was due and demandable on the 1st day of January, 1888, or at least not before the whole of the crop was gathered and ready for delivery, and the advancements when all the crops were gathered and ready for division; that by the division of the corn, and delivery to each of his share thereof, the plaintiff lost all lien that he may have had on the share of the defendant therein for advances and rents out of other parts of the

Digitized by Google

crop; that after the division of the corn, and delivery to each of his part thereof, the defendant had a right to remove his part thereof from the premises of the plaintiff without paying for advances or the rent out of other parts of the crop, or giving the plaintiff notice, or gaining his consent to said removal; that until the crops were gathered and in condition to be divided, and up to the time when the rents or advances were due and demandable, the defendant was entitled to the actual possession of the crops, and the plaintiff only to the constructive possession thereof; that at the time of bringing this action the plaintiff had no cause of action against the defendant for the detention of the property described in the complaint; that the defendant is entitled to the possession of the property described in the complaint; that John W. Bryan recover judgment against the plaintiff, E. T. Jordan, and his surety, N. G. Holland, for his costs."

The plaintiff filed the following exceptions to the referee's report: (1) That so much of his finding of facts as finds that "the time agreed on when the advances made for 1887 should be due and demandable was when all the crops were gathered and divided," is erroneous, as there was no sufficient evidence to support such finding; (2) that the conclusion of law of the referee which finds "that the rent which the defendant was to pay the plaintiff was due and demandable on the 1st day of January, 1888, or at least not before the whole of the crops were gathered and ready for division, and the advancements when all the crops were gathered and ready for division," is erroneous; (3) that the conclusions of law which find "that by the division of the corn, and delivery to each of his share thereof, the plaintiff lost all lien that he may have had on the share of the defendant therein for advances and rents out of other parts of the crops," are erroneous; (4) that the conclusions of law which find "that after the division of the corn, and the delivery to each of his part thereof, the defendant had a right to remove his part from the premises of the plaintiff without paying for advances or the rent out of other parts of the crops, or giving the plaintiff notice or gaining his consent to said removal," are erroneous; (5) that the conclusions of law which find "that until the crops were gathered, and in condition to be divided, and up to the time when the rents or advances were due and demandable, the defendant was entitled to the actual possession of the crops, and the plaintiff only to the constructive possession thereof," are erroneous; (6) that the conclusions of law which find "that at the time of bringing this action the plaintiff had no cause of action against the defendant for the detention of the property described in the complaint," are erroneous; (7) that the conclusions of law which find "that the defendant is entitled to the possession of the property described in the complaint," are erroneous; (8) that the conclusions of law which find "that the defendant, John W. Bryan, recover judgment against the plaintiff, E. T. Jordan, and his surety, N. G. Holland, for his costs," are erroneous.

His honor overruled the exceptions of the plaintiff, and gave judgment for the defendant, from which the plaintiff appealed. The first exception is to a finding of fact, when there was no sufficient evidence to support it. None of the evidence is sent up with the record, and the question sought to be raised by the first exception is not before us; and, if it were, it is not for us to pass upon the weight of evidence. By section 1754 of the Code, all crops raised on lands rented or leased "shall be deemed and held to be vested in possession of the lessor or his assigns at all times, until the rents for said lands shall be paid," etc., and the "remedies in an action upon a claim for the delivery of personal property" are given to the lessor or his assigns, "against the lessee or cropper or the assigns of either, who shall remove the crop, or any part thereof, from the lands without the consent of the lessor," etc. Section 1755 gives a like remedy to the lessee or cropper for the recovery of such part of the crop as he, in law and according to the lease or agreement, may be entitled to, whenever the lessor or his assigns "shall get the actual possession of the crop, or any part thereof, otherwise than by the mode prescribed" in section 1754. The case before us is clearly distinguishable from Livingston v. Farish, 89 N. C. 140, cited by counsel for plaintiff, and similar cases referred to. In that case the tenant was to pay 450 pounds of cotton as rent, and the rent and sums advanced for supplies were to be due on the 1st day of October, 1881. The defendant cultivated and gathered the crop, and refused to "pay the rent and sum due for supplies." The court below instructed the jury "that the action of claim and delivery would not lie, under the statute, unless some part of the crop had been removed from the premises by the defendant." By the terms of the agreement the rent and supplies were due the 1st of October; the crop had been gathered; and the landlord was entitled to the remedy by claim and delivery, not simply by virtue of his constructive possession under the statute, but by his right to the actual possession, the rent and advances having become due; and the refusal to deliver the cotton was a denial of the landlord's right to possession, and, by a fair construction of the statute, this court held that he was entitled to claim and delivery, and the ruling of the court below was reversed. Though the constructive possession of the crop is vested by statute in the landlord, for the very obvious purpose, indicated by the statute, of protecting his lien, yet during the cultivation, and for all purposes of making and gathering the crop, the actual possession is in the tenant until such time as the rent and advances shall become due, or a division can be had. In State v. Copeland, 86 N. C. 694, it is said: "Notwith-

Digitized by Google

standing the provisions of the first section, (chapter 283, Acts 1876–77, now section 1754 of the Code,) the whole tenor of the act contemplates the right of the lessee or cropper to hold the actual possession until such time as a division may be made;" and this, against the lessor himself. It was never contemplated that while the crop remained on the land, with no attempt or purpose on the part of the tenant to remove or so dispose of it as to deprive the landlord of his security, he should have the remedy of claim and delivery. The remedy was designed for his protection, and it cannot, either by the terms of the statute or by any fair construction, be resorted to before the time fixed for division, unless the tenant is about to remove or dispose of the crop, or abandon a growing crop; otherwise the tenant might be sued for each parcel of the crop as it was gathered. Neither the language nor the spirit of the statute will permit this. If the tenant, at any time, before satisfying the liens of the landlord, remove the crop, or any part of it, not only has the landlord the civil remedy given by statute, but the tenant subjects himself to a criminal prosecution. Code, § 1759. Nothing of this kind is alleged by the plaintiff against the defendant in this case, and the foregoing declarations, as to the law applicable to them, dispose of the fifth, sixth, seventh, and eighth exceptions of the plaintiff adversely to him. We think the plaintiff's right to demand his rent and pay for advancements was when the crops were gathered and ready for division, and the second exception was properly overruled by his honor.

The questions involved in the third and fourth exceptions must also be disposed of adversely to the plaintiff. The division of the corn by the plaintiff and defendant, "each taking his share thereof," was an assent on the part of the plaintiff to the appropriation, possession, and removal of his "share thereof" by the defendant, and a recognition of his right thereto. Curtis v. Cash, 84 N. C. 41. There is no error.

(102 N. C. 226)

GULLEY v. COPELAND *et al.*

(*Supreme Court of North Carolina.* March 4, 1889.)

CHATTEL MORTGAGES — RIGHT OF MORTGAGEE TO POSSESSION.

In an action for an adjustment of liens held by defendant and secured by chattel mortgage, and for other relief, a referee reported the amount due on the chattel mortgage, which report was confirmed, the court adjudging that the defendant recover of plaintiff the sum found due, and ordering that upon payment of said sum the defendant cancel and mark "Satisfied" the said chattel mortgage. *Held*, that upon the failure of the plaintiff to pay the sum found due, the defendant could sue for the immediate delivery of the property described in the chattel mortgage, or for damages for its detention, to the extent of the amount found due.

Appeal from superior court, Wayne county; SHEPHERD, Judge.

W. R. Allen, for appellant. *E. W. Kerr* and *N. Y. Gulley*, for appellees.

SMITH, C. J. In February, 1883, the defendants instituted suit against the plaintiff in the superior court of Wayne for an adjustment of claims held by the latter and secured by chattel mortgages, seven in number, executed by the plaintiff E. G. Copeland, and to compel a conveyance of a certain parcel of land the title to which the defendant had caused to be made to himself by the vendor Julia Goelet. After a reference and report it was ascertained that the said E. G. Copeland was indebted on May 1, 1885, to said L. D. Gulley in the sum of $245.40, for which the said Gulley was entitled to judgment, and that upon the payment thereof the mortgages were to be discharged. It was further ascertained that all the purchase money due for the land had been paid by the vendee Sally A., including the sum advanced by Gulley when he took the title, and that she was entitled to a conveyance of the land from him. At September term, 1885, all exceptions to the report were overruled, and it confirmed, and among other things it was adjudged by the court "that the defendant L. D. Gulley recover of the plaintiff E. G. Copeland the sum of two hundred and forty-five dollars and forty cents, with interest on the same from May 1, 1885, and that upon the payment of said sum to said defendant by said E. G. Copeland it is ordered that said Gulley cancel and mark 'Satisfied' on the records of Wayne county the chattel mortgages referred to in the amended complaint in this action, and executed by said E. G. Copeland to said Gulley." The conveyance of the land has been made to the said Sally A., and the money declared to be due her paid by the said Gulley, but so much of the judgment as relates to the amount due Gulley from E. G. Copeland, and the discharge of the chattel mortgages, remains unperformed. The present action, begun on December 21, 1885, is to recover possession of certain personal goods described and conveyed in the chattel mortgages, and in it the plaintiff has sued out process to recover immediate delivery of the said articles under the statute, (Code, § 321, et seq.,) pursuant to which the sheriff seized and took in possession certain goods mentioned in his return, and restored them to defendants on their giving the bond required by law.

Among other defenses to the action the defendants say that the subject-matter of this action was adjusted and determined in the first action between the same parties with reversed relations, and that this adjudication is a bar to the present proceeding; and, further, that if not finally disposed of therein the remedy lies in a motion in that cause, which is still pending, to carry into effect the unperformed part, and not in the institution of an independent suit. There was a reference by order of the court made at April term, 1886, to R. W. Nixon, who put in his report

Digitized by Google

at July term next ensuing, in which are separate findings of fact and law, to which said E. G. Copeland filed 11 exceptions, and these, upon the hearing, were overruled, and the report confirmed, and judgment rendered in favor of the plaintiff for the recovery of the following articles mentioned in the complaint of the value of each as agreed on between the parties, to-wit: One bay horse, of the value of $100; one spotted cow, of the value of $15; one cart, of the value of $12. And it was further adjudged that the plaintiff also recover of defendant and Elizabeth Pearson, surety on the undertaking for the forthcoming of said property, as damages for the wrongful detention thereof, interest on $127, the agreed value of said property, at the rate of 6 per cent. per annum from the 21st day of December, 1885, the day of commencing the action; and that the plaintiff recover of said defendants and surety the assessed value aforesaid of such of the articles as are therein mentioned, as a return cannot be had thereof, and the costs of the action incurred by the plaintiff. From this judgment the defendants appeal.

We concur in the ruling of the court that neither of the obstructions relied on as in the way of prosecuting the present action is a bar thereto. It is distinctly adjudged in the first suit that upon an account stated, in which all the moneyed transactions between the contesting parties are set out in detail, there remains a resultant balance due the plaintiff of $245.40, which he recovers of the defendant E. G. Copeland, and upon its payment the mortgages wherein it is secured will be discharged, and must be canceled. But this has not been done, and hence a right to get possession still residing in the plaintiff may be enforced, and damages recovered commensurate with the secured debt, but not beyond its amount. The former adjudication not only determines the sum due, but that it is secured in the mortgages, and these are not open longer to controversy. But it does not direct a sale of the mortgaged property, leaving the discharge of the mortgages dependent upon the action of the defendants, and they have taken no steps in the direction of the exoneration of the property. It was left, therefore, to the plaintiff to seek the remedy he has adopted, and, the result being a conversion of the property into its money value, the reception of so much as will pay the debt and costs thus becoming a satisfaction of the demand. But the recovery in this case falls short of the required amount, and will all belong to the plaintiff. The exceptions not disposed of in what has been already said have not been urged in the argument, and are untenable, and we notice only that relating to the refusal to allow the referee in the first cause to explain his account orally. Evidence of this sort falls under the general ruling which excludes outside oral testimony of what a party means in a written statement submitted and acted on by others. It is obligatory in the sense in which it was understood and acted upon by the parties affected by it, ascertained by its terms and their fitting to surrounding facts, and not from the undisclosed intention of the person preparing the paper. But a sufficient answer is found in the fact that what was proposed to be shown sufficiently appears in the report itself, without such external aid; and the ascertained balance is determined, to be secured under the chattel mortgages, one or more of them, it matters not which, and this has become *res adjudicata*. We find no error, and the judgment must be affirmed.

(103 N. C. 46)

POWELL *et al. v.* ALLEN *et al.*

(*Supreme Court of North Carolina.* March 4, 1889.)

INJUNCTION—CLAIM AND DELIVERY—JUDGMENT—PLEADING—AMENDMENT.

1. In claim and delivery proceedings before a justice of the peace the property was delivered to the plaintiff, but afterwards the justice dismissed the proceeding for want of jurisdiction, and gave judgment of restitution against plaintiff, with an alternative judgment for $150. *Held*, that it was proper for the superior court to refuse a preliminary injunction, in an action by plaintiff to restrain the collection of an execution issued on the alternative judgment, on the ground that the property belonged to him, and if he paid the money he would be unable to recover it.

2. The plaintiff having paid the alternative judgment, he was not entitled to amend his complaint by alleging that the money was his, and seeking to recover it of defendant, as such an amendment amounted to an entirely new cause of action accruing after the original action was commenced. Besides, the amount in controversy being less than $200, and the action on an implied contract, for money had and received, it was not within the original jurisdiction of the superior court.

Appeal from superior court, Franklin county; AVERY, Judge.

C. M. Cooke, for appellants. *N. Y. Gulley* and *F. S. Spruell*, for appellees.

MERRIMON, J. The plaintiffs brought their action in the court of a justice of the peace against the present defendants to recover possession of a mule and certain cotton of greater value than $50, and, under the ancillary proceeding of claim and delivery, the property was delivered to the plaintiffs in that action, who are the plaintiffs in the present one. In the course of the action, the justice of the peace dismissed the same upon the ground that his court had not jurisdiction of the cause of action, and gave judgment of restitution of the property against the plaintiffs, and an alternative judgment in that connection against them for $150 in favor of the defendants. The plaintiffs having failed to restore the property to the defendants, an execution was issued upon the alternative judgment, and the sheriff was about to enforce the same when the present plaintiffs brought this action to obtain an injunction to restrain him from collecting the money, upon the ground that the property belonged to the plaintiffs, and if they paid the money they might not be able to recover the same, etc. A judge at chambers denied the motion

Digitized by Google

for an injunction pending the action until the hearing upon the merits. Afterwards the plaintiffs paid the money in discharge of the alternative judgment, and by leave of the court amended their complaint, alleging that the money so paid belonged to them, etc. On the trial, after the jury was impaneled, the defendants moved the court to dismiss the action on the grounds: (1) That the complaint did not state facts sufficient to constitute a cause of action; (2) that the alleged cause of action, to-wit, the collection of the sum of $150, has arisen since this action was brought, as appears from the supplemental complaint; (3) that there is a want of jurisdiction, in that this court cannot try an action to recover $150 alleged to have been wrongfully paid to the sheriff, when it appears that it was collected by the sheriff under process rightfully issuing from the court. Thereupon the court gave judgment for the defendants for costs. Plaintiffs excepted to the ruling of the court and the judgment, and appealed to this court.

It is not alleged that the judgment of restitution and the alternative judgment mentioned in the complaint before it was amended were in any respect improper or subject to valid objection. Indeed, inasmuch as the justice of the peace decided that he had no jurisdiction of the cause of action, and dismissed the action, it was his duty to require the property improperly seized and placed in the possession of the plaintiffs in that action to be restored to the defendants therein, and, in case of a default in this respect, that the value of the property be paid to them. The court could not allow an improper and illegal use and abuse of its authority and process to prejudice a party; nor will it allow the moving party in such case to take advantage thereby. It will, on the contrary, and it is its duty, as far as practicable, to restore the parties to the same *status* in all respects that each had when the authority of the court was at first improperly exercised, and its process put in operation. Nor will the court delay to do so, or allow its purpose to be obstructed in any way. Its integrity, duty, and absolute fairness in all things alike prompt it to such a remedial course of action. Nor will it proceed to administer the rights of the parties until such restoration shall be made. Perry v. Tupper, 71 N. C. 385; Manix v. Howard, 82 N. C. 125. The court, therefore, properly refused to grant the injunction as demanded by the complaint.

It appears from the amended complaint that the plaintiffs paid the defendants $158.17 in discharge of the alternative judgment mentioned, and they allege that the money thus paid belongs to them, and they seek to recover the same in this action. There are two insuperable obstacles that prevent such recovery: *First.* The superior court did not have original jurisdiction of the sum of money demanded. It, being less than $200, was within the exclusive jurisdiction of the court of a justice of the peace. This action is not brought to recover the property mentioned, —the plaintiffs have that in their possession, —but the money which they allege they ought not to have been required to pay, and therefore the defendants have it as money had and received to their use. Waiving all possible tort, they contend that the law implies a contract on the part of the defendants to pay their money. The demand is not therefore a tort in any possible view of it of which the superior court has jurisdiction. Winslow v. Weith, 66 N. C. 432; Latham v. Rollins, 72 N. C. 454; McDonald v. Cannon, 82 N. C. 245; Burbank v. Commissioners, 92 N. C. 257. *Secondly.* The cause of action arose after the action began. It appears from the allegations of the amended complaint that the money which the plaintiffs paid to the defendants, and which they seek to recover, was paid some time after this action was brought. It is settled that ordinarily the cause of action must have existed at the time the action began. Moreover, the introduction of such new cause of action could not be allowed, the defendants objecting, because it changed the action, and made it substantially a new one. This cannot be allowed. Kramer v. Light Co., 95 N. C. 277; Clendenin v. Turner, 96 N. C. 416; Glover v. Flowers, 101 N. C. 134, 7 S. E. Rep. 579; Bynum v. Commissioners, 101 N. C. 412, 8 S. E. Rep. 136.

Judgment affirmed.

(102 N. C. 209)

EMRY *et ux.* *v.* RALEIGH & G. R. CO.

(*Supreme Court of North Carolina.* Feb. 25, 1889.)

APPEAL—TRIAL—SPECIAL FINDINGS—OPINION EVIDENCE—NEGLIGENCE—EASEMENT.

1. The appellate court will not limit the discretion of the trial court in settling the issues to be submitted to the jury for special findings. The facts established by such findings must constitute a lawful basis for the judgment, and a party must not be denied an opportunity to have the law applicable to any material portion of the testimony fairly presented and passed on by the jury through the medium of some issue.

2. In an action against a railroad company for damages to plaintiff's crops and brick-yard, by the overflow of water from a stream alleged to be caused by the insufficient size of a culvert constructed by defendant at the place where its road crossed the stream, defendant introduced a witness who testified that he built the culvert in 1859 as contractor, and that one B., a civil engineer, had charge of its construction. Defendant then offered to show by the witness "the reputation of B. as an intelligent and expert engineer." *Held*, that this evidence was properly excluded, as it had no tendency to show whether or not the culvert was in fact adequate.

3. The same witness testified for defendant as an expert that, in his opinion, the culvert was sufficiently large for the size of the stream; that it was the largest culvert he ever built. *Held*, that it was competent for plaintiff to show, after that evidence was admitted, that a culvert built for another company, a short distance further down stream, was larger than the one in question.

4. Plaintiff testified that his brick-yard was overflowed in the fall of 1885, and again in May, 1887, causing much damage on both occasions; that the reason he again made brick at the same place after the first overflow, was because the plant had cost him a great deal of money, and the place selected

Digitized by Google

was the only one on the land suitable for brick-making. *Held*, that the court did not err in refusing to charge that plaintiff was guilty of contributory negligence. The question was for the jury, under proper instructions as to the abstract principle that plaintiff was bound to exercise ordinary care and prudence.

5. An instruction that if defendant has used its culvert, "as it now is, since 1857, then the law presumes it has a grant to do so, and the plaintiff cannot recover," is properly refused, where defendant has offered no evidence to show that it had overflowed plaintiff's land, substantially in the manner complained of, at regular or irregular intervals, during a period of 20 years. The user, in order to raise the presumption of a grant, must have been such as to have subjected defendant to an action for the trespass at any time for 20 years before its right to the easement was controverted by bringing this action.

W. H. Day, for appellant. *R. O. Burton, Jr.*, for appellees.

AVERY, J. This was a civil action tried before GRAVES, J., at May term, 1888, of the superior court of Halifax county. There was a verdict for plaintiffs, and the defendant appealed to the supreme court. The pleadings were as follows, omitting immaterial portions of them:

The plaintiffs, complaining of the defendant, allege: (1) That the defendant is a corporation duly chartered and organized under an act of the general assembly of North Carolina passed at its session in 18— and acts amendatory thereof. (2) That the plaintiff Emma J. intermarried with Thomas L. Emry many years prior to the year 1884. (3) That the *feme* plaintiff is the owner of, and for some years prior to 1884 has been the owner of, a valuable farm, adjacent to the town of Weldon, and lying upon Chockeyotte creek, and upon the upper or south side of the road-bed of the defendant, which said farm is commonly known as the "Model Farm." (4) That the defendant's track passes over said Chockeyotte creek, and the defendant, more than three years prior to the beginning of this action, negligently constructed a culvert under its said track for the passage of the waters of said creek, which it has maintained ever since, to the great nuisance of the plaintiff. (5) That in times of freshet or excessive rains the said culvert is entirely too small for the free passage of the waters of said creek, so that the said stream becomes dammed and choked up, and the waters thereof are ponded back upon the plaintiff's land, to its great injury and diminished productiveness for purposes of agriculture. (7) That in the fall or late summer of 1885 the said defendant wrongfully and negligently, by means of its said culvert, as aforesaid, caused the waters of said creek to pond back upon plaintiff's land, and brick-yard situated thereon, and destroyed 175,000 brick, the property of the plaintiff, standing thereon, worth $5 per thousand, and accumulated clay and débris upon the said brick-yard of the plaintiff, to her damage $1,075. (8) That about May or June, 1887, the said defendant wrongfully and negligently, by reason of its said culvert as aforesaid, caused the waters of said creek to pond back upon the plaintiff's land and brick-yard situated thereon, and destroyed 75,000 brick situated thereon, the property of plaintiff, worth $5 per thousand, and accumulated clay and débris upon said yard, to her damage $475, and destroyed the plaintiff's crop growing upon said land, to her further damage $900. (9) That about the last of October or first of November, 1887, the said defendant negligently and wrongfully caused the water of said creek to pond back upon the plaintiff's land and brick-yard as aforesaid, by means of said culvert, and destroyed 15,000 brick, the property of plaintiff, standing upon said yard, which said brick were worth $5 per thousand, and accumulated clay and *débris* thereon, to the plaintiff's damage $125. (10) That the annual damage to the plaintiff's crops of grass, oats, corn, etc., has been $500 per year for the past three years. Wherefore the plaintiff prays judgment for $4,000 damages, and costs.

ANSWER.

The defendant, answering the complaint herein, says: (1) That sections 1 and 2 are admitted. (2) That section 3 is admitted, with the following modification, *i. e.*, that the farm of the plaintiff known as the "Model Farm" does not abut on or touch the road-bed or right of way of the defendant. (3) That section 4 is denied as therein charged; and in answer thereto the defendant says that, more than 20 years before the commencement of the plaintiff's action, the defendant caused to be constructed over the said creek, by skillful engineers, and with the utmost care, the said culvert as a part of its road-bed and track, which it was duly and legally authorized to do; and this defendant is informed and believes, and so avers, that the said culvert in no way obstructs or impedes the natural flow of the water in and along said creek, but, on the contrary, the capacity of said culvert exceeds many times the capacity of the channel of said creek; and this defendant denies that it has unlawfully, negligently, or willfully erected or maintained any nuisance to the plaintiff by the construction of said culvert. (4) That section 5 of the complaint is not true, and is denied; and, further answering said section, this defendant says that the culvert of the defendant exceeds many times the natural capacity of said creek, and that the overflow of the plaintiff's said land is caused by the negligence of the plaintiff in not removing obstructions from and near the bed of said creek, so as to allow a free discharge of the surplus waters thereof,—all of which said obstructions are above the defendant's culvert and right of way. (5) That section 7 of the complaint is not true, and is denied; and, as a further answer thereto, this defendant says that, prior to placing their brick-yard on said "Model Farm," the plaintiffs well knew that said yard was subject to overflow, both from the Roanoke river and

Digitized by Google

said creek, in times of freshets therein, and the defendant alleges that the plaintiffs were guilty of contributory negligence in placing their said brick-yard on said farm. (6) That section 8 of the complaint is not true, and is denied; and, further answering said section, this defendant says that the damages to said plaintiff's brick-yard and bricks were caused by the contributory negligence of plaintiffs, as set out in section 5 of this answer; and that as to the alleged damages of the plaintiff's growing crops, if any, this defendant alleges the same was caused by the negligence of the plaintiff in not causing his said land to be properly drained, and in not removing obstruction to the flow of the water in said creek. (7) That section 9 of the complaint is not true, and is denied; and, for further answer thereto, this defendant adopts the next two preceding sections of this answer as an answer thereto. (8) That section 10 of complaint is not true, and is denied; and, for further answer thereto, defendant alleges that the alleged damage to plaintiff's crop, if any, was caused by the negligence of the plaintiff, as hereinbefore set out and pleaded. And for a further defense to the plaintiff's said action these defendants say that the alleged damages charged in complaint, if any, were the result of unusual and excessive rain, which no care, caution, or foresight of the defendant could have prevented, and the defendant alleges that it was guilty of no negligence or want of due care in the construction and maintenance of its said culvert; and, for a further defense, this defendant says that, more than 20 years before the commencement of this action, it erected its said culvert of its present dimensions, and has been in the peaceable and undisturbed possession and maintenance thereof since then up to the bringing of this action, and that the then owner of the plaintiff's land assented and agreed to the building of said culvert. Wherefore defendant asks judgment that he go without day, and for his costs.

AMENDED COMPLAINT.

The plaintiff, by leave of the court, amends his complaint by striking out in section 5, line 2, the word "excessive," and inserting in lieu thereof the word "heavy."

The plaintiff offered issues numbered 1 and 2, and the defendant offered issues numbered 3 and 4. The issues thus submitted were approved by the court, and submitted to the jury After the charge, and before the jury retired, the court directed issue No. 4 to be divided, and the issues submitted were as follows: (1) Has the defendant negligently ponded water back upon the plaintiff's land? (2) If so, what damage has plaintiff sustained thereby? (3) Have the plaintiffs been guilty of contributory negligence? (4) How long has defendant been using the culvert in its present condition? (5) And has the user given the defendant an easement in the lands of plaintiff? To this defendant excepted. The defendant asked that this issue be submitted to the jury: "What was the depth of rainfall on 10th May, 1887? Was the rainfall of 10th May, 1887, excessive and extraordinary?" This was refused, and the defendant excepted. The defendant asked to have this issue submitted to the jury: "What damages did plaintiff sustain by the ponding back of the water on that occasion?" meaning 10th May, 1887. The court declined to submit this issue, and defendant excepted.

There was much evidence offered on both sides, and it seems material to set out a good deal of it in order to present the several exceptions made. The complainant, T. L. Emry, testified: "My wife owns and had owned the land known as 'Model Farm' 14 years at the time of bringing this suit. That the tract of land did not adjoin the railroad track of defendant, but lies to the south of the road, on Chockayotte creek, above the culvert. The culvert at the base is 16 feet wide. The stream just above the culvert is 26 feet wide. The length of the embankment is more than 100 feet. Close to the culvert, below, the creek is 25 or 26 feet wide, and then it widens out and deepens, being 36 feet wide. Seemed to be 8 or 9 feet deep. We measured from water's edge when low; 12 inches above low water, spreads out a hundred or two feet. There is eddy or back-water within a foot or two of lower edge of culvert. I noticed that the water rushes through and had undermined the culvert, so that some of the large stones of which it was built have cracked." The plaintiff then offered to prove that some 200 yards below, on the same stream, the Roanoke Navigation Company had constructed a culvert, before defendant, which is 26 feet wide; but, upon objection, this testimony was then excluded. The witness then testified that in time of heavy rains, when the creek is swollen, the water is ponded back on the land; that much of the land is rich, alluvial land; that it is not all low bottom; that on the land is clay suitable for making bricks; that he had made a brick-yard; that in the fall of 1885 he had been damaged by the ponding back of water on the land. That his crop was injured, and he had lost 175,000 unburnt, sun-dried brick, which had been packed under shelter. The water did not go over top of the stack, but came up to the lower part, and the brick softened and mashed, and others came down, and were softened and mashed down in the same way. Brick worth $5 per thousand. At that time the water was 10 or 12 feet higher above the culvert than it was below. That in May, 1887, the water was ponded back over his land. Land rich, partly in clover, partly in oats, and partly in other crops. The witness testifies as to the damage to the crop, but as to that it is not deemed material to set out the particulars. At this time witness had about 75,000 bricks destroyed at same place, and in same manner, as in 1885. Again in October, 1887, about the time of the fair, water ponded back again; destroyed 15,000

Digitized by Google

brick. For agriculture for 1885–86, damages, $400 to $500 per year. The water was ponded back at almost every rain by the culvert. The land was well ditched. Any ordinary size rain would pond it back on the farm. It takes a larger rain than ordinary to pond it back on the brick-yard. On the cross-examination of witness, he said: "There is a mill-dam below the culvert, I do not know how high, which has been there 8 or 10 years. The rain in May, 1887, was a big rain, but I do not know that it was extraordinary. Culvert is higher 25 to 30 feet. No freshet in river when my brick were destroyed." In reply to question as to "why did you not make your brick-yard out of reach of the water after your bricks were destroyed the first time?" witness said: "The brick-yard had cost me a great deal, and I took the risk;" and afterwards said it was the only suitable place for making brick. I have omitted much of the details in regard to damages to brick, etc., not deemed material. By consent, defendant was allowed to introduce, out of the regular order, the witness, P. B. Hawkins, who testified: "I built the culvert in 1859. I was contractor for the work. Bodwell, a civil engineer, had direction of the construction." The defendant offered to show by witness the reputation of Bodwell as an intelligent and expert engineer.

Plaintiff objects. Objection sustained. Exception by defendant. Witness qualified himself as an expert, and further testified: "I think the culvert sufficiently large culvert for the size of stream. I thought it sufficient to carry off any rise. Largest culvert I ever built." Upon cross-examination, witness said: "If the jury find as a fact the water was ponded back ten or twelve feet higher above the culvert than below, it would not be sufficient." T. A. Clark, a witness introduced by defendant, testified "that under the authority of the war department he had kept a record of rain-fall in Weldon for past 17 years. That on the 10th day of May, 1887, 6.63 inches of rain fell. Fell from 9 A. M. to midnight. This was an extraordinary fall of rain. No such rain has fallen since I have kept record." The plaintiff was permitted, after objection by defendant, to ask the witness Clark "if ponding back or accumulating water on the Model Farm in the spring or summer time tended to injure health?" Objection overruled. Exception by defendant. Witness answered: "It would depend upon how long water stayed; if it became stagnant, it would." Defendant objected to answer. Overruled. Defendant excepts. The plaintiff proposed to show that the culvert below was larger. Defendant objects. Court, being of opinion that defendant had opened the door by the examination of the witness Hawkins, allowed witness to testify. Dr. O'Brien, a medical expert introduced by the defendant, was asked by the plaintiff: "If the jury believe, in time of large rain, large quantities of water are ponded back on Emry's Model farm, on which the vegetation is rank, what would be the effect upon health?" Defendant objects. Overruled. Exception by defendant. Witness answered: "Rank vegetation would be killed by water and exposure to sun; in the summer-time would produce malaria." Objection to answer by defendant. Overruled. Exception by defendant.

The defendant prayed the following instructions: "(1) If the jury shall believe that in May, 1887, a rain-fall of over 6 inches fell, said fall of rain excessive and extraordinary, and if the jury shall believe that damage was sustained thereby, the defendant is not liable therefor. (Refused, except as is hereinafter set out in charge. Defendant excepts.) (2) That if the jury shall believe that the plaintiffs knew, or had cause to know, at the time they placed the brick at the place they did, that it was subject to overflow, then it was contributory negligence, and they will answer the issue 'Yes.' (Refused, except as is hereinafter set out in charge. Defendant excepts.) (3) That if the plaintiffs knew at the time they planted their crops on the Model farm that it was subject to overflow, then they have contributed to the damage, and the jury will find issue, 'Yes.' (Refused, except as is hereinafter set out in charge. Defendant excepts.) (4) That if the defendant has used its culvert as it now is since 1857, then the law presumes it has a grant to do so, and the plaintiff cannot recover. (Refused, except as is hereinafter set out in charge. Defendant excepts.")

The defendants also asked this instruction: "That there is no evidence that the maintenance of the culvert by the defendant in its present condition is a public nuisance;" which was given by the court.

The court then instructed the jury as follows: "The first issue is, has the defendant negligently ponded water back upon the plaintiff's land? The burden rests upon the plaintiff to satisfy you by a preponderance of the testimony, *i. e.*, by the greater degree of credence raised in your minds. Now, what is the truth of this matter? No question is made about the building of the railroad and the construction of the culvert, for the defendant admits so much. The defendant says that, although it had constructed the culvert, it was built in such manner and with such care that injury to the plaintiff was not to have been anticipated. It was the duty of the defendant to have constructed its culvert so that would carry off the water of the stream under all ordinary circumstances and the usual course of nature, even to the extent of such heavy rains as are ordinarily expected, unless it has the right of grant actual or presumed to make it smaller. If the defendant so constructed the culvert that it was not sufficient to carry off the water of the stream under ordinary circumstances, (and by ordinary circumstances is meant the usual rain-fall,) even if such heavy rains are occasional, and if by reason of the insufficient culvert

Digitized by Google

the plaintiff's land was overflowed, the answer to the first issue should be, 'Yes,' unless the defendant had acquired the right to pond water on the plaintiff's land. As to whether the defendant had such right I will instruct you when I come to speak of the fourth issue. On the other hand, if the jury shall believe that the plaintiff's land was flooded from the creek, and not by back-water from culvert, then it was not done by the negligence of the defendant, and the issue should be answered, 'No.' And if the jury shall believe that the mill-dam below the culvert obstructed full flow of the water, so that it did not flow freely through the culvert, as it would have otherwise done, and that if it had not been for the mill-dam the water would not have ponded back on the plaintiff's land, then your answer should be, 'No;' for the defendant is not responsible for the overflow caused by the mill-dam. It can be only responsible for its own act, not for the acts of others. If the jury shall believe that the culvert is sufficient to carry off all the water having a natural outlet by the creek, except in cases of extraordinary and unusual rainfall, then defendant was not negligent, and, if the overflow was the result of extraordinary rain-fall, the answer should be, 'No.' But whether there was overflow of plaintiff's land, whether such overflow was caused by heavy rains such as are not unusual and the obstructed flow of the water by the culvert, or whether the culvert was sufficient to carry off the water under ordinary circumstances, or whether the overflow was all the result of extraordinary rain-fall, are questions for you to say. Perhaps it may be proper for me to say that, if you find the first issue, 'No,' that is an end of the case. But if you should answer, 'Yes,' then it becomes material to consider and determine other issues. I shall next call your attention to the fourth issue. (This issue was afterwards divided, and constitutes the fourth and fifth issues as found in the record.) The fourth issue is compound. The first question presented is as to how long the defendant has been using the culvert in its present condition. This is merely a question of fact, upon which I can give you very little assistance. You must determine it upon the evidence. The second part of the issue is: 'And had the user given the defendant an easement on the land of the plaintiff?' It is insisted by the defendant that, having used the culvert for more than 20 years before the plaintiff began his action, it has acquired a right, not only to use it for its own purposes, but to use it although it may have the effect of ponding back water on the land of the plaintiff. It is true that a right to pond water upon the land of another may be acquired by actually ponding it back and keeping it so ponded back for 20 years. It is not necessary that it should be kept continually ponded to the same height, when the difference is made by low-water in time of drought, or for repairs. As in case of mill-ponds, if a dam is erected and kept up, and the water is ponded back for 20 years, the owner of the mill acquires an easement to pond the water back over the land covered by the mill-pond, when as full as usual, although it may have been taken down for repairs, and although it may occur that by reason of drought, or by reason of defects in the dam itself, temporarily the water may have been part of the time lower. The defendant assumes the burden of proof when it undertakes to show its right to pond water back on the land of plaintiff, and it must show it by a preponderance of evidence. (Exception by defendant.) If the jury is satisfied that the defendant has for 20 years ponded water back on the land of plaintiff in such a way as to expose itself to action for such ponding for 20 years before this suit was begun, then the defendant had acquired a right to pond the water back on the plaintiff's land. (Exception by defendant.) In determining this question of easement, and fixing the time of the 20 years, the jury must count out the time from the 20th May, 1861, to the 1st January, 1870. In fixing the beginning, the jury must find the time that defendant's claim began,—the time its right was first asserted by an actual ponding back upon the lands now claimed by the plaintiff. It makes no difference whether the land was then owned by the plaintiff, or by those under whom she claims. [In order to acquire a right by prescription, the user must have been continuously asserted and enjoyed without interruption for 20 years; and, if the ponding back of water on the land of plaintiff was at long intervals, such occasional trespasses could not ripen into title.] (Defendant excepts to portion of charge in brackets.)"

On the subject of contributory negligence, his honor instructed the jury that if the circumstances were such that a man of ordinary prudence would have planted his crops and put his bricks on the land, then the plaintiff was not negligent. If the defendant had a right by prescription to pond back the water, (if it did pond it back,) then the plaintiff would be guilty of negligence in placing his bricks or planting his crops on the land, and the jury should answer the third issue, "Yes." But if defendant had no right to pond back the water, (if it did pond it back,) and a man of ordinary prudence would have so planted his crops and placed his bricks, then the plaintiffs were not guilty of negligence in so planting his crops and placing his bricks on the land. Defendant excepted. His honor also further charged the jury that the measure of damages was the actual injury sustained by plaintiff's crops and bricks. Verdict for plaintiff as before stated. Defendant moved for a new trial: (1) For admission of improper testimony; (2) for failure to instruct as requested; (3) for error alleged in charge given. Then defendant moved for judgment upon the verdict Motion overruled. Judgment for plaintiff. Appeal by defendant.

Digitized by Google

JUDGMENT.

"This cause coming on to be heard, and having been tried by the jury upon the following issues: (1) Has the defendant negligently ponded water back upon the plaintiff's land? (2) If so, what damage has plaintiff sustained thereby? (3) Have the plaintiffs been guilty of contributory negligence? (4) How long has defendant been using the culvert in its present condition? (5) And has the user given the defendant an easement in the lands of plaintiff? And the jury having answered the first issue, 'Yes;' the second issue, '$1,870;' the third issue, 'No;' the fourth issue, 'Since it was built, with the exception of the cracks, August, 1857,' and the fifth issue, 'No,'—it is now, on motion of R. O. Burton, Jr., plaintiff's attorney, adjudged that the plaintiffs recover of the defendant the sum of one thousand eight hundred and seventy dollars, with interest from the 1st day of this term till paid, and the costs of this action, to be taxed by the clerk.

"J. F. GRAVES, Judge Presiding."

From this judgment the defendant appeals to the supreme court.

The action was brought to recover damage for injury done to plaintiff's brick-yard in the year 1885, and again in May, 1887, and to his crops, by overflows caused by the defective construction of a culvert over a creek on the defendant's land.

The first and second exceptions present the question whether his honor erred in refusing to submit two additional issues tendered by defendant's counsel. It was not the design in adopting the new procedure that parties should be bound by rules so technical as those which governed the old system of pleading. The forms of action being disregarded, and it being requisite only, under the Code, to allege the material facts in the complaint, and to admit or deny the allegations in the answer, ordinarily it must be left to the sound discretion of the *nisi prius* judge to determine, when required or allowed to settle the issues, whether the action can be tried more intelligently and satisfactorily by the jury upon specific issues, submitted for the purpose of eliciting distinct findings in the nature of a special verdict, or by confining the inquiry, in imitation of the old method, to a single issue or a small number of issues, and pointing out by instruction how the conflicting evidence, controverted in the pleadings and on the trial, though not involved in the terms of the issues submitted, bears upon the verdict to be rendered in response to them. But the issues submitted must be such as are raised by the pleadings. It is misleading to embody in one issue two propositions, as to which the jury might give different responses, and, on exception taken in apt time, a new trial will in such cases be granted. The facts found by the jury, whether comprehended under one or many issues, must be sufficient to enable the court to proceed to judgment. When the judgment can be predicated upon the findings, though it may appear that the judge who tried the cause below refused to submit more specific issues tendered by a party, yet if he told the jury how the testimony relating to the issues refused should be considered in connection with the law in passing upon those submitted, and thereby gave opportunity to enter exception to the instruction given, and to the refusal to give that asked, the appellate court will not grant a new trial. The court will impose no limit to the exercise of discretion on the part of the judge below in settling the issues, except that the facts established by the response to them shall constitute a lawful basis for the judgment, and that an appellant was not denied an opportunity to have the law applicable to any material portion of the testimony fairly presented and passed upon by the jury through the medium of some issue.

The defendant contends that there was error in declining to submit to the jury the two issues offered: "(1) What was the depth of rain-fall on 10th of May, 1887?" "Was the rain-fall 10th of May excessive and extraordinary?" "(2) What damage did plaintiff sustain by ponding back of the water on that occasion?" His honor presented the whole question of negligence on the part of the defendant in the first of the five issues, to which the jury responded, and which is in the following language: "Has defendant negligently ponded water back upon the plaintiff's land?" The judge instructed the jury upon the question of negligence on defendant's part as follows: "It was the duty of defendant to have constructed its culvert so it would carry off the water of the stream under all ordinary circumstances and the usual course of nature, even to the extent of such heavy rains as are ordinarily expected, unless it has the right of grant actual or presumed to make it smaller. If the defendant so constructed the culvert that it was not sufficient to carry off the water of the stream under ordinary circumstances, (and by ordinary circumstances is meant the usual rain-fall,) even if such heavy rains are occasional, and by reason of insufficient culvert the plaintiff's land was overflowed, the answer to the first issue should be 'Yes,' unless the defendant had acquired the right to pond water on the plaintiff's land." We think his honor stated the law correctly, and is sustained by the case of Wright v. Wilmington, 92 N. C. 156, and the authorities there cited; also 2 Wood, Ry. Law, § 253, p. 873. By applying the law as there stated by the court, the jury would naturally determine from the testimony whether the rain-fall of the 10th of May, 1887, or that in the year 1885, was so extraordinary and excessive that it could not have been reasonably expected to fall, and, if such was the character of the rain at either date, they would naturally leave out any injury sustained by such a rain-fall in making the estimate of the damage, or if they found that all the damage sustained by the plaintiff, both in his brick-yard and as to his crops,

Digitized by Google

was attributable to extraordinary rains, they would of course respond "No" to the issue. His honor, in addition to the language quoted from his charge, told the jury that the defendant was "not negligent if the overflow was the result of extraordinary and unusual rain-fall," etc. The defendant introduced a witness, P. B. Hawkins, who testified that he built the culvert in 1859, was contractor for the work, and that one Bardwell, a civil engineer, had direction of the construction. The defendant offered to show by the witness Hawkins "the reputation of Bardwell as an intelligent and expert engineer." On objection by the plaintiffs, the testimony was held to be incompetent, and the defendant excepted. Counsel, on the argument in this court, did not abandon this exception, but failed to cite any authority in support of it, and we cannot see how the fact that the engineer who had the oversight of the construction of the culvert was an intelligent and expert engineer tends to show that the culvert was in fact so constructed as to carry off any but an excessive fall of rain. The plaintiff had, before the introduction of the witness P. B. Hawkins, "offered to prove that some two hundred yards below, on the same stream, the Roanoke Navigation Company had constructed a culvert before defendant, which was twenty-six feet wide," but, upon objection by defendant, the testimony was then excluded. The witness Hawkins, having qualified himself to speak as an expert, said: "I think the culvert a sufficiently large culvert for the size of the stream. I thought it sufficient to carry off any rise. It was the largest culvert I ever built." Subsequently the court, being of opinion that the defendant, by the examination of Hawkins, had "opened the door," and made the evidence previously excluded competent, allowed a witness to testify, after objection on the part of defendant, that the culvert built for the Roanoke Navigation Company, 200 yards below, on the same stream, was larger than that built by Hawkins, and this is the ground of another exception relied on by defendant. We concur with his honor in his ruling. Hawkins had qualified as an expert, as we may fairly infer from the record, in part at least, by showing his experience as a contractor for work on railways; and at any rate he had been allowed, after stating that he built that particular culvert, to testify, further, that it was the largest he had ever built,—the natural inference being that he had constructed a number, and this was of unusual capacity. In order to break the force of this testimony, it was competent for the plaintiff to show that another had been built so near below that the volume of water in the stream would not probably be materially increased before reaching it, or certainly to show that another and larger one was very near, and in that way to meet the argument (which defendant's counsel might make to the jury) that an expert and experienced engineer had never constructed one that would allow so much water to pass. Hawkins might have been asked, on cross-examination, and with a view to impeach him or destroy the weight of his testimony as an expert, what the dimensions of the lower culvert were. 1 Greenl. Ev. § 468. But we think that the testimony of Hawkins tended to show that the defendant had not done the work in a negligent or unskillful manner, by impressing the jury with the idea that no larger culvert had ever been constructed, because an educated and intelligent contractor had not, in the years of experience that had made him an expert, built one so large. This is only a fair inference from the testimony, and it would follow that testimony as to the location and capacity of the lower culvert must of necessity tend to remove the incorrect impression made by Hawkins' testimony, and in that way bear directly upon the question of negligence involved in the first issue.

The testimony, offered to prove that the stagnant water engendered malaria and caused sickness, was withdrawn from the jury, and the exception growing out of its introduction was not insisted on in this court.

Counsel for the defendant contends that there was error in the refusal to give the instruction prayed for in reference to contributory negligence, and in giving that substituted by his honor for it. Indeed, in the argument in this court, counsel went further, and cited a number of authorities to establish the position that this is a case in which, upon the undisputed facts, the jury should have been told there was contributory negligence on the part of the plaintiff. The plaintiff T. L. Emry testified that in the fall of 1885 his brick-yard was overflowed, and in May, 1887, it was again submerged, and that the *feme* plaintiff suffered great damage on both occasions in the destruction of brick. In reply to a question, he stated, as a reason why he again made brick at the same place after the overflow in 1885, that the preparation of the brick-yard had cost him a great deal of money, and that the place selected was the only place suitable for making brick on the land. It is insisted that there was a want of ordinary care shown by the plaintiffs in manufacturing brick a second time in a place that had been overflowed nearly two years before. If the jury had not found that there was negligence on the part of the defendant in response to the first issue, then, under the instruction of his honor, it would have been unnecessary to proceed to consider the third, which involved the question of contributory negligence. So we must assume that the jury agreed upon the affirmative answer to the first issue before discussing the third. We cannot, upon reason or authority, reach the conclusion that the plaintiffs exhibited a want of ordinary care by manufacturing brick in the year 1887 because the brick-yard had been damaged in 1885, nor that they were negligent in planting another

Digitized by Google

crop in the latter year on land that had been overflowed two years before; for the reason that the defendant company, by the careless and unskillful construction of its road in the failure to provide adequately for the escape of the water of the creek even when there was no extraordinary volume, had subjected the plaintiffs to some risk in raising the usual crops on the farm, or attempting to utilize the only suitable place for manufacturing brick on that tract of land. It is often difficult to determine where the admitted evidence in a case crosses the shadowy line, and compels the court to take the case from the jury, and declare as the law that contributory negligence has been proved. The application of the rule that when the facts are ascertained the question whether there has been negligence or contributory negligence is one addressed exclusively to the court is attended with difficulty, because it seldom happens that the facts in any two cases are precisely the same. When there is any conflict in the testimony, the court will lay down the rule of law and define the standard of care necessary, but leave the jury to decide whether, under the circumstances, ordinary care was exercised by a defendant.

The defendant has no reason to complain that the court allowed the jury to apply as the test the abstract principle that the plaintiffs were bound to exercise that degree, and only that degree, of care which a man of ordinary prudence would exhibit in the management of his affairs, and refuse to sustain the unreasonable proposition that a prudent man must either allow his land to remain uncultivated, and his brick-yard with his investment for manufacturing to be abandoned, or incur the risk of losing the fruits of his labor, because he had some reason to fear that by the negligent construction of a culvert the crop or the brick might be injured or destroyed. 2 Wood, Ry. Law, § 300, and note. The authorities cited by defendant do not sustain the position either that the court erred in refusing to give the instruction asked, or in the failure to go further in that given, and tell the jury that the admitted facts were sufficient proof of contributory negligence. The authority to which counsel refers us is not applicable to the facts of this case. Beach, Contrib. Neg. §§ 12, 13. The author says, (section 162:) "It is for the court to say in a majority of instances what is and what is not negligence as an abstract proposition. When, therefore, the facts of a given case are undisputed, and the inferences or conclusions to be drawn from the facts indisputable, when the standard of duty is fixed and defined so that a failure to attain it is negligence beyond a cavil, then contributory negligence is matter of law. * * * When the facts are unchallenged, and are such that reasonable minds could draw no other inference or conclusion from them than that the plaintiff was or was not at fault, then it is the province of the court to determine the question of contributory negligence as one of law." He cites Field on Damages, (page 519,) to the effect that, "to justify a nonsuit on the ground of contributory negligence, the evidence against the plaintiff should be so clear as to leave no room for doubt, and all material facts must be conceded or established beyond controversy." The learned author concludes that, in a majority of cases, the question of the plaintiffs' negligence will be one of fact, to be ultimately determined by a jury. In Railroad Co. v. Van Steinburg, 17 Mich. 120, (cited by the author,) Judge COOLEY says: "The case must be a very clear one which would justify the court in taking upon itself this responsibility." Speaking of the finding by the court that there was contributory negligence in any given case, the learned judge says, further: "He thus makes his own opinion of what would be generally regarded as prudence a definite rule of law. It is quite possible that if the same question of prudence were submitted to a jury, collected from the different occupations of society, and, perhaps, better competent to judge of the common opinion, he might find them differing with him as to the ordinary standard of proper care."

The last exception grows out of the refusal to give the instruction asked, that, "if the defendant has used its culvert as it now is since 1857, then the law presumes it has a grant to do so, and the plaintiff cannot recover." The injury resulting from the unskillful construction of culverts cannot be estimated as a part of the damage for right of way, and the grant from the land-owner or the proceeding for condemnation, to which he and the corporation were parties, would not operate as an estoppel in an action brought by him for injury caused by the unskillful construction of culverts, and consequent damage to land located beyond the right of way. The owner of adjacent land can, of course, resort to the common-law remedy for damage sustained by him in the overflow of his land, directly consequent upon such carelessness on the part of the said railroad company in the construction. 2 Wood, Ry. Law, § 253, p. 876. His recovery can be defeated only by proof of a prescriptive right acquired by user to maintain the culvert in its present state, with the consequent injury. The right by prescription could be acquired by the defendant by user for 20 years, and the user, in order to raise the presumption of a grant from the quiet enjoyment of the easement, must have been such as to have subjected the claimant to an action at any time for 20 years before his right to the easement was controverted by the bringing of this action. The defendant must show, too, in order to establish his right to the easement, "that the user at the time when the action was brought was not substantially in excess of that which he has exercised during the period requisite to the right." Sherlock v. Railway Co., 17 N. E. Rep. 171. To apply that rule to this case, the burden was on the defendant to show not

Digitized by Google

that the overflow has constantly extended over a fixed territory on the plaintiff's land, or varied only with the water-mark, for 20 years, but at regular or irregular intervals the water has overflowed the very land on which the bricks were destroyed or the crops injured, and to the same extent so as to have made the defendant liable in an action for or in the nature of trespass by the *feme* plaintiff, and those under whom she claims, at any time during that period. The floods occurring at intervals must have always covered the land on which the crops were raised or the bricks were made in order to establish an easement that would prove available as a defense to the one ground of action or the other. Wood, Lim. Act. § 182, p. 377; Sherlock v. Railway Co., (Ind.) 17 N. E. Rep. 171.

The defendant has not attempted to establish the prescriptive right by offering any evidence to show that the land has been overflowed. So far as we can judge from the report of the evidence, which does not purport to be full, there was no proof offered as to the nature or extent of the overflow, except that offered by plaintiffs in support of their demand for damages, and covering only three years prior to the bringing of the action. The proof by the plaintiff that ordinary rains for four years prior to the bringing of the action had been sufficient to cause the overflow of the brick-yard and the cultivated land of the *feme* plaintiff does not supply the omission of the defendant company or relieve it of the burden. It does not follow that the overflow has been uniform, so as to subject the company to an action in favor of those under whom she claims for the previous time, extending back 20 years; for changes in the system of drainage by land-owners above, and the clearing of lands, might have increased the volume of water in the creek, and caused it to overflow more readily. But such alterations would not have relieved the defendant company of liability, resulting directly from the insufficiency of its culverts to discharge the water. No such testimony having been offered by the defendant, the complaint that his honor left the jury to pass upon the question whether an easement had been acquired ought not to come from it. We conclude, therefore, that there was no error, and the judgment must be affirmed.

(85 Va. 936)

SAUNDERS v. JAMES *et al.*

(*Supreme Court of Appeals of Virginia.* March 28, 1889.)

JUDGMENT—EQUITABLE RELIEF.

In a suit by a creditor to set aside a judgment confessed by his debtor in favor of A., the complainant charged in his bill that the judgment and the note upon which it was founded were wholly without consideration, and a device to defraud creditors; and asked that the defendants be required to answer upon oath all the allegations of the bill, and specifically to make discovery as to the consideration for the said note. The answer of the defendants set out that a sum of money, realized by A. on the sale of certain property, had been deposited with the debtor for safe keeping, and that the debtor had used a portion of such sum in his business, and that the note in question was executed for the portion of the money so used. *Held*, that the answers were fully responsive, and the complaint was properly dismissed.

Appeal from circuit court, Lancaster county; J. M. JEFFRIES, Judge.

R. L. T. Beale, for appellant. *W. A. Jones*, for appellees.

FAUNTLEROY, J. This is an appeal from a decree of the circuit court of Lancaster county, pronounced on the 14th day of July, 1887, in a cause in said court pending, in which R. M. Saunders is complainant, and A. James, Sr., and A. James, Jr., are defendants. The suit was instituted by R. M. Saunders, a judgment creditor of A. James, Sr., to avoid and set aside a prior judgment confessed by the said A. James, Sr., in favor of a son, A. James, Jr., on the 2d day of April, 1884, for a debt of $800, evidenced by the note of the firm of A. James & Son, dated the 2d day of April, 1882. The bill, which is a bill for discovery and relief, charges that the said note for $800, and the judgment on it, are wholly without valuable consideration, and but a device to delay, hinder, and defraud the said R. M. Saunders, and other creditors of the said A. James, Sr., in the recovery of their just debts; that no such debt was in fact due by the said A. James, Sr., to his son, Alonzo; that it is fraudulent in fact and in construction. The defendants are called upon and required to answer upon oath all the allegations of the bill, and are specially and specifically required to make discovery as to the consideration for the note upon which the judgment was confessed. The answers of the defendants (appellees) set forth the facts that A. James, Sr., and G. E. James were partners in the mercantile business, under the firm name of A. James & Son; that in October, 1881, A. James, Jr., sold a vessel for $2,300, of which amount he deposited for safe-keeping with A. James & Son the sum of $1,060; that of this deposit G. E. James, as the managing member of the firm of A. James & Son, used $800 in and about the business of the firm, and that this was the $800 for which the appellee A. James, Sr., confessed the judgment in question. Every allegation of the bill is clearly, specifically, and unequivocally answered, and the answers are pertinent, and fully responsive. The cause was heard in the circuit court, "upon bill, answers, with replications thereto, exhibits, and argument of counsel, on consideration whereof the court, being of opinion that the plaintiff has wholly failed to sustain the allegations of his bill, doth adjudge, order, and decree that the said bill be dismissed," with costs, etc.

We are of opinion, upon a careful inspection of the record, that the charge of fraud, made in the appellant's bill, is utterly unsustained by evidence; and, the charge being positively denied in the answers of the appellees, which answers are responsive and une-

Digitized by Google

quivocal, and furnish detailed statements of the facts and circumstances connected with the execution of the note, and the confession of the judgment upon it, which are satisfactory and reasonable, the complainant's bill was properly dismissed. There is no error in the decree of the circuit court appealed from, and it must be affirmed.

(85 Va. 918)

COMMONWEALTH v. HURT.

(*Supreme Court of Appeals of Virginia.* March 21, 1889.)

VIRGINIA COUPONS.

Code Va. § 412, provides that, when a paper purporting to be a coupon cut from a state bond, is offered in evidence, the burden of showing its genuineness shall be on the party offering it. The party contesting its genuineness may call for the production of the bond from which it was cut, and the plaintiff shall be required to produce the bond as a condition precedent to his right of recovery *Held*, in an action to try the genuineness of coupons tendered for taxes, that the commonwealth can question the genuineness of the bonds so produced without filing a plea of *non est factum*.

Error to corporation court of Lynchburg; CHARLES P. LATHAM, Judge.

R. A. Ayers, Atty. Gen., for the Commonwealth.

LEWIS, P. This was a proceeding in the corporation court for the city of Lynchburg, to try the question whether certain alleged tax-receivable coupons, which had theretofore been tendered by the plaintiff to John W. Bransford, treasurer of the said city, in payment of certain taxes due by the plaintiff to the commonwealth, were genuine coupons, and legally receivable for such taxes. The proceeding was under sections 406–408, 412, Code. The last-mentioned section enacts as follows: "Where any paper purporting to be a coupon cut from a bond of the state is offered in evidence in any case, the burden of showing its genuineness shall be on the party offering it. If the paper be printed, engraved, or lithographed, expert testimony shall not be received to establish such genuineness. At the hearing, or on the trial of the issue, the party contesting the genuineness of such coupon may call for the production of the bond from which the coupon was detached, and the plaintiff shall be required to produce the bond as a condition precedent to his right of recovery."

The plaintiff, not contesting the constitutionality of this legislation, but impliedly, at least, conceding its validity, produced in court at the trial the bonds from which the coupons in question had been detached, which purported to be bonds of the state; whereupon counsel for defendant proposed to interrogate the witness by whom the bonds were produced as to the genuineness of the signatures to the bonds. But to this counsel for the plaintiff objected, and the court sustained the objection, and declined to permit evidence upon the point to be introduced, unless the defendant should first file a plea of *non est factum* as to the said bonds, to which ruling of the court the defendant excepted; and, a verdict and judgment having been rendered for the plaintiff, the case, on a writ of error, was brought to this court.

We think the ruling of the corporation court complained of is erroneous. Upon the production of the bonds it was competent for the commonwealth to show, if she could, that the bonds were not genuine, in order to show that the coupons detached from them were spurious, and therefore not "legally receivable for taxes," and to show this it was not necessary that a plea of *non est factum* should have been filed. Indeed, it would have been irregular to have filed such plea. No such proceeding is sanctioned or contemplated by the statute. The proceeding was not based upon the bonds, but the question upon which issue was joined was whether the coupons in question were genuine tax-receivable coupons, and the bonds were produced merely as evidence to sustain the issue on the part of the plaintiff. If the bonds were genuine, the right of the plaintiff to recover is not denied; but if they were not genuine, and that fact had been established, then the commonwealth would have been entitled to a verdict and judgment in her favor. The course of examination sought to be pursued by counsel for the defendant was therefore legal and proper, and ought to have been permitted. We are therefore of opinion to reverse the judgment, and to remand the case for a new trial.

COMMONWEALTH v. ADAMS *et al.*

(*Supreme Court of Appeals of Virginia.* March 21, 1889.

Error to corporation court of Lynchburg; CHARLES P. LATHAM, Judge.

Action by Adams Bros. & Paynes, to try the genuineness of certain coupons purporting to be cut from bonds of the state, tendered by them in payment of taxes due the commonwealth.

R. A. Ayers, Atty. Gen., for the Commonwealth.

LEWIS, P. This case is in all respects like the case of Com. v. Hurt, ubi supra, (just decided.) We are therefore of opinion, for reasons stated in writing, and filed with the record in that case, that the judgment must be reversed, and the case remanded for a new trial.

(85 Va. 924)

SMITH v. COMMONWEALTH.

(*Supreme Court of Appeals of Virginia.* March 21, 1889.)

CRIMINAL LAW — PLEA — RAPE — WITNESS — INDICTMENT.

1. A plea that defendant has been held for trial for more than four terms after the indictment was found is unavailing where he was convicted during that time, and the conviction was reversed, as he was held till reversal for punishment, and not for trial.

2. On a criminal trial, a plea which presents in different words the same issue presented in another plea is properly rejected.

3. A conviction for rape will not be set aside on the ground that the prosecutrix, who was 12 years of age, could not understand the nature of an oath, where she was very critically examined by the court, and the jury were instructed that they were judges of her credibility.

Digitized by Google

4. An indictment for rape in the words of Code Va. 1887, § 3680, defining the offense, is sufficient.

Hardaway & Hairston, for plaintiff in error. *R. A. Ayers*, Atty Gen., for the Commonwealth.

FAUNTLEROY, J. This is a writ of error to a judgment of the circuit court of Henry county, rendered at the October term, 1888, of the said court, in a criminal case therein pending on an indictment for rape against William Smith, the plaintiff in error, in which prosecution the said William Smith was found guilty by the verdict of the jury, and sentenced by the court to a term of 10 years in the penitentiary.

The first error assigned is as to the action of the court in overruling the prisoner's demurrer to the indictment. This assignment of error is not well taken. The indictment is in the words of the statute, (section 3680, Code 1887,) and is in exact accordance with the law.

The second assignment of error is to the action of the court in sustaining the replication of the commonwealth to the prisoner's plea averring that he had been held for trial more than four terms after the indictment had been found against him in the county court. The record which the prisoner avouched shows that the fact averred in the plea does not obtain in fact. It shows that the prisoner was indicted at the March term, 1886, of the county court of Henry county; that he was tried and convicted at the May term, 1886, and that upon the prisoner's own motion the judgment was suspended for 60 days, to enable him to apply for a writ of error, which he obtained from the circuit court of Henry county; that on the 23d of October, 1886, the judgment of the county court was reversed and annulled, and a new trial awarded to the prisoner by the circuit court of Henry county, to be had in the said county court. The prisoner, after his conviction in the county court, at its May term, 1886, was not held for trial, but was held for punishment until the judgment of the county court was reversed and annulled by the circuit court, whose order, made October 23, 1886, remanded the prisoner to the county court for a new trial, where he was held for trial during the months of November and December, 1886, and January, 1887. At the February term, 1887, the prisoner was granted a continuance, upon his own motion, until the March term, 1887, when he was tried and convicted, and sentenced to the penitentiary for 15 years. From this judgment the prisoner obtained a writ of error and *supersedeas* from the circuit court of Henry county, and upon the 16th day of April, 1887, the said judgment of the county court was reversed and annulled, and a new trial was awarded to the prisoner by the said circuit court. At the August term, 1887, of the county court of Henry county the prisoner was again tried, and again convicted, and sentenced to the penitentiary for the term of 10 years. Upon the application of the prisoner the said judgment was suspended, and upon a writ of error and *supersedeas* the said judgment was reversed and annulled, and a new trial was awarded to the prisoner, by the said circuit court of Henry county, the 3d day of November, 1887, upon the ground of informality in the manner of summoning the grand jury who had found the indictment. But the prisoner was immediately rearrested by a bench-warrant issued by the judge of the circuit court, and at the November term, 1887, of the county court of Henry the prisoner was indicted anew for the same offense, and he elected to be tried in the circuit court. At the May term, 1888, of the said circuit court the indictment was quashed for informality in the *venire facias* summoning the grand jury which found the indictment under which the prisoner was held, and it was ordered by the court that the indictment be quashed, and the prisoner be discharged from further prosecution upon said indictment, and the prisoner was held in custody by order of the court until a warrant was prepared and issued for his arrest. At the June term, 1888, of the county court of Henry a new indictment was found, and the prisoner elected to be tried in the circuit court. At the October term, 1888, of the circuit court the prisoner was tried and convicted, and sentenced to a term of 10 years in the penitentiary.

The third assignment of error is the rejection by the court of the prisoner's plea No. 2, which was properly rejected by the court, because it set up no defense, and presented only the same issue presented in his plea No. 1 in different words.

The fourth error assigned is the ruling of the court permitting the prosecutrix, Josephine Hairston, to testify against the objection of the prisoner that she was too young to understand the nature of an oath. At the trial and conviction of the prisoner, October, 1888, the witness was in her twelfth year. She was closely and critically examined by the court to determine her capacity and competency as a witness for the prosecution. The trial judge was satisfied, and allowed her to testify, but out of abundant precaution specially instructed the jury that they were the judges of her credibility. The jury was satisfied, and found the prisoner guilty, as he had been three times theretofore found to be by juries of the vicinage. This court will not interfere upon this ground. 1 Greenl. Ev. § 367 et seq.

The fifth error assigned is to the overruling by the court of the prisoner's motion to set aside the verdict because it was contrary to the law and the evidence. Without going into a recital and analysis of the painful and shocking details of the evidence in this record, upon which 48 sworn jurors have found the prisoner guilty, and upon which the judge of the circuit court, who saw and heard and tested the witnesses and weighed the evidence, has based his judgment, it is enough for this court to say that the evidence certi-

Digitized by Google

fied in this record is conclusive of the prisoner's guilt. He was not only clearly and fully identified by the child-victim, as the perpetrator of the brutal outrage which was inflicted upon her, but he was proved to have been polluted with the foul disease which was imparted to the child by her ravisher; and he was proved by sundry witnesses to have been at the place and time when and where the atrocious deed was done. There is no error in the judgment of the circuit court of Henry county complained of, and it is affirmed.

(85 Va. 880)

LAWSON *et al.* *v.* MOORMAN *et al.*

(*Supreme Court of Appeals of Virginia.* March 14, 1889.)

WRITS—PUBLICATION—DECREE—PURCHASER.

1. Infants named as defendants to a bill for the sale of their ancestor's land to pay debts, against whom an order of publication is made upon an affidavit of their non-residence, must show the falsity of such affidavit in direct proceedings to avoid the decree rendered in the cause, and cannot attack it collaterally.

2. Such a sale will not be set aside, in a suit brought for that purpose, on the ground that the debts were not properly proved, and did not in fact exist, and that, on the evidence in the cause, no sale should have been ordered, as, the court having had jurisdiction of the subject-matter and parties, errors in its determination of the questions before it cannot be so reviewed.

3. Where one buys land of the purchaser at such a sale, and is substituted on the record as the purchaser, paying a greater price than that at which the land was valued, and the only evidence tending to show any collusion between him and the original purchaser to defraud the heirs, by procuring the sale to be made for an inadequate price, is that he required an indemnity bond to secure him against failure of title, which was taken, as there is evidence tending to prove, as a precaution against the claims of other creditors, the evidence is insufficient to establish any fraud on his part.

Appeal from corporation court of Danville.

Bill by William J. Moorman and others, heirs at law of James C. Moorman, deceased, against W. N. Shelton, administrator, etc., of R. W. Lawson, deceased, and said Lawson's heirs, and others, to set aside a sale of land of plaintiffs' said ancestor, under a decree of court, to said R. W. Lawson. Decree for plaintiffs, and the administrator and heirs of said Lawson appeal.

Guy & Gilliam and *Peatross & Harris*, for appellants. *Christian & Christian* and *Berkeley & Harrison*, for appellees.

LACY, J. This is an appeal from a decree of the corporation court of Danville city, rendered on the 14th day of January, 1888. The suit was instituted on the 20th day of March, 1884, by the appellees, as the heirs at law of one James C. Moorman, deceased, being at that time aged, respectively, William J. Moorman, 28 years of age; Samuel J. Moorman, 26; and J. C. Moorman, 20 years and 10 months,—the object of this suit being to set aside a judicial sale of their deceased father's real estate made by the circuit court of Pittsylvania county to the appellants' intestate, R. W. Lawson, deceased, who had been substituted as such purchaser in the place of E. B. Keen, the actual purchaser of the land, who was the grandmother of the said appellees, who were then infants, the said sale having been made in June, 1873. They allege that their father, James C. Moorman, the elder, died on the 13th day of October, 1863, leaving their mother a widow, with three infant children, and seised with the real estate in question, and possessed of large personal estate, which went into the hands of their grandfather, W. W. Keen, by whom it was wasted. That the debts of their father were nominal, only, so far as he was a principal debtor, and comparatively nominal so far as he was debtor as security for W. W. Keen. That one of his creditors of the latter class of debts, Thomas O. Soyars, obtained a judgment on his debt in August, 1866. That in July, 1872, the said Soyars instituted his suit in chancery in the county court of Pittsylvania to subject the real estate of the said J. C. Moorman, deceased, to the payment of his said judgment. This suit was brought against W. W. Keen, as administrator of J. C. Moorman, deceased, Nanny Dougherty (his widow) and Charles E. Dougherty, her husband, and the said William A., Samuel J., and J. C. Moorman, (his heirs.) That the writ was served on W. W. Keen, and, upon affidavit of their non-residence, order of publication was had as to the other parties defendant. That at this time the defendants were out of the state, but for a short time only. That the bill was taken for confessed as to all the defendants, although the infants had at that time no guardian *ad litem*. One was, however, subsequently appointed in the suit, and answered.

An account was ordered of the transactions of the administrator, and an account of debts, liens, and of the real estate. The report under this order showed W. W. Keen indebted to the estate of Moorman in the sum of $29,986.66, while the debts amounted to only $1,807.78; while the lot of ground in Danville was valued at $5,000, with a rental value of $500, and a lot at Ringgold was valued at $1,000, and the rental value fixed at $200. This resulted in a decree for the renting out of the real estate, and a further account of debts of Moorman. In May following, (this being in April, 1873,) W. W. Keen made affidavit that he was the father of Mrs. Dougherty, who had been Mrs. J. C. Moorman; that the realty was not susceptible of division in kind; that the infants had no other estate, and that their interest would be subserved by a sale of the land; that their mother desired a sale; that she was their natural guardian, and they had no other guardian. Whereupon the decree for the renting out of the land was rescinded, and a sale of the land ordered, without assigning dower to the widow. In June following, a sale is reported of the Danville lot to W. W. Keen, agent for E. B. Keen, his wife, at the price of $4,000, and of the Ring-

Digitized by Google

gold lot at $600 to the same purchaser. This sale was confirmed by the court, and a commissioner appointed to collect the bonds. In November, 1873, following, R. W. Lawson, the appellants' intestate, became the purchaser of this real estate at the price of $7,000, he buying from Keen, and was received by the court as the purchaser in the place of Keen, and a deed ordered to be made to him, when he had fully paid, by the same commissioner; all of which was subsequently done accordingly. They charge that the sale to Keen was fraudulent, and that Lawson took nothing by his subsequent purchase of Keen; that the sale was not to pay debts, but was made under chapter 124, § 2, Code 1873, authorizing the sale of the lands of infants and insane persons, etc., under certain conditions; that Lawson, by his purchase, made himself a party to the suit, and was bound by all the facts of record therein. And Lawson is called upon to answer certain interrogatories: (1) Was he not at the sale of the real estate? (2) Did he not hear that the sale was for so inadequate a price on account of a subterfuge that it was bought for the widow and children of Moorman? (3) Did he not demand some other assurance from Keen than an ordinary deed, to-wit, an indemnifying bond? (4) Did he not have and express a doubt as to this title on account of the probable interest of the children? And Lawson was called on to answer under oath, and it was prayed that the sale of the lands might be set aside, and proper accounts taken, etc.

Lawson demurred and answered. He claimed that the corporation court of Danville was without jurisdiction to correct the errors and irregularities of the circuit court of Pittsylvania county; that for these the plaintiffs must either appeal or apply by bill of review for their correction. He denies that the court decreeing the sale was without jurisdiction. He denies all fraud or collusion on the part of W. W. Keen, or of any other person. He says that the personal property of Moorman which came into the hands of Keen was chiefly slaves, which came into his hands during the pendency of the late war, and who were freed by its results; and tobacco, which was sold in Confederate currency, and the money likewise lost by the result of the war; a horse, which died; and household furniture and cows, exempt from sale for debts. He denies that the lots were very valuable. That the lot in Danville had on it an old wooden house, which he pulled down. He denies that the debts of Moorman as principal debtor were merely nominal, and as surety comparatively nominal, and exhibits the records of the suit of his creditors and the suit of Peatross v. Peatross, in which he was surety for the receiver, by which, he claims, it is shown that his debts as principal, and as surety for a bankrupt principal, greatly exceeded his entire estate. That after the loss of the personal property belonging to Moorman, in the manner stated, there was nothing out of which the debts could be paid, except the proceeds of two lots bought by him. He denies the allegation that the defendants in the Soyars suit, other than W. W. Keen, were not non-residents. That the suit of Soyars and others was a creditors' suit for the settlement of the estate of Moorman, and that the debts were over $20,000, after exhausting all assets, and a sale was necessary; and that the statute concerning a rental for five years to pay debts refers only to living judgment debtors' estates, and does not apply to the estates of dead debtors in a case like this. He denies that Keen bought by any profession of acting for the widow and children, or for an inadequate price; that he was not present at the sale; that he did get a bond of indemnity from W. W. Keen, E. B. Keen, and W. W. Keen, Jr., their son, but that this was taken, not with any idea that the complainants had any interest in said lot, but to protect him against the claims of creditors; and that there were creditors for large amounts against Moorman; and answered the interrogatories specifically as set forth above, and claimed to be a *bona fide* purchaser for value of his lot, without any notice of any irregularities in any of said proceedings, and that his rights as such purchaser give him a perfect title; and insists that, if the complainants had any claim which they could have asserted at any time, they are now barred by the statute of limitations; and that J. C. Moorman, Jr., one of the appellees, had applied in the circuit court of Pittsylvania county, in the suit of Soyars v. Moorman, to have the same revived, and that he should be required to elect in which of the said two suits he would proceed against him.

Depositions were taken in the cause and filed, and on the 6th day of January, 1888, a decree was rendered in the said court, by which, among other things, the court decreed: *First*, that the sale of the property to E. B. Keen, on June 17, 1873, and the sale and conveyance thereof to R. W Lawson, are void; *second*, that the plaintiffs do recover the entire lot of land on Main street, in the town of Danville, demanded by the bill, and all original improvements thereon on November 18, 1873, rents and profits, etc.; *third*, that the plaintiffs do not recover the additional value of the new improvements, etc.; *fourth*, certain accounts as to these are ordered. From this decree the appeal is taken to this court.

The effect of this decree is to declare the decree of the circuit court of Pittsylvania county in the suit of Soyars v. Moorman void, and in its legal effect no decree; and it is therefore wholly disregarded, and all the proceedings under it are set aside. It has been said that by a void judgment no rights are divested; from it no rights can be obtained. Being worthless in itself, all proceedings founded upon it are equally worthless. It neither binds nor bars any one. All acts performed under it, and all claims flowing

Digitized by Google

out of it, are void. The parties attempting to enforce it may be responsible as trespassers. The purchaser at a sale by virtue of its authority finds himself without title and without redress. This inquiry as to the validity of a judgment, says Mr. Freeman, is to be prosecuted only by an investigation of jurisdictional facts, upon whose real or assumed existence every valid judgment must stand. In the case of U. S. v. Arredondo, 6 Pet. 709, the supreme court of the United States said: "The power to hear and determine a cause is jurisdiction. It is '*coram judice*' whenever a case is presented which brings this power into action. If the petitioner states such a case in his petition that on a demurrer the court would render judgment in its favor, it is an undoubted case of jurisdiction." And in the case of Sheldon v. Newton, 3 Ohio St. 494, it was said: "Before this power can be affirmed to exist, it must be made to appear that the law has given the tribunal capacity to entertain the complaint against the person or the thing sought to be charged or affected; that such complaint has actually been preferred; and that such person or thing has been properly brought before the tribunal to answer the charge therein contained." Jurisdiction over the subject-matter is conferred by the authority which organizes the court; that is, by law. Jurisdiction over the person is obtained by service of process, or in some other manner authorized by law, as by the voluntary appearance of a party during the progress of a cause; and a judgment pronounced by a tribunal having no authority to determine the matter in issue is necessarily and incurably void, and may be shown to be so in any collateral or other proceeding in which it is drawn in question. But the distinction between a total want of authority, on the one hand, and an erroneous exercise of the conceded authority, on the other, must be remembered; for, when a court of general jurisdiction acts within the scope of its general powers, its judgments will be presumed to be in accordance with its jurisdiction, and cannot be collaterally impeached. Pulaski Co. v. Stuart, 28 Grat. 879. If the decree under examination was rendered by a court of record in the exercise of its ordinary jurisdiction over the subject-matter in litigation, the next fact to be determined is whether the court had jurisdiction over the person against whom the decree has been obtained. This fact must be determined by an inspection of the record, if the proceeding is in a court of limited jurisdiction, or one exercising a special jurisdiction; but nothing shall be intended to be out of the jurisdiction of a superior court but that which expressly appears to be so. Gosset v. Howard, 10 Q. B. 453; Guilford v. Love, 49 Tex. 715; Goar v. Maranda, 57 Ind. 339. Hence, though the existence of any jurisdictional fact may not be affirmed upon the record, it will be presumed upon a collateral attack that the court, if of general jurisdiction, has acted correctly and with due authority, and its judgment will be as valid as though every fact necessary to jurisdiction affirmatively appeared. Cox v. Thomas, 9 Grat. 328; Grignon's Lessee v. Astor, 2 How. 319; Potter v. Bank, 28 N. Y. 656; Kelsey v. Wyley, 10 Ga. 371; Reynolds v. Stansbury, 20 Ohio, 344. Jurisdiction being obtained over the person and over the subject-matter, no error in its exercise can make the judgment void. The authority to decide being shown, it cannot be divested by being improperly or incorrectly employed.

The decree in Soyars v. Moorman of the circuit court of Pittsylvania county, held to be void by the corporation court of Danville, is claimed to be so on account of the fraudulent conduct of W. W. Keen, as alleged, of which Lawson is claimed to have had constructive notice. The facts disclosed in the record do not establish the charge of fraud against Keen. The charge that he sold the property for a large advance, and then pocketed this for his own benefit, was not made against him until he was dead; while it is shown that the plaintiffs were his fatherless grandchildren, living in his house, of tender years, without any property which they could hope to call their own out of their father's estate; and that estate is alleged to be hopelessly insolvent in a large sum, and a creditors' suit pending to subject his property to the payment of his debts. Their mother, who was living, was dying of consumption, and soon died; and the statement that he was acting for the best interest of the children in buying the property in his wife's name was not at that time contradicted, and does not appear to have been doubted. If the children were without property, and he a bankrupt, whatever he may have owed their father's estate, it is not unreasonable to suppose that he was without the means of saving the land for them, and a resale at an advance may have been his only available resource. But, however this may have been, there is not a particle of proof in the record to show any fraud on the part of Lawson. The land was only valued at $5,000, and he gave $7,000 to a purchaser who had bought under a decree of a court of competent jurisdiction, and he appears to have been a *bona fide* purchaser, to whom no taint of fraud can in any wise be affixed. The single unusual circumstance of an indemnity bond is explained in a way to clearly exhibit Lawson's motive in procuring it by the statement that there were persons claiming to have large demands against Moorman's estate, whose debts, if valid, exceeded the value of the property bought by Lawson, and who might contend that the advance price should be paid to them. The appellees contend that the large claim established in the suit of Peatross v. Peatross against Keen has never been established as a valid claim against the heirs of Moorman. But, however that may be, and this court expresses no opinion on that point, it cannot affect the purchaser Lawson. He, having purchased and duly paid his purchase money in a court

Digitized by Google

of general and competent jurisdiction, is a *bona fide* purchaser for value, without notice.

It is further insisted that this decree was void, because the infant defendants were not made parties; but the bill names them as parties, and prays for process against them, and it appeared by affidavit filed that they were not residents of this state, whereupon there was an order of publication against them. This is authorized by statute. But it is alleged that this affidavit was untrue; that they were not non-residents of this state, but lived within the state. If this be so, they were allowed an opportunity to correct the erroneous proceeding, either then or after they came of full age; but for some cause they did not regard this as desirable, and they cannot deny now the validity of the decree by this collateral attack upon it in another forum, because the record shows that they were not residents of this state, and were properly proceeded against by the order of publication. But it is not denied, in fact, that they were not residents of the state at that time, but it is claimed that they soon returned. It is clear that this was a creditors' suit, having for its object the settlement of Moorman's estate, and the sale of his lands to satisfy his debts. Of such a suit it is understood that the circuit court had jurisdiction. The administrator lived in the county, the real estate was situated there, and by the record it appears that the court acquired jurisdiction of the parties in the mode prescribed by law; and when the affidavit was filed that the widow desired a sale, and that it was to the interest of the infants that a sale should have been had, the question as to the time when the land should be sold, if at all, was one to be determined by the court, and, if determined erroneously, such erroneous decision might have been corrected by appeal, but it did not render the decree void, even if it should be conceded to be erroneous, which does not appear to be clear, when the fact is borne in mind that the indebtedness of Moorman was such as to render a sale unavoidable before the proceedings in that suit had been brought to a close. In that view of the case, if these parties had brought the case up on appeal within the prescribed time, I do not perceive how they would have been benefited by a reversal of the decree upon that ground. We do not perceive any fraud in the case. It is clear that the circuit court is a court of general jurisdiction, and that in this case the subject-matter of the controversy was within its jurisdiction, and it had jurisdiction of the parties; and we are not prepared to say there was any error in its proceedings for which this court would reverse its decree, but, no appeal having been taken, its decision is final. And it is clear that the corporation court of Danville was without jurisdiction to reverse for error, if any there were, and the bill should have been dismissed in that court. And we will proceed to render such decree as the corporation court of Danville ought to have rendered, and render a decree here dismissing the bill. Decree reversed.

(35 Va. 89?)

FIRST NAT. BANK OF ALEXANDRIA v. PAYNE & CO.'S ASSIGNEES.

(*Supreme Court of Appeals of Virginia.* March 21, 1889.)

BANKS AND BANKING — DISSOLUTION AND INSOLVENCY.

1. The plaintiff, a banking corporation, sent a number of checks to its correspondent, a banking firm at A., for collection; the checks being drawn upon the latter firm. Afterwards, but before the checks were received, the latter firm was dissolved by the death of one of its members. The surviving partner paid the checks by charging them to the accounts of the drawers, and gave credit for the amount thereof to the plaintiff on the books of the firm. *Held*, that he had no such authority, but that he should have either sent back the checks or remitted the proceeds.

2. And where the moneys represented by the checks were afterwards transferred by the surviving partner to an assignee for the benefit of creditors, but remained easily traceable on the books of the firm, no checks having been drawn against the credit to the plaintiff, the latter could reclaim such moneys from the assignee.

Appeal from circuit court, Fauquier county.

S. F. Beach, for appellant. *Brooke & Scott* and *A. D. Pyne*, for appellees.

LACY, J. This is an appeal from a decree of the circuit court of Fauquier county, rendered on the 11th day of January, 1887. In May, 1885, the appellant company, the First National Bank of Alexandria, filed its bill against the appellees, the assignees of Payne & Co., wherein it is set forth that the said the First National Bank of Alexandria was a banking association located in the city of Alexandria, Va., which for many years prior to the 9th day of January, 1885, had had for their correspondents a banking firm, Payne & Co., composed of Charles E. F. Payne and James Keith, their place of business being in Warrenton, in the county of Fauquier, Va., where also were their private residences, and that the said the First National Bank of Alexandria was the correspondent of Payne & Co. in Alexandria. That the relations between the two banking concerns were such as are usual between corresponding banks and bankers keeping running accounts with each other. Collections in Warrenton for the First National Bank of Alexandria were made by Payne & Co., and collections in Alexandria for Payne & Co. were made by the First National Bank of Alexandria, each placing to the credit or debit of the other the amount respectively collected or paid for such other, and from time to time settling balances as they should be ascertained. That during the day of January 8, 1885, the appellant received from its other correspondents and customers divers checks drawn on Payne & Co., to-wit, 16 checks, amounting

Digitized by Google

in the aggregate to $929.13; also 8 drafts on Fletcher & Bro., of Warrenton, aggregating $81.08. These several checks and drafts, in anticipation of their payment and collection, were, when received by the appellant, credited to the respective parties from whom they were received. At the same time, in anticipation likewise of their payment and collection by and through Payne & Co., the checks and drafts were also charged to the account of the said Payne & Co.; thus increasing the previous apparent balance due from the said Payne & Co. to the appellant. These credits and charges, respectively, were subject to cancellation by cross-entry, according to the established and well-known usage of business, in case the checks and drafts should be dishonored when forwarded for payment. Said checks and drafts were on the same day, in the evening, (January 8th,) inclosed in a letter to Payne & Co., with the usual direction to place the proceeds to the credit of the First National Bank of Alexandria. That on the early morning of the 9th, before the commencement of the business hours of that day, and before the arrival of the letter in Warrenton, the firm of Payne & Co. was dissolved by the death of Payne. That the condition of the firm at that time was one of deep insolvency,—a condition which had existed for not a short time previously, though wholly unknown or suspected by the First National Bank. The letter, with the stated inclosures, reached the bank on the 9th, when, without direction from any source, as if no legal interruption had occurred to the receipt of deposits as usual by the firm, the clerk of Payne & Co. paid the check by charging them against the accounts of the drawers, and placed the proceeds of the same ($929.13) to the credit of the First National Bank of Alexandria upon the books of the dissolved firm. That on the 12th of January following James Keith, the surviving partner of Payne & Co., made an assignment to A. D. Payne, R. T. Scott, and Albert Fletcher, in trust for the benefit of the creditors of the late firm, without preference. That the said assignees had taken possession of the assets of the said firm of Payne & Co., among which was the said sum of $929.13, which came to the hands of the said assignees with notice of above-mentioned facts. It is claimed that the death of Charles E. F. Payne, and the consequent dissolution of his firm, terminated *eo instanti* the relations previously subsisting between the said firm of Payne & Co. and the First National Bank. That all pending direction by either to the other, looking to further transactions, and made in contemplation of the continued existence of those relations, was thereby revoked. That, under the circumstances existing on the arrival of their letter, either the checks should have been returned unpaid to the First National Bank, to be by them returned to the respective parties from whom they had been received, or, if paid, that the proceeds of their payment should have been remitted to the First National Bank for remittance by them in turn to the parties by whom they had been drawn. That there was no authority of law, nor by said First National Bank of Alexandria, warranting the deposit of the proceeds of said checks with the dissolved firm, and that, being so deposited, they continue to be, and are now, in equity, the moneys of the First National Bank of Alexandria, whether in the hands of the surviving partner of Payne & Co., or their said assignees, the appellees.

There was no answer, but the facts were agreed, and it was laid before the commissioner in chancery appointed for the purpose as a case agreed that the letter from the First National Bank of Alexandria containing these checks came to hand on the 9th of January, after the dissolution of the firm by the death of Payne; that but one check was paid over the counter of Payne & Co. that day, but that their usual business with correspondents was transacted that day; that at 3:15 P. M. James Keith, the surviving partner, wired the Alexandria Bank as follows: "Owing to the death of Charles Payne, the banking-house of Payne & Co. has closed its doors, and goes at once into liquidation. JAMES KEITH." At 4:05 P. M. of the same day the following telegram was received by Keith: "If we send letter to-day, will it have attention as usual? Can you remit balance? Shall I come up in the morning? C. R. HOOFF, Cashier." At 5:25 P. M. it was answered as follows: "Do not send letter. Will remit balance to-morrow. PAYNE & Co." At 10 A. M. of the 10th, the foregoing was followed by this: "Are unable to remit balance, as promised yesterday. JAMES KEITH, Surviving Partner." The Alexandria Bank responded on the 12th of January, as follows, by letter: "*Judge James Keith, Surviving Partner, etc.*—DEAR SIR: Our inclosures of the 8th instant—ten hundred and ten dollars and sixteen cents—received by you on the 9th, after going into liquidation, were placed to our credit, when, under the circumstances, the amount should have been remitted or the inclosures returned. We beg, therefore, that this error may be rectified before the matter becomes involved in possible complications. I am, with respect, yours, etc., CHAS. R. HOOFF, Cashier." The assignees—Fletcher, Payne, and Scott—replied to this, denying the right claimed, and declining the request. The matter was so referred to a master commissioner, who made report against the claim of the First National Bank of Alexandria as to the $929.13 aforesaid, and reported the said sum to be a part of the social assets of Payne & Co.; that "it is contended by the bank that he was not authorized to pay the checks and place the amounts to the credit of the bank on the books of the firm of Payne & Co. It might be said with equal force that he was not authorized to even pay the

Digitized by Google

checks or collect them, yet, as seen above, this last is admitted. In your commissioner's opinion his authority in the premises was such as the law confers on a surviving partner to complete a transaction begun with his firm before its dissolution;" and, further, that the actions of the bank (the First National Bank of Alexandria) constitute on their part a complete satisfaction of what Keith had done for the late firm, and the First National Bank was as much bound thereby as if they had expressly authorized him so to act. The court confirmed this commissioner's report, and decreed against the claim set up by the First National Bank of Alexandria; whereupon the said First National Bank of Alexandria brought the case here by appeal.

The controversy in this case is within a very narrow compass. It is mutually conceded that the death of any one member of a firm operates as a dissolution thereof as between all the members, and that on such dissolution the survivor has the right to take possession of the co-partnership assets and settle up the affairs of the joint concern; and it may be stated, as a settled proposition, that the power of a partner to make a contract for the firm ceases upon the dissolution of the firm, and the surviving partners or ex-partners can enter into no contract which will bind the estate of the deceased partner, except such as is appropriate and necessary in settling the affairs of the concern. Dissolution operates as a revocation of all authority for making new contracts; as dissolution finds the engagements of the company, they must remain until liquidated and paid. Woodson v. Wood, 5 S. E. Rep. 277, and cases cited. As was said by Lord KENYON, (Abel v. Sutton, 3 Esp. 112:) "To contend that this liability to be bound by the acts of his partner extends to a time subsequent to the dissolution, was, in his mind, a most monstrous proposition. A man in that case could never know when he was to be at peace, and retired from all concerns of the partnership." Mr. Justice STORY said in Bell v. Morrison, 1 Pet. 373: "The light in which we are disposed to consider this question is that, after a dissolution of a partnership, no partner can create a cause of action against the other partners, except by a new authority communicated to him for that purpose. It is wholly immaterial what is the consideration which is to raise such cause of action, whether it be a supposed pre-existing debt of the partnership, or any auxiliary consideration which might prove beneficial to them. Unless adopted by them, they are not bound by it."

The partnership of Payne & Co. was dissolved and cease to exist as such before banking hours on the 9th of January. The "day," in banking parlance, means simply the few hours set apart by usage as banking hours. Banking hours are so far recognized by the courts that any transaction in the ordinary course of banking business, which is to be had with the bank on any day, must be had within banking hours upon that day. The firm of Payne & Co., then, did not exist on the 9th of January; it was dissolved before banking hours. It is admitted that the letter of the appellant bank did not reach its destination until the 9th. It then never reached the firm of Payne & Co. at all, but it came into the hands of the surviving partner, who claimed the right to receive it in the name of the late firm, and charge it to the said extinct partnership, and thus created a debt against the dissolved firm of $929.13. In other words, on the dissolution of the firm the debt to the First National Bank of Alexandria, due by the said firm on the last moment of its existence, was $1,557.63; whereas, after its dissolution, by the action of its surviving partner it was made to owe the said First National Bank of Alexandria $2,486.76, and had incurred a debt, if the surviving partner had such power, of $929.13 after dissolution. This the surviving parner could not do; his powers do not go so far. If the question arose upon the assertion of the right to charge Payne's estate with this, against his personal representative, it must be conceded that no such right could exist. Whether the transaction was hurtful or beneficial is immaterial. If it be true that Payne & Co. could not be charged with this as a non-existent firm, how does the case stand? The surviving partner received this sum of money destined for Payne & Co., and he was unable to apply it as directed. It was then a sum of money or a lot of evidences of debt in his hands belonging to the First National Bank of Alexandria, with whose instructions he could not comply. He was bound to obtain further instructions from his principal, or return the remittance. He had no authority to apply it otherwise than as directed. It was not the property of the late firm. It was not a debt due the late firm. It could not be received or paid out on account of the partnership. It was in no wise connected with the late firm. It never came into their hands at all. He could not undertake to deal with it as partnership property, and, if he received it and disposed of it, it would in no wise concern the affairs of the late firm, and the deceased partner's estate could not be held bound for it. He did not return it, however, as has been said, but conveyed in trust to secure the debts of the dissolved partnership. This he could not do, because, as we have said, it was not the property of the late firm, and could not be bound for the debts of the deceased partner any more than his estate could be held liable for it.

Having passed, then, actually, but unlawfully, and without any authority, express or implied, from the real owners into the hands of appellee trustees, can it be reclaimed? It appears to be easily and clearly traceable upon the books of the late concern, placed there after there was no such firm; no checks have been drawn against it; it has remained unchanged in any respect, and there is no diffi-

Digitized by Google

(30 S. C. 305)

SULLIVAN *v.* SUSONG *et al.*

(*Supreme Court of South Carolina.* March 8, 1889.)

CONTRACTS—CONSTRUCTION—ARBITRATION—INTEREST.

1. Plaintiff executed certain grading contracts with a railway company, which provided that the work was to be paid for according to the estimates of the company's engineer. These estimates were made, and a portion of the amount so ascertained paid. Thereafter defendants agreed with the company to pay all its debts, but on condition that "the work done and to be done should be measured and valued." Defendants having refused to pay plaintiff on the basis of the prior estimates, they entered into an agreement whereby plaintiff, in consideration of a part payment of the claim, agreed to "await the payment of the balance due * * * until the said work shall be measured, and the value thereof computed, by two competent engineers,"—one to be selected by each party. Two engineers were accordingly selected, but one was unable to act, whereupon defendants selected another engineer without plaintiff's consent, and these two engineers made their report, which plaintiff refused to recognize, and sued for the balance due according to the estimates under his original contracts. *Held*, that plaintiff could maintain no action against defendants except by complying with the condition of defendant's contract with the railway company in regard to measurement, particularly in view of his agreement to "await" payment until such measurement should be made by the two engineers as agreed; and that though the right to select an engineer was exhausted by the first selection, and the report made was therefore not binding under the agreement, the court was authorized to require the parties, or, if they failed to agree, a special master, to select suitable engineers to remeasure the work.

2. As the amount to which plaintiff would be entitled, as against defendants, could not be ascertained until a remeasurement of the work, the demand was unliquidated, and plaintiff was not entitled to interest in the mean time.

Appeal from common pleas circuit court of Aiken county; B. C. PRESSLEY, Judge.

Action to recover money alleged to be due on a contract, brought by W. E. Sullivan against the firm of Susong & Co. The master's report, referred to in the opinion, was as follows:

"This action, and all the issues therein, was, by an order of this court, referred to me to hear and determine the same. I have duly considered the allegations and proofs of the parties, and having heard Henderson Bros., Esqs., for the plaintiff, and W. C. Benet, Esq., for the defendants, determine said issues as is herein stated. * * *

"The Atlantic, Greenville & Western Railway Company was in February, 1886, and the times hereinafter mentioned, a corporation under the laws of this state, and engaged in the construction of a railway over their right of way in the counties of Aiken, Edgefield, and Abbeville, in this state. In February, 1886, said railway company employed the plaintiff herein 'to construct and finish in the most substantial and workmanlike manner, to the satisfaction and acceptance of the chief engineer of said company, all the gradation, masonry, and such other work as may be required,' on that section of their railway extending from Ninety-Six to Cokesbury, in Abbeville county. 'Such other work as may be required,' as the provisions

suity in tracing and indemnifying it. It does not belong to the assignees, because it did not belong to the firm. It was not in the power of the surviving partner to convey it. It did not pass by the deed, and the assignees have no right to it whatever, but, actually holding it, they cannot use it for the purposes of the firm, but ought, in justice, to return it to the owner, the First National Bank of Alexandria. It is claimed by them that placing it in the mail commenced a transaction with the firm of Payne & Co., which the surviving partner had a right to perfect, because already begun, and this is what the commissioner reports; but in no sense is this so. The transaction could not begin with them so as to charge them in any way, unless the remittance was received. What responsibility was there, or could there be, if they never received it? If lost in the mail or recalled, or if by any means it never reached them, can it be contended that they could be held responsible? This is what did occur. It never did reach them. The firm did not receive it, but some other person. That other person cannot deliver it to the dissolved firm; it is incapable of taking. His plain obligation is, as we have said, to return it to the owners, or dispose of it as they direct. But it is insisted that the appellant ratified what was done. There is no ratification in the case. There was not only no ratification, after full information, but a positive renunciation of the unauthorized act. To the telegram of Judge Keith on the 9th: "Do not send letter; will remit balance to-morrow,"—there was no reply; but when, on the morning of the 10th of January, he sent the following: "Are unable to remit balance as promised yesterday,"—the bank promptly set up its claim, by telegram, on the 12th, as stated. We think this money is no part of the assets of Payne & Co., and that the appellees have no right to hold it under the assignment to them, and that it should be delivered to the owner, the appellant bank. Overseers v. Bank, 2 Grat. 547; McLeod v. Evans, 66 Wis. 401, 28 N. W. Rep. 173, 214; Fahnestock v. Bailey, 3 Metc. (Ky.) 48; Bank v. Insurance Co., 104 U. S. 54. The appellees rely in part on the case of Heberton v. Jepherson, 10 Pa. St. 124, where a consignment is made to commission merchants (partners) to be sold. One died, the firm thereby being dissolved, and thereafter sale of the consigned effects was made by the surviving partner. This sale was adjudged valid, and the estate of the dead partner held responsible to the consignor. In that case the goods were received by the firm before, not after, dissolution, and it was the business of the partnership to sell them. This does not seem to be at variance with anything we have said, and is in accord with the appellees' citation from Lindl. Partn. 298, 299. We are of opinion to reverse the decree of the circuit court of Fauquier county, appealed from, and a decree will be rendered here accordingly. Decree reversed.

Digitized by Google

of the contract between plaintiff and said company show, means such work as the chief engineer might direct plaintiff to perform, such as widening, beyond the width stated in the notes of survey, for the guidance of the contractor in building the railway, the cuts and embankments of the road, digging ditches, repairing work already completed and accepted by the company, changing highways, and providing for the safe and easy passage of the traveling public across said railway where the same is crossed by highways. In a few words, the chief engineer had the authority to require plaintiff to obey his orders, and to fix the compensation to be paid to plaintiff for all work done by him not specifically provided for in the contract. Such work, in the evidence, is called 'extra work.' The railway company agreed to pay to the plaintiff as compensation for his work 9¾ cents for each cubic yard of earth, 84 cents for each cubic yard of loose or soft rock, 69 cents for each cubic yard of solid rock, and 9¾ cents for each cubic yard of excavation and embankment necessary in the construction of the railway. On the 1st of each month, during the progress of the work, the chief engineer of the company was to make an estimate of the relative value of the work then done by plaintiff, and the company was to pay plaintiff ninety per cent. of the value of the work done; and when all of the work was done, to the satisfaction of the engineer of the company, said engineer was to make a final estimate of the quality, character, and value of the work, and plaintiff was to be paid the full amount due him as then estimated. The contract between plaintiff and the railway company stipulated 'that the work under this contract shall, at every stage of its progress from beginning to end, be subject to the direction, inspection, and acceptance of the engineer, who shall determine, without appeal, what in any case a fair construction of the contract requires to be done by either party; and whose measurements, classifications, and estimates, monthly and final, shall be absolutely conclusive upon both parties.' Plaintiff performed his part of the contract. The chief engineer made his monthly inspection and estimate, and on May 19, 1886, made a final estimate of the completed work, as the contract required, and certified that plaintiff had graded 15¾ miles on this section, and that the work done was worth $8,126.31. One item in said amount reads: 'Road crossing and changing public road, $132.00.' On April 30, 1886, the railway company paid to plaintiff, on account of this demand, $2,800, and on June 7, 1886, the further sum of $4,000; leaving the railway company in debt to the plaintiff, on last-mentioned date, in the sum of $1,326.31.

"On June 10, 1886, the railway company made a second contract with plaintiff, containing the same terms and stipulations, conditions, and parts, as appears in the contract made in February, 1886, whereby plaintiff contracted to construct a section of said railway extending from Hamburg, in Aiken county, to Johnston, in Edgefield county. Plaintiff performed his part of this contract. His work was inspected monthly by the chief engineer; and on August 6, 1886, the chief engineer made a final report as to a part of the work done on this section, and certified that said work was worth $7,547.59. On the 15th day of December, 1886, the chief engineer made a final estimate of the work done on the remainder of this section, and certified the same to be worth $11,439.36. These two items aggregate $18,986.95. Plaintiff has been paid upon this amount $1,795. The exact date of this payment does not appear, and it was paid as follows: Parties along the line of said railway had subscribed certain sums, upon certain conditions, to the railway company, and given their notes therefor. These notes were turned over to plaintiff as collateral security for the payment of the amount due him by the railway company, with authority to 'receive' such payments as the makers should make, and to apply the amounts thus received upon his debt. Plaintiff 'received' $1,795 upon these notes, and that amount must be credited upon his debt, which left $17,171.36 due plaintiff. Plaintiff, in his final settlement, must, upon the payment of his demands, return these notes to defendants, they having purchased them from the railway company, or account for the same. As matters then stood, the plaintiff and the railway company were bound by the estimates of the chief engineer, because an account stated or a liquidated demand. Railroad Co. v. March, 114 U. S. 549, 5 Sup. Ct. Rep. 1035. Plaintiff could have sued the railway company for this amount; and his having taken the notes heretofore referred to, would not have estopped him from so doing. 'A creditor holding collaterals is not bound to apply them before enforcing his direct remedy against the debtor.' Lewis v. U. S., 92 U. S. 619; Story, Cont. § 692.

"It was alleged in the complaint, and admitted in the answer, herein, 'that on the 21st day of December, 1886, the aforesaid defendants, Susong & Co., by their contract in writing under seal, and for valuable consideration, entered into a covenant for the benefit of the creditors of the aforesaid railway company, whereby and wherein they promised to pay the debts then due by said railway company to its creditors, and thereby they became liable and responsible for the aforesaid debts of the plaintiff, so as aforesaid due to said plaintiff, at said time, by the said railway company.' The debts then due to plaintiff by the railway company, and referred to in the pleadings, are those I have already stated and discussed. On the 21st day of December, 1886, the defendants herein, Susong & Co., became bound to plaintiff for the payment of $18,517.67, the amount then due plaintiff, as principal, by the railway company.

"It appears that the defendants questioned the accuracy of the figures which the chief

Digitized by Google

engineer of the railway company had reported as being due by the railway company to plaintiff, and refused to recognize the same, or to be bound thereby. Plaintiff and defendants, wishing to settle this difference in an amicable manner, entered into the following agreement or contract: 'In consideration of * * * eight thousand dollars to me paid by Messrs. Susong & Co., for the * * * Railway Co., * * * I hereby agree to await the payment of the balance due me by said company for work done by me in grading the railroad of said company * * * until the said work shall be measured, and the value thereof computed, by two competent civil engineers, one to be selected by Susong & Co., and one by myself, with an umpire; said work to be measured and computed as soon as may be practicable, and in accordance with the specifications of the contract entered into between myself and the said railway company under which said work was done. And I hereby promise and bind myself to accept and receive the balance which is shown to be due me by said report of said engineers in full discharge of all claims against said Susong & Co., and against said railway company, by virtue of said contract, or any other contract made by me or for me or in my behalf. Witness my hand and seal this January 28th, 1887. [Signed] W. E. SULLIVAN. [L. S.] Test, G. G. WELLS. In pursuance of the foregoing agreement, we, the undersigned, do hereby select the following engineers to make the measurements and valuations therein provided for, to-wit: The said W. E. Sullivan selects St. John Cox, and the said Susong & Co. select I. H. Harrison; and W. A. Jones and G. P. Sullivan are hereby chosen as umpires in case they are needed, and the said Susong & Co. agree to abide by the report of said engineers, and to pay the balance found due to said W. E. Sullivan by their report, when the same is rendered, or within a reasonable time thereafter, and the parties hereto are to bear the expenses of said measurement, valuation, and report equally. *January* 28th, 1887. [Signed] W. E. SULLIVAN. SUSONG & Co. Test, G. G. WELLS.'

"This was a new contract, direct between plaintiff and defendants. They had the right to make it. The object of this contract was, on the side of the plaintiff, to get eight thousand dollars ($8,000) in cash, and of both parties to agree upon some amicable method whereby the differences between them might be adjusted, and a final settlement reached. As I construe this contract, the only duty the two engineers had to perform was to measure the work done by plaintiff, and compute the amount due him therefor 'in accordance with the specifications of the contract' under which plaintiff did the work for the railway company. Plaintiff was not forced into this last contract,—he wanted money, and went to Susong & Co. for it. Whether or not he could have, by an action at law, compelled Susong & Co. to pay him the full amount due, and inclusive of the $8,000 they had paid, need not be considered. He did not sue. He did take $8,000 from Susong & Co., paid in cash, and he took it upon the promise that he would wait for the balance until his work was measured by two civil engineers, and its value computed, and bound himself to receive, in full discharge of his demand, the amount so found to be due to him.

"St. John Cox, one of the engineers selected to measure and compute the work, as provided for in the contract between the plaintiff and defendants, left the state, because of bad health, and never performed the duties of his appointment. It was not Mr. Cox's fault that he got sick, and his failure to act was not occasioned by either plaintiff or defendants, and neither should suffer prejudice therefrom. Susong & Co., claiming that Mr. Cox was their selection in the first instance, and, upon his failure to serve, that they had the right to select another engineer to take Mr. Cox's place, selected Mr. H. M. Ramseur. Defendants did not consult or notify plaintiff of their attempt to substitute Mr. Ramseur in Mr. Cox's place. Thus appointed, Mr. Ramseur, with Mr. Harrison, went over plaintiff's work, and, in papers addressed to Susong & Co., Mr. Ramseur reported that plaintiff's work on the Hamburg and Johnston section was worth $13,977.78½, and on the Ninety-Six and Cokesbury section plaintiff's work was worth $4,899.50. At the bottom of these papers appear the words, 'Verified. I. H. HARRISON.' On March 14, 1887, plaintiff served a written notice on defendants, notifying them that he had appointed Maj. T. B. Lee, in place of St. John Cox * * * to carry out the provisions of the agreement, etc. Defendants paid no attention to this notice. I hold that neither plaintiff nor defendant could, under their written agreement, make a second selection or appointment of a civil engineer. The first part of the agreement, so far as it refers to engineers, provided that 'the work shall be measured, and the value thereof computed, by two competent civil engineers.' The manner in which the engineers were to be selected was agreed upon as a means to an end. The second part of the contract named the engineers, and ended the selecting business. The second part exhausted the first part, and there is nothing in either paper which even hints at or indicates that the selecting business, after the parties had once made a selection, should continue. Either party could, with an equal show of right, claim that he could withdraw one of the names agreed upon. The parties agreed to abide by the report of Cox and Harrison. There was no agreement to abide by the report of Ramseur and Harrison, or Lee and Harrison. I hold, therefore, that plaintiff is not bound by the report of Ramseur and Harrison, nor are the defendants prejudiced by disregarding plaintiff's notice that he had appointed Lee.

"Defendants attempted to introduce evidence to show that there was an error in the

Digitized by Google

last part of the agreement between plaintiff and defendants, in that the names of the civil engineers had been transposed; that Mr. Cox was the selection of defendants, and Mr. Harrison the selection of the plaintiff. I ruled that this evidence was inadmissible. As defendants' counsel contested this ruling with much earnestness, I will briefly state some of the reasons which induced me to exclude such evidence. It may be as well for me to note that frequently evidence is held to be inadmissible at a certain stage of the cause, and later on is admissible, after the foundation for the same has been laid. I am perfectly willing that the ruling under consideration should rest upon its merits, but this remark applied to other rulings in this case. I held that evidence tending to support the alleged error was inadmissible, for the following among other reasons: (1) I considered it irrelevant. Under my view of the contract, the differences between the parties were to be adjusted by 'two competent civil engineers.' Each party was to select one; but the moment that selection was made, by the signing of the agreement, each and both of the engineers so selected represented each and both of the parties. If this is correct, what difference could it have made, so far as rights are concerned, which party chose Cox, and which party chose Harrison? Had it been alleged that the name of some third engineer, not the choice of either party, had, by mistake, been inserted in the agreement, then it might be proper to reform the paper. (2) Because parol testimony is inadmissible to vary, add to, or alter a written instrument which in itself is plain and free from doubt. The writing 'being the act and instrument of the parties, finally and solemnly agreed upon, no other words than those found therein can be added to it, or substituted in their stead, by oral testimony. Nor can oral testimony of a previous *colloquium*, or of conversation, or declarations at the time when completed, or afterwards, be offered to explain it. On the contrary, the instrument must stand upon its own terms.' Railway Co. v. Seigler, 24 S. C. 129; Arnold v. Bailey, Id. 494. (3) Because plaintiff objected to the introduction of the evidence, and there was no allegation in the answer which made this error an issue in the cause.

"I find, as a matter of fact, that the agreement between plaintiff and defendants of January 28, 1887, was not carried into effect, because of the failure of Engineer Cox to act, and that neither of the parties to said agreement is responsible for such failure. Plaintiff claims, as the result of said failure, that he is remitted to his original contracts with the railway company, and that defendants should pay him the amounts due, with interest on the final estimates of the chief engineer of the railway company, and that the $8,000 paid him by Susong & Co. should be charged against him as a payment on the amount so due. Defendants claim that as a result of their agreement, and under the present circumstances of the case, that plaintiff can only recover the value of his work, less the payments made; in other words, plaintiff's claim is for the value of his services rendered to the railway company, and that he can recover the value of his work, and no more. I have held that the contract of January, 1887, was a valid contract. Through no fault of the parties, that contract has not been carried out. In my opinion this case comes before the court as all other cases of disputed or unsettled contracts do, and the court must settle the matter. Plaintiff cannot keep Susong & Co.'s money, and stand upon his contract with the railway company too. Nor can Susong & Co. repudiate the terms of their contract with plaintiff, wherein they agreed to pay plaintiff for the work he had done according to scale of prices named in the contracts with the railroad company. Plaintiff's contract with Susong & Co. reopened the contract with the railway company as to the quantum of plaintiff's work, and did not touch the scale of values. This action is not for the specific performance of the contract of January, 1887. It is for the collection of money; and the court, carrying out the contract of the parties as nearly as it can, and in accordance with substantial justice, should ascertain and fix the amount and classification of the work done by plaintiff, ascertain the value thereof according to the scale of prices, and award judgment in favor of plaintiff for the sum then found to be due. I have no hesitation in reaching my conclusions upon this question.

"Let us take the Ninety-Six and Cokesbury section. Chief Engineer Kirk, in his final estimate, certified that plaintiff's work on said section was worth $8,126.31, and the railway company actually paid all of this amount to plaintiff except a balance of $1,326.31. Ramseur and Harrison fixed the value of plaintiff's work on this section at $4,899.50. It would from this follow that, inasmuch as plaintiff had been paid $6,800 for work worth only $4,899.50, plaintiff should refund $1,900.50; that amount, in excess of his dues, having been paid to him. It is hardly to be supposed, and cannot be assumed, that the railway company would have made such a mistake as to pay out $1,900.50 of their money for nothing,—make a mistake in a transaction which amounts to 25 per cent. of the total involved in the transaction. Chief Engineer Kirk, in his estimate, classifies plaintiff's work, stating how much was 'earth-work,' 'solid rock,' 'loose rock,' and 'road crossings and changing public road,' and computes the value thereof according to the scale of prices agreed upon, fixing the value of the 'road crossings and changing public road' at $132. He fixes the number of cubic yards of all classes of plaintiff's work at 79,544 cubic yards, and says that he included in his estimate extra work done by plaintiff under his orders. Ramseur and Harrison fix the amount of plaintiff's work at '50,251.3 cubic yards of excavation and

Digitized by Google

embankment,' and compute its value by multiplying that number by 9¼ cents. Why should they ignore those classes of work which call for higher compensation, and assume that all of the work done was of the cheapest class,—ignore 'road crossings,' 'changing public road,' and 'extra work?' Chief Engineer Kirk was the trusted officer of the road. He was familiar with the plan of construction of the road; inspected plaintiff's work while it was being done, and just after it was done; he gave the order for 'extra work,' and knew the value of such 'extra work.' Ramseur and Harrison made their estimate, in great part, from the surveyor's notes, months after the work was done, and when rain and storm had damaged it. I am satisfied that Chief Engineer Kirk's figures are correct, and I therefore hold that Susong & Co. are indebted to plaintiff in the sum of $1,326.31 as the balance due plaintiff on the Ninety-Six and Cokesbury contract.

"As to the Hamburg and Johnston section. Chief Engineer Kirk estimated and certified that plaintiff's work on this section amounted to 187,456 cubic yards of earthwork, worth $18,276.95, besides 'ditching,' $110.00; 'building double track S. C. R. R.,' $210.00; 'removing obstructions and refilling burrow pits made by Mitchell,' $190.00; 'moving twice by order,' $200,—making a total of $18,986.95. These figures were approved by other officers of the railway company. The president approved the first estimate of a part of the work, amounting in value to $11,439.36; and the 'members of executive board, A., G. & W. Ry. Co.' approved the last estimate of the last part of the work, amounting to $7,547.59. Messrs. Ramseur and Harrison report that plaintiff's work on this section amounts to '143,361.9 cubic yards of excavation and embankment,' worth $13,977.78⅓. This report makes no reference, in terms, to 'extra work,' though in their evidence they say that they allowed for abandoned and changed work in some places. It will be seen that there is a difference, in the number of cubic yards of work done by plaintiff, in the estimate of Kirk, and of Ramseur and Harrison, amounting to 44,094.1 cubic yards, and a corresponding difference in their estimates of its value. It appears in evidence that a new railway, called the 'Mitchell Road' by witnesses, was in process of construction about the time plaintiff was doing his work; that there was some bad feeling between these two roads; that both roads desired, very frequently, the same location; that Mitchell's road injured and impeded the A., G. & W. Ry. Co. in their work, and that plaintiff was ordered by the chief engineer of the A., G. & W. Ry. Co. to do considerable extra work, made necessary by the conduct of the Mitchell road company. Chief Engineer Kirk also required plaintiff to make his cuts and embankments wider than the specifications put down in the surveyor's notes. These and other items are included in Kirk's estimates, but are not noticed by Messrs. Ramseur and Harrison, except to the extent I have stated. There was considerable evidence as to railway work being measured by the 'center-height method,' and the 'cross-section method;' also about 'wedge-shaped end' embankments, etc. I don't think it necessary to the ends of justice that I should go into such, to me, 'abstruse learning.' I am satisfied that Mr. Kirk's figures are correct, and that plaintiff's work was worth $18,986.95. Deduct from this amount $1,795, the amount plaintiff collected on the notes placed in his hands, and the $8,000 paid by Susong & Co., and the balance due plaintiff for his work on the Hamburg and Johnston section amounts to $9,191.95.

"As the result of the contract between plaintiff and defendants, these balances become unliquidated demands, and therefore plaintiff is not entitled to interest on the same. Wherefore it is ordered, adjudged, and decreed that plaintiff have judgment in his favor, and against the defendants, for the sum of thirteen hundred and twenty-six and thirty-one one-hundredths dollars, ($1,326.31,) and the further sum of nine thousand one hundred and ninety-one and ninety-five one-hundredths dollars, ($9,191.95,) making, in the aggregate, ten thousand five hundred and eighteen and twenty-six one-hundredths dollars, ($10,518.26.) That upon the payment of this amount, with the interest due thereon from the date of the judgment herein, at the date of such payment the plaintiff to deliver and turn over to the defendants herein all of the uncollected notes now held by him as collateral security. That plaintiff also have judgment against the defendants for his costs and disbursements, to be taxed by clerk of this court.

"JAMES ALDRICH, Referee."

Both parties excepted to this report, and the court, (PRESSLEY, J.,) upon hearing the exceptions, rendered the following opinion and decree:

"This was a legal action, begun by attachments, but defendant's answer raised equity questions, and the case was referred, for action on its issues, to James Aldrich, as special referee. From his very full, learned, and exhaustive report, I extract these facts, to-wit: Plaintiff had finished his work on two contracts for grading with the Greenville, Atlantic & Western Railway Company. As required by said contracts, the engineer of the company had measured the work, and reported its value to the company, so that it thereby was in debt to plaintiff to amount of $18,518.26, after deducting all it had paid to plaintiff, and all that he had collected on its assets left with him as collateral security. After this debt had been thus settled and acknowledged as a liquidated liability of said company, it transferred all its assets to defendants; and they then, on 26th December, 1886, assumed to pay all the debts of said company, but provided that 'the work done and to be done should be measured and valued.' Plaintiff was no party to said contract with defendants, but became so, by con-

Digitized by Google

tract with them, on 28th January, 1887. He then, in consideration of $8,000 at same time paid to him by defendants, bound himself, by writing under seal, to await payment of his balance 'until the said work shall be measured, and the value thereof computed, by two competent engineers, one to be selected by defendants, and the other by plaintiff.' Said contract also required umpires, but that provision need not now be noticed. On same day a paper, not under seal, was signed by plaintiff and defendants, which named the engineers chosen by them respectively, but contained a clerical error in stating that St. John Cox had been selected by plaintiff, and I. H. Harrison by defendants. The testimony is altogether conclusive that the said writing reversed the selecting made by said parties. St. John Cox was sick, and left the state. Plaintiff and defendants both claimed the right to select another engineer in his stead, and thereupon defendants selected H. Ramseur, and plaintiff selected T. B. Lee. The former of these acted with J. H. Harrison in making a remeasurement of said work, but their return and testimony show that they did not do their work in accordance with plaintiff's contract with the railway company, as the contract under which they were selected required of them. Their estimate, made in total disregard of the difference between rock and earthwork, and of the other specifications of said contract, fixes the amount of plaintiff's claims at very much less than had been reported by the engineer of the railway company. The special referee, rightly deciding that the measurement of Harrison and Ramseur was not a compliance with the contract between plaintiff and defendants, concluded to hear the testimony of the company's engineer as to the measurement and computation which he had made. He also took the testimony of other witnesses, who say that by reason of damage to the work plaintiff had done, and for other causes, a correct measurement and computation cannot now be made.

"The order of reference did not authorize the referee to appoint engineers to make the remeasurement, which was stipulated for in defendants' contract with the railway company, and for valuable consideration, to-wit, the immediate payment of $8,000 by defendants, was made binding on plaintiff in his contract of January, 1887. Thus, without authority to order remeasurement, the referee was compelled to base his report in the case on the testimony before him, and he has awarded judgment to plaintiff for the sum of $10,518.26 dollars; that being according to the former measurement and computation, after deducting the $8,000 paid to plaintiff by the defendants. As to the points of law ruled by the referee, I concur with him that the contract between plaintiff and defendant was one for valuable consideration, and still exists in full force; that its effect was to render plaintiff's claim an unliquidated demand that does not bear interest; that, after failure of St. John Cox to serve as one of the engineers chosen for the new measurement of plaintiff's work, neither party, without consent of both, had the right to select another engineer in the stead of St. John Cox. But in my opinion it is the imperative duty of this court to supply that defect, and to order the new measurement which both contracts expressly call for. No matter that a correct measurement cannot now be made. That was a hazard which plaintiff contracted to incur when he received $8,000 from defendants in part payment for the said work.

"It is therefore ordered and adjudged the case be recommitted, and that the special referee do require plaintiff and defendants, each party, to select a suitable engineer for a new measurement of said work. If either party shall object to the engineer chosen by the other, the validity of his objection may be determined by the referee; and he may from time to time, if necessary, require another selection by either party, until two competent and suitable engineers shall be appointed. If, within a time to be limited by the referee, such appointment be not so made, then the referee shall choose the engineers, and appoint them to said work. He may also limit a time for them to complete their measurement and computation, and be examined on their reports before him at the time appointed. The testimony heretofore taken herein shall be considered as still in the case in any further consideration thereof."

Plaintiff appeals.

Henderson Bros., for appellant. *W. C. Benet*, for respondents.

McIver, J. It seems that the plaintiff, under certain written contracts with the Atlantic, Greenville & Western Railway Company, had graded two sections of said railway; which contracts, among other things, specified the amount per cubic yard which the plaintiff should be entitled to receive for such work, varying according to the nature of the materials handled,—so much for each cubic yard of earth, so much for each cubic yard of loose or soft rock, and so much for each cubic yard of solid rock. These contracts also provided that the work was to be done under the supervision of the chief engineer of the company, and to be paid for according to his estimates. The chief engineer made his final estimates, ascertaining the total amount due plaintiff by the company under these contracts, upon which sundry payments were made by the company, leaving a considerable balance still due to the plaintiff. At this juncture the defendants entered into a written contract with the railway company,—to which contract, however, the plaintiff was not a party,—whereby the defendants, for valuable consideration, undertook to pay the debts of said railway company. This contract appears to have been executed on the 21st of December, 1886, but, as no copy of it appears in the "case," we are not informed, except as above stated, of

Digitized by Google

its terms, though it is stated in the decree of the circuit judge that under this contract the defendants assumed to pay all the debts of the company, but provided that "the work done and to be done should be measured and valued;" and, from the fact that the words which we have placed within quotation marks are found within similar marks in the decree of his honor, we infer that the contract was before the circuit judge, and that the words quoted were taken from the contract. The plaintiff claiming that the amount due him by the railway company, which had thus been assumed by the defendants, had been fixed by the final estimates of the chief engineer of the company, and the defendants questioning the correctness of such estimates, and refusing to be bound thereby, with a view to settle this difference, the parties, on the 28th January, 1887, entered into an agreement under seal—a copy of which is set out in the "case"—whereby the plaintiff, in consideration of the sum of $8,000 then paid to him by the defendants, agreed "to await the payment of the balance due" him for the work done on the railroad "until the said work shall be measured, and the value thereof computed, by two competent civil engineers," one to be selected by plaintiff and the other by defendants, with an umpire; "said work to be measured and computed as soon as may be practicable, and in accordance with the specifications of the contracts" with the railway company under which the work was done; and the plaintiff bound himself "to accept and receive the balance which is shown to be due me by said report of said engineers in full discharge of all claims against said Susong & Co. and against said railway company." On the same day both parties, plaintiff and defendants, signed a paper, not under seal, which reads as follows: "In pursuance of the foregoing agreement, we, the undersigned, do hereby select the following engineers to make the measurements and valuations therein provided, to-wit: The said W. E. Sullivan selects St. John Cox, and the said Susong & Co. select J. H. Harrison; and W. A. Jones and G. P. Sullivan are hereby chosen as umpires in case they are needed; and the said Susong & Co. agree to abide by the report of said engineers, and to pay the balance found due to said W. E. Sullivan by their report, when the same is rendered, or within a reasonable time thereafter; and the parties hereto are to bear the expenses of said measurement, valuation, and report equally." Very soon after these papers were signed, it was ascertained that Cox, one of the engineers selected, owing to ill health, was unable to act; and the defendants, claiming that Cox was in fact their selection, though, as the paper above copied reads, he appears to have been selected by plaintiff, insisted that by a clerical error of the draughtsman of the paper the names were reversed, and assuming that they had a right to supply the place of Cox, named H. M. Ramseur for that purpose, without consultation with or notice to the plaintiff. In pursuance of such appointment, Ramseur and Harrison began the examination and measurement of one section of the work on the 8th of February, 1887, and finished on the 19th of that month. The other section they began on the 12th, and finished on the 18th, of March, 1887. They then made their report, fixing the value of the work at a sum much less than that fixed by the final estimates of the chief engineer of the railway company. It seems, however, that in making their estimate they calculated the whole amount of cubic yards at the rate fixed by the original contracts with the railway company for each cubic yard of earth, without taking into account the higher rates fixed by those contracts for loose rock and for solid rock. In the mean time, however, the plaintiff, claiming that he had a right to substitute another engineer in place of Cox, on the 14th of March, 1887, addressed a letter to the defendants, naming T. B. Lee for that purpose, which letter was delivered on the 15th, —the next day; but no notice was taken of it, and Lee never assumed to act. The plaintiff, declining to recognize the report of the engineers Ramseur and Harrison, brought this action to recover the balance due on the final estimates of the chief engineer of the railway company, after deducting certain payments made by said company, as well as the sum of $8,000 paid to him, as aforesaid, by the defendants, on the execution of the agreement of 28th of January, 1887; alleging that his work was reasonably worth the amount fixed by said final estimates. To this complaint the defendants answered, setting up several defenses, which need not be specifically stated here, as the issues raised will be hereinafter considered, so far as they are applicable to the present appeal. By consent, an order was passed referring the case to James Aldrich, Esq., as special master, to take the testimony, and determine the issues both of law and fact. In his report the master presents the case so fully and clearly that it should be incorporated in the report of this case. Both parties excepted to his report, and the case was heard by Judge PRESSLEY upon the report and exceptions, and his decree is set out in the record, and should likewise be embraced in the report of this case. From this decree the plaintiff appeals upon the several grounds set out in the record, which need not be repeated here, as we propose to consider what we regard as the material issues in the case, without following the several exceptions in the order in which they are presented.

If, as is stated by the circuit judge in his decree, the contract of the 21st of December, 1886, whereby the defendants assumed the payment of the debts of the railway company, contained a provision that the work out of which the plaintiff's claim arose should be measured and valued, we do not see how the plaintiff could maintain an action against these defendants until that provision was

Digitized by Google

complied with. They were not parties to the contracts between the plaintiff and the railway company under which the work was done for which he is now seeking compensation. They were under no liability whatever to the plaintiff originally, and, if they have assumed such liability upon terms, it seems to us clear that, in order to fix their liability, such terms must be complied with. It is manifest that the defendants were unwilling to assume liability for the amount due to plaintiff, as ascertained by the final estimates of the chief engineer of the railway company, and refused to accept such estimates as a proper ascertainment of the amount of work done by the plaintiff. This being so, the parties entered into the agreement of 28th January, 1887, whereby the plaintiff bound himself to await the payment of the balance due him until the work shall be measured, and its value computed, according to the specifications of the contracts with the railway company, by two civil engineers, to be selected in the manner therein prescribed; so that, if there had been any doubt before as to the right of the plaintiff to maintain an action against defendants for the value of the work done by him for the railway company until such work was remeasured, this agreement effectually dispelled such doubt, as such agreement expressly provided that the plaintiff should "await" payment until the work was measured, and its value computed, by two competent civil engineers, to be selected in the manner prescribed in the agreement. It follows, therefore, necessarily, that until this was done no action could be maintained by the plaintiff against the defendants, unless it was shown that the performance of the condition precedent to payment had become impossible, or its performance defeated by the fault of the defendants; in which case, doubtless, the plaintiff would be remitted to his original rights, whatever they might be. U. S. v. Robeson, 9 Pet. 319; Holmes v. Richet, 56 Cal. 307; Campbell v. Insurance Co., 1 MacArthur, 246; and Sullivan v. Byrne, 10 S. C. 122. It may be that the plaintiff acted incautiously and unwisely in binding himself to await payment of his claim until the work should be remeasured, but he was probably induced to take such action by the present advantage of receiving a cash payment to a large amount; and it seems to us that he cannot fall back upon his original rights without surrendering such advantage, which it does not appear that he has ever done or offered to do. There can be no doubt that the defendants were induced to make this large payment for the purpose of obtaining a remeasurement of the work; and if the agreement of 28th January, 1887, has failed from no fault of either of the parties, but from the inability of one of the engineers originally selected to act, as both the special master and circuit judge seem to have found, then we think it clear that the plaintiff would not be entitled to maintain an action against the defendants until he had refunded the $8,000, and thereby placed the parties *in statu quo*. But the circuit judge seems to have taken a view of the case much more favorable to the plaintiff; and, as his view has not been excepted to by the defendants,—probably for the reason that they are willing to pay what may be found due the plaintiff upon what they regard as a proper measurement of the work, as is stated by their counsel in his argument, without insisting that the $8,000 shall be refunded, but that it shall stand as a partial payment on the amount so found to be due,—we are not disposed, and perhaps might not have the right, to substitute our view for that taken by the circuit judge.

It only remains for us to consider whether there is any such error in the conclusion reached by the circuit judge, prejudicial to the appellant, as requires us to reverse it. The special master held that after the parties had made their selection of engineers under the agreement of 28th January, 1887, neither party could supply the place of Cox, who was unable to act; their power of selection being exhausted by its first exercise. He therefore held that the parol evidence offered to show the alleged clerical error or mistake, in designating the names of the persons selected by each of the parties, was irrelevant, being wholly immaterial; and upon this and other grounds stated in his report he ruled out the testimony. The circuit judge does not seem to have made any distinct ruling upon this point; but, from the fact that he says in his decree that the testimony conclusively showed that there was such clerical error or mistake, we infer that he regarded the testimony as admissible. He held, however, that the estimate made by Ramseur (who had been substituted by the defendants in place of Cox) and Harrison was not made in accordance with the specifications of the plaintiff's contracts with the railway company, as required by the agreement of 28th January, 1887, and, therefore, that such estimate was properly rejected by the special master; and in this we agree with his honor. It seems to us, therefore, that the question as to the admissibility of parol evidence to show a mistake in the designation of the engineers becomes wholly immaterial, and need not be considered.

The circuit judge further held "that, after the failure of St. John Cox to serve as one of the engineers chosen for the new measurement of plaintiff's work, neither party, without consent of both, had the right to select another engineer in the stead of St. John Cox. But in my opinion it is the imperative duty of this court to supply that defect, and to order the new measurement which both contracts expressly called for." He therefore rendered judgment recommitting the case to the special master, with instructions to require each party, within a prescribed time, to select suitable engineers to remeasure the work, and providing that, if such selection be not made by the parties within the time

Digitized by Google

limited, then that the special master make the selection. In one of his grounds of appeal, the appellant contends that the court had no power to make such an order; but aside from the fact that such an order is much more favorable to the plaintiff, as we have seen above, than anything he could obtain under a strictly legal view of his case, it seems to us that the case of Hall v. Warren, 9 Ves. 605, affords authority for such an order. In the case of Milnes v. Gery, 14 Ves. 400, cited by appellant in support of his view, the application was that the court should appoint a person or persons in place of the two selected by the parties to value the estate, who had failed to agree. There the proposition was to take away from the parties the right to make the selection, and give it to the court, while here the order still left it to the parties to make the selection, and it was only in case of their refusal to do what they had agreed to do that the selection is to be made by the court. We do not think, therefore, that the case is applicable. The other case relied on by appellant, Blundell v. Brettargh, 17 Ves. 232, does not seem to be in point. In that case the agreement was for the sale of an estate at a price to be fixed by arbitrators, whose award should be made within a prescribed time. Before the time limited had expired, and before the award was actually made, one of the parties died, and the question was whether specific performance of the award thus made could be required. We do not understand that there was any question in that case as to the power of the court to require the parties to make another selection of persons to value the estate after the first had failed.

The plaintiff, in one of his grounds of appeal, raises the question whether he was not entitled to interest on his demand. Both the special master and the circuit judge held that the claim of the plaintiff against these defendants was an unliquidated demand, and therefore not entitled to bear interest. In this view we concur, as the amount which the defendants had assumed to pay was clearly unascertained until the work was remeasured. The judgment of this court is that the judgment of the circuit court be affirmed.

SIMPSON, C. J., and MCGOWAN, J., concur.

(82 Ga. 346)

BLOUNT v. BOWNE.

(*Supreme Court of Georgia.* March 18, 1889.)

PRINCIPAL AND SURETY—INSTRUCTIONS—EVIDENCE.

1. One who is hired at a fixed compensation to become security on a bond given to procure the release of goods under seizure by a court of equity, is entitled to the stipulated compensation, if his liability attaches upon the bond, and the goods are released, although they may be immediately afterwards seized under other process, and detained indefinitely, or until again released by compromise of the whole litigation, as well that pending when the bond was given as that afterwards commenced.

2. The charge of the court upon every material point was correct, or, if not strictly so, the verdict being right, there is no cause for a new trial.

3. Although parol evidence touching a bond, and its acceptance and approval by the court, may be subject to objection, yet the objection that the bond itself is the highest evidence is not sustainable, because the instrument, being an office paper of the court, a certified copy, or an exemplification of it, is the primary evidence. Had this been called for instead of the bond, the court might have required its production; but even then, as the action was not upon the instrument, the bond being only collaterally in question, it is possible that the parol evidence received was competent.

(*Syllabus by the Court.*)

Error from superior court, Decatur county; BOWER, Judge.

Donaldson & Hawes, for plaintiff in error.
D. A. Russell, for defendant in error.

BLECKLEY, C. J. The scene of this action was Decatur superior court. The scene of the cause of action was Fulton superior court. The latter, as a court of equity, had possession, by its receiver, of certain goods, consisting of tobacco, snuff, and cigars, valued at from eight to ten thousand dollars, which had been seized at the suit of Walter *et al.*, against Gillette Bros. Of these goods Blount desired to obtain possession, to do which it became necessary for him to execute a bond with sureties. He employed Bowne to become one of the sureties, which he did; and for the agreed compensation this action was brought. Upon the trial the parties differed upon two questions of fact: (1) As to the terms of the contract; and (2) as to whether a full execution of it had been realized. There was no difference as to the amount of compensation, but Blount contended that the terms of the contract embraced not only the execution of the bond, but a sale of the goods which was subsequently to be made by Bowne; whereas Bowne contended (and such was the overwhelming weight of the evidence) that the compensation was solely for executing the bond, and that he assumed no duty or obligation whatever touching the selling of the goods. The chief pressure of the case was upon the question whether Blount obtained the possession of the goods on the bond which Bowne and others executed with him, or whether that bond proved fruitless, so as not to subserve the purpose which both parties had in contemplation. Bowne and the receiver both testified that Blount did obtain possession under the bond. One of the attorneys concerned in the transaction testified that such was also his recollection. Blount alone testified to the contrary, and even he admitted that after the bond was accepted he insured the goods in the name of Bowne, and that Bowne "was not liable for the goods more than about an hour." This implies that he was liable for them during that length of time. How liable for them? Upon the bond, of course; for there is no pretense or suggestion that he became liable for them in any other way. The explanation is that, after the receiver's custody ceased, and Blount's commenced, the goods were seized under fresh process at

Digitized by Google

the instance of a new plaintiff or claimant. This is apparent from the evidence. It was this fresh seizure which caused the subsequent detention of the goods, and led to the compromise by which Blount not only got possession a second time, but obtained a final release, both for himself and his sureties upon the bond. The seizure was not the fault of Bowne, but the misfortune of Blount. Bowne did all he undertook to do, and thus became entitled to the agreed compensation. The letter of Blount, written after the whole business was concluded, is a manifest recognition of Bowne's right to be compensated, and the only measure of compensation of which the evidence affords any glimpse is that fixed by the contract. Considering the date of this letter, the explanation which Blount attempts to give of it is too feeble to bear criticism. The evidence warranted the verdict.

2. The charge of the court, and the refusal to charge, (taken in the light of the whole charge as given,) complained of in the motion for a new trial, we consider free from substantial error. At all events, as the verdict is correct, there is no cause for reversal.

3. The ground of objection taken to the admission of certain evidence as to the bond, and its acceptance and approval by the superior court of Fulton, namely, that the bond itself, with its acceptance and approval, would be the highest evidence, is not sustainable. The bond became an office paper of the court, which accepted and approved it, and a certified copy or exemplification of such a document, and not the document itself, is declared by the Code to be the primary evidence. Code, §§ 3816, 3817. Had this ground of objection been presented to the parol evidence, instead of the one which was presented, possibly it should have been, and perhaps it would have been, sustained. But even then, as the action was not upon the bond, but the instrument was only collaterally in question, it is not certain that an exemplification would have been necessary. 1 Tayl. Ev. §§ 405–408; 1 Greenl. Ev. § 89. However this may be, the objection on which the court adjudicated was correctly decided. Our review of the question ought to be and is confined to that objection. 1 Thomp. Trials, § 698. Judgment affirmed.

(82 Ga. 445)

SOLOMON *et al.* v. CREECH.

(*Supreme Court of Georgia.* March 18, 1889.)

PLEADING—AMENDMENT—EVIDENCE.

1. Counsel being marked on the docket for the defendants at the appearance term, the case is considered as answered, and the plea of the general issue filed. Such plea is amendable at a subsequent term by a plea in behalf of one of the defendants denying the existence of the alleged partnership as to him.

2. The evidence of a subscribing witness to a mortgage, based on an examination of the record of such mortgage, and tending to prove that a copy of the instrument annexed to his interrogatories corresponds with the record, is not admissible as against the mortgagees, without first accounting for the original. Nor is it admissible to establish an alleged partnership, consisting of three persons, when the partnership which the copy describes consisted of two of these only.

3. If a witness testify to the correctness of an account annexed to his interrogatories, and no account is annexed to the same, or to his answers as they appear in this court, there can be no reversal here of a judgment excluding his evidence.

4. A witness who kept the plaintiff's books, testifying to the correctness of the account sued upon, but basing his evidence upon an examination of the books, together with other documents, and admitting that he did not sell the goods, is not competent to prove their sale and delivery; the books themselves being higher evidence than his information derived from them.

(*Syllabus by the Court.*)

Error from superior court, Brooks county; HANSELL, Judge.

W. C. McCall, for plaintiffs in error. *E. P. S. Denmark* and *D. W. Rountree*, for defendant in error.

BLECKLEY, C. J. The suit was against J. B. Creech and Charles R. Creech, as survivors of H. M. Fearnside & Co., upon an account against the partnership dated in 1882. The sheriff served J. B. Creech personally, and R. C. Creech by leaving a copy at his most notorious place of abode. It is probable that Charles R. and R. C. are one and the same person. It seems that no plea was filed until after the appearance term. The name of counsel was, however, marked for the defendant. In Simon v. Myers, 68 Ga. 74, it was held that, counsel being marked on the docket for the defendant, it has been the practice to enter the case answered, on the call of the appearance docket. When there is no such call, the marking of the name of counsel alone at the first term is sufficient, and the general issue will be considered as filed. Although section 1898 of the Code designates the plea of no partnership as a plea in abatement, yet it was held in Long v. McDonald, 39 Ga. 186, that a plea denying the existence of a partnership is a plea in bar, and, although sworn to, is not a dilatory plea, which is required to be filed at the first term of the court. Here J. B. Creech pleaded under oath that he was not a member of the firm of H. M. Fearnside & Co. at or after the time the account sued on was contracted.

1. The first point made is that the plea was filed too late. On the authority of the cases just cited, we think it was in time.

2. The court excluded evidence offered by the plaintiffs below, and, having so done, granted a nonsuit. If the evidence was properly excluded, the nonsuit was a logical sequence, for nothing was before the jury upon which to base a verdict. All the plaintiffs' evidence seems to have been taken by interrogatories. F. J. Fearnside testified that he had examined a certain record of a mortgage in Florida, made to H. M. Fearnside & Co., to which mortgage he was a subscribing witness. It is probable that this evidence was intended to prove the partnership alleged; but the copy of the mortgage

Digitized by Google

annexed to the interrogatories, as set out in the bill of exceptions, shows that the instrument was made to a partnership composed, not of three persons, as alleged in the declaration, but of only two, to-wit, Henry M. Fearnside and James B. Creech, using the name and style of H. M. Fearnside & Co. Moreover, there was no attempt, so far as appears, to account for the non-production of the original mortgage. For these two reasons the interrogatories of F. J. Fearnside were properly excluded. They had no tendency to prove a partnership consisting of H. M. Fearnside, James B. Creech, and Charles R. Creech, and, had they not been obnoxious to this objection, they would not have been admissible; for a copy of a deed taken from the register is not admissible evidence against the grantee, without notice to him to produce the original. Com. v. Emery, 2 Gray, 80; Code, § 3767.

3. In order to prove the account sued upon, the answers of Norden were offered in evidence, and he testified that the account annexed to the interrogatories exhibited to him was correct; but in the bill of exceptions (and we cannot look out of the same, as there was no motion for a new trial) no account whatever is set forth as having been annexed to his interrogatories. So we cannot assume that the account concerning which he testified was the same as that upon which the action was brought. The court having excluded his evidence, and the plaintiff in error not having set forth the ground of exclusion, we are left to discover for ourselves such ground as we can; and we find that, no account being attached to his interrogatories, this was a sufficient ground. The bill of exceptions merely states that the court rejected the evidence upon oral objections made by the defendant's attorneys, and seems studiously to conceal what objections were presented.

4. L. B. Glover testified, by interrogatories, that he was the book-keeper of the plaintiffs, and that he knew the account was correct, because he had examined the original entries made on the day of sale, and found them to be in usual order, and that he had examined the original dray receipts signed by the railroad clerk who received the articles, and he found the items in the bill to agree with the original entries; that the goods were sold upon written orders, which orders were attached to his answers, but that he himself did not sell them. This evidence was excluded also, upon oral objections, but the excepting party is equally reticent as to what the objections were as in the preceding instance. Why this concealment should have been practiced upon us we can only conjecture, but we find that this witness knew of the correctness of the account only by certain entries on the books which he kept; and it was ruled in Day v. Crawford, 13 Ga. 508, that it is incompetent for a witness to prove a merchant's account from merely having seen and examined the original entries. To the same effect is Crawford v. Stetson, 51 Ga. 120. We think, therefore, that the court committed no error in excluding this evidence. Judgment affirmed.

(82 Ga. 409)

BRYANT v. MERCIER.

(*Supreme Court of Georgia.* March 18, 1889.)

LANDLORD AND TENANT—RENT.

1. An affidavit for a distress warrant to enforce a landlord's general lien for rent is amendable, under the act of October 5, 1887.

2. Though the amendment was not made until after the return of the papers to the court of the proper county, yet, when made, it related back so as to heal defects both of issuing and returning the proceedings. Whether the distress warrant was amendable, or needed amendment, is not decided; the court below not having passed on the question.

(*Syllabus by the Court.*)

Error from superior court, Clay county; JOHN T. CLARKE, Judge.

John R. Irwin, G. G. Lark, and *C. Wilson,* for plaintiff in error. *W. A. Jordan,* for defendant in error.

BLECKLEY, C. J. A distress warrant for rent was sued out by Mercier against Bryant, in Early county, based upon an affidavit made before the judge of the county court, which officer issued the warrant. The affidavit alleged that Bryant was of that county. The sheriff of that county seized Bryant's property, under the warrant, and he made affidavit denying that the sum distrained for was due and owing. Thereupon the papers were returned to the county court; and at the succeeding term of the court Bryant appeared and pleaded to the jurisdiction, on the ground that he was not a resident of Early county, but of Clay county. This plea being found true, the court passed an order transferring the case to the county court of Clay county. A trial was afterwards had in the latter court, and resulted in a judgment against Bryant, from which he entered an appeal to the superior court of Clay county. When the appeal came up for trial, he moved to dismiss the case (1) because the case was not properly brought in this court, no officer authorized by law having returned the papers to the court; (2) because the face of the papers showed want of jurisdiction in Clay superior court, nor did it appear that Early county had jurisdiction to issue the warrant, the defendant being shown to be a non-resident of that county, and there being no allegation that he had property therein; (3) because the order directing the transfer from Early county court to that of Clay county was null and void, and the papers were not returned to the latter court by any officer authorized by law to execute and return process as the law directs. The court granted leave to amend the affidavit on which the warrant was issued, by alleging therein that Bryant had property in Early county at the date of the original affidavit and warrant, and that his residence was then in Clay county. This

Digitized by Google

amendment being made, the court denied the motion to dismiss the case, and exception was taken (1) to the allowance of the amendment; and (2) to the denial of the motion to dismiss.

1. The affidavit having been made on the 29th of October, 1887, the act of the 5th of October (Acts 1887, p. 59) was applicable to it. This we understood to be conceded by counsel for the plaintiff in error, and for that reason he forebore to argue this point before us. The act seems to be decisive against him on the question.

2. It is true there was no jurisdiction in Early county to issue the distress warrant, unless Bryant, the defendant, resided in that county or had property there. Code, § 4082. The jurisdictional fact alleged in the original affidavit was residence; but the actual facts which were afterwards introduced by amendment were the possession of property in that county, and residence in Clay county. The amendment related back to the date of the process, and cured all defects, both of issuing and returning the proceedings. The case may be treated, therefore, as if it had been returned to the county court of Clay county in the first instance. According to the authority of analogous cases, Clay being the county of the defendant's residence, return should have been made to the proper court of that county. Hardeman v. De Vaughn, 49 Ga. 596; Tharpe v. Foster, 52 Ga. 79. It is true that in the latter case the execution was set aside because not made returnable to the court of the proper county; but in that case it never reached the proper court, and besides, as far as appears, no effort was made to amend it. It would seem from the case of Steam-Boat Co. v. Torrent, 46 Ga. 585, that such a defect would be amendable. We need not, however, concern ourselves with that question now; for in the present case there was no motion to quash or set aside the distress warrant, but the motion was to dismiss the case. We think it was properly overruled, and we leave the parties to deal with the specific question as to whether the warrant was amendable, or needed amendment, when that question shall be raised in the court below. Judgment affirmed.

(82 Ga. 435)

MARSHALL v. DIXON.

(*Supreme Court of Georgia.* March 18, 1889.)

PRINCIPAL AND SURETY.

1. A creditor who, by the same contract, has personal security and a mortgage upon personal property, having, after maturity of the debt, received the mortgaged property, by contract with the principal debtor, in part payment, at more than its full value at the time he received it, may proceed against the surety as well as the principal for the balance of the debt. His inability to subrogate the surety to his rights as mortgagee against the property is no injury to the surety, because the latter has received the full benefit of the property by a credit on the contract.

2. A stipulation between the creditor and the principal debtor at the time the property was received in part payment, to the effect that the latter might redeem the same within a given time by the payment of the whole debt, is no contract for indulgence upon the debt, but a mere agreement for the privilege of redemption, and such stipulation is therefore no discharge of the surety.

(*Syllabus by the Court.*)

Error from superior court, Decatur county; BOWER, Judge.

Donaldson & Hawes, for plaintiff in error. *Townsend & Harrell*, for defendant in error.

BLECKLEY, C. J. Dixon sold a horse to Murphy for $100. Murphy and Marshall gave a joint note for the price, which note contained also a mortgage upon the horse. The debt became due in October, and on the 2d of December thereafter a credit was entered upon the note for $60, which included $50, the agreed price of the horse on his repurchase by Dixon from Murphy, together with $10 otherwise paid. In the contract of repurchase Dixon agreed that Murphy might redeem the horse by paying the whole debt, provided he paid it by the 1st of January thereafter. He failed to comply with these terms, and Dixon afterwards sold the horse to another person for $100, payable in the succeeding fall. He then brought suit upon the note against both makers; and Marshall, the surety, set up his discharge—*First*, on the ground that, the mortgage being extinguished, he was no longer bound; and, *secondly*, on the ground that the arrangement between Dixon and Murphy amounted to an extension of time or a contract for indulgence upon the note. At the trial Dixon testified that when he repurchased the horse it had been badly treated, and had so run down in value that $50 was more than it was then worth. There was no evidence tending to negative or in any way modify this testimony. It was conceded that Marshall did not give his consent to the horse being repurchased at less than the amount of the debt, nor to the sale of the horse subsequently made by Dixon.

1. No doubt the mortgage was extinguished by merger. Jackson v. Tift, 15 Ga. 557; Knowles v. Lawton, 18 Ga. 476. It follows, necessarily, that the right of subrogation given to the surety by section 2176 of the Code cannot be enjoyed. This, however, could not operate to the injury of the surety, because he had the full benefit, by a credit upon the note, of any advantage that he could have derived from subrogation. Not only was the expense of foreclosing the mortgage saved to him, but he got credit for more than the value of the horse. It might be thought, according to some authorities, that the mere loss of the right of subrogation would operate to discharge the surety, irrespective of whether damage resulted or not. Hereford v. Chase, 1 Rob. (La.) 212; Succession of Daigle, 15 La. Ann. 594. It is, perhaps, to one of these cases that Judge SPEER refers in Echols v. Head, 68 Ga. 152. But the true rule is that the surrender or extinction of securities operates as a discharge

Digitized by Google

only *pro tanto;* that is, to the extent of their value. Barrow v. Shields, 13 La. Ann. 57; Provan v. Percy, 11 La. Ann. 179; Neff's Appeal, 9 Watts & S. 36; Everly v. Rice, 20 Pa. St. 297; Brandt, Sur. § 370; Lewis v. Armstrong, (March term, 1888,) 7 S. E. Rep. 114. The right of subrogation is primarily a doctrine of equity; and when the surety has obtained otherwise all that this right could possibly secure to him, he is not injured, and therefore is not discharged.

2. With regard to the contract for redeeming the horse, there can be no question that it did not constitute any agreement, express or implied, to grant indulgence on the note. The creditor did not tie his own hands. Had he brought suit upon the note immediately after entering into this contract, the contract would have been no defense to it. Had payment of the balance of the note been enforced by suit before the time expired for redemption, the principal debtor would have had the right still to redeem by paying the $50 which had been credited upon the note as the price of the horse on receiving him back, provided this had been done within the time fixed by the contract. Had the surety come forward and paid off the balance of the note, that payment would have operated *pro tanto* in behalf of the principal in respect to the contract to redeem, and the surety could have proceeded forthwith to compel his principal to refund the payment so made. The contract for redemption would have been as well satisfied by a compulsory payment as a voluntary payment,—as well satisfied by a payment by the surety as by the principal; so that contract was not in the way of the collection of the balance of the note, whether by the creditor or by the surety. We think there was no error in allowing a recovery against both principal and surety for the unpaid balance, and that the court below did right in overruling the *certiorari* sued out by the surety. Judgment affirmed.

(82 Ga. 406)

WHEATLEY *v.* BLALOCK.

(*Supreme Court of Georgia.* March 18, 1889.)

COURTS—JURISDICTION—MECHANICS' LIENS.

The county court, where the amount sued for is within its jurisdiction, has jurisdiction to render a judgment foreclosing a mechanic's lien on realty. Such a proceeding is not a case respecting titles to land, within the meaning of the constitution.

(*Syllabus by the Court.*)

Error from superior court, Sumter county; FORT, Judge.

John Dodson & Son, for plaintiff in error.
E. G. Simmons, for defendant in error.

BLECKLEY, C. J. An execution for $65.43, besides interest, in favor of Wheatley against Blalock, directed the seizure of specific realty situated in Americus, Sumter county, and the sale of the same to satisfy a lien on said realty in favor of Wheatley as a mechanic, contractor, and material-man. This lien was foreclosed by a judgment rendered in the county court of Sumter county, on which the execution was predicated. The sheriff levied upon the property, and a claim was interposed by Mrs. Mary A. Blalock; and, the same coming up for trial in the superior court, the levy was dismissed, on the ground that the county court had no jurisdiction to render a judgment foreclosing such a lien. The sole question for our consideration is whether there was such jurisdiction or not. The constitution (Code, § 5139) gives the superior court exclusive jurisdiction of "cases respecting titles to land." The statute (Code, § 282) provides that "the jurisdiction of the county courts shall extend, in the county, town, district, or districts, to all civil cases of contract or tort (save when exclusive jurisdiction is vested in the superior court) where the principal sum claimed in cases of contract, or damages in cases of tort, does not exceed $300, and over the remainder of the county when the principal sum, as aforesaid, does not exceed $300, nor is less than $50." In section 295 the power of the county judge over the foreclosure of liens, without any restriction as to the species of property to which the liens relate, is distinctly recognized. The statutory provisions applicable directly to mechanic's liens and other like liens upon realty are contained in sections 1980, 1990, of the Code. From these it will appear that no court is specifically pointed out for the exercise of jurisdiction in proceedings for foreclosure. There must be, by the mechanic, "the commencement of an action for the recovery of the amount of his claim within twelve months from the time the same shall become due." Also, "in declaring for such debt or claim, the claimant of the lien must set forth his lien, and the premises on which he claims it; and, if the lien is allowed, the verdict shall set it forth, and the judgment and execution be awarded accordingly." It might be argued inferentially that, as the county court acts without a jury, the provision last quoted would amount to an implied negative upon its power to entertain such cases; but this is only an argument, and is met, we think, by the case of Parish v. Murphy, 51 Ga. 614, in which the foreclosure took place in the city court of Augusta; and this court say the judgment was, in effect, just what a verdict and judgment should have been had it been a case where a verdict had been rendered. The meaning of the Code we take to be this: That where, according to the course of proceedings, a verdict is necessary, it shall set forth the lien; but where no provision of law is made for a verdict, its office is supplied by setting forth the lien in the judgment. And such was the course pursued in the present case. From the recitals made above it will be seen that the county court, within certain limits as to amount, has jurisdiction of civil cases, unless they be such as fall within the exclusive jurisdiction of the superior court. We have seen that cases respecting titles to land do fall within such exclusive jurisdiction. The ques-

Digitized by Google

tion before us is therefore narrowed down to this: Is an action to enforce a mechanic's lien upon realty a case respecting titles to land? The answer, we think, must be in the negative. In Stroupper v. McCauley, 45 Ga. 74, it was ruled that such an action is not a proceeding *in rem*. To the same effect is Porter v. Wilder, 62 Ga. 521. Beckwith v. McBride, 70 Ga. 642, holds that an action against a trustee to enforce a claim against trust land is not within the constitutional provision touching exclusive jurisdiction. The question is further illustrated by Royston v. Royston, 21 Ga. 161, and various other cases which might be cited. See, also, Wells, Jur. p. 67, § 79.

We were pressed by counsel for the defendant in error with the third paragraph of section 1990 of the Code, which says: "If any real property on which there is a lien be sold by any process from the courts of this state, the purchaser shall obtain the full title, and the lien shall attach to the proceeds of the sale, upon notice by the party claiming the lien to the officer to hold the money until the next session of the superior court for that purpose." The superior court being here named as the one to arbitrate upon the distribution of money produced by the sale of the realty under liens, the argument is that that court alone has jurisdiction to enforce such liens. We think, however, the reason for this section is that, no matter from what court process may issue, only the sheriff—that is, the officer of the superior court—can sell land. Any fund, therefore, raised by the sale, must come into the hands of that officer, and of course the court, of which he is primarily and pre-eminently the ministerial officer, should direct him in paying it out. This construction of the paragraph, and of the reason for it, is an answer, we think, to any tacit argument which may be drawn from it respecting the proper court in which proceedings to foreclose should be had. The paragraph is quite as consistent with one theory of jurisdiction as another. Our general conclusion is that the county court of Sumter had the jurisdiction which it exercised, and that the superior court erred in dismissing the levy. Judgment reversed.

(82 Ga. 409)

CENTRAL RAILROAD CO. v. RAIFORD.

(*Supreme Court of Georgia.* March 18, 1889.)

RAILROAD COMPANIES—ACCIDENTS AT CROSSINGS.

1. The statutory diligence required touching the use of the bell or whistle, and touching checking of trains, on approaching public crossings, is exacted primarily for the benefit of persons crossing the track, and not for those walking along it, yet relatively to the latter, as well as the former, a failure to comply with the statute is evidence of negligence to be considered by the jury.

2. Ordinary care, by one crossing a railway upon a public crossing, is not the measure of ordinary care for one using the track to walk upon, although at the moment he may be at or on such a crossing. One who undertakes to make a passway of a railroad must use that degree of diligence which every prudent person uses who puts himself unnecessarily in a perilous situation. The evidence in the record strongly indicates that, had the injured party come up to this measure of diligence, he could and would have avoided the consequences to himself of the negligence of the company; and a new trial is ordered on this question alone, with direction to render judgment for the amount already assessed, or dismiss the action, according as the finding of another jury may be in the affirmative or the negative touching this one question.

(*Syllabus by the Court.*)

Error from superior court, Sumter county; FORT, Judge.

Lyon & Estes and *E A. Hawkins*, for plaintiff in error. *Guerry & Son* and *B. P. Hollis*, for defendant in error.

BLECKLEY, C. J. Raiford obtained a verdict for $1,500 damages against the railroad company for a personal injury, and a motion for a new trial by the company was denied. The injury resulted in the loss by Raiford of one hand, and part of one foot. We are satisfied that the damages were assessed upon the theory that both parties were negligent. That theory is well warranted by the evidence. The injury occurred at a street crossing, and Raiford was stricken while upon the crossing, or very near to it; but he was not using the highway for the purpose of crossing the railroad, but was using the track for the purpose of walking along it. It was late at night. He had already passed up the railroad for some distance, and had stepped off the track to allow a freight train to pass. He then returned to it and continued to walk along it, although he knew that another freight train was behind, and would probably soon overtake him. The only explanation he gives why he was not looking out was that he expected that train to "drill" at the station. He says it came upon him unawares, and he did not discover its approach until it was within some four feet. He then attempted to leave the track, but was too late. It struck him and inflicted the injury. Whether he was then upon the crossing or slightly beyond it is uncertain, but in either case there was negligence on the part of the railroad employes, under sections 708–710 of the Code, in failing to ring the bell and check the train. While these measures of statutory diligence are intended for the protection of persons crossing the track, and not for those walking along the track, yet relatively to the latter, as well as the former, a failure to comply with the statute is evidence of negligence to be considered by the jury. Railroad v. Williams, 74 Ga. 723. Looking at the whole charge of the court as we find it set out in the record, there was no error committed either in the instructions given, or by refusing to instruct as requested. So far as requests were legal, they were substantially embodied in the main charge.

2. We should affirm the judgment refusing a new trial without hesitation were it not that, according to any view we can possibly adopt with reference to ordinary diligence on the part of Raiford, we are unable to see how it could have failed to protect him against the

Digitized by Google

consequences of the company's negligence. On the part of the company there seems to have been no negligence whatever except in failing to ring the bell and check the train, as required by the statute. With knowledge that the train was behind, and was soon to pass along the track, Raiford, while walking along the track in front of it, was bound to come up to that measure of diligence which a prudent person would have exercised for his own safety under like circumstances. He may have exercised that degree of care which such a person would have used in crossing a railroad upon a public crossing, but that would not suffice; for one who walks upon a railway track, using and intending to use it as a passway, not only at the crossing, but on both sides, must be much more on the alert than when he merely attempts to cross from side to side of the railroad. The train was a heavy freight train, going slowly up grade, and it seems to us that if Raiford had given even slight attention to the perils of his situation, he would have discovered the approach of the train in time to protect himself. He must have been not only negligent, but grossly negligent, to have been run down by such a train under the circumstances. Railroad Co. v. Smith, 78 Ga. 694, 3 S. E. Rep. 397. We fully recognize it as a question of fact, and not of law, whether by the use of ordinary diligence he could have avoided the consequences to himself of the company's negligence. But it is our duty, on a motion for a new trial, which complains that the verdict is contrary to the evidence, to form our own opinions upon such a fact; and, where they are so decided as in the present case, it is our duty to give effect to them by ordering a new trial. But we shall confine the new trial to the single question, and direct that such trial be had for the sole purpose, of ascertaining by the verdict of another jury whether Raiford could, by the use of ordinary diligence, have avoided the injury. If he could, and the jury so find, we direct that the action be dismissed. If he could not, and the jury so find, we direct that judgment be entered up in his favor for the amount assessed by the former jury, to-wit, $1,500, with interest thereon from the date of the previous verdict. Reversed, with direction.

(82 Ga. 438)

ATLANTIC PHOSPHATE CO. v. ELY.

(*Supreme Court of Georgia.* March 18, 1889.)

SALE—CONTRACTS—LAW OF PLACE.

1. The statutes of Georgia touching the inspection of fertilizers relate solely to such as are offered for sale or distribution in this state.

2. Where a farmer orders, by letter written in Georgia, commercial fertilizers for his own use, to be sent to him from South Carolina by a dealer in that state, and the goods are shipped by railroad, according to order, from South Carolina to Georgia, and thereupon notes for the price are executed in Georgia and sent to South Carolina, the sale of the fertilizers is completed in South Carolina, and the laws of Georgia touching inspection, etc., have no application to the transaction. The notes are valid and collectible.

(*Syllabus by the Court.*)

Error from superior court, Baker county; BOWER, Judge.

Spence & Twitty, for plaintiff in error. *D. H. Pope*, for defendant in error.

BLECKLEY, C. J. The notes sued upon were given by Ely to the phosphate company for the purchase price of commercial fertilizers. The case was decided below upon an agreed state of facts, from which it appears that Ely, by letter from Camilla, Ga., to the phosphate company at Charleston, S. C., made inquiry as to the prices of their fertilizers. In reply, they wrote to him, inclosing their printed circular of prices; whereupon he again wrote requesting them to ship to Camilla, Ga., a certain quantity of their fertilizers, at the prices named in their circular. On this order, they placed upon the cars at Charleston, S. C., consigned to him at Camilla, on a through bill of lading, the fertilizers embraced in the order. He received them at Camilla, and thereupon, at the same place, executed his notes, and forwarded them to the company. He is a farmer, and purchased the fertilizers for his own use. The sole plea which he has interposed is that the fertilizers were not inspected according to the laws of this state. The court held the notes invalid, and thereupon rendered judgment for the defendant.

1. The statutes of Georgia touching the inspection of fertilizers relate solely to such as are "offered for sale or distribution in this state." Code, §§ 1553*a*, 1553*c*, 1573, 1575, 1576*b*–1576*e*; Martin v. Guano Co., 77 Ga. 257. The case just cited differs from the present in no material respect, save that in that case the goods were purchased by a retailer for sale in Georgia, while here the purchase was by a farmer for his own use. This difference we think of no significance in respect to the legality of the purchase. In neither case was there any sale, or offer for sale, in Georgia. In both alike, the seller parted with his title in another state, and the goods entered Georgia as the property of the buyer; and certainly in the present case, whatever might be said of the former, it cannot be suggested that they were sent into the state for distribution.

2. The contract of sale was altogether a South Carolina contract. Though the order was written and sent from Georgia, its acceptance took place in South Carolina, and when it was complied with by putting the goods on board the cars, consigned as directed, the sale was complete, and the property in the goods passed to the purchaser. The case is quite parallel with that of Orcutt v. Nelson, 1 Gray, 536, in which intoxicating liquors were ordered in Massachusetts by letter addressed to a party in Connecticut. The goods were delivered to a carrier in the latter state, consigned to the purchaser in the former, in pursuance of the order. It

Digitized by Google

was held that the sale was complete in Connecticut on delivery to the carrier. Chief Justice SHAW said: "It cannot be presumed that the legislature intended to extend their prohibition beyond this state, and give the enactment an extraterritorial operation, to prohibit and vacate sales made out of its territorial jurisdiction." See, also, Abberger v. Marrin, 102 Mass. 70; Dolan v. Green, 110 Mass. 322. The like rule as to the place of sale of intoxicating liquors has been recognized by this court at this term, in the case of Dunn v. State, 8 S. E. Rep. 806. The cases cited by the learned counsel for the defendant in error were Hammond v. Wilcher, 5 S. E. Rep. 113, (October term, 1887;) Allen v. Pearce, 7 S. E. Rep. 82; and Faircloth v. De Leon, 7 S. E. Rep. 640, (March term, 1888.) All these related to sales made within this state, and therefore are not in point. The judgment of the court below is reversed, with direction to enter judgment in favor of the plaintiff upon all the notes.

(82 Ga. 441)

KELLY v. STATE.

(*Supreme Court of Georgia.* March 18, 1889.)

CRIMINAL LAW—EVIDENCE—BURGLARY.

1. Where there are three grades of offense, and the evidence is equally consistent with any one of the three, a conviction of the highest grade is not warranted. To convict of burglary, rather than larceny from the house, or receiving stolen goods knowing them to be stolen, the evidence should be sufficient to exclude all reasonable doubt as to the fact that the house was closed, and the goods within it, at the time of the alleged burglary.

2. That another person, also under indictment for the same offense, has admitted that he was the guilty party, is not evidence in favor of the accused on trial.

3. Where a conversation is referred to by a witness, and is relevant only as matter of inducement to explain why he entered upon a certain investigation, it is better to admit the fact of the conversation, but to exclude all the details and particulars of the same.

(*Syllabus by the Court.*)

Error from superior court, Chattahoochee county; SMITH, Judge.

C. J. Thornton, Z. A. Littlejohn, and *B. A. Thornton,* for plaintiff in error. *J. H. Worrill,* Sol. Gen., for the State.

BLECKLEY, C. J. The indictment was for burglary, and the accused was found guilty. His motion for a new trial was overruled. The house alleged to have been broken and entered was the property of Wooldridge, and consisted of two rooms, in one of which Louis Logan, a colored man, resided. In the other were stored certain articles of personal property, including a quantity of guano in sacks. This room had a door, which was kept locked. It also had a window, through which the employes of Wooldridge, the owner, entered, and carried out the guano as it was needed for use. The window had a sash, which was raised and lowered as occasion required. There is no direct evidence that Kelly either broke or entered this room. The inculpating evidence against him is that a sack of the guano was found in his possession at his house, some 3 miles distant from these premises, and his wagon was tracked, from a point some 200 yards from the place where the guano was stored, to his house. It is certain that his wagon was used to haul the sack; and there is no evidence, save his own statement, that it was not so used by himself. His explanation is that he bought the guano from Louis Logan, and that Logan borrowed his wagon for the purpose of making delivery. There is no want of sufficiency in the evidence to justify the conviction, save that it lacks sufficient force upon the question of breaking and entering. Wooldridge, the owner of the guano, and of the house in which it was stored, testifies that he was absent from home during the night when the burglary is supposed to have been committed; that on the previous day his employes were taking out guano through the window; that in the evening (meaning the afternoon) he saw the window, and the sash was then down; that sometimes the window was left open in the day-time; at night it was secured,—such were his orders, and, "if it were not secured that night, it was their carelessness,—it was contrary to orders." He testified that when he returned home next day he found the sash up, but that his hands had already carried out one load of guano that day. None of his employes were examined, and so there is no certainty whether they raised the sash and left it up the previous afternoon, or in what condition it was found when they resumed work the next morning. The failure of the state to examine these employes, or to account for their non-production, is wholly unexplained. It is obvious that the owner did not rely upon himself to keep the window secure at night. He speaks of the carelessness of others, and by others he must mean either his employes or Louis Logan, who occupied the adjoining room in the building. It is plain that he did not know of the condition of the window at the beginning or at the end of the night on which the alleged offense was committed. If the sash was left up, and Kelly entered and took the guano from the room, his offense was larceny from the house. If the sack which he received was taken therefrom by another,—say, Louis Logan, or one of the employes,—Kelly's offense was probably only that of receiving stolen goods, knowing them to be stolen. The evidence in the record is just as consistent with the hypothesis of larceny from the house, or of receiving stolen goods, as with that of burglary. While Wooldridge identified the stolen sack as one which had been in that house, he did not know that it was in the house on the night in question. There had been opportunity during the whole week for it to have been taken therefrom by his employes; for he says they had been hauling out guano for a week. It seems to us there ought to be a new trial, and that Wooldridge's employes should be brought forward, as well as himself, to show

Digitized by Google

that the stolen sack of guano was probably in the house on the night in question, and to show what condition the window was left in when the employes last used it on the day preceding, and what condition it was in when they first used it on the morning following. Williams v. State, 52 Ga. 580. Where there are three grades of offense, and the evidence is equally consistent with any one of the three, the conviction of the highest grade seems to us unwarranted.

2. The accused offered evidence that Louis Logan, who was also indicted for the offense, told a certain witness that he (Logan) had entered the house and taken the guano. This evidence was properly rejected. The identical question was distinctly ruled in Lyon v. State, 22 Ga. 399. In that case two persons were indicted together in the same indictment, and it was ruled that the admissions of one against himself were not evidence in favor of the other; and upon the general question of such admissions the law is so well settled that it seems unaccountable that the point should ever again make its appearance. 1 Whart. Crim. Law, § 662; Smith v. State, 9 Ala. 990; Snow v. State, 58 Ala. 372; West v. State, 76 Ala. 98; State v. Duncan, 6 Ired. 236; Rhea v. State, 10 Yerg. 256; Moughon v. State, 57 Ga. 102; Daniel v. State, 65 Ga. 199.

3. The court admitted, in behalf of the state, a conversation of one witness with a third person, as mere inducement, to account for investigation by the witness. This evidence did no harm, but we think it would have been more regular to admit only the fact that a conversation occurred, without going into the particulars of what was said. The fact itself was all that was needed to show inducement, and certainly the conversation was not admissible for any other purpose. Some other questions were raised in the motion for a new trial, but, as they will have no relevancy on a future trial, it is unnecessary to discuss them. Judgment reversed.

(82 Ga. 427)

RICHARDSON *et al.* *v.* SUBERS.

(*Supreme Court of Georgia.* March 18, 1889.)

WIFE'S SEPARATE ESTATE—EXECUTION.

1. Where creditors of a husband levy on certain personal property which the wife, who has a separate estate, claims to have purchased from a third party with her own means, the burden of proving fraud on the part of the wife is on the creditors.[1]

2. In such case, where the property levied on is, as shown by the sheriff's return, in the possession of the husband, the *onus* of explaining such possession is on the wife, under Code Ga. § 3789, providing that in such cases the burden of proof shall be on the claimant.[1]

Error from superior court, Decatur county; BOWER, Judge.

Richardson & Co. recovered judgment against W. C. Subers, and levied on certain personal property in the possession of Subers. The latter's wife filed claim to the goods, and from a judgment in her favor plaintiffs bring error.

O. G. Gurley, for plaintiffs in error. *D. A. Russell* and *Donalson & Hawes*, for defendant in error.

SIMMONS, J. It appears from the record in this case that W. C. Subers and K. Donalson were partners in business in the city of Bainbridge, under the firm name and style of W. C. Subers & Co. Subers became indebted to Donalson, and on the 23d of July, 1880, the firm was dissolved. Subers turned over the entire stock of goods to Donalson in payment of his indebtedness. On August 1, 1880, Donalson sold the same stock of goods to Mrs. W. M. Subers, the wife of W. C. Subers. Mrs. Subers gave her three promissory notes to Donalson for $500 each, payable at different times, in payment for said stock of goods, and assumed the outstanding indebtedness of W. C. Subers & Co., to the amount of $1,500. In order to secure the purchase money of the stock of goods, she gave a mortgage thereon to Donalson, and in order to secure the indebtedness of the late firm, which she had assumed, she gave a mortgage to Donalson on certain real estate which belonged to her, situate in the city of Bainbridge. Richardson & Co. obtained a judgment against W. C. Subers, January 21, 1884, and had execution issued thereon, which was levied by the sheriff upon a portion of the goods purchased by Mrs. Subers from Donalson. The sheriff's entry stated that W. C. Subers, the defendant in execution, was in possession of the goods at the time of the levy. Mrs. Subers filed a claim to the goods. On the trial of the claim case the foregoing facts, and others which it is not now necessary to mention, were put in evidence before the jury. The jury, under the charge of the court, found the property not subject. The plaintiffs in *fi. fa.* moved for a new trial, which was denied by the court, and they excepted. The grounds of the motion for a new trial are, in substance, that the evidence did not identify the goods levied on as a part of the goods purchased from Mrs. Subers; that the evidence failed to show that Mrs. Subers had any separate estate with which to buy property; and, in the absence of such evidence, the presumption was that the husband purchased the property, or it was purchased with his money; and that the court charged the jury that it was not necessary for Mrs. Subers to show from whom she derived the money, or the means employed, if any were employed, in the purchase of the property; and that the verdict was contrary to the evidence.

1. One of the main grounds relied on by counsel for the plaintiffs in error before us was that the court charged that it was not necessary for Mrs. Subers to show in what manner she obtained the money to purchase these goods; counsel contending that, she

[1] As to the burden of proof in controversies between a wife and her husband's creditors, see Welsh v. Solenberger, (Va.) 8 S. E. Rep. 91, and note.

Digitized by Google

being a married woman, it was incumbent upon her to show that the money which was paid Donalson for the property was her own money, and not her husband's. Under the facts of this case we think the court was right in charging as he did upon this subject, and refusing to charge the request of the plaintiff in execution. While it is true that Mrs. Subers is a married woman, still the law allows her to make contracts with other parties just the same as if she were single. The evidence shows that she had a separate estate. She made this contract in her own name with Donalson, and gave him her notes and a mortgage to secure the purchase money of the goods. So far as the record discloses, the husband had nothing to do with the contract. Donalson traded with her, and relied upon her, and the security which she gave, for payment, and not upon her husband. We therefore do not think that it was incumbent upon her, under this state of facts, to prove how she got the money to pay for the goods, any more than it would have been incumbent upon any other person under like circumstances. The rule contended for by counsel for the plaintiffs in error would have been correct if this had been the husband's property which the husband had sold or given to the wife, and a creditor had attacked the transaction for fraud. Whenever the transaction is between husband and wife, and the creditors attack it, then the law throws the *onus* on the wife, when she claims the property purchased or received from her husband, to make a fair showing about the whole transaction. When the wife has a separate estate, and purchases from other parties than her husband, and this property is levied on as the property of the husband, then we think that the *onus* is upon the creditor to show fraud or collusion, or that the wife did not have any separate estate, or any means wherewith to purchase the property.

2. The entry made by the sheriff on the *fi. fa.* shows that the husband was in possession of these goods at the time of the levy. The record fails to disclose any explanation by the claimant or by her husband of this possession. Under our Code, § 3739, this entry of the sheriff placed the *onus* of explaining the possession of the husband upon the claimant in this case. She failed to explain it. The property levied on being personal property, and the title thereto passing by delivery, it might have been her husband's at the time of the levy, so far as this record discloses. It is true, we might infer that her husband was simply her agent, but we think that in cases like this, where the property levied on is in possession of the husband, it being personal property, if the wife claims it she ought to show by what right it was in possession of the husband. Of course, if it was realty, the title to which is passed by writing, the exhibition of the deed would be sufficient. We think the better practice, where personalty is involved, and the husband is in possession, is for her to explain that possession; and upon this ground we reverse the judgment of the court below. Primrose v. Browning, 59 Ga. 69; City of Atlanta v. Word, 78 Ga. 276. As to the right of a married woman to contract, see Huff v. Wright, 39 Ga. 41; Wilcoxson v. State, 60 Ga. 184. Judgment reversed.

(82 Ga. 336)

DE VAUGHN v. HOWELL.

(*Supreme Court of Georgia.* March 18, 1889.)

LEASES—RESERVATION OF TITLE TO CROP.

A stipulation in a lease of a plantation for a year, with the right to continue two years longer, provided the rent is paid, that the title to the crops shall vest and remain in the landlord until he shall have been fully paid, is not void as to crops grown the last year, as being a sale of things not *in esse*. It simply amounts to a reservation by the landlord of the fruits of his own land.

Error from superior court, Macon county; FORT, Judge.

Trover by Howell against De Vaughn for crops. Verdict and judgment for plaintiff, and defendant brings error.

John B. Holmes, J. M Du Pree, and *R. F. Lyon,* for plaintiff in error. *John W. Haygood* and *E. A. Hawkins,* for defendant in error.

SIMMONS, J. J. J. Howell, in the year 1884, entered into a written contract with De Vaughn for the rent of a certain plantation and mules for that year, whereby he agreed to pay said De Vaughn 2,600 pounds of lint cotton. He made other agreements, in said contract, as to repairing fences and attending to stock, which need not be mentioned here. De Vaughn agreed to furnish a certain amount of supplies. It was also further agreed that Howell was to have said land and mules for the years 1885 and 1886 at the same terms, "provided Howell paid said De Vaughn for rent and all advances for each year." In order to secure De Vaughn in the payment of the rent and advances, the contract says: "I hereby sell, assign, and convey unto said De Vaughn all my interest in and to said crop of all sorts made by me and my tenants, and consent that the title of the same shall vest and remain in said De Vaughn or assigns until he shall have been fully paid for all articles I may be due him for." Howell occupied the farm for the years 1884 and 1885, and up to June, 1886, when he died before the crop had matured. He left his widow upon the farm, who undertook to carry it on, but failed; whereupon De Vaughn took possession, and cultivated and gathered the crop. The widow applied for a year's support, and the crop was set aside to her by the ordinary. She brought trover against De Vaughn to recover possession of the crop. Upon the trial of the case, under the charge of the court, the jury returned a verdict in her favor. De Vaughn moved for a new trial, upon the several grounds stated therein, which was overruled by the court, and he excepted. The ground relied upon here by

Digitized by Google

counsel for the plaintiff in error for a reversal of the judgment of the court below is as follows: "The court erred in charging the jury that it was their duty to construe the contract mentioned above, under which De Vaughn claimed title to the crops in dispute; and in so far as this contract, made in 1884, undertook to pass title to De Vaughn to the crops of 1886, it was void and of no effect; that it was contrary to law to permit a title to be maintained to the crop made in 1886 by such contract made in 1884; and that De Vaughn could not maintain title to the crops under such contract."

1. We think the exception to this charge is well founded. While it is true, as a general rule, that things not *in esse* cannot be sold, we do not think that that rule applies to a case of this character. Here was a landlord who made a rent contract with his tenant, and the tenant not only agreed to sell the crop, but went further, and agreed that the title to all the crops made on the farm should remain in the landlord until the landlord was fully paid for his rent and all advances. We see no reason why a landlord, when he rents his farm, cannot reserve in the rent contract the title to the crops grown thereon until his rent and advances are paid. It is simply a reservation of the fruits of his own land. It is not like an owner of land selling his crop before it is planted, or a tenant mortgaging his crop before it is planted. This question has never been before this court before, but it seems to have arisen in other states. In the case of Smith v. Atkins, 18 Vt. 465, REDFIELD, J., in discussing this question, says: "It is without doubt true that the sale of a thing not in existence is, upon general principles, inoperative, being merely executory; that is, it confers no title in the thing bargained. But when the thing thereafter to be produced is the produce of land, or other thing, the owner of the principal thing may retain the general property of the thing produced, unless there be fraud in the contract, and it be entered into merely to defeat creditors. The leasing of land or domestic animals, or delivering to another property to trade with,—the lessee having still an interest in the thing, but the general property remaining in the lessor,—is not a sale of things not *in esse*, nor is it so to be esteemed, even where the lessor retains a lien for his rent upon the product of the land, or the animals."

In the case of Bellows v. Wells, 36 Vt. 601, 602, POLAND, C. J., says: "It has been repeatedly decided in this state that the lessor of land may stipulate in the lease that the crops grown on the premises by the lessee shall remain the property of the lessor until the rent shall be paid, and that such provision is valid, not only between the parties, but as to third persons also. * * * The reasoning upon which our decisions go is that the owner of the land, being also the owner of the fruits or products of it, in parting with the use of it to another, may make such conditions and reservations in relation to the land itself, or the products grown from it, as he chooses, instead of parting with the full right. The principle is the same as that upon which conditional sales of personal property are upheld." In the case of Andrew v. Newcomb, 32 N. Y. 419, DENIO, C. J., says: "The owner of land may lawfully contract for its cultivation, and may provide in whom the ownership of the product shall vest." See, also, Heald v. Insurance Co., 111 Mass. 38; Butt v. Ellett, 19 Wall. 544; Wentworth v. Miller, 53 Cal. 9; Howell v. Foster, 65 Cal. 169, 3 Pac. Rep. 647; Lewis v. Lyman 22 Pick. 437; Ponder v. Rhea, 32 Ark. 435; 4 Amer. & Eng. Cyclop. Law, note, 896. These cases, we think, fully sustain our position in this case. We think the principle ruled is sound and fair, both to the landlord and the tenant. It follows, therefore, that the contract made between De Vaughn and Howell was a valid and binding contract, and that the title to the crop vested and remained in De Vaughn until he was paid his rent and the advances made by him for the year 1886.

2. It may be argued, however, that this principle would have applied to the year 1884, when the contract was made, but could not apply to the crops made in 1886, because the contract was made more than two years before that time. We do not see any difficulty in that suggestion. The contract was absolute for the year 1884, and conditional for the years 1885 and 1886. It was stipulated in the contract that the same terms should apply to these years as to 1884, if the rent was paid. We presume the rent was paid for 1884 and 1885, as the evidence shows that Howell was still on the farm up to June, 1886, when he died. He recognized the contract as binding upon him for that year, as the evidence in the record shows; and in our opinion, if he had paid his rent for the two previous years, it was as binding in the year 1886 as it was in the year 1884.

3. When De Vaughn is fully paid for his rent and advances, and for the necessary expense in cultivating and gathering the growing crop of that year, if there is a balance left, we think that Mrs. Howell would be entitled to it. It will be for the jury to say on the next trial what were the necessary expenses incurred by De Vaughn in the cultivation and gathering of that crop. She would also be entitled, under the evidence in this record, to recover the horse and its reasonable hire. Judgment reversed.

(81 Ga. 716)

JEFFERSON v. HARTLEY.

(*Supreme Court of Georgia.* Jan. 28, 1889.)

SHERIFFS' BONDS—WHO MAY SUE ON.

1. At common law, and particularly under the provisions of Code Ga. § 12, and § 160, par. 4, a stranger to the process may bring an action upon a sheriff's bond for an injury done by the sheriff under color of his office.

2. Such action lies, in the first instance, directly on the bond. No preliminary proceeding or judgment against the sheriff is requisite.

Digitized by Google

Error from superior court, Crawford county; GUSTIN, Judge.

M. G. Bayne, for plaintiff in error.

BLECKLEY, C. J. This was an action upon the sheriff's bond, brought by a woman who alleged that the sheriff, when executing a writ of possession against her husband, expelled her from certain land, she having title to the same, and not having been a party to the ejectment cause against her husband, out of which the writ issued. The declaration was demurred to upon the ground that an action upon the bond would not lie in the first instance; that the sheriff had to be first sued, and a recovery had against him. The demurrer was sustained, and the action dismissed. The case was argued here for the plaintiff in error alone, there being no appearance for the defendants in error. So we have not had the benefit of representation on both sides, and we confine our adjudication to the exact point made by the demurrer, not investigating carefully the allegations of the declaration, so as to see whether all the elements of a good action are set out. The demurrer being confined to a single point, our judgment is restricted accordingly. We, however, say, upon the general question of a right of action by one turned out of possession who is not named in the writ nor within its legal operation, the right certainly exists. If the sheriff, in endeavoring to execute a writ of possession, expels from the premises any such person, the person expelled would have a cause of action. As to who will come within the operation of the writ, there may be some question. Section 3638 of the Code deals with the matter in a general way, and some adjudications have been had, as for instance, Rodgers v. Bell, 53 Ga. 94, and Stokes v. Morrow, 54 Ga. 597, throwing light upon the subject. We are not to be understood as doubting that a husband can be removed from specific realty by a writ of possession against him, though the land may belong to his wife. What we suggest is that the wife cannot be removed from her own land by virtue of a writ to which she is no party, unless, by reason of the special facts of the case, she falls within some class of persons against whom the writ silently operates by the rules of law. Here the wife sues, not for the removal of her husband, but of herself. She raises no question as to the legality of his removal. Of course, when the sheriff has an express order from a court of competent jurisdiction to expel a particular person, or when the law points out a class of persons to be expelled, he commits no tort by obeying the writ, and is protected. This principle, as it affects the seizure of property, is ruled in Buck v. Colbath, 3 Wall. 334; in Wallace v. Holly, 18 Ga. 394; and in Chipstead v. Porter, 68 Ga. 220.

1. As to suit upon the bond, where there is a cause of action, our Code, § 12, and § 160, par. 4, is decisive. The former section is as follows: "All bonds taken from public officers shall be kept in the places specified by law, and copies thereof shall be furnished to any person desiring them. Suits thereon may be brought by any person aggrieved by the official misconduct of the officer, in his own name, in any court having jurisdiction thereof, without an order for that purpose." The latter relates likewise to the bond of every officer; and paragraph 4 reads thus: "For the use and benefit of every person who is injured, as well by any wrongful act committed under color of his office as by his failure to perform, or by the improper or neglectful performance of those duties imposed by law." And upon general law, without reference to these express provisions of the Code, the decided weight of authority respecting suit on the sheriff's bond seems to be on the same line. The cases on both sides of the question are cited, and seem to be fully discussed, in Lammon v. Feusier, 111 U. S. 17, 4 Sup. Ct. Rep. 286. It was there held that the United States marshal was subject to action upon his bond by one whose property had been seized under a general attachment on mesne process against a third person. So we think there is no obstacle, in the light of general law, and certainly none under our Code, in the way of a stranger to the process bringing an action upon the bond for an injury done by a sheriff under color of his office.

2. And we are quite certain that the action, when it lies at all, lies, in the first instance, directly upon the bond. There is no requirement of law that any preliminary proceeding against the sheriff shall be had in the nature of an action at common law against an administrator or executor to establish a *devastavit*, before the bond can be sued upon. We think that the ground of demurrer presented was not good, and that the court erred in dismissing the action upon that ground. Judgment reversed.

(32 W. Va. 203)

KANAWHA VALLEY BANK v. ATKINSON *et al.*

(*Supreme Court of Appeals of West Virginia.* Feb. 16, 1889.)

HUSBAND AND WIFE—WIFE'S SEPARATE ESTATE—EVIDENCE.

1. A husband, with the knowledge and consent of his wife, at different times, receives, or she delivers to him, the proceeds of the sale of her realty, gives her no note or written obligation to repay it, mingles it with his means, uses it in his business for years, keeps no written account of such moneys, (nor does she,) then becomes insolvent, and some eight or ten years after his receipt of the money purchases real estate in the name of his wife, and it is alleged by him and her that it was paid for with the money so received; and several years afterwards he and she unite in a deed of trust to secure a very considerable debt on said real estate, such debt being a loan to the husband, and before such purchase a judgment is rendered against him for a debt. The lot is liable to the judgment.

2. If, when such purchase is made, any claim which she may have on him for such proceeds of her real estate is barred by limitation, that circumstance tends strongly to repel the wife's claim to exempt the land against creditors.

Digitized by Google

3. The law will not, from the mere delivery by the wife of her money to the husband, or from the permitted receipt by him of her separate estate, imply a promise by him to repay her, but will require more,—either an express promise, or circumstances to prove that in such matters they dealt with each other as debtor and creditor. To thus raise a debt against him to the prejudice of creditors, the proof must be clear, full, and above suspicion.

4. Points 1, 2, 3, and 5 of the syllabus in Burt v. Timmons, 29 W. Va. 441, 2 S. E. Rep. 780, reaffirmed.

(*Syllabus by the Court.*)

Appeal from circuit court, Ohio county.

J. F. Brown, for appellant. *W. J. W. Cowden*, for appellees.

BRANNON, J. On 20th of November, 1874, the Kanawha Valley Bank recovered a judgment in the circuit court of Kanawha county against Charles T. Duling, Herman L. Gebhart, and George W. Atkinson, for $861.92, and on the 31st of March, 1885, it brought a suit in equity in the circuit court of Ohio county against Ellen Atkinson and others, alleging in its bill the recovery of this judgment, and its non-payment, and that on the 2d of January, 1882, the United States Building, Land & Loan Association of Wheeling conveyed to Ellen Atkinson a lot of land on Twelfth street, in the city of Wheeling, for the consideration of $3,300, and that said consideration was paid by George W. Atkinson, her husband, out of his own funds; that he purchased it from the association, and that Ellen Atkinson paid no part of it, and that George W. Atkinson was largely indebted at the time, and used the name of his wife, and had the lot conveyed to her, to delay, hinder, and defraud his creditors; that said Atkinson, on January 17, 1885, borrowed from the Commercial Bank $1,500, and secured it by a deed of trust on said lot executed by his wife and himself; and alleged that he was insolvent. The bill prayed that said lot be decreed to sale for said debt of plaintiff, and that the deed to Mrs. A. be held void as to it. Ellen Atkinson answered, admitting the debt of plaintiff, her husband's insolvency, the deed of trust to the Commercial Bank for money borrowed by her husband, but denied that the consideration of the conveyance to her of said lot was paid by her husband, or that he purchased, or that he used her name in the conveyance to defraud his creditors, or that she never paid any consideration deemed valuable for the lot. She averred that she married on 8th December, 1868, and when married she and her sister owned a lot in Charleston, vested in a brother as trustee, and, she having bought her sister's share, it was conveyed to her 21st March, 1870; that on the 8th February, 1871, Bessie Eagan, her sister, purchased a lot in Charleston, and on 10th March, 1871, she, Allen Atkinson, and Bessie Eagan traded properties, and said Ellen received in the exchange a property in Charleston called the "Moore Property." That on 1st of November, 1872, she, her husband joining in the deed, conveyed to Smith and Gilligan a portion of said lot for $4,000, and on 15th August, 1874, conveyed the balance to A. C. Fellars for $500; that, with part of the money received from said two pieces of property, she purchased from the Methodist Episcopal Church the parsonage property in Charleston, paying for it $2,000 cash; this last-mentioned property, on February 1, 1883, she and her husband conveyed to J. D. Pubbs for $1,500; that it was from these transactions with the money she received from the sales of her separate estate the purchase money was paid to the said association for said lot in Wheeling. She denied all allegations of fraud. George W. Atkinson answered, admitting the indebtedness, and his inability to pay his debts. He alleged that it was not true that the consideration for the Wheeling property was paid by him, or that he used the name of his wife in its purchase to defraud his creditors, and averred that the consideration for the property was paid wholly with money belonging to his wife; that when he married her she owned real estate in Charleston, which was exchanged for other real estate, from the sale of which $4,750 was realized, and said Wheeling property paid for out of it. He admitted the deed of trust to the Commercial Bank was for a loan to him. Depositions were taken. On the hearing plaintiff's bill was dismissed, and it appealed here.

It is clear from the evidence of George W. Atkinson and Mrs. Atkinson that the proceeds of the sale of her Moore property went into his hands, and with her knowledge; that he gave no note for it, or any memorandum touching it, to her. She declined to receive a note for it, as he definitely states. No written account of moneys proceeding from her property, though there were several transactions, or of rents arising from it, was kept by either of them. He made no deposit in bank or elsewhere to her credit, or to himself as her trustee or agent, or in any manner designating it as a special fund distinct from his own money. Other moneys he certainly had during the years covered by the transactions pertinent to this case, for he was holding lucrative offices under the United States government,—postmaster at Charleston, collector of internal revenue, and United States marshal,—and he had a bank account, as he speaks of drawing checks on bank. Moreover, it cannot be said that the money arising from the sale of her property or its rents went to acquire the Wheeling property, rather than any of his own proper money derived from other sources, for he mingled it with his, and used it for years in his business. His own deposition shows this. He says: "The $3,300 was paid by me as agent for my wife out of her funds, which I held in trust for her." When asked how long he had held in trust funds of his wife, he answered: "From the time it came to my hands from the sale of the Charleston property until it was paid over for the Wheeling property." Being asked as to the character of the trust, he answered: "It was a positive understanding between us that

Digitized by Google

the money was hers; that it should not be taken from her, but be forthcoming when her needs required it. I offered to give her notes, but she declined to receive them, for the reason that she knew that I would not defraud her out of it, and the further reason that neither of us considered it necessary, in a legal point of view, to pass notes between us." He further said: "It was a verbal contract. It was at various times, and, as I have stated above, no notes were given. The only evidence of the contract was the verbal acceptance of it. It was a verbal contract between man and wife, which should be held sacred, and I have ever regarded it such." Asked to state definitely the times when he received the $4,750 which he admitted having received from her property, he answered: "I cannot. I have no means of arriving at the exact date." When asked to state what he did with the money immediately on its receipt, he says: "I cannot, for the life of me, answer that question." He stated, also, that the money was received at different times, and he could not say definitely the disposition he made of the money at the time; and that $2,000 of it was paid on the Methodist Episcopal Church lot in Charleston, and some of it was on the purchase of the lot in Wheeling. He was asked to state, outside of the $2,000 paid the Methodist Episcopal Church, what disposition was made of any part of the $4,750, where it was, or how it was used, up to the time of the purchase of the Wheeling lot, and he replied: "I cannot definitely furnish you the desired information. I held it in my possession, and may have used it temporarily in some of my business undertakings, but it was always understood that it should be forthcoming, or its equivalent, when needed by my wife." He further stated that he held the money in trust, and paid the same to her creditors "out of my own resources," either growing out of the funds I held for her, and may have used in my own affairs, or out of my earnings in my business undertakings." He was asked: "Can you not state more definitely the immediate sources from which you got the money you paid for the property on Twelfth street, in Wheeling?" He answered: "I cannot." He further stated: "It may be that I borrowed temporarily from A. F. Gibbons funds to help make up a sufficient sum to pay one or more of the notes of my wife due for the purchase money of the property mentioned in the bill. I have stated over and over again that I had received from my wife in trust for her, and as her agent, a sum or sums of money greater than the amount paid by her in the purchase of the property mentioned in the bill, and that the money so received from her was held by me in trust for her, and frequently used by me in my personal transactions, but when the money was required by her it was always forthcoming." He was asked, "Was the money held by you in trust for your wife so held or placed that you could distinguish it from your own money?" and answered, "It was not, in the general handling of it, but at all times I kept a careful account of the same, so that I could at any time answer the question as to how much of her funds I had in my possession." When asked when and how the account was kept, and where it was then, he answered: "The transactions involved only real estate, and, when a piece of property was sold, the amount, of course, was known to both. It was therefore a very easy matter to keep track of the amounts without keeping a written record. I do not remember whether either of us ever made any entry of these transactions in writing. There never was a time, however, when it was not known to both of us the exact amount I held for her." He then stated he owed her a balance of $350, exclusive of interest. He was then asked to state the receipts and disbursements, and replied: "I received $4,750 from the sale of the Capitol-Street property. I paid $2,000 for the Methodist Episcopal Church parsonage. This left a balance in my hands to her credit of $2,750. I received from the sale of the parsonage property $1,500. This would make $4,250 of her money which I held in trust. I paid for her on the property mentioned in the bill $3,300. This would leave a balance due her of $950. Deducting from this the amount paid by her on the Mountain Lake property, $500, would leave a balance to her credit of $450. You will see from my last answer I made a clerical error of $100 when I said $350." He was then asked if the above moneys constituted all that he held in trust for his wife, and he answered: "I presume it does not, although I cannot now think of any sum." His wife stated that he collected rents. He further stated that his wife did not directly exercise direction or control as to any property held in trust for her, but always felt that her funds would be forthcoming "at her call, should I live, without any note or bond, and, if I should die, I carry enough life insurance to make her comfortable." When asked where he got the $500 cash payment on the Wheeling lot he answered: "I cannot answer that question, as I do not remember." When asked where he got the money to pay the second $500 payment, he answered: "I cannot answer that definitely, as I kept no separate accounts from whom I received funds due me from persons with whom I had business transactions." He made the same answer as to the third $500 payment. When asked by whom a further $500 payment was made, he answered: "My recollection is, I paid it as the agent of my wife." These quotations furnish, substantially, the case as put by the defendant G. W. Atkinson. The defense rested on the evidence of G. W. Atkinson and wife.

It cannot be said that the specific money from her property was paid on the purchase of the Wheeling property. It came from his general funds. He denominates it a "trust." He may honestly so regard it, but to merely

Digitized by Google

denominate it a "trust" does not make it a trust, unless the facts in law make it one. A trust must have a definite, certain subject-matter. Hill, Trustees, 44. The trust will not be executed unless the precise nature can be ascertained. It must have a specific, certain object, if express. 1 Perry, Trusts, § 83. Mrs. Atkinson says: "At my own request, my husband took charge of my money, to keep it for me. I knew he would be a much safer person to have care of it than I. I don't know anything about how it was used. He had it for me. He pledged himself that at any time I wanted it to invest in a home it would be forthcoming. He pledged himself solemnly to that." But is this any more than a loan, viewed in the most favorable light, from her? A deposit for safe-keeping until called for? He was not charged with selecting and buying a home. No specific instruction of that kind was given him by her, nor any undertaking on his part to do so, even according to her evidence. He was not a trustee to invest the fund. But when the question was propounded to him, "What was the character of the trust on which you held the money?" his answer was: "It was a positive understanding between us that the money was hers, that it should not be taken from her, and that it should be forthcoming when her needs required it." He specifies no particular trust of legal outline or certainty, with a specific object in view, and he does not say with Mrs. A. that he pledged himself to have the money when she should want a home. The most that can be said of it is that George W. Atkinson was a mere holder or loanee of this money. And here it is proper to say that the contention that a trust existed is not set up in either of the answers of George W. and Ellen Atkinson; the position taken by way of defense in them being that the Wheeling property was paid for, not by George W. Atkinson, but by the proceeds of the sale of her separate estate, and neither answer alleges that the money therefrom went into the husband's hands by way of trust for any purpose. It is first found in the depositions, but the depositions cannot be read to support a trust not set up in the answers, for the rule of pleading is that the *allegata et probata* must both exist and correspond, and the *probata* can perform no function unless preceded by *allegata*. Matters not charged in the bill or averred in the answer cannot be considered on the hearing. Hunter's Ex'rs v. Hunter, 10 W. Va. 321. Could it be regarded a trust for the purchase with her particular fund of the Wheeling lot, the case would have more strength, especially as to limitation. Can we uphold it as a loan? Wells, Mar. Wom. § 370, p. 371, on the authority of Schaffner v. Reuter, 37 Barb. 49, and Savage v. O'Neil, 44 N. Y. 298, says: "As to loans between them, it has been held that where a conveyance made by a husband to a wife is only a fair equivalent for money borrowed of her, and is free from actual fraud, although executed after the debt has been incurred by him, it is supported by the antecedent equitable obligation to pay it, and in legal effect relates back to the time of the loan, so as, of course, to cut out any intervening creditor of the husband. Being equitably bound to pay, he may do so voluntarily, either in money or other property; and, if a creditor undertakes to impeach it, the burden is on him to show *mala fides;* that is, where a loan or the indebtedness of the husband to the wife is *prima facie* established; for, where a wife claims a debt due her, she must, like any other person, show it in some way." And in French v. Motley, 63 Me. 326, it is held that other creditors of a husband cannot complain if he prefers to discharge a debt to her rather than to them. So in Bank v. Kimble, 76 Ind. 195, this position is said to be well settled in that state by several cases. So in Steadman v. Wilbur, 7 R. I. 481.

To the general proposition that if a clearly valid, subsisting debt in favor of a wife were fully proven, he might pay it, or prefer in payment of it to pay another for conveyance to her of property in discharge of his indebtedness to her, I would accede. But it is to be noted that, under the rule above extracted from Wells, a loan, a distinctive loan, as distinguished from a gift, must be established. In the Rhode Island case, which is as liberal as any towards the wife in this matter, it is held that "the law will not, from the mere delivery by her of her money to him, or from the permitted receipt by him of her separate income, imply a promise by him to repay her, but will require more,—either an express promise or circumstances to prove that in such matter they dealt with each other as debtor and creditor." The chief justice, in delivering the opinion in that case, says: "She cannot, when her husband becomes insolvent, convert into debts, as against his creditors, former deliveries to him of her money or other property, or permitted receipts by him of the income or proceeds of sale of her separate estate, which at the time of such delivery or receipt were intended by her as gifts, to assist him in his business, or to pay their common expenses of living; and, considering the relation between them, the law would not, merely from such delivery or receipt, imply a promise on his part to repay or replace, as in cases not thus related, but would require more, either in express promise or circumstances, to prove that in these matters they had dealt with each other as debtor and creditor." So held, also, in Edelen v. Edelen, 11 Md. 415. It would be exceedingly dangerous to the business world to have a loose principle in this matter, and would open a wide door for the defeat of honest creditors. A husband and wife embark on the voyage of life together, expecting to meet the waves together, devoting to the support of themselves and children, and to his success, their common efforts and their several means. She is always willing, from affection for her husband and interest in his success, to extend him the help of her means,

Digitized by Google

his business interests being in a large sense her interests, she never expecting any return of the means she commits to his hands; and if, after he has had those means employed in his business for years, mingled indiscriminately with his, it were permitted her, when misfortune overtakes him, to raise up loans to the prejudice of his creditors, and support them by his own and her evidence, after creditors had trusted him in total ignorance of such loans, and allow him to use his means in purchasing real estate in her name, a wide road would be laid out for the promotion of wrong against honest creditors. Better that there should be individual cases of hardship than that such dangers should stand in the way of the business world. If any one must suffer, better that even the helpless woman suffer than honest creditors whose means or property were perhaps consumed in furnishing shelter, food, and raiment to the wife and her children. In this case the husband had had the proceeds of the sale of the Moore property, except what was invested in the church lot, some of it 8, some 9, some 10 years nearly, before the purchase of the Wheeling lot, and his wife's right of action for it as a loan had become barred. In Crawford v. Carper, 4 W. Va. 56, where a party had given a note to his father-in-law for money and property advanced at different times, for which no notes were taken, and of which no account was kept, and judgment was confessed on the note, and such note and judgment were attacked by creditors for fraud, and were overthrown, BROWN, president of this court, without passing on the question whether it was a just debt or not, but waiving it as unnecessary, said: "These debts thus acknowledged, and for which the note was given and judgment confessed, were all barred by the statute of limitations. And while it was all very right, if they were just and real, that they should be paid as between the parties, yet still the important question remains whether, under the circumstances of the case, it could be done so as to intercept the other *bona fide* creditors, whose debts were not so barred. And I am free to say I think it could not, because it comes clearly within the first section of chapter 118, Code of 1860, and is just such a case as it was the intention of the statute to prohibit." Here the husband mingled the wife's money with his own; no note was ever given by him to her; no account kept; and he used it in his business. He collected some rents from the realty, as his wife says, and no account is kept. This is all right—as between husband and wife, very natural; but it does not answer the rigid requirements of the law when the wife, after her husband's insolvency, seeks to set up indebtedness in her favor. And, again, the fact that the wife in 1885 united in a deed of trust conveying the Wheeling property to secure the large sum of $1,500, purely a loan by the bank to her husband, tends to confirm the idea that it was substantially his property.

A line of decisions in our state, made up of many well-considered cases, goes far in behalf of creditors against fraudulent conveyances, and there is perhaps no state in the Union whose decisions go farther to vindicate the rights of honest creditors over such conveyances, especially between relatives, and more especially between husband and wife. In Burt v. Timmons, 29 W. Va. 441, 2 S. E. Rep. 780, it is held that as to a "transaction between father and child, husband and wife, brother and sister, or between others between whom there exists a natural and strong motive to provide for a dependent at the expense of honest creditors, if such transaction be impeached as fraudulent, may be shown to be fraudulent by less proof, and the party claiming the benefit of such transaction is held to a fuller and stricter proof of its justice and of the fairness of the transaction, after it is shown to be *prima facie* fraudulent, than would be required if the transaction was between strangers." And that "when a wife purchases land or other property the burden is on her to prove distinctly that she paid for the land or other property with funds not furnished by her husband. Evidence that she purchased amounts to nothing, unless it is accompanied with clear and full proof that she paid for it with funds furnished by some one other than her husband." And the court also held that "a transfer of property, either directly or indirectly, by an insolvent husband to his wife, is justly regarded with suspicion, and unless it clearly appears to have been entirely free from intent to withdraw the property from the husband's creditors, or the presumption of fraud be overcome by satisfactory affirmative proof, it will not be sustained." Herzog v. Weiler, 24 W. Va. 199; McMasters v. Edgar, 22 W. Va. 673; and other cases of same general principle, might be cited. Particularly in McGinnis v. Curry, 13 W. Va. 29, where a transaction by which the proceeds of the sale of the wife's land went to his hands was held to be a gift by her, not a loan, there is a strong leaning towards the position that where a wife allows the proceeds of the sale of her separate estate to go into the husband's hands, and so remain for years, especially when he uses and invests it in business, it is to be taken that the parties did not deal as debtor and creditor, that they did not contemplate the creation of debt, but a gift rather than a loan. I may say that I have struggled hard to sustain this conveyance, but under the facts of this case, and the decisions referred to, considering their letter and spirit, I find myself unable to do so. Our decisions are rigid, it must be admitted, but on the whole are right and promotive of the highest good faith (*uberrima fides*) between debtor and creditor, and should not be relaxed.

Reference is made by counsel for plaintiff to the fact that Mrs. A.'s earnings went to pay her sister for her interest in the home property, which was exchanged by Mrs. A. for

Digitized by Google

the Moore property, and that such earnings were the property of the husband, and that, as the Moore property entered into the purchase of the Wheeling lot, such earnings may be followed up. Such earnings would be the husband's. Bailey v. Gardner, 5 S. E. Rep. 636, 31 W. Va. ——. So the ready money which she owned at marriage, and the furniture which she sold, which money, furniture, and earnings went to acquire the sister's half in the home property, would be the husband's. But on March 21, 1870, the home property was conveyed to Mrs. A., and it does not appear that the plaintiff's or any debt then existed against the husband, and he could lawfully allow such earnings, furniture, and money to be invested for her use; he could give it to her. True, the fact may not be wholly irrelevant, to be considered with the other circumstances, in determining whose property is the Wheeling lot, but its weight does not seem to be important. The decree complained of is to be reversed, with costs, against Atkinson and wife, and the cause remanded to the circuit court of Ohio county, with instructions to ascertain the amount of the debt of the Commercial Bank under its deed of trust, which appears to have priority, and enter a decree subjecting the said lot on Twelfth street, Wheeling, to said Commercial Bank's debt and plaintiff's judgment in the bill mentioned, and for further proceedings.

SNYDER, P., and ENGLISH, J., concurred. GREEN, J., absent.

(32 W. Va. 244)

FIDELITY INS., T. & S. D. CO. v. SHENANDOAH VAL. R. CO.

(*Supreme Court of Appeals of West Virginia.* Feb. 25, 1889.)

CORPORATIONS — CONTRACTS — MORTGAGES — NOTICE — RELEASE — TRUSTEES.

1. Where the contract of a corporation purports to be sealed with its corporate seal, and it is proven to be signed by the proper agents of the corporation, the presumption is that the seal was affixed by the proper authority, and such contract will be held valid until the contrary is shown.

2. The presumption of authority to affix the corporate seal to a contract will not be overcome by the mere fact that no vote of the directors authorizing it is shown.

3. Notice to a trustee is notice to the *cestui que trust;* and this rule applies to trustees under an ordinary mortgage made by a railroad company to secure the holders of bonds issued under it.

4. Where a subsequent purchaser has actual notice that the property in question was incumbered or affected, he is charged constructively with notice of all the facts and instruments to the knowledge of which he would have been led by an inquiry into the incumbrance or other circumstance affecting the property of which he had notice.

5. An entry of satisfaction by the mortgagee, after he has parted with his interest in the security, will not discharge the mortgage in favor of one who had acquired an interest in the land before the discharge was made.

6. A mortgage is executed by a railroad company on its property to secure bonds to be issued thereunder, which provides that upon the full payment of all said bonds at maturity the trustee shall release the same. Before the maturity of the bonds, they are surrendered to the trustee, upon an agreement that other bonds to be issued under a subsequent mortgage are to be substituted for them. The trustee, without substituting such other bonds, executed a release of the mortgage, stating therein that all the bonds "had been surrendered." The railroad was not in a condition to anticipate the payment of its bonds, and had executed several other mortgages to take up bonds issued under former mortgages. *Held*, these facts and circumstances were sufficient to charge a subsequent mortgagee with notice of the terms and conditions upon which the bonds under said released mortgage had been surrendered, and he takes subject to the rights of those entitled to the bonds under said agreement.

7. The trustee can only do with the trust property what the deed, either in express terms or by necessary implication, authorizes him to do.

8. The cancellation of a mortgage on the record is only *prima facie* evidence of its discharge, and the owner may prove that the cancellation was done by fraud, accident, or mistake, and, if he does this, his rights will not be affected by the improper cancellation of it.

9. Where the road of a railroad company passes into two states, in each of which it is a domestic corporation, and the trustee in a mortgage upon the whole road first brings a suit in one state to foreclose the mortgage, and afterwards brings an ancillary suit in the other state for the same purpose, the plaintiff in said suits cannot object to or prevent a lien creditor of the railroad company, who has not filed his claim in the first suit, from intervening in the second to establish his lien.

(*Syllabus by the Court.*)

Appeal from circuit court, Jefferson county

McDonald & Moore and *D. B. Lucas*, for appellants. *W. H. Travers*, *W. J. Robertson*, *J. C. Bullitt*, *Geo. B. Caldwell*, and *Frank P. Clark*, for appellees.

SNYDER, P. Appeals from two decrees of the circuit court of Jefferson county,—the one pronounced November 29, 1887, in the suit of J. Garland Hurst, administrator of H. H. Crumlish, deceased, suing on behalf of himself and all other stockholders of the Central Improvement Company, against the Shenandoah Valley Railroad Company; and the other pronounced September 11, 1888, in the suit of the Fidelity Insurance, Trust & Safe-Deposit Company, trustee, against the said Shenandoah Valley Railroad Company. As the record is voluminous and the facts complicated, an understanding of the questions to be determined may be facilitated by first giving a brief statement of some of the prominent facts appearing in the record.

The Shenandoah Valley Railroad Company was organized in May, 1870, under acts of the legislatures of the states of Virginia, West Virginia, and Maryland, for the purpose of constructing and operating a railroad; and the road, as constructed by it, now extends from Hagerstown, in the state of Maryland, through Jefferson county, in West Virginia, to the city of Roanoke, in the state of Virginia. The Central Improvement Company was organized in July, 1870, under an act of the legislature of the state of Pennsylvania, passed April 9, 1870, for the purpose of constructing any work, public or private, and for other purposes. Three written contracts were entered into between the improvement and said railroad companies, designated

Digitized by Google

as contracts Nos. 1, 2, and 3. No. 1, dated August 9, 1870, was for the construction of the railroad by said improvement company from Shepherdstown to Big Lick, (now Roanoke city,) a distance of 233 miles, the work to be completed by August 10, 1872, at the price of $35,000 per mile of track laid, payable in first and second mortgage bonds of the said railroad company, and certain county bonds, as the work progressed. No. 2, dated August 1, 1872, was practically a substitute for No. 1, and provided for the construction of the railroad from Shepherdstown to Waynesboro, a distance of only 140 miles, and fixed October 1, 1874, as the time for the completion of the work. No. 3, dated April 23, 1873, was supplemental to contract No. 2, and conferred upon the improvement company the power to vote a large amount of the stock of said railroad company. On October 15, 1872, the said railroad company executed to J. Edgar Thompson, trustee, a first mortgage on its road and franchises between Shepherdstown and Waynesboro, to secure $3,750,000 of first mortgage 7 per cent. gold bonds, being $25,000 per mile of the road. During the month of September, 1873, $781,000 of these bonds were issued, and delivered to said improvement company on account of its contracts for the construction of said railroad; and of these bonds $250,000 were subsequently delivered by the improvement company to the Pennsylvania Railroad Company as collateral security for loans made by the latter to the improvement company; leaving in the hands of the improvement company the balance of $531,000 of said bonds. On January 7, 1873, a resolution was passed by the stockholders of the improvement company authorizing its president and treasurer to dispose of the securities receivable under its contract with the said railroad company. Work on the railroad was abandoned by the improvement company in the fall of 1873, and never afterwards resumed by it. Jefferson county, on behalf of itself and the other stockholders of the Shenandoah Valley Railroad Company, in April, 1874, filed its bill in the circuit court of Clarke county, Va., to set aside the aforesaid contracts, Nos. 1, 2, and 3, between the said railroad company and the improvement company. A final decree was entered in this suit on December 8, 1874, whereby said contracts Nos. 2 and 3 were set aside and declared void, but the court refused to set aside contract No. 1. In December, 1876, an attachment suit in equity was brought in the circuit court of Warren county Va., by J. T. Griffith, suing in the name of H. H. Crumlish for his use, against the Central Improvement Company and the Shenandoah Valley Railroad Company, to attach whatever stock might be held by the improvement company in the said railroad company, and any indebtedness due from the latter to the former, to satisfy a debt due to the plaintiff from the said improvement company on account of work done for the latter in the construction of said railroad. The suit was afterwards transferred to the circuit court of Clarke county, and referred to a commissioner, who made a report holding that the $781,000 of bonds aforesaid had been delivered by the railroad company to the improvement company under the said contracts Nos. 2 and 3, which had been set aside and declared void in the aforesaid Jefferson county suit, and that the said delivery was void. In December, 1878, an amended bill was filed by Griffith, in which he averred that the said bonds had been delivered under said contract No. 2, which had been declared void, and, consequently, the said delivery was without authority and void, and the debt which these bonds had been transferred to pay was still a subsisting debt due from the said railroad company to the improvement company, and liable to the plaintiff's attachment. In January, 1880, Griffith, on behalf of himself and the other creditors of the improvement company who had by petition made themselves plaintiffs, filed a petition in the suit, in which it is averred "that all these bonds thus issued ($781,000) have been returned and canceled, and the mortgage securing them has been released, and they have been substituted by a like number of bonds issued under a second mortgage, recorded, for $15,000 per mile."

On May 18, 1880, the court entered a decree in favor of the plaintiff, Griffith, against the Central Improvement Company for $8,826.33, and ordered the sale of 5,000 shares of stock of the Shenandoah Valley Railroad Company, held by the improvement company at the time the attachment was sued out by Griffith, to pay said sum; and the court being of opinion that the improvement company had, subject to the lien of the attachment of Griffith, and before the filing of the petition and amended bill making the general creditors parties, made a valid assignment of the said stock to the Pennsylvania Railroad Company, it denied the relief prayed for by the general creditors, and the amended bill, so far as it asked relief in their behalf, was dismissed. From this decree, and other decrees subsequently rendered in other suits heard with this suit, an appeal was taken to the supreme court of appeals of Virginia, and the said decree of May 18, 1880, was affirmed. Railroad Co. v. Griffith, 76 Va. 913. By an agreement dated April 29, 1878, the said improvement company agreed to surrender to the said railroad company all the first mortgage bonds held by it upon the terms set forth in said agreement. On January 1, 1879, the said railroad company executed a mortgage on its railroad and franchises to the Farmers' Loan & Trust Company to secure $2,250,000 of first mortgage bonds. On August 25, 1878, W. H. Travers, as substituted trustee, in the aforesaid mortgage of October 15, 1872, executed a release of said mortgage. The railroad company, by a mortgage dated July 1, 1871, but which was in fact executed in September, 1879, and recorded October 6, 1879, conveyed its road and franchises to W. H. Travers, trustee, to secure $1,500,000 of second mortgage bonds; being $10,000 per mile on its road from Shep-

Digitized by Google

herdstown to Waynesboro. The aforesaid mortgages of July 1, 1871, (1879,) and of January 1, 1879, were subsequently released, the former by deed of May 6, 1880, and the latter by deed of Oct. 2, 1880. On April 1 1680, the railroad company executed a mortgage to the plaintiff, the Fidelity Insurance, Trust & Safe-Deposit Company, trustee, on all its property, to secure first mortgage bonds to be issued at the rate of $15,000 per mile of completed road, and $10,000 of bonds additional for each mile of double track. On the next day, April 2, 1880, the said railroad company executed to the same trustee, on all its property, another mortgage, to secure second mortgage bonds at the rate of $10,000 per mile of its road. On April 5, 1881, the said railroad company executed to the same trustee another mortgage, known as the "General Mortgage," to secure bonds to be issued at a rate not exceeding $25,000 per mile of its road. By deed of release, dated July 30, 1881, the Fidelity Insurance, Trust & Safe-Deposit Company released the aforesaid mortgage of April 2, 1880. The railroad company on February 12, 1883, executed another mortgage, known as the "Income Mortgage," on all its property and the income of its road, to the plaintiff, the Fidelity Insurance, Trust & Safe-Deposit Company, trustee, to secure $2,500,000 of income bonds. It will be observed that of the aforesaid seven mortgages, all have been released, except the three dated, respectively, April 1, 1880, April 5, 1881, and February 12, 1883, to the Fidelity Insurance, Trust & Safe-Deposit Company, trustee.

On December 1, 1882, the administrator of H. H. Crumlish, deceased, brought the first of these suits in the circuit court of Jefferson county. The bill alleges that the plaintiff, as administrator of Crumlish, was the owner and holder of two certificates of the paid-up stock of the Central Improvement Company of 100 shares each, of the par value of $50 per share; that the paid-up capital stock of said company was $150,000; that the said company owes debts amounting to about $300,000; that in a settlement made in the spring of 1874 it became the owner of $781,000 of first mortgage bonds of the Shenandoah Valley Railroad Company, and is still the owner of $531,000 of said bonds; that, in the spring of 1879, these bonds, without the authority of said company, were destroyed, with the understanding they were to be substituted by other bonds to be issued under another mortgage; and, in order to prevent the issue and delivery of said substituted bonds to some unauthorized person, the plaintiff prayed an injunction to inhibit such issue, etc. A demurrer to this bill was sustained by the circuit court. An amended bill was filed in April, 1885, in which the plaintiff avers that since the filing of his original bill he has learned that the Shenandoah Valley Railroad Company sets up a claim to said $531,000 of bonds under an alleged agreement dated April 29, 1878, which is fraudulent and void, and that the mortgage of October 15, 1872, securing said bonds, has been improperly released, setting out the facts and grounds upon which the agreement is alleged to be void, and the said mortgage improperly released; and then praying that said agreement and release may be declared ineffectual and void, and the title of said improvement company to said bonds established, etc. A demurrer to this bill was also sustained by the circuit court, but upon appeal to this court the demurrer was overruled, the bill sustained, and the cause remanded. Crumlish v. Railroad Co., 28 W. Va. 623. By a decree entered in the cause by the circuit court on November 29, 1887, it was decided that the aforesaid agreement of April 29, 1878, did not pass the title to said $531,000 of first mortgage bonds from the improvement company to the Shenandoah Valley Railroad Company; that the amount of the debt evidenced by said bonds is still due from said railroad company to said improvement company; and adjudged and decreed that said agreement of April 29, 1878, be declared void as between the said companies; and A. W. MacDonald was appointed receiver of the assets of the said improvement company, and leave given him to prosecute the claim of said company in the suit of the Fidelity Insurance, Trust & Safe-Deposit Company then pending in said court. From this decree the Shenandoah Valley Railroad Company has appealed.

The Fidelity Insurance, Trust & Safe-Deposit Company, trustee, on March 31, 1885, filed its bill against the Shenandoah Valley Railroad Company in the circuit court of the city of Roanoke, in the state of Virginia, to foreclose the mortgages held by it as aforesaid; and on April 1, 1885, the said Fidelity Company, as trustee, filed its bill in the second of these suits, in the circuit court of Jefferson county, as ancillary to the foreclosure suit already brought in Roanoke city, as aforesaid; and Sidney F. Taylor was appointed receiver of said railroad, and its property, in each of said suits. In February, 1888, A. W. MacDonald, special receiver, filed his petition in this cause, exhibiting therewith the record of the aforesaid suit of Crumlish's administrator against the Shenandoah Valley Railroad Company, averring that he was a necessary party to this suit, by reason of the aforesaid decree of November 29, 1887, in the said Crumlish suit, appointing him receiver to prosecute the claim therein established in favor of the Central Improvement Company against the Shenandoah Valley Railroad Company, which he represented to be the first lien on the property of said company. The said Fidelity Company excepted to the filing of said petition, and demurred to the same, and, said exceptions and demurrer being overruled by the court, it filed its answer to said petition, and to the bill and amended bill in the said Crumlish suit. As defenses in its answer, it denied the right of petitioner to exhibit the record in the Crumlish suit against it in this suit, because it was not a party to that suit; it denied the right of pe-

Digitized by Google

titioner to intervene in this suit, because it is only an ancillary proceeding to the main suit which was then pending in the circuit court of the city of Roanoke, and insisted that the improvement company should assert its claim in that suit; it claims that on a settlement of accounts the improvement company would be shown to be indebted to the Shenandoah Valley Railroad Company; it pleads and relies on the said agreement of April 29, 1878, as a valid and binding contract between the improvement company and said railroad company; and it also pleads and relies on the laches of said improvement company as a bar and estoppel to its right to set up its alleged claim in this suit. The petitioner replied generally to this answer. The administrator of Crumlish having also filed his petition in this cause, he was also made a party, and the Fidelity Company made substantially the same objections and answer thereto. On September 11, 1888, the circuit court pronounced a decree by which it was adjudged and decided that, as between the stockholders and creditors of the Central Improvement Company and the Fidelity Insurance, Trust & Safe-Deposit Company, trustee, representing the holders of the bonds issued under the said mortgages, dated, respectively, April 1, 1880, April 5, 1881, and February 12, 1883, the said Fidelity Company was and is a purchaser for value without notice, and postponed the payment of the debt of said improvement company to the liens created by said mortgages. From this decree J. Garland Hurst, administrator of H. H. Crumlish, deceased, and A. W. MacDonald, special receiver for the Central Improvement Company, have appealed.

The first inquiry is whether or not the circuit court erred in the decree entered by it on November 29, 1887, in the first of these causes. It is contended by the appellant, the Shenandoah Valley Railroad Company, as well as by the Fidelity Company, that inasmuch as the contracts, Nos. 2 and 3, under which the first mortgage bonds claimed by the Improvement Company were delivered or paid to it by the Shenandoah Valley Railroad Company, were set aside and declared void by the decree of December 8, 1874, of the circuit court of Clarke county, in the suit of Jefferson county against said improvement company, the said company never had any right or title to said bonds. In the view I take of this cause, it is unnecessary to consider any matter connected with said Jefferson county suit. The record shows that at a meeting of the stockholders of the Central Improvement Company held on January 2, 1873, the following resolution was adopted: "Resolved, that the president and treasurer of this company are hereby authorized and empowered to dispose of the securities receivable by this company under its contract with the Shen. Val. R. R. Co., on such terms as in their judgment may be to the best interests of this company." So far as the minutes of this company show, its stockholders had but three meetings after this resolution had been passed, and the last of these was held November 4, 1875. At neither of these meetings was the authority conferred by the aforesaid resolution revoked or withdrawn. The records of the improvement company show that on April 29, 1878, and prior thereto, Phillip Collins was the duly-elected and acting president of said company, and C. W. Mackeehan was secretary and treasurer. On said day the following agreement was executed:

"This agreement, made this 29th day of April, A. D. 1878, between the Shenandoah Valley Railroad Company, of the first part, and the Central Improvement Company, of the second part, witnesseth: Whereas, under certain contracts heretofore made with the Shenandoah Valley Railroad Company, the Central Improvement Company agreed to build the said Shenandoah Valley Railroad from Shepherdstown, on the Potomac river, in the state of West Virginia, to a point of connection with the Chesapeake and Ohio Railroad near Staunton, Va., being a distance of about one hundred and thirty-three miles; and whereas, under said contracts, a large amount of grading and masonry has been done on the first seventy-five miles of the line south of Shepherdstown; and whereas, by reason of the financial panic of 1873, the further construction of said road had ceased up to this time, and it is now the desire of the Shen. Val. R. R. Co. and the Central Improvement Company that the bonds and other securities of the Shenandoah Valley R. R. Co., heretofore paid to the Central Improvement Company, and by it pledged to other parties, shall be retired and canceled, in order that under a new contract with John Satterlee & Co. and Alfred Creveling and the Shenandoah Valley Railroad Company may be carried out for the completion of said road to a connection with the Chesapeake and Ohio Railroad, and in order that the said Central Improvement Company be released from all liability under the contracts above mentioned: Now, therefore, this agreement witnesseth: *First.* That the securities heretofore deposited with the Pennsylvania Railroad Company for the amount advanced to the Central Improvement Company by the Pennsylvania Railroad Company shall be surrendered by said Pennsylvania Railroad Company to said Shenandoah Valley Railroad Company; the Pennsylvania Railroad Company agreeing to receive in exchange therefor, under the terms of an agreement already made between said companies, two hundred and fifty thousand dollars, of an issue of five hundred thousand dollars, six per cent. currency second mortgage bonds of the Shenandoah Valley Railroad Company, subject to a prior lien of fifteen thousand dollars per mile of first mortgage six per cent. bonds, which second mortgage bonds the said Shenandoah Valley Railroad Company agrees to deliver to the said Pennsylvania Railroad Company, under the terms of the agreement herein referred to.

Digitized by Google

Second. The Central Improvement Company agrees to deliver to the Shenandoah Valley Railroad Company all the first mortgage bonds of the Shenandoah Valley Railroad Company held by it which were received under the contracts aforesaid. *Third.* The Shenandoah Valley Railroad Company also agrees to issue and deliver to the Central Improvement Company two hundred and fifty thousand dollars of the second mortgage aforesaid, in full consideration for the delivery and cancellation of the securities referred to. *Fourth.* The Shenandoah Valley Railroad Company also agrees to issue and deliver to the Central Improvement Company, in payment for the amount received by it from subscribers to its capital stock heretofore expended by said Central Improvement Company in the gradation of the line above mentioned, the amount paid in on the capital stock of the Central Improvement Company, with interest amounting to the sum of———, six per cent. currency income bonds of said Shenandoah Valley Railroad; said bonds to be taken at the rate of fifty cents on the dollar, to be subject only to the first and second mortgage bonds herein mentioned. Should the Central Improvement Company, or any of the holders of the above-mentioned income bonds paid out under the terms of this contract, elect to have said bonds converted into preferred stock of the Shenandoah Valley Railroad Company, then the Shenandoah Valley Railroad Company agrees to issue said preferred stock upon the written request of the said Central Improvement Company or the holders thereof. *Fifth.* The Shenandoah Valley Railroad Company agrees to release the Central Improvement Company from all damages arising from breach of contract above mentioned, and consents that the same shall be declared null and void. *Sixth.* The Central Improvement Company hereby gives its full consent to the delivery by the Pennsylvania Railroad Company, and all other holders of securities herein mentioned, to the Shenandoah Valley Railroad Company, of the securities hereinbefore referred to, and held by the Pennsylvania Railroad Company and others as collateral for advances made from time to time to said Central Improvement Company.

"In witness whereof the parties of the first and second part hereunto have affixed their seals, duly attested, day and year above written. WILLIAM MILNES, Jr.,

"Pres. Shen. Val. R. R. Co.

[Seal of Shenandoah Valley Railroad Co.]

"PHILLIP COLLINS,

"Pres. Central Improvement Co.

[Seal of Central Improvement Co.]

"Attest: C. W. MACKEEHAN, Secretary Central Improvement Company."

It is proven by C. W. Mackeehan, whose name is signed to said agreement, that Phillip Collins was at the time the president, and that he was the secretary and treasurer, and that he and Collins signed and affixed the seal of the company to said agreement for the purpose of executing it; that they fully understood the facts, and regarded the agreement as very satisfactory and beneficial to the improvement company,—to use his language, they thought "that it was a godsend to the improvement company." The records of the company do not show any other express authority to execute this agreement than the aforesaid resolution of January 7, 1873; nor is there any other evidence on the subject. The Shenandoah Valley Railroad Company and the Fidelity Company not only concede that this agreement was properly and legally executed, but insist that it is valid and binding upon both the Shenandoah Valley Railroad Company and the improvement company. The only question, then, is whether or not the improvement company is bound by this agreement. It is claimed on behalf of this company that the aforesaid resolution authorized the president and treasurer to act for it, while this agreement is executed by the president, and attested by the secretary, and therefore it is not only not an exercise of the power conferred by the resolution, but it does not purport to be so; and, in fact, the officers who executed it did not intend to act under that resolution. It is proven that Mackeehan, at the time he executed the agreement, was both secretary and treasurer of the company, and that he did execute it as an officer of the company. In the face of this proof it is immaterial in what form he executed it. It would be extremely technical, and I think unwarrantable, to hold that a paper, duly signed and sealed by the proper officer, should be held invalid simply because he failed to properly add to his signature the proper title of his office, and especially when, as in this case, the officer held the two offices in the same company. Nor does it seem to me at all material that the agreement does not refer to the resolution, or that the officers did not intend to execute it under said resolution. The question is not what the officers believed or intended at the time, but what they did, and whether they acted within the authority conferred upon them, and these questions must be determined solely and entirely by the act or agreement itself.

The rule is well settled that, "if a contract purporting to be sealed with the seal of a corporation, and it is proven to be signed and executed by the proper agents, the presumption is that the seal was regularly affixed by the proper authority; and a contract under seal, executed by an agent within the scope of his appointed power, will be held valid and binding upon the corporation, until evidence to the contrary has been introduced." Ang. & A. Corp. § 224; 2 Mor. Priv. Corp. § 617; Smith v. Smith, 62 Ill. 493, 497. "The presumption of authority to affix to the instrument the seal of the corporation will not be overcome by the mere fact that no vote of the directors authorizing it is shown, since it is often the case that large powers are executed by corporate officers with the tacit ap-

Digitized by Google

proval of the corporation." 1 Wat. Corp. § 96; Railroad Co. v. Bastian, 15 Md. 494.

It appears in proof that the stockholders of the improvement company had notice of this agreement as early as July, 1879, and that they acquiesced in it until the filing of the amended bill in this cause, in April, 1885. It is true, the plaintiff in this suit avers in his bill that he did not know that said agreement had not been properly executed and honestly carried into effect until after he had filed his original bill in December, 1882; but this did not relieve him from the responsibility of acquiescence in said agreement. He had notice of the existence of the agreement, and the means of determining its validity, and it was his duty to do so. It is therefore plain, under the authorities above cited, that, even if said agreement was executed without express authority from the stockholders or directors of the company, the plaintiff in this suit, as well as the improvement company, is estopped to question or deny the authority to execute it. Trader v. Jarvis, 23 W. Va. 108; Field, Corp. § 226; Story, Ag. § 255. This agreement fully explains the condition of the improvement company, and the circumstances under which it was made; and, considering these circumstances, it seems to me that it was not only just, but liberal, in its provisions in favor of the improvement company. Its operative provisions deal with two subjects: *First*, the $250,000 of bonds that had been placed with the Pennsylvania Railroad Company as collateral security; and, *second*, the $531,000 of bonds which still belonged to the improvement company. In respect to the latter, the improvement company agrees to deliver to the Shenandoah Valley Railroad Company said $531,000 of bonds, and the railroad company agrees, in consideration thereof, to issue and deliver to the improvement company $250,000 of second mortgage bonds, out of a total issue of $500,000, subject to a first mortgage of $15,000 per mile, and also to issue and deliver to the improvement company income bonds at the rate of 50 cents on the dollar to an amount equal to the paid-up capital stock of said improvement company, subject to the lien of the aforesaid first and second mortgages, and also to release the improvement company from all damages arising from the breach of the contract on account of which said $781,000 had been delivered to it. This is the whole purport and effect of said agreement, so far as it relates to said $781,000 of bonds. Therefore, whatever may be the fate of the aforesaid contracts, Nos. 1, 2, and 3, and the defects in the title to the bonds originally delivered under the same, there can be no question in regard to the title of the improvement company as to the bonds which the railroad company bound itself to deliver to said company under the said agreement of April 29, 1878, provided the latter agreement is valid and enforceable. That it is a valid agreement, I think, for the reasons and upon the authority hereinbefore given, there can be no question. But the improvement company contends that said agreement was executory, and that the railroad company has not only wholly failed to perform it, but that, by its subsequent acts and conveyances, it has entirely disabled itself to perform it or carry it into execution. Admitting that said agreement is executory, it does not necessarily follow that it would be inoperative, or that the railroad company, by its subsequent acts, has disabled itself to perform it, or respond in damages for its failure to do so. A simple judgment against the railroad company for damages would probably be worthless, and could not, perhaps, be considered as a sufficient remedy for its failure to perform said agreement.

The real question presented, therefore, it seems to me, is whether or not the railroad company has so disabled itself, or changed its condition, that, on account of the intervening rights of others, there can be neither a specific execution of said agreement in equity, or substantial compensation compelled for the failure to perform it; and the solution of this question depends upon whether or not the Fidelity Company, as trustee in the three subsisting mortgages executed to it by the railroad company, is a purchaser for value, without notice, of the claim or rights of the improvement company. We shall therefore proceed to consider that question. It is a well-settled principle of law, and especially in this state and in Virginia, that notice to a trustee is notice to his *cestui que trust*. Beverely v. Brooke, 2 Leigh, 446; French v. Loyal Co., 5 Leigh, 641; Le Neve v. Le Neve, 2 Lead. Cas. Eq. 132, 145. In these states a trustee is always treated as a purchaser for value. Wickham v. Lewis, 13 Grat. 430; Manufacturing Co. v. Coal Co., 8 W. Va. 409. "Notice to trustees under an ordinary mortgage deed of a railroad company is notice to the holders of the bonds secured by the mortgage. Such trustees are considered in the light of agents for the negotiating of the loan. They act for those who lend their money on the security of the mortgage. They are charged with the duty of protecting the interests of the bondholders, who are unconnected individuals, having no ready means of acting together, except through trustees whom the law appoints to act for them. Notice to the trustees is held to affect the title in their hands with reference to incumbrances upon the trust property.

Actual notice to the trustees of a prior equitable mortgage is notice of it to the bondholders, who therefore take their bonds subject to the legal consequences of the incumbrance." Jones, Ry. Sec. § 363; Pierce v. Emery, 32 N. H. 484, 521; Miller v. Railroad Co., 36 Vt. 452. What is sufficient to put a person on inquiry is considered as conveying notice, for the law imputes a personal knowledge of a fact of which the exercise of common prudence might have apprised him. When a subsequent purchaser has actual notice that the property in question was incumbered or affected, he is charged construct-

Digitized by Google

ively with notice of all the facts and instruments to the knowledge of which he would have been led by an inquiry into the incumbrance or other circumstance affecting the property of which he had notice. 2 Minor, Inst. 889; 2 Bart. Ch. Pr. 1006; Booth v. Barnum, 9 Conn. 286.

The first mortgage executed to the Fidelity Company is dated April 1, 1880, and was recorded on April 7, 1880. At the latter date the records of Jefferson county showed the following facts in respect to the Shenandoah Valley Railroad property: (1) The mortgage to J. Edgar Thompson, trustee, dated October 15, 1872; (2) the mortgage to the Farmers' Loan & Trust Company, trustee, dated January 1, 1879; (3) the deed releasing the aforesaid mortgage to J. Edgar Thompson, executed by W. H. Travers, as substituted trustee, and dated August 25, 1879; and (4) the mortgage to W. H. Travers, trustee, dated July 1, 1871, but not delivered until September, 1879. At the time the mortgage of January 1, 1879, to the Farmers' Loan & Trust Company was executed and recorded, the mortgage of October 15, 1872, had not been released, and, as a legal consequence, the Farmers' Loan & Trust Company held subject to the lien of said mortgage; for it is a well-recognized and sound principle of law that an entry of satisfaction by the mortgagee, after he has parted with his interest in the security, will not discharge the mortgage in favor of one who had acquired an interest in the land before the discharge was made. Such person is no worse off than he supposed himself to be when he acquired his interest; and there is no reason in equity why the person really entitled to the mortgage should not have the benefit of it, so far as he is concerned. 2 Jones, Mortg. § 957, and cases cited. But this is not all. The said mortgage of January 1, 1879, contains the following provision: "Resolved, that it is the judgment of the president and directors of the Shenandoah Valley Railroad Company that the bonds authorized and directed to be issued by the president and board of directors on the 12th day of October, 1872, * * * be reduced to the sum of $2,250,000, * * * and that said bonds be secured by a first mortgage, * * * to be executed and delivered to the Farmers' Loan & Trust Company." Thus we have an express declaration upon the face of this mortgage that the bonds to be issued under it are to take up and secure the bonds which had been issued under the said mortgage of October 15, 1872. The recordation of this mortgage was notice of this fact, not only to the Farmers' Loan & Trust Company, the trustee therein, but to W. H. Travers, trustee in the deed of September, 1879, and the Fidelity Company, as trustee in the subsequent mortgages on the same property. Tysen v. Railroad Co., 13 Amer. & Eng. R. Cas. 134, and cases cited in note, p. 138. In the mortgage to W. H. Travers, trustee, dated July 1, 1871, but not delivered until September, 1879, is this recital: "And be it further resolved, that the following indorsement, to be signed by the president and secretary, be made upon the bonds: 'This bond, and the mortgage to secure the payment of the same, although dated the first day of July, 1871, were not actually delivered until after the making and issuing of a series of bonds of the Shenandoah Val. Railroad Company, amounting to $2,250,000, dated Jan. 1st, 1879, and secured by a first mortgage upon the property and franchises of the Shenandoah Valley Railroad Company, of even date therewith, and duly recorded, which bonds and mortgage of Jan. 1st, 1879, were issued in substitution of the bonds and mortgage dated Oct. 15, 1872; and the mortgage to secure the payment of this bond is subject to the said first mortgage on Jan. 1, 1879.'" This recital of record, as a part of this mortgage, was notice, not only to W. H. Travers, the trustee therein, but to the Fidelity Company, and all other subsequent mortgagees or purchasers, that both this mortgage, and the aforesaid mortgage of January 1, 1879, were made subject to, and in part for the purpose of taking up, the bonds issued under the prior mortgages of October 15, 1872, by the substitution of the bonds to be issued under it for the bonds secured by said mortgage of October 15, 1872. The mortgage of April 1, 1880, executed to the appellee, the Fidelity Company, as trustee, contains the following recital: "And it is further resolved, that the board of directors be, and they are hereby, fully authorized and empowered to negotiate with, and make such contracts or agreements with, the bondholders secured under the said mortgage of January 1, 1879, and the trustees thereof, with the bondholders secured under the second mortgage of July 1, 1871, and the trustee thereof, and with the holders of the different bonds, and with other creditors of and claimants against the company, or with either or any of them, upon such terms and conditions as the board of directors may deem proper, for the purpose of retiring and canceling the bonds issued under the said mortgages, and obtaining a satisfaction and release of said mortgages, and retiring and canceling the different bonds and other indebtedness of the company, or for any of these purposes, and to make, execute, and deliver such instrument or instruments in writing as may be deemed expedient to effect these or any of these purposes. And it is further resolved, that for the purpose of retiring and canceling the bonds issued under the security of the second mortgage, dated July 1, 1871, and obtaining a satisfaction and release of the same for the purpose of retiring any other bonds now issued and outstanding, and to settle other indebtedness of the company, or for any of these purposes, if in the opinion of the board of directors it should be deemed advisable so to do, and for the purpose of enabling the company to increase the facilities for a speedy completion of the road, and effecting the purposes of its incorporation, the

Digitized by Google

board of directors are fully authorized and empowered, and have and hereby are given the consent of the stockholders of this company, to create, issue, and negotiate the certificates of loans or bonds of this company, coupon or otherwise. * * * And provided, further, that the first bonds issued under this resolution shall be used by the trustees for the purpose of exchanging the same with and canceling the bonds issued, and which may hereafter be issued, under the said first mortgage of Jan. 1, 1879, to the Farmers' Loan & Trust Company of New York."

These recitals declare distinctly, not only that the bonds to be issued under this mortgage are, so far as may be necessary for the purpose, to be substituted for and used to cancel and retire the bonds theretofore issued under the said mortgages of January 1, 1879, and July 1, 1871, (September, 1879,) but "for the purpose of retiring any other bonds now issued and outstanding, and to settle other indebtedness of the company;" and "that the first bonds issued under this resolution [mortgage] shall be used by the trustees for the purpose of exchanging the same with and canceling the bonds issued, and *which may hereafter be issued*, under the said mortgage of Jan. 1, 1879." This deed was recorded on April 7, 1880, while the deed releasing the aforesaid mortgage of January 1, 1879, was not recorded until November 24, 1880, more than seven months thereafter. This fact makes the above italicised words, "which may hereafter be issued," significant, because the mortgage of January 1, 1879, to which those words refer, expressly provided that the bonds to be issued under it were to be used to reduce and secure the bonds issued under the mortgage of October 15, 1872. It is hardly possible that, at the time when the mortgage of April 1, 1880, was executed, it was contemplated that any bonds would be thereafter issued under the mortgage of January 1, 1879, for the loan of money, or to be sold on the market; but it is very probable, as the holders of the bonds under the mortgage of October 15, 1872, were entitled to have their bonds exchanged for bonds to be issued under the said mortgage of January 1, 1879, that it was contemplated by the parties to the mortgage of April 1, 1880, that bonds might be thereafter issued under the mortgage of January 1, 1879, in exchange for bonds issued under the mortgage of October 15, 1872, and it was these bonds, so thereafter issued in exchange, that the trustees in the deed of April 1, 1880, were to take up. This fact and purpose, appearing upon the face of the mortgage to the Fidelity Company, was, of course, notice to it. It therefore seems clear that the Fidelity Company is chargeable with notice, by the records under which it claims title, that the holders of bonds issued under the said mortgage of October 15, 1872, have a prior lien on the railroad property in said mortgage mentioned, unless said lien has been either legally released or equitably barred, as against the rights of the Fidelity Company. I think it may be assumed as a legal proposition, which will not be controverted or denied, that unless the deed of August 25, 1879, executed by W. H. Travers, as substituted trustee, releasing the mortgage of October 15, 1872, operated to exempt the Fidelity Company from notice, or any liability for the bonds issued under said mortgage, then the said company is not entitled to the position of a purchaser without notice, as against the claim of the Central Improvement Company. The said mortgage of October 15, 1872, provided that, in the event of the death of the trustee therein named, the grantor should have the authority to appoint his successor. It seems to me, therefore, that the substitution of W. H. Travers as trustee therein for J. Edgar Thompson, deceased, was a legal exercise of that authority, and conferred upon said Travers all the powers possessed by said Thompson as trustee therein. The only provision in the said mortgage of October 15, 1872, which can be construed into an authority to the trustee to release the same, under any conditions or circumstances, is that contained in the proviso declaring "that if the party of the first part * * * shall and do well and truly pay, or cause to be paid, unto the person or persons, bodies politic or corporate, who shall become the holders of the bonds intended to be secured hereby, the several respective sums expressed therein, * * * according to the provisions of said bonds, * * * then, and from thenceforth, as well this present indenture * * * as the said recited obligations shall become void and of no effect, * * * and satisfaction shall be forthwith duly entered by the said trustee or trustees, for the time being, upon the record of this indenture of mortgage." This proviso is a positive contract between the grantor, the trustee, and the bondholders, and contains the only authority upon which the trustee can release the mortgage. The manner of exercising this authority is limited by the contract to the simple entry of satisfaction by the trustee upon the record of the mortgage. But even if this power could be properly exercised by the execution of a deed of release, as was done in this instance, it could only be done upon the condition precedent prescribed in the contract or mortgage itself, that is, upon the payment of the bonds to the holders thereof; and any release or attempt to release the mortgage by the trustee, whatever may be its form, if executed before the happening of or compliance with this condition, is absolutely null and void; and a subsequent purchaser must at his peril ascertain whether or not this condition has been performed. 2 Minor, Inst. 209, 237; 2 Perry, Trusts, § 783; Jackson v. Ligon, 8 Leigh, 161; Raper v. Sanders, 21 Grat. 60. The trustee can only do with the trust property what the deed, either in express terms or by necessary implication, authorizes him to do. Seborn v

Digitized by Google

Beckwith, 30 W. Va. 774, 5 S. E. Rep. 450; Mundy v. Vawter, 3 Grat. 518; Heth v. Railroad Co., 4 Grat. 482. "When a recorded mortgage is discharged by a person other than the mortgagee, the person paying the money, and all subsequent purchasers as well, are bound to inquire what authority he had to discharge it, and are chargeable with notice of such facts as by proper inquiry might have been ascertained. * * * A mortgagee, with notice that a prior mortgage has been improperly discharged without being satisfied, still hold subject to that mortgage as much as if no discharge had been made. If, for instance, he has notice that the prior mortgage has been assigned as collateral security, and the assignment not being recorded, the assignor enters satisfaction of it on record, this does not deprive the assignee of his priority of claim. The discharge, however, would bar all equitable rights of the assignor, and the assignee could recover only to the extent of his actual interest in the mortgage." 2 Jones, Mortg. § 957; Swarthout v. Curtis, 5 N. Y. 301.

The said deed of release of August 25, 1879, after reciting the provisions of the mortgage of October 15, 1872, and the fact that the Shenandoah Valley Railroad Company had executed the mortgage of January 1, 1879, to the Farmers' Loan & Trust Company to secure $2,250,000 of bonds, contains the following provision: "And whereas, there have been surrendered to the said party hereto of the first part, the trustee substituted as aforesaid, all of the bonds, as well those issued as those executed, but not issued under and in pursuance of the terms of the said mortgage, bearing date Oct. 15, 1872, for cancellation; and whereas, the said trustee hath canceled and destroyed all of the said bonds, numbering three thousand seven hundred and fifty, each for one thousand dollars, amounting in all to the sum of $3,750,000, being the whole number and amount of bonds secured by the said mortgage deed dated Oct. 15, 1872, and hath canceled also and destroyed all coupons attached to and detached from the said bonds, and that in any wise and at any time belonging to the said bonds: Now, in consideration of the premises, and of the payment of the sum of five dollars by the party of the second part to the party of the first part, the said William H. Travers, by virtue of the authority vested in him as substituted trustee, as aforesaid, by the said mortgage deed, bearing date the fifteenth day of Oct., 1872, and in discharge of the trust therein reposed in the trustee named therein, and his successor or successors, doth grant, remise, release, surrender, assign, and set over unto the Shenandoah Valley Railroad Company all the right, title, interest, property, and estate granted and conveyed by the mortgage deed bearing date as last mentioned, and recorded as aforesaid, and to which reference is hereby expressly made for a description of the same, to the intent that all the right, title, interest, property, and estate of the said Shenandoah Valley Railroad Company, granted as aforesaid, may be discharged from the said mortgage." It will be observed that the words "surrendered," "canceled," and "destroyed" are used in this provision of the deed, but it is nowhere stated therein that the bonds secured in the mortgage of October 15, 1872, had been either paid or satisfied. It will also be noted that it is not stated by whom the bonds "had been surrendered,"—whether by the owners or holders or some unauthorized person. It becomes, therefore, important to inquire into the facts and circumstances under which said bonds were "surrendered," because the cancellation of a mortgage on the record is only *prima facie* evidence of its discharge, and the owner may prove that the cancellation was done by fraud, accident, or mistake, and, if he does this, his rights under the mortgage will not be affected by the improper cancellation of it. Heyder v. Association, 42 N. J. Eq. 403, 8 Atl. Rep. 310; Kenicott v. Supervisors, 16 Wall. 469; Harris v. Cook, 28 N. J. Eq. 345. "A release executed by a trustee in a deed of trust, without the authority of the *cestui que trust*, and without having received payment of the debt secured, does not discharge the lien." 2 Jones, Mortg. § 957; Lakenan v. Robards, 9 Mo. App. 179.

The circumstances under which the $531,000 of bonds of the Central Improvement Company were "surrendered" and destroyed appears by the record to be as follows: The office of the improvement company in the city of Philadelphia was kept in the office of the Pennsylvania Railroad Company. The said $531,000 of bonds had been put in the safe of the improvement company in said office by J. P. Green, the then treasurer of the company. Green resigned, and turned the bonds over to his successor, J. H. Mackeehan, who died, and was in the year 1877 succeeded as treasurer by his brother, C. W. Mackeehan, who held said office until after 1880. The bonds remained in said safe, and it seems that C. W. Mackeehan was never informed that they were there. After the aforesaid agreement of April 29, 1878, had been executed, and a duplicate copy thereof delivered to the railroad company, and only a few days after W. H. Travers had been made substituted trustee in the said mortgage of October 15, 1872, (the appointment of said Travers having been made on December 6, 1878,) the said Travers, accompanied by U. L. Boyce, the vice-president of the railroad company, went to the office in which said bonds were kept, where they found J. P. Green, a vice-president of the Pennsylvania Railroad Company, but who had no authority or control over the said bonds, took possession of the said $531,000 of bonds, and destroyed them, together with all the other bonds issued under the said mortgage of October 15, 1872. J. P. Green, in answer to the question, "Under what circumstances were these bonds destroyed?"

Digitized by Google

deposes: "My understanding was, at the time, it was in pursuance of an arrangement between the Central Improvement Company and the Shenandoah Valley Railroad Company, by which all of the old first mortgage bonds were to be destroyed, and new bonds take their place." And the said Travers, in reply to the same question, deposes: "I had known that negotiations were going on between the Shenandoah Valley Railroad Company and the Central Improvement Company, to whom a portion of these bonds had been delivered, to relieve the road from the incumbrance of the mortgage of 15th of October, 1872, and I was advised of the fact that those bonds had been surrendered, or were under the control of the Central Improvement Company, and were ready for cancellation and destruction. Under that arrangement, and being so advised, I went to the office of the Central Improvement Company and the Pennsylvania Railroad Company, and found them there in the possession of Mr. Green. I examined them, and found that they were all there, as described and called for in the deed of trust of October 15, 1872, together with all the coupons attached, —and some of them probably had been detached,—and they were destroyed in my presence and with my assistance." Mr. Travers also testified that he was at the time a stockholder, director, and general counsel for the railroad company.

It is impossible to assert or believe, in the presence of these facts, and others appearing in the record, that Mr. Travers did not take possession of and destroy said bonds of the improvement company under and upon the authority contained in the aforesaid agreement of April 29, 1878, and upon that authority alone. Any other conclusion would place Mr. Travers in the position of having destroyed them without any right whatever to do so; for there is not a particle of evidence that he had any other authority. Having destroyed said bonds under the authority conferred by said agreement, Mr. Travers, of course, knew its contents. By the terms of said agreement,—which the Fidelity Company admits, and insists is a valid and binding contract,—the improvement company agreed to surrender and deliver to the railroad company the said $531,000 of bonds, in consideration of the issuing and delivery to it by the railroad company of certain second mortgage and income bonds therein specified. The surrender of the bonds held by the improvement company, and the delivery of the bonds to be given in exchange therefor by the railroad company, were to be dependent or concurrent acts. If they were not both performed at the same time, the performance of its part by either company imposed an immediate obligation on the other to perform its part. It therefore appears that the railroad company, by U. L. Boyce, its vice-president, and W. H. Travers, the substituted trustee in the mortgage of October 15, 1872, assumed the responsibility of performing, and did perform, for the improvement company, its part of said agreement without its knowledge or assistance. Whatever might be said by the improvement company as to the propriety and good faith of this transaction, it is certain that neither the railroad company nor W. H. Travers, the trustee, can question or deny that it was, in effect, a full and complete performance on the part of the improvement company of its part of said agreement, and that it thereby became, *eo instanti*, entitled to the substituted bonds provided for therein. Of this fact both the railroad company and W. H. Travers were of necessity fully informed.

It is thus apparent that the word "surrendered" was advisedly used in reference to these bonds by Mr. Travers in the deed of release of August 25, 1879. We have now shown that the "surrender" of said bonds was upon the authority of an agreement, and under circumstances, which made it the duty of the trustee to see that the bonds due to the improvement company, by virtue of said agreement, were delivered to it, or, at least, to give notice to subsequent purchasers of the fact that said company was entitled to said bonds. It must therefore be presumed that, if he did not perform this duty by giving such notice to the Fidelity Company and the other subsequent purchasers, he certainly would have informed them of all the facts, if inquiry had been made of him. Caylus v. Railroad Co., 10 Hun, 295; Acer v. Westcott, 1 Lans. 193; 1 Story, Eq. Jur. § 399. Was there anything upon the records, or in the circumstances of the transaction, which made it the duty of the Fidelity Company, as a subsequent purchaser, to make this inquiry? As we have seen, the only condition upon which the trustee was authorized to release the mortgage of October 15, 1872, was upon the true payment of all the bonds therein secured to the holders thereof. Now, in the search which the Fidelity Company was legally bound to make, when it read the mortgage, and then found in the deed purporting to release that mortgage the word "surrender," instead of "payment" or "satisfaction," would it not have been an act required by the most ordinary prudence and diligence for it to have gone to Mr. Travers, the trustee, who had used that word in executing the release, and have made of him the inquiries, by whom, and under what circumstances, were said bonds "surrendered?" In addition, the Fidelity Company knew from the records through which it claims title that the prior mortgages of January 1, 1879, and of September, 1879, had been executed to take up the bonds issued and outstanding under the mortgage of October 15, 1872, and that its mortgage of April 1, 1880, was, in turn, executed to take up the bonds then or thereafter issued under said mortgage of January 1, 1879. Wade, Notice, §§ 308, 309; Taylor v. King, 6 Munf. 358; Briscoe v. Ashby, 24 Grat. 454; Coles v. Withers, 33 Grat. 201. And,

Digitized by Google

of necessity, it must also have known that the Shenandoah Valley Railroad was at the time, if not insolvent, not plethoric with money to pay off its bonds before maturity, and that it was not likely that the holders would gratuitously surrender their first mortgage bonds to the company or its trustee; and especially so, in the face of the fact that the company was then using its utmost efforts to borrow money, and shingling over its property with new mortgages for that purpose. It seems to me that, if these facts and circumstances were not sufficient to excite diligence and invoke inquiry from the most careless, then nothing in reason could be expected to do so. "A party willfully closing his eyes against the lights to which his attention has been directed, and which, if followed, would lead to a knowledge of all the facts, is chargeable with notice of every fact that he could have obtained by the exercise of reasonable diligence. * * * The limit of inquiry necessary in any case is that required by the use of reasonable diligence. What is reasonable diligence cannot be determined by any general rule, but must vary with the circumstances of each case." 1 Jones, Mortg. § 596. The circumstances in this cause, it seems to me, are entirely sufficient to have put the Fidelity Company on inquiry as to the terms and conditions and by whom the bonds of the improvement company were surrendered; and if this inquiry had been made of the trustee, W. H. Travers, it would have been informed that they had been taken possession of by him, and destroyed, under the said agreement of April 29, 1878, and this agreement would have given it notice of the equitable lien of said company. Burwell v. Fauber, 21 Grat. 463; Long v. Weller, 29 Grat. 353; Watts v. Kinney, 3 Leigh, 293, 296; Association v. Thompson, 31 N. J. Eq. 536; Swarthout v. Curtis, 5 N. Y. 301, 309; Claflin v. Railroad Co., 8 Fed. Rep. 118; Brush v. Ware, 15 Pet. 93; Roberts v. Halstead, 9 Pa. St. 32. I am therefore of opinion that the Fidelity Company is not a purchaser without notice as to the said equitable lien of the improvement company.

Having reached this conclusion, it is apparent there is no foundation for the contention of the improvement company that the railroad company has disabled itself by subsequent mortgages from performing its part of the said agreement of April 29, 1878. All these mortgages are subordinate to the claim of the improvement company under said agreement; and said claim may be enforced, not only against the railroad company, but against those claiming under said mortgages as well. I think it better to abstain at this time from indicating the manner in which this equitable lien of the improvement company ought to be enforced, or the specific form of the relief to be granted in that behalf under the peculiar circumstances of this cause, for the reason that none of these matters were considered or passed upon by the circuit court, nor were they discussed by counsel in the argument before this court. From what has already been said, and from the facts appearing in the record, it is not apprehended there can be any serious difficulty in settling these questions. It seems to me the objections made by the Fidelity Company to the right of the improvement company to intervene in this cause are not well taken. While it is true the decision in Muller v. Dows, 94 U. S. 444, and other cases, hold that the railroad property in this state could have been sold in the Roanoke city suit, still, as the railroad company is a domestic corporation of this state as well as Virginia, and the plaintiff, the Fidelity Company, has elected to invoke the jurisdiction of a court in this state in aid of its suit in Roanoke city, I do not think it can exclude the creditors of the railroad company from intervening in either court. In the view we have taken of the rights of the improvement company in this cause, the question of laches does not apply. It appears from the amended bill in the Crumlish suit that the plaintiff never discovered until after December, 1882, that there was any adverse claim or denial of the right of the improvement company to the bonds which it was entitled to under the agreement of April 29, 1878. It also appears in the record that all the bonds issuable under the mortgage of April 1, 1880, had been negotiated in 1881, before said discovery was made; and, consequently, even if the holders under that mortgage were not purchasers with notice, any delay, after they had invested their money in 1881, could not be to their prejudice. It therefore seems to me, for this reason, and others so apparent in the record as to require no discussion, that the defense of laches must be overruled.

For the reasons stated I am of opinion that both the decrees appealed from in these causes must be reversed,—that of November 29, 1887, at the costs of J. Garland Hurst, administrator, etc., the plaintiff therein; and that of September 11, 1888, at the costs of the Fidelity Insurance, Trust & Safe-Deposit Company, the plaintiff therein,—and that these causes be remanded to the circuit court for further proceedings there to be had therein according to equity and the principles announced in this opinion.

ENGLISH and BRANNON, JJ., concurred. GREEN, J., absent.

(106 N. C. 81)

WARLICK *et al.* v. PLONK.

(*Supreme Court of North Carolina.* March 11, 1889.)

ADVERSE POSSESSION—TRIAL—VERDICT—JURY.

1. In ejectment, the issue being as to the mental condition of plaintiffs' ancestor during a period of years in which defendant occupied the premises adversely, the court charged that if the ancestor was so mentally diseased during that period as to be unable to understand and assert his rights,—to know that he was the owner of the land, and that defendant was in possession and asserting rights, and that such possession might eventually destroy

Digitized by Google

his ownership,—plaintiffs would be entitled to recover, notwithstanding defendant's adverse possession. *Held*, that the instruction was unexceptionable.

2. Rev. Code N. C. c. 65, § 1, providing that persons under mental disability shall have three years after "coming of sound mind" in which to bring their action, a special finding that plaintiffs' ancestor was "mentally incapable at all times since April 1, 1847, up to seven years prior to his death, of prosecuting and defending his rights," is too imperfect to support a judgment, as it leaves uncertain the condition of his mind during those seven years.

3. The jury deliberated all night, and on their return to court next morning the court inquired if they thought an agreement was improbable, to which a juror replied that they stood 9 to 3. The court thereupon said to the jury that it was their duty to agree if possible; that no juror, from mere pride of opinion, hastily expressed, should refuse to agree; nor, on the other hand, should he surrender any conscientious views founded on the evidence; and that it was the duty of each juror to reason with his fellows concerning the facts, with an honest desire to arrive at the truth, and with the view of arriving at a verdict. *Held* entirely proper directions.

Appeal from superior court, Cleveland county; BOYKIN, Judge.

W. A. Hoke, for appellant. *W. P. Bynum*, for appellees.

SMITH, C. J. The plaintiffs, as heirs at law of Christy Eaker, who died in 1885, intestate, derive title to the land sued for under a grant from the state, and successive intermediate conveyances terminating with their ancestor. The defendant claims it under deeds from one Neal to Alex Norton, dated in 1847; from Norton to Froneberger, made in 1856; and from the latter to himself, executed the same day; and an alleged continuous and adverse possession from the year 1847 to the death of said Eaker. To rebut the effects of this hostile occupation, the plaintiffs introduced evidence to show the insanity of Christy Eaker, and his mental incapacity to understand and enforce and defend his rights in the premises during an interval of more than 50 years from 1831 to the time of his death; so that, the present action having been commenced on July 17th of the same year, the running of the statute to protect the defendant's possession has been arrested, and no bar is interposed to prevent the plaintiffs' recovery. The defendant offered testimony in disproof of this contention as to the mental condition of the deceased. The controversy, in different forms, was tried before a jury at spring term, 1888, of the superior court of Cleveland, upon issues in which the findings are that the adverse possession of the premises was in plaintiff's ancestor for a period of seven years previous to April 1, 1847, and thereafter for a similar period in the defendant, and those from whom he claims. The essential matter in dispute is the alleged mental infirmity of the said Christy Eaker, and its effect in saving his rights from the operation of the limitations of the statute, which are in this feature unchanged as found in the Revised Code, c. 65, § 1, which exempts persons who are *non compos mentis*, and in the Code, § 163, which exempts such as are "insane," and both allow three years to the person under the disability "coming of sound mind," in which to bring his action. Rev. Code, c. 65, § 1; Code, § 148. The issue of fact involving this question was put in this form: Was Christy Eaker mentally incapable at all times since April 1, 1847, up to seven years prior to his death of prosecuting and defending his rights? The response was in the affirmative. The court charged the jury that if the said Christy Eaker labored under the disability of insanity during the time between the years 1831 and 1885, the plaintiffs, his heirs at law, would be entitled to the verdict, although the defendant had possession and occupied the said land as contended. That if he was so mentally diseased as to be unable to understand and assert his rights, the possession of the defendant could avail him nothing in this action. That if it should be proved that he did not possess sufficient mental capacity to know that he was the owner of the land, and that the defendant was in the possession thereof, asserting title thereto; and that if he could not, by reason of mental disease, understand that such possession threatened, and eventually would destroy, his rights thereto,—then, in that event, the plaintiffs would be entitled to recover, inasmuch as their ancestor labored under such a disability as would prevent the operation of the statute of repose. The defendant excepted to that part of the charge referring to the degree of mental capacity necessary, etc. The jury remained out an entire night. When court convened the ensuing morning, the jury came into court, and were asked if they had agreed. They responded in the negative. The court inquired if the diversity of opinion among them was such, in their opinion, as to render an agreement improbable. A juror responded that they stood 9 to 3. This was not in response to any inquiry on the part of the court as to how the panel then was on the issue submitted. No such inquiry was made. The court then remarked to the jury that it was their duty to agree if possible; that no juror, from mere pride of opinion, hastily expressed during the consultation, should refuse to agree; that no juror was required to surrender any conscientious views, found on evidence, he might entertain concerning the case; that it was the privilege, and indeed the duty, of each juror to reason with his fellows concerning the facts in the case, with an honest desire to arrive at the truth, and with the view of arriving at a verdict. The defendant excepted to the remarks of the judge to the jury. The jury retired, and after further deliberation returned a verdict for the plaintiffs. Judgment for the plaintiffs. Appeal by defendant.

Without instituting an inquiry into the nature and extent of the disability which gives immunity to persons thus designated in the statute from the consequences of delay in bringing suit when their rights of prop-

Digitized by Google

erty are invaded, we think the instruction of the judge leaves nothing unsaid or given of which the appellant can complain. Quite as unfounded is his exception to what was said and done when the jury came into court and announced their failure to agree upon a verdict. The directions given them were entirely fit and proper, as tending to bring about unanimity of opinion after a full and free interchange of views among the jurors, and to prevent unnecessary mistrials. But the verdict upon the issue of the insanity of the deceased is imperfect, and leaves undetermined the state and condition of his mind during the seven years next before his death. It establishes the insanity up to the beginning of this period, while the charge explicitly requires a finding of this fact up to the year 1885; and we are at a loss to know why the issue was framed so as not to embrace this additional time. If any inference is to be drawn from this omission, as intentional, and not the result of inadvertence, it would be that the insanity did not continue until death, but that reason was restored during life. If, then, the deceased recovered from this disability, and became of sound mind for a period of three years before the suit was begun, the bar would become complete, and the right to recover the land lost. But the case shows no change of mental condition before death, and the instruction covered the entire period up to death, during all of which a continuance of the unsound mind is made a condition of the plaintiffs' right of recovery. The discrepancy does not admit of our acceptance of the finding of the issue as a basis on which to render a final judgment in the cause, and we feel constrained to consider this *lapsus* as an imperfection in the form of the issue tendered, and followed by a correspondent imperfection in the finding of fact, the correction of which can be made only by sending the cause back to the end that a proper issue be submitted to the jury. The judgment must be reversed, and a new trial had, and it is so adjudged.

(103 N. C. 270)

BLACKWELL *v.* DIBBRELL *et al.*

(*Supreme Court of North Carolina.* March 11, 1889.)

PLEADING—JUDGMENT—RES ADJUDICATA.

In an action to recover money due on contract, evidence of an estoppel by judgment in a former action is not admissible under the general issue, where such judgment was rendered before the defendant was required to plead.

John Manning, for appellants. *W. W Fuller* and *E. C. Smith*, for respondent.

AVERY, J. This was a civil action tried before MERRIMON, J., and a jury, on appeal from a justice's judgment, at June term, 1888, of the superior court of Durham county. The plaintiff sued for the recovery of $108.33 for rent of a certain brick prize-room for the months of November and December, 1887. The summons was issued on the 13th day of March, 1888, and tried upon a removal by affidavit from one justice to another, on the 15th day of March, 1888. The defendant pleaded the "general issue, and counter-claims amounting to $89.07." After evidence by the plaintiff tending to establish his debt, the defendant offered to introduce the following evidence: That on the 13th day of March, 1888, the plaintiff had sued out another summons against these defendants in which he claimed the rent due for the same prize-room for the months of January, February, and up to the 13th day of March; that there was judgment for the plaintiff in that action against the defendants, which judgment was satisfied in full; that that action was tried, judgment rendered, and judgment satisfied before the present suit was tried. It was proven by the plaintiff, and admitted by the defendants, that the rent was payable monthly, in advance. Upon objection by the plaintiff, his honor held that the evidence could not be received under any plea pleaded by the defendants, and excluded the evidence. Exception by defendants. Defendants moved to be allowed to amend their answer. His honor refused to allow the amendment. Defendants excepted. There was verdict and judgment against the defendants. Motion for new trial for errors alleged. Motion overruled. Appeal by defendants.

The case is before us upon the single point whether his honor erred in excluding the testimony offered on the ground that it was not admissible "in support of any plea pleaded by the defendant." The transcript contains on the subject of the pleadings only the following: "The plaintiff complained for the sum of one hundred and eighty dollars and 33-100, due by defendants on contract. The defendants pleaded the general issue, and counter-claim of $89.07." The defendant contends that the "general issue" in an action of this kind (*assumpsit*) was *non assumpsit*, and cites several authorities to show that under the former practice a defendant was allowed under this plea to show the pendency of another action, or even a judgment in another suit, between the same parties, in bar of recovery. We therefore deem it pertinent to quote the language of Justice PEARSON, in Branch v. Houston, Busb. 85, in which he so clearly points out the proper time and manner, under the old rules of pleading, of setting up and showing a want of jurisdiction in the court: "(1) If there be a defect, *e. g.*, a total want of jurisdiction, apparent upon the face of the proceedings, the court will, of its own motion, 'stay, quash, or dismiss' the suit. This is necessary to prevent the court from being forced into an act of usurpation, and compelled to give a void judgment. (2) If the allegation bring the case within the jurisdiction, so that the defect is not apparent, and the general issue is pleaded, the proof not sustaining the allegation, there is a fatal variance, which is ground of nonsuit, *e. g.*, declaration *quare clausum fregit* in the county of Wake; gen-

Digitized by Google

eral issue; proof, trespass on land in the county of Johnston; * * * nonsuit, unless affidavit be made according to the statute. (3) If the subject-matter is within the jurisdiction, and there be any peculiar circumstance excluding the plaintiffs or exempting the defendant, it must be brought forward by a plea to the jurisdiction; otherwise there is an implied waiver of the objection, and the court goes on in the exercise of its ordinary jurisdiction." See, also, Clark v. Cameron, 4 Ired. 161; Wait, Act. & Def. 400. Under the system of pleading and practice established by the Code of Civil Procedure, it has been repeatedly held by this court that where the defendant relies on a general denial, in the answer, of the allegations of the complaint, such a variance as the example given by the chief justice must compel the plaintiff to submit to judgment of nonsuit, unless permitted to amend after mistrial upon such terms as the court may impose. And while the forms of action are abolished, and the technical rules of pleading dispensed with, the same principles of law underlie both, and must make the old and the new practice and pleading often assimilate.

The pendency of another suit between the same parties and involving the same subject-matter, being a circumstance *dehors* the record, which exempts the defendant from liability, must, under the formal method peculiar to the common law, have been made available by a plea in abatement before pleading to the merits; and upon the same governing principles is founded the rule, established under the Code practice, that the same defense must be "set up in the answer, or in some way insisted on before the trial on the merits, and, if not, will be considered waived." Hawkins v. Hughes, 87 N. C. 115. Pomeroy in his work on Remedies and Remedial Rights, § 711, says: "The defense that another action is pending for the same cause must be specially pleaded, unless it is raised by demurrer." The same author, in section 721, says: "It is now settled, in direct opposition to the common-law rule, that defenses which seek only to abate the particular action in which they are pleaded may be united with those which seek to bar all recovery upon the cause of action." The author points out, as a difficulty in the practical working of the rule, that a general verdict for the defendant upon all of the issues in abatement and in bar might leave it uncertain whether plaintiff could prosecute another action, or was precluded from doing so. He suggests that in such cases the jury should be instructed with great care upon the issues raised by the pleadings as defenses of both characters. The practice of incorporating the defense of the pendency of another action with others that, if established, would bar recovery in any action brought for the same cause, has been approved by this court. The suggestion of the court in Hawkins v. Hughes, supra, that the matter set up in abatement should be passed upon before a trial upon the merits, might be made perfectly consistent in practice with the rule laid down by Mr. Pomeroy. A jury could be instructed to respond, first, to an issue involving the question whether another action was pending, and, if they should answer that affirmatively, then that they need not extend their inquiries to the other issues, because that finding would make it necessary to dismiss the action that was being tried, and leave the plaintiff to seek his remedy in the other action already at issue between the same parties.

The plaintiff caused summons to be issued by a justice of the peace in both actions on the 13th day of March, 1888. The judgment was rendered in this action on the 15th of March following, but after return and removal to another justice on the 13th. It does not appear when the other action was tried; but it was tried, and judgment entered and satisfied, before the justice tried this case. The pleadings were not written, but in the summons the defendant had notice "to answer the complaint of James W. Blackwell for the non-payment of the sum of $108.33, due by contract." Under rule 10, § 840, of the Code, the justice would, at the request of the defendant, have required the plaintiff "to exhibit his account or demand, or state the nature thereof," or preclude him from giving evidence as to any demand not exhibited. We must assume, therefore, that the defendant waived his right under the rule, because he either knew the nature of the demand or did not care to know. So, if the defendant did not in fact know, he might by reasonable diligence have known the cause of action in each of the cases before the trial of either, and, so far as we can see, might have pleaded the pendency of the one in the other. If, however, the record leaves us at liberty to conclude that the other action had been tried, and judgment had been rendered and satisfied, before the defendant was required to plead in this action, then the defendant could not avail himself of the estoppel (even if we concede that this case falls within the rule stated in Jarrett v. Self, 90 N. C. 478) without pleading specially in his answer, as new matter, the record in the other case. An estoppel by judgment must be pleaded, if there is or has been any opportunity to do so. Pom. Rem. § 712, note 4; Caldwell v. Auger, 4 Minn. 217, (Gil. 156.) Where the record and judgment in a former action are relied upon to bar recovery in a second suit between the same parties, the plea of estoppel on that ground must be distinctly set up as new matter in the answer, and will not be considered as comprehended under the general denial of the several allegations constituting the plaintiff's cause of action. Yates v. Yates, 81 N. C. 397; Tuttle v. Harrill, 85 N. C. 456; Isler v. Harrison, 71 N. C. 64; Falls v. Gamble, 66 N. C. 455; Gay v. Stancell, 76 N. C. 369. We cannot construe the "memorandum," "general issue," when made in a justice's court under our present system of pleading, to mean more than that

Digitized by Google

the defendant will interpose a general denial to the cause or causes of action alleged, either *ore tenus* or in a written complaint by the plaintiff; and evidence of an estoppel by a judgment in another action, or of the pendency of another action between the same parties, is not admissible in support of such a defense. But it is unnecessary for us to decide whether the plaintiff could "split up" his account, and bring two actions instead of one, or whether the account was due under a single contract, and therefore cognizable only in the superior court, if the evidence had been admitted and was true. It was not competent to sustain the defense as it was entered in the justice's court, and the defendant's counsel admits on the argument that the refusal of his honor to allow an amendment cannot be reviewed in this court. We concur with his honor in his ruling. There is no error, and the judgment must be affirmed.

(103 N. C. 50)

EDWARDS *et al.* *v.* BOWDEN *et ux.*

(*Supreme Court of North Carolina.* March 11, 1889.)

MORTGAGE—FORECLOSURE—EVIDENCE.

In a foreclosure suit the issue being as to whether one of the defendants, a married woman, voluntarily signed and acknowledged the mortgage without the compulsion of her husband, evidence that she executed a deed conveying part of the same property a year later, for the purpose of raising money to pay on the mortgage debt, is admissible to rebut her allegation that she executed the mortgage under duress.

Appeal from superior court, Greene county; J. F. GRAVES, Judge.

Action by Edwards & Murchison against R. E. Bowden and Bettie J. Bowden, his wife, to foreclose a mortgage. Verdict for defendants, and judgment thereon. Plaintiffs appeal.

W. C. Munroe, for appellants. *Geo. M. Lindsay*, for respondents.

SHEPHERD, J. This was a civil action, for the foreclosure of a mortgage deed, and tried before GRAVES, J., and a jury, at fall term, 1888, of Greene superior court. Among other things, the defendant Bettie J. Bowden alleged that she was a *feme covert* at the time the mortgage was executed, and that the land attempted to be conveyed was her sole and separate property, and that her signature to said mortgage deed was obtained by the fraud and collusion of the plaintiffs, and the threats, fear, and compulsion of her husband, and that her husband threatened to abandon and leave her unless she signed the mortgage to plaintiffs. It was alleged and proved that at the time the *feme* defendant signed said mortgage she was confined to her bed with sickness, and had been so confined for two weeks or more. There was no allegation or proof that the plaintiffs knew that her husband threatened to leave her if she refused to sign the mortgage to plaintiffs. On the trial, plaintiffs offered in evidence a deed from plaintiffs and defendants to one Mary J. Pate, purporting to convey a part of the land attempted to be conveyed in said mortgage, and which was executed a year after the mortgage, for the purpose of raising money to pay off a part of said mortgage debt, for the purpose of rebutting the allegation that she signed said mortgage through fear of her husband, which evidence was objected to by the defendant, and rejected by the court, to which ruling the plaintiffs excepted. The defendant Bettie J. Bowden testified in her own behalf as follows: "R. E. Bowden, my husband, brought the mortgage, and said, if I did not sign it, he would leave me. Edwards, one of the plaintiffs, came in. I was sick. He talked to me much about his kindness to my husband. I told him I did not want to give mortgage on my land. He said Bowden had given him an agreement to give him a mortgage on land. He said he would prosecute my husband for false pretense, and put him in jail, if I did not sign the mortgage. My husband was in the habit of getting intoxicated, and when so was violent. I never signed the mortgage willingly and voluntarily. I was afraid he would do what he threatened." Exceptions were taken by the plaintiffs to the instructions given by the court, but, as the appeal is disposed of upon the exception to the exclusion of testimony, it is unnecessary to set out the charge here. There was a verdict for the defendants, and the plaintiffs appealed.

We are of the opinion that a new trial should be granted because of the rejection of the testimony offered by the plaintiffs. It is true that, if the deed were executed under duress, and is for that reason void, it could not be validated by the fact which the plaintiffs sought to prove. But it was not offered for that purpose, but to rebut "the allegation that she signed said mortgage through fear of her husband." The alleged fact that a year after she signed the deed which is the subject of this controversy she voluntarily (as far as we can see) joined the plaintiffs in the execution of the rejected deed of mortgage upon a part of the same land, and for the purpose of paying plaintiffs' mortgage debt, would, it seems to us, be clearly relevant to the issue before the jury. They might well have inquired why she did not repudiate the whole transaction, instead of recognizing it by joining in the execution of the second deed. It may be that she could have fully explained her act so as to repel the imputed inconsistency; but, be that as it may, we think the plaintiffs were entitled to the testimony offered. *Venire de novo.*

(103 N. C. 276)

HALL *v.* TILLMAN *et al.*

(*Supreme Court of North Carolina.* March 11, 1889.)

REPLEVIN—JUDGMENT—SURETIES.

Code N. C. § 326, as amended by Laws 1885, c. 50, § 2, provides that property taken in an action of claim and delivery may be returned to defendant

Digitized by Google

on the execution by the latter of an undertaking, with one or more sufficient sureties, for the delivery of the property to plaintiff, with damages for its deterioration and its detention, if delivery can be had, and, if not, then for the payment to plaintiff of such sum as may be recovered against defendant for the value of the property, etc. Section 481 provides that in an action to recover the possession of personal property judgment for plaintiff may be for the possession of the property, or for the value thereof. *Held*, in such an action, where the only issues decided were that plaintiff was the owner of the property in question, and entitled to immediate possession, and a money judgment was rendered against defendant, that a judgment against the sureties for a balance of the debt owing to plaintiff, after the application of the proceeds of the property thereon, was not authorized.

A. P. Gilbert, for appellants. *T. B. Womack* and *John Manning*, for respondent.

DAVIS, J. This is an appeal by the defendants from a judgment of GILMER, J., rendered at February term, 1888, of the superior court of Chatham county. The plaintiff alleged that he was the owner of an engine and saw-mill, described in the complaint, which were in the possession of the defendants Tillman & Esher, and wrongfully detained by them. The said engine and saw-mill were taken under proceedings in claim and delivery, and returned to the defendants, who gave the required undertaking, with the defendants O. A. Palmer, J. R. Jones, and A. P. Gilbert, as sureties, as set out in the record. The action was commenced in November, 1884. At May term, 1886, there was a trial, and a verdict of a jury upon issues submitted, and by consent the verdict of the jury was set aside, and new trial ordered. At fall term, 1886, the action was tried, and the following issues were submitted to a jury: "(1) Is the plaintiff the owner of the said mill and engine described in the pleadings? (2) Is the plaintiff entitled to the immediate possession of said saw-mill and engine? (3) What was the value of the said saw-mill and engine at the time of the contract of defendants? (4) What sum has been paid on the contract price? (5) What is the value of the saw-mill and engine, now? (6) What damage, if any, has the plaintiff sustained by reason of the detention of said saw-mill and engine?" The jury responded to the first and second issues, "Yes." There was no response to the other issues, and the following judgment was rendered: "This cause coming on to be heard before me and a jury, upon the pleadings, proofs, and arguments, and the jury having found the first and second issues in favor of the plaintiff, now, on motion of John Manning and T. B. Womack, attorneys for the plaintiff, it is ordered and adjudged that the plaintiff recover of the defendants the sum of six hundred and sixty-six dollars and sixty-three cents, with interest on five hundred and eighty-seven dollars and eight cents from the first day of the term until paid, together with the costs of this action, to be taxed by the clerk. It is further adjudged that if the said sum of six hundred and sixty-six dollars and sixty-three cents and interest be not paid on or before the 1st day of December next, then, and in that event, A. P. Gilbert and T. B. Womack are appointed commissioners to sell the saw-mill and engine described in the pleadings at public auction for cash, first advertising the same according to law, and apply the proceeds to the extinguishment of this judgment, interest, and costs, and pay the surplus, if any, to the defendants. That this cause be held for further direction, and trial of the remaining issues." After the record of the verdict, the following entry appears: "Judgment. Appeal. Bond fixed at $40.00." But no appeal was perfected. At February term, 1887, the commissioners made the following report: "A. P. Gilbert and T. B. Womack, commissioners under judgment of fall term, 1886, in this cause, respectfully report that after due advertisement they, on the 12th day of February, 1887, sold at public auction, for cash, the saw-mill and engine described in the pleadings, when and where Joseph Malone became the last and highest bidder, in the sum of two hundred and fifty dollars, and has complied with the terms of the sale. That they have applied said sum of two hundred and fifty dollars as a credit on said judgment." Upon which the following judgment was rendered at the same term: "This cause coming on to be heard upon the report of A. P. Gilbert and T. B. Womack, commissioners, herein filed, no one objecting, now, on motion of John Manning and T. B. Womack, attorneys for plaintiff, it is adjudged that the said report is ratified and confirmed, and this cause is continued for the plaintiff."

The case on appeal states that at February term, 1888, the plaintiff, through his counsel, announced that the only action he proposed to take in the case was to move for judgment against the sureties upon the undertaking of the defendants for the residue of the plaintiff's debt, after the application to said debt of the proceeds arising from the sale of the property in controversy. This motion was accordingly made, and resisted by the defendants upon the ground that the judgment theretofore rendered at fall term, 1886, of the superior court of said county of Chatham, in the above-entitled cause, was irregular, void, and not supported or justified by the record and papers in the case, and that the said sureties were not liable for the amount of said judgment, or any part thereof. The motion of the plaintiff was granted, and judgment rendered accordingly. The defendants excepted. The defendants then moved to set aside the said judgment theretofore rendered at fall term, 1886, as aforesaid, upon the ground that the said judgment was irregular, and contrary to the course and practice of the court. From which said judgment and rulings the defendants appealed to the supreme court. The following is the judgment:

"This cause coming on to be heard before me upon the motion of the plaintiff for summary judgment upon the replevy bond of the

Digitized by Google

defendant herein filed, after argument by counsel representing both plaintiff and defendants, it is ordered and adjudged that the plaintiff do recover of O. A. Palmer, J. R. Jones, and A. P. Gilbert, sureties upon the defendants' undertaking, the sum of sixteen hundred dollars, to be discharged upon the payment of the sum of four hundred and forty-eight dollars and fifty-nine cents, ($448.59,) with interest from the first day of this term, and the costs of action."

Section 326 of the Code, as amended by chapter 50, § 2, of the Acts of 1885, provides for the return of the property taken under proceedings in claim and delivery upon giving an undertaking by the defendant, payable to the plaintiff, executed by one or more sufficient sureties, etc., "for the delivery thereof to the plaintiff, with damages for its deterioration and its detention, if delivery can be had, and, if such delivery cannot for any cause be had, for the payment to him of such sum as may be recovered against the defendant for the value of the property at the time of the wrongful taking or detention, with interest thereon, as damages for such taking and detention." Section 431 of the Code provides: "In an action to recover the possession of personal property, judgment for the plaintiff may be for the possession, or for the recovery of possession, or for the value thereof, in case a delivery cannot be had, and the damages for the detention." This action is brought to recover the possession of engine and saw-mill. The defendants admit that they are in possession of the engine and saw-mill, and deny the other allegations of the plaintiff. Nowhere in the record does it appear that the plaintiff has, or is seeking to recover, any debt against the defendants, and if there were such a claim it would not be covered by the undertaking of the sureties of the defendants. The only issues passed upon are the first and second, and the only facts found by the jury are that the plaintiff is the owner of the saw-mill and engine, and that he is entitled to the immediate possession. No other issues were passed upon. It nowhere appears by the finding of the jury, or in any other way, that the plaintiff has sustained any damage by the deterioration or detention of the property. Upon a careful inspection of the record, we can nowhere find any allegation, admission, or finding of any facts upon which the judgment rendered at fall term, 1886, could have been for anything but restitution; and, if there were, that judgment is not such as is contemplated by the statute to bind the sureties upon the defendant's undertaking. Unquestionably a plaintiff is entitled to summary judgment against the sureties in an "undertaking of defendant to retain property" where the judgment is "for the possession, or for the recovery of possession, or for the value thereof, in case a delivery cannot be had, and the damages" for its detention. Insurance Co. v. Davis, 74 N. C. 78; Harker v. Arendell, Id. 85, and cases cited. But the judgment must be such as is authorized by law. Code, § 431; Council v. Averett, 90 N. C. 168; Horton v. Horne, 99 N. C. 219, 5 S. E. Rep. 927; Manix v. Howard, 82 N. C. 125. We are not inadvertent to the fact that this action was commenced prior to the amendment by chapter 50, Acts 1885, but that in no way affects the character of the judgment, and the effect of the amendment is to make the condition of the bond harmonize with the judgment authorized. Our attention is called to the fact that the judgment in Council v. Averett, supra, was not in the alternative, as required in claim and delivery, but was similar to this. A glance at the case will show the difference. There, by agreement, the alternative judgment was dispensed with, and by consent a judgment was entered for the value of the goods taken, and the court, after stating and recognizing the proper mode of entering judgment, puts the decision upon the ground of agreement and consent. But the learned counsel for the plaintiff says that no objection was made to the judgment rendered at fall term, 1886. In that judgment the cause was "held for further direction, and trial of the remaining issues." No one of the remaining issues has been tried, and the trial and finding upon at least one of them is necessary to determine the liability of the sureties on the defendant's undertaking. There is error.

(102 N. C. 333)

GULLEY *v.* COLE.

(*Supreme Court of North Carolina.* March 11, 1889.)

ASSIGNMENT OF HOMESTEAD—JUDGMENT.

In the absence of fraud or irregularity in the assignment of a homestead, under Code N. C. §§ 501–524, it is binding on a creditor whose judgment was not recovered when it was made, and he cannot by the levy of an execution on the land cause the homestead to be reassigned. Following Gulley v. Cole, 1 S. E. Rep. 520.

Appeal from superior court, Wayne county; CLARK, Judge.

One Gulley, having a judgment against Willis Cole, caused it to be levied on land of the latter, which had, in 1879, under another execution, been assigned to said Cole as a homestead. The judgment of Gulley was not recovered until after the homestead had been assigned, in 1879, and he caused the homestead to be assigned again, and under the new allotment Cole received a part only of the tract formerly assigned to him. The trial court held that it was competent to lay off the homestead a second time, but that the second assignment was affected with such irregularities as to be invalid, and directed the appraisers to reassign the homestead. From this decision both parties appealed. The defendant's appeal was decided March 7, 1887. 1 S. E. Rep. 520. The court there held that proceedings under Const. N. C. art. 10, and Code, §§ 501–524, providing for a homestead for a debtor, and directing the manner in which it shall be laid off, were intended finally to settle the location and value

Digitized by Google

of the homestead, and that a creditor who does not interpose and object to the allotment made thereunder as prescribed by said sections is concluded by it. It was also held that, there being no allegation of fraud in the first assignment, it was valid, and the second allotment unauthorized by the statute.

E. W. Kerr and *N. Y. Gulley*, for appellant. *Strong, Gray & Stamps* and *W. R. Allen*, for respondent.

MERRIMON, J In 1879, the homestead of the defendant was duly valued and laid off to him. Thereafter the plaintiff obtained a judgment against him, sued out an execution upon the same, and under this execution the sheriff proceeded to have valued and laid off the defendant's homestead in the same land, as if no homestead had ever theretofore been laid off to him. The court below held that the homestead, as valued and laid off the second time, was affected with such irregularities as rendered it void. The plaintiff excepted, and appealed to this court. The court properly decided that the attempt to value and lay off the homestead of the defendant in the same land the second time was void, not upon the grounds upon which the court based its judgment, but because the homestead as at first laid off was effectual, continued to be so, and could not be disturbed by a revaluation thereof, and laying it off a second time. This court so expressly decided in the defendant's appeal in this case. Gully v. Cole, 96 N. C. 447, 1 S. E. Rep. 520. That case is conclusive of this, and we need not do more than cite it. Judgment affirmed.

(103 N. C. 53)

DAVENPORT *et al.* v. TERRELL.

(*Supreme Court of North Carolina.* March 11, 1889.)

NEW TRIAL—DISCRETION OF COURT.

Where, during the decision of a motion for a new trial, the court remarks that the amount involved is small, and the case ought not to be tried again, but the motion is not then disposed of, and afterwards the court, "on consideration, and in the exercise of its discretion," denies the motion, the ruling of the court will not be disturbed on the ground that he was influenced by an erroneous view of the law.

C. M. Busbee, for appellant. *Peel & Maynard*, for appellee.

AVERY, J. This was a civil action tried on appeal from the court of a justice of the peace at the April term, 1888, of the superior court of Wake county, before SHIPP, J. The record contains but one exception. After verdict for the plaintiff, the defendant's counsel moved the court for a new trial because the verdict was against the weight of evidence. The motion was argued by counsel. During the discussion the court (judge) remarked that if he had been on the jury he would have found differently, but that it was a small matter, or that there was a small amount involved, and the case ought not to be tried again. The motion was not then disposed of, but afterwards the court, upon consideration, and in the exercise of its discretion, discharged the rule for a new trial. Appeal by defendant, Terrell.

On the argument in this court, counsel raised no question as to the discretionary power of the judge below to grant or refuse a motion of this kind. We cite only one late case reaffirming the settled principle, Redmond v. Stepp, 100 N. C. 212, 6 S. E. Rep. 727. But, when it appears that the judge was influenced in the exercise of such power by an erroneous view of the law, this ruling can be reviewed, and ought to be reversed on appeal in this court. Vest v. Cooper, 68 N. C. 131. In the case before us the rule for a new trial was discharged by the court "upon consideration, and in the exercise of its discretion," not at the time when the remark which is set forth in the assignment of error was made, but afterwards. We must accept the statement in the record, and, as the motion was refused after deliberate consideration, and in the exercise of an admitted power, it is useless to speculate as to whether there would have been error for which a new trial might be awarded, if it clearly appeared that his honor was influenced by the consideration that only a small amount was involved in the controversy settled by the verdict. Affirmed.

(103 N. C. 282)

RYAN *et al.* v. MCGEHEE *et al.*

(*Supreme Court of North Carolina.* March 11, 1889.)

MORTGAGES—FORECLOSURE—TAX TITLE.

A married woman joined with her husband in a mortgage of land which belonged to her as security in an action of ejectment wherein they were defendants. At the time the mortgage was given certain taxes were in arrears, and, pending the ejectment suit, portions of the mortgaged tract were sold for the taxes, and the wife purchased at the sale, and took the sheriff's deeds thereto. *Held*, that such a purchase of her own property was utterly void, and could not affect the rights of the mortgagee.

Appeal from superior court, Guilford county; JAMES E. SHEPHERD, Judge.

L. M. Scott, for appellant. *E. C. Smith*, for appellees.

MERRIMON, J. The plaintiffs brought this action to recover possession of the land specified in the complaint. The defendant W. A. Martin was allowed to become party defendant, as landlord, and instead of giving an undertaking with surety thereto, as required by the statute, (Code, § 237,) he and the appellant, (who was his wife,) on the 11th of March, 1879, executed a mortgage of certain lands therein described, to the plaintiffs, as allowed by the statute, (Id. § 120,) which was accepted and filed in the action. The condition thereof was to the effect that, if the mortgagors should fail to pay the mortgagees "all such costs and damages" as they might recover in this action, then they might sell the land, etc. Afterwards the plaintiffs obtained judgment for the possession of the

Digitized by Google

land as demanded by the complaint, for the rents, profits, and costs. Thereupon an execution against property was issued, which the sheriff returned *nulla bona*. Thereafter the plaintiffs gave the mortgagors notice of a motion in the action "for order of foreclosure of the mortgage deposited,"—that mentioned above. The appellant resisted the motion upon the grounds that the land the subject of the mortgage was her own separate property; that there were arrearages of taxes due for the same for the years 1872, 1873, 1874, 1875, amounting to $175; that the sheriff sold nine acres thereof to pay these taxes the 17th of December, 1877; that she thereafter paid such taxes, and after the lapse of 12 months took the sheriff's deed for the land on the 2d day of December, 1879; that on the 1st of December, 1879, the sheriff sold 101 acres of the land to pay other arrearages of taxes due for the same for the years 1876, 1877, 1878; that she paid such taxes, and took the sheriff's other deed for the land, dated the 5th of March, 1881; that such tax deeds were registered; that she has had possession of the land ever since; that the plaintiffs recovered the rents for the whole of the land, including what she so purchased; and she demanded an account, and that she should not be charged with the rents therefor, etc. It appeared that the appellant made the purchases of the land as claimed by her pending this action, and afterwards applied to the court to be made a defendant to enable her to set up her claim, which application was denied, and she did not appeal; that she brought a separate action to enjoin the execution of the judgment obtained by the plaintiffs for possession of the land, rents, etc., which action was decided adversely to her, and she did not appeal from the adverse judgment therein.

The court gave judgment, of which the following is a copy: "It is now, on motion, adjudged by the court that the plaintiffs have the right to judgment of foreclosure of the mortgage aforesaid, and that unless W. A. Martin and Jane C. Martin shall pay or cause to be paid the sum secured by said mortgage, to-wit, the sum of $200, into the office of the clerk of this court, as a credit on the plaintiffs' damages $245, and the costs $22 hereinbefore mentioned, within 30 days from this term of the court, then, and in that case, it is adjudged that the clerk of this court be, and he is hereby, appointed a commissioner, whose duty it shall be, after 30 days' advertisement in some newspaper published in Rowan county of the time and place of sale, to proceed to sell at auction to the highest bidder the lands conveyed in the mortgage aforesaid at the court-house in Salisbury for ready money, and report his sale to the next term of this court for confirmation and order of title; and the cause is retained for further orders and directions." From this judgment Jane C. Martin, having excepted, appealed to this court.

It was not contended that the mortgage mentioned was in any respect objectionable. It purported to be that of the appellant and her husband. They covenanted specially therein with the plaintiffs that they were seised of the land conveyed; that they had the right to convey the same; that it was free from incumbrance; and for the quiet enjoyment thereof. It seems that the land really belonged to the appellant, and at the time of the sale of part of it to pay the taxes it was hers subject to the mortgage. The arrearages of taxes were due and ought to have been paid before the mortgage was executed. The appellant was bound to pay them, whether they, or any part of them, constituted a valid incumbrance on the land or not. She allowed a part of it to be sold to pay them, and bought it herself; bought her own land. She undertook to take the sheriff's deed for it, and now insists that she has a title to it other than that that she incumbered by the mortgage. Her supposed purchase at the sheriff's sale was absurd and void. It went for naught, and did not affect the rights of the mortgagee. She could not purchase the land from herself. Besides, it seems that she was estopped by the judgment adverse to her in the action she brought to obtain relief by injunction. There is no error, and the judgment must be affirmed. To the end that further proceedings may be had in the action let this opinion be certified to the superior court. It is so ordered.

(102 N. C. 515)

WINFREE *v.* BAGLEY.

(*Supreme Court of North Carolina.* March 11, 1889.

WRITS—SERVICE—PUBLICATION.

1. A chose in action is "property" within the meaning of Code N. C. § 218, subd. 8, providing for service by publication where defendant is a non-resident, but has "property" in the state. Section 3765, subd. 6, provides that the word "property," as used in the Code, "shall include all property, both real and personal."

2. In an action *in personam*, in which no attachment has been or can be issued, service by publication on a non-resident is ineffectual for any purpose.

Appeal from superior court, Guilford county; PHILIPS, Judge.

John A. Barringer, for appellant. *J. T. Morehead*, for appellee.

SHEPHERD, J. This was a motion to dismiss, heard before PHILIPS, J., at June term of the superior court, 1887, of Guilford county. The action was for libel, and, the defendant being a non-resident, publication of the summons was made. The affidavit upon which the order was made, stated that the plaintiff was a resident of North Carolina, that defendant had property within the state, and was in other respects regular. The defendant entered a special appearance for the purpose of making this motion to dismiss, and filed an affidavit in which he stated that he had no property within this state. He admitted

Digitized by Google

that the plaintiff owed to him a bond for $1,000, dated April 24, 1882, and payable on demand. His contention is "that said bond is not such property within the state of North Carolina, within the provisions of the statute, (Code, § 218, subd. 3,) in order to give the courts of this state jurisdiction to hear and determine actions against non-residents, and, if within the provision of said statute, he is further advised, and so charges, that the same is unconstitutional and void." His honor denied the motion, and the defendant appealed.

Code, § 218, subd. 3, provides that service by publication may be made "where the defendant is not a resident of this state, but has property therein, and the court has jurisdiction of the subject of the action." The defendant contends that the bond mentioned in the affidavit is not "property," within the meaning of the above section. The cases cited by him involved the construction of the word "property" when used in wills, and have no application to the construction of the word as used in the Code. Section 3765, subd. 6, provides that the word "property," when used in statutes, shall "include all property, both real and personal." So there can be no question that a chose in action is embraced in section 218.

But there is another objection, which we think is fatal to the plaintiff, unless personal service can be made on the defendant. No attachment has been issued in this action, and none can issue, because it is for unliquidated damages. Price v. Cox, 88 N. C. 261; Wilson v. Manufacturing Co., 88 N. C. 5. There being no attachment, and the suit being merely *in personam*, constructive notice in this form upon a non-resident is ineffectual for any purpose. Justice FIELD, in delivering the opinion in the case of Pennoyer v. Neff, 95 U. S. 714, says: "The want of authority of the tribunals of a state to adjudicate upon the obligations of non-residents where they have no property within its limits is not denied by the court below; but the position is assumed that, where they have property within the state, it is immaterial whether the property is in the first instance brought under the control of the court by attachment, or some other equivalent act, and afterwards applied by its judgment to the satisfaction of demands against its owner; or such demands be first established in a personal action, and the property of the non-resident be afterwards seized, and sold on execution. But the answer to this position has already been given in the statement that the jurisdiction of the court to inquire into and determine his obligations at all is only incidental to its jurisdiction over the property. Its jurisdiction in that respect cannot be made to depend upon facts to be ascertained after it has tried the cause, and rendered the judgment. * * * Even if the position assumed were confined to cases where the non-resident defendant possessed property in the state at the commencement of the action, it would still make the validity of the proceedings and judgment depend upon the question whether, before the levy of the execution, the defendant had or had not disposed of the property. If, before the levy, the property should be sold, then, according to this position, the judgment would not be binding. This doctrine would introduce a new element of uncertainty in judicial proceedings. The contrary is the law. The validity of every judgment depends upon the jurisdiction of the court before it is rendered; not upon what may occur subsequently." To this reasoning it has been said that each state has the right to regulate its own proceedings, so far as to bind the property of the debtor within its territory, and that there is no mode of directly reviewing or impeaching the judgment in the state where it is rendered. The force of this is admitted by the learned justice, but he says "that, since the adoption of the fourteenth amendment to the federal constitution, the validity of such judgments may be directly questioned, and their enforcement in the state resisted, on the ground that proceedings in a court of justice to determine the personal rights and obligations of parties over whom that court has no jurisdiction do not constitute due process of law, * * * except in cases affecting the personal *status* of the plaintiff, and cases in which that mode of service may be considered to have been assented to in advance, as hereinafter mentioned. The substituted service of process by publication allowed by the law of Oregon, (which is the same as in North Carolina,) and by similar laws in other states, where actions are brought against non-residents, is effectual only where, in connection with process against the person for commencing the action, property in the state is brought under the control of the court, and subjected to its disposition by process adapted to that purpose, or where the judgment is sought as a means of reaching such property, or affecting some interest therein." This decision, which we are constrained to follow, is so contrary to the general view as to the right of a state to regulate its own process in subjecting the property of non-resident debtors within its limits, that we have thought it proper to quote largely from the opinion in order that it may be seen upon what ground the restriction is based. For the above reasons the court below should declare that there has been no service on the defendant, and that he is not required to answer. As the defendant's motion was simply to dismiss the action, and there has been no discontinuance, his honor was correct in his ruling, as the court had jurisdiction of the subject-matter, and the plaintiff may be able to make personal service in the state. We have deemed it our duty, however, to declare that as yet there has not been due and proper service, in order that the court below may proceed advisedly. Affirmed.

Digitized by Google

(103 N. C. 410)

STATE v. SMITH.

(*Supreme Court of North Carolina.* March 19, 1889.)

CRIMINAL LAW—WARRANT—AMENDMENT.

In a prosecution of a defendant, under Code N. C. § 1120, for going upon the land of another without a license, having first been forbidden to do so, the superior court may allow an amendment to the warrant so as to charge the defendant with having "willfully and unlawfully" entered upon the land, contrary to the "form of the statute."

Appeal from superior court, Pitt county; ARMFIELD, Judge.

Moore & Bernard, for appellant. *The Attorney General*, for the State.

MERRIMON, J. The defendant was arrested on a criminal warrant issued by a justice of the peace, charging him with going upon the land of another without a license, having first been forbidden to do so, in violation of the statute. Code, § 1120. He pleaded not guilty, was convicted in the court of the justice of the peace, and from the judgment there against him he appealed to the superior court, and on the trial in that court there was a verdict of guilty; whereupon he moved in arrest of judgment, upon the ground that it was not charged in the warrant that the entry upon the land was "willful and unlawful," and that the charge did not conclude, "against the form of the statute." Upon the motion of the solicitor for the state, the court allowed the warrant to be amended in the respects mentioned, overruled the motion in arrest of judgment, and gave judgment against the defendant, from which he, having excepted, appealed to this court. The amendments of the warrant allowed did not change the nature of the offense charged, or affect the substance thereof, nor did it deprive the defendant of any defense he might or could have made. The power of the superior courts to allow such amendments is very comprehensive, and is intended to help actions and proceedings, both civil and criminal, beginning in courts of justices of the peace. Their authority to exercise such power has been repeatedly considered by this court, and is well settled. State v. Vaughan, 91 N. C. 532; State v. Crook, Id. 536; Manufacturing Co. v. Barrett, 95 N. C. 36. Very clearly, the superior court had power to allow the amendments complained of, and properly did so. There is no error. Let this opinion be certified to the superior court according to law. It is so ordered.

(102 N. C. 491)

ARRINGTON v. ARRINGTON *et al.*

(*Supreme Court of North Carolina.* March 11, 1889.)

HUSBAND AND WIFE—JUDGMENT—LIEN—DIVORCE—DOMICILE.

1. A. and wife were in right of the latter judgment creditors of B., who was the owner of an equity of redemption in land, the legal title to which was in M., a creditor of B., under an agreement to reconvey to B. upon the payment of the debt. M. conveyed to A. and L. for the amount of B.'s debt, and a further amount paid by M. upon the purchase of B.'s interest at execution sale; A. and L. having notice of B.'s equity. The land was afterwards sold at judicial sale, and A. and L. received a sum of money therefor in excess of the aggregate debts due from B. to M. *Held*, that as A. was liable to B. for his moiety of the excess so received, and had at the same time the common-law right of reducing his wife's choses in action into possession, under which B. might lawfully have paid him the judgment, equity would, at the instance of the sureties of B. in the judgment, treat the moiety as a payment on the judgment, though A. and wife were afterwards divorced *a vinculo matrimonii*.

2. The same result follows though the deed from B. to M. was made with intent to defraud B.'s creditors.

3. Where, after the lien of a judgment attaches to land of a testator, the devisees make partition among themselves, and the creditor releases one of the shares from the lien, such release is not a payment upon the judgment, nor does it impair the right of the creditor to enforce the lien against the residue of the land.

4. A wife, if cruelly treated by her husband, so as to endanger her health, or make her life burdensome, may leave her husband's domicile, and acquire one in another state, the courts of which will have jurisdiction of a suit brought by her for a divorce.

5. A letter by a defendant sued by his wife for a divorce in another state to an attorney, saying, "I write to employ you as my attorney in the suit of myself and wife, which is now pending in your court," and inclosing money designated as a retainer, is sufficient authority for the appearance of the attorney to confer jurisdiction of defendant's person, though defendant also inquires what fee will be charged for appearing in the cause if it "should be necessary to fight the case."

6. After a divorce *a vinculo matrimonii*, the wife is reinstated to the right to all her choses in action not reduced to possession by the husband during coverture.

Appeal from superior court, Vance county; SHEPHERD, Judge.

Action by Pattie D. B. Arrington against B. L. Arrington and John P. Arrington, executors and devisees of A. H. Arrington, deceased, Thomas M. Arrington, A. H. Arrington, Samuel Arrington, George Arrington, Robert W. Arrington, and J. C. Arrington, also devisees of said A. H. Arrington, and W. L. Thorpe, sole devisee under the will of Mary Thorpe, deceased, who was also a devisee of said A. H. Arrington, deceased, John W. Blount, administrator, etc., of Thomas Cooper, deceased, and W. H. Williams and O. Williams, his wife, (formerly O. Cooper, and widow of said Thomas Cooper,) and Lilly Cooper, an heir and distributee of said Cooper. The object of the suit was to enforce the payment of a judgment recovered by said plaintiff and her former husband, W. H. Arrington, against said A. H. Arrington, deceased, and Thomas Cooper, deceased, as sureties for L. N. B. Battle. Pending the action W. H. Arrington became a party defendant, as did also certain creditors, W. H. Morris & Sons, and Spier Whitaker, to whom said W. H. Arrington had assigned said judgment. These last named parties set up their claim to the judgment, denying that the plaintiff had ever been legally divorced from said W. H. Arrington. The decree sustained some exceptions to the reports of the referees, and overruled others, and the defendants appeal.

Digitized by Google

Jacob Battle and *E. C. Smith*, for appellants. *Spier Whitaker*, for respondent.

SMITH, C. J. W. H. Arrington and Pattie D. B. Arrington, then his wife and sole plaintiff in the present suit, brought their action as relators in the name of the state against her guardian, L. N. B. Battle, A. H. Arrington, and Thomas J. A. Cooper, sureties to the guardian bond, and others, for the trust-estate which had been wasted; and at fall term, 1871, of the superior court of Franklin, recovered judgment for $8,878.30, with interest thereon from January 1, 1871, and costs. The judgment was docketed in that county on September 11, 1871, and in Nash county on April 1st of the next year. The present action is prosecuted by the said Pattie D. B. as a *feme sole*, upon an allegation that she has been divorced, by a decree dissolving the bonds of matrimony, from her husband, and is prosecuted to subject the personal, and, if insufficient, the real, estate of the deceased sureties, A. H. Arrington and Thomas J. A. Cooper, to the payment and satisfaction of said debt; the guardian being insolvent himself, and having, as administrator of the remaining surety, John Evans, wasted his estate. The action is against the devisees and executors *nominatim* of the estate of A. H. Arrington, the administrator and heirs at law of Thomas J. A. Cooper, and his widow and her second husband, and others, among whom have become parties defendant Spier Whitaker, trustee, and W. H. Morris & Sons, claiming as assignees of the fund from the husband, W. H. Arrington. The object of the suit is to have an account taken of the personal and real estate of the said deceased sureties in the hands of their representatives, devisees, and heir, and, if the former prove insufficient, for a sale of said lands, and the appropriation of the proceeds as far as needed to the discharge of the said judgment. Answers were put in, and a reference ordered, in response to which a report was made by E. S. F. Giles of the administration accounts of the executors of A. H. Arrington with the estate of their testator, and of J. W. Blount, administrator of Thomas J. A. Cooper, with the intestate's estate. From this report it appears that the personal estate of A. H. Arrington has been fully administered and exhausted, leaving a sum overpaid and due the executor J. P. Arrington of $2,678.71, and in like manner due the executor B. L. Arrington of $69.71, computed to September 1, 1882. It further appears that the defendant J. W. Blount has in his hands, ascertained and due, December 4, 1882, an unexpended surplus of $2,985, and that the intestate in his life-time paid on the judgment, with interest added, $3,644.44, and his administrator has since paid on it $4,771.84. It further appears from an exhibit that W. H. Arrington and wife, in October, 1878, after the rendition of the judgment in their favor, made a deed to John P. Arrington, one of the executors of A. H. Arrington, and a devisee under his will, conveying all their "right, title, and interest" in, and releasing from the lien of their judgment and all other liens they may have, a tract of land described and supposed to contain 500 acres, allotted to said John P. Arrington in the division of the testator's lands; such interest being declared to be by reason of said judgment against the executors docketed in Nash county, wherein the land lies.

Under another order of reference, made at fall term, 1883, to R. A. P. Cooley in the present suit, and after the removal of the cause to the superior court of Vance county, he reports as follows: "The payments made by Blount, administrator of the surety Cooper, out of the assets in his hands, between September 25, 1874, and July 16, 1878, are in amount $3,557.45, while those made by the executor, John P., between February 1, 1875, and February 15, 1876, are in the aggregate $2,000. The residue of the judgment after the last payment in July, 1878, due at that date, is $6,688.93, which sum, with interest to December 1, 1884, $2,558.51, makes an aggregate due at that date of $9,247.44. Of this sum, in an adjustment between the estates of the sureties, that due from Cooper at the date aforesaid is $3,489.13; and from Arrington is $5,758.30. The value of the land released from the judgment lien is $4,000, and that of the residue of the real estate of the testator, A. H. Arrington, situated in this state is $25,000, while he owned real estate in Alabama of the value of $14,500. There is a mortgage deed executed on June 25, 1872, by one W. H. Rowland to the testator, A. H. Arrington, as an indemnity against loss from suretyship on the former's administration bond, reported by the referee, on the liability whereof he finds due on December 1, 1884, the sum of $7,568.87, consisting of principal and interest. The referee finds to be due on outstanding liabilities of the testator's estate $6,612.14, whereof is due on the judgment $5,758.30, and to one Nancy Bunn $853.84, and the liabilities of the estate of Cooper on the judgment $3,489.13. These are the only unsatisfied claims against the two estates."

These two reports were confirmed by the court, with the proviso that the defendants other than W. H. Arrington and his assignees, who were authorized to file an amended answer at the term, "may urge the defenses set up in the said amended answer in reduction of the amount due on the judgment described in the complaint, or in the discharge thereof." It was further adjudged that out of the estate of said A. H. Arrington there be paid to Spier Whitaker, trustee, $1,550, with interest from September 8, 1882, and the costs in the suit of G. S. Alford v. J. P. Arrington, pending in Nash superior court, and that subject thereto the balance due the executors be retained; that all other debts due said estate, as set forth in the two referees' reports, be paid by the executors; and that the cause be referred to said Cooley, "to

Digitized by Google

find all issues of law and fact relating to the matter of defense set up for the first time in the amended answer," with certain other matters not necessary to mention, "with leave to the plaintiff, the said W. H. Arrington, and his assignees, within sixty days, to reply thereto." The referee accordingly made his report, submitting the evidence, from which, and the pleadings and admissions of parties, he finds:

"That the said W. H. Arrington and the *feme* plaintiff intermarried in February, 1868, and prosecuted their suit upon the guardian bond against L. N. B. Battle, the principal, and the executors of the surety, said A. H. Arrington, and Thomas J. A. Cooper, a living surety, and others, and made the recovery already stated. That the only solvent sureties on the bond when judgment was rendered, and since, were said A. H. Arrington and said Cooper, and said judgment was also entered in Franklin superior court against L. F. Battle, and was docketed in Nash county on April 2, 1879.

"(5) That sundry payments have been made on said judgment by the personal representatives of A. H. Arrington and Thos. J. A. Cooper, which leave a balance appearing to be due on the 1st day of December, 1884, of $9,247.44, with interest on $6,688.93 from December 1, 1884. The amount due December 1, 1884, from Arrington's estate, was $5,758.30; from Cooper's estate, $3,489.13, as then appeared.

"(6) That A. H. Arrington died on the ——— day of ———, 1871, leaving a last will and testament, which was duly proved and recorded in Nash county, and the executors therein named who have duly qualified as such are the defendants J. P. Arrington and B. L. Arrington, and the said testator's devisees are the following: (*a*) J. P. Arrington; (*b*) Mary Thorpe, wife of W. L. Thorpe, (she is now dead, and W. L. Thorpe is her sole devisee;) (*c*) Thomas M. Arrington; (*d*) A. H. Arrington; (*e*) S. L. Arrington; (*f*) George Arrington, (he has died since the commencement of this suit, unmarried, without issue, and intestate;) (*h*) Robert W. Arrington; (*i*) J. C. Arrington, who appears by his general guardian, J. J. Battle. Said parties are the only children of the testator, A. H. Arrington, the sole devisees and legatees under said will, and are each entitled to an equal share of his estate.

"(7) Thos. J. A. Cooper died in Nash county, intestate, and John W. Blount is his administrator. O. Williams was his widow, who has since intermarried with W. A. Williams, and his only child is Lizzie Cooper,—all these being defendants herein.

"(8) That the value of A. H. Arrington's real estate in Nash county was $29,000, and of his real estate in Alabama, $14,500.

"(9) At the time of filing the undersigned's previous report, the outstanding liabilities of the two estates were ascertained and stated.

"(10) That on the 30th October, 1878, the plaintiff and her then husband, W. H. Arrington, executed a deed to J. P. Arrington, one of the defendants, releasing from said judgment certain land which he had acquired from the testator, A. H. Arrington, said land being worth $4,000. For copy of said deed of release, see report previously filed by the undersigned.

"(11) That the personal estate of the testator, A. H. Arrington, has been exhausted, and there is due to the executor B. L. Arrington $269.71, and to the executor J. P. Arrington, $267.81, with interest in each case from September 1, 1882. The debt of $269.71 has, for value, been assigned by B. L. Arrington to J. P. Arrington. This indebtedness due to J. P. Arrington, $2,948.42, with interest from September 1, 1882, has been mortgaged to Spier Whitaker, trustee, to secure a debt of $1,550, with interest from September 8, 1882, and certain costs.

"(12) That the Rowland mortgage described in the previous report of the undersigned has been foreclosed under order of court. See judgment rendered at spring term, 1887, of Nash superior court, in the civil action entitled 'J. P. Arrington and B. L. Arrington, executors of A. H. Arrington and others against A. W. Rowland, executor, and another.' The land was sold for $3,500, and was bid in by J. P. Arrington for his father's estate.

"(13) That in 1869, on the 5th day of March, the said L. N. B. Battle conveyed valuable real and personal estate to A. G. McIlwaine and R. D. McIlwaine by a deed recorded in the register's office of Nash county, in book 23, at page 580, the consideration expressed being $3,790, a debt due from said L. N. B. Battle to said McIlwaines. This deed is produced in evidence, copy herewith filed, marked 'N.' That said deed was made for the purpose of securing the debt to McIlwaines, and to defend the said L. N. B. Battle from the payment of surety debts, and from the event of suits then pending against him, and was not intended as a fee-simple deed.

"(14) That on the same day of the conveyance to the McIlwaines the said McIlwaines, by their agent, S. S. Bridgers, made and executed to the said L. N. B. Battle their obligation in the penal sum of seven thousand and six hundred dollars, to be void if the said parties should, upon the payment to them by the said L. N. B. Battle, on or before the 5th day of March, 1872, of the sum of three thousand one hundred and eighteen dollars and sixty cents, with interest from date, execute and deliver to him, the said Battle, or to any one whom he should elect, at any time he should require the same, a fee-simple and guaranty deed to all of said property, etc.; that on the same day the said McIlwaines, by their agent, S. S. Bridgers, made and delivered to the said Battle a paper writing authorizing and empowering him to act as their agent in the management of said property.

"(15) That the said Battle, during the

Digitized by Google

years 1870–71, sent to the said McIlwaines, in Petersburg, Va., thirty-six bales of cotton, and directed them first to pay an account which he owed them for supplies, and to give him credit for the balance of the proceeds of said cotton on the debt due them for the purchase of the aforesaid property, which they did.

"(16) That in August, 1871, G. N. Lewis, sheriff of Nash county, by virtue of an execution in his hands in favor of W. W. Parker and against said L. N. B. Battle, sold the interest of said Battle in the real estate conveyed by said deed, at which sale the said A. G. McIlwaine and R. D. McIlwaine, at the request of the said Battle, became the purchasers at the price of fifty dollars, and took the sheriff's deed therefor. See Exhibit I, herewith filed. The said McIlwaines paid, at the request of the said Battle, $350 to said Parker, he having agreed to accept that in discharge of his debt, which amounted to about $700. That the said McIlwaines, after they had made the purchase, told the said Battle that whatever interest they acquired by said purchase they would convey to the defendant upon the payment of the amount expressed in the aforesaid obligation, and the three hundred and fifty dollars paid by them to Parker added.

"(17) That on the 6th day of June, 1872, the said McIlwaines made and executed to B. H. Bunn a power of attorney, authorizing him, in their name, to dispose of their interest in said property to such persons as to him should seem best. A copy of this document is herewith filed, marked 'D.'

"(18) That negotiations were then had between said B. H. Bunn and said L. N. B. Battle, touching the amount of the indebtedness due from the latter to said McIlwaines, and for the settlement of the same; and said Battle's friend, Wm. Rich, agreed to advance whatever amount was justly due as aforesaid from said Battle, and to take a conveyance of the legal title to said property, to hold in trust for the security of the sum so advanced.

"(19) That on the 29th day of August, 1872, the said McIlwaines (through their attorney in fact, B. H. Bunn) sold and conveyed all their interest in said property to the defendant W. H. Arrington and L. F. Battle for $5,280, and one of the grantees, L. F. Battle, had notice that the said McIlwaines held in trust, and that the sum above mentioned was the amount claimed by them, and for the security whereof they held the legal title. See Exhibit P, herewith filed.

"(20) That said property was worth $10,967.70.

"(21) That on the 2d of November, 1872, the said W. H. Arrington and L. F. Battle brought suit against the said L. N. B. Battle for the recovery of the possession of said property and other relief. See Exhibit A, herewith filed.

"(22) That at spring term, 1874, in said court, in said action, a decree by consent, signed by the attorneys of the parties and approved by his honor, S. W. Watts, was rendered, appointing Calvin Ward and N. W. Boddie receivers and commissioners, and directing them to sell the real and personal property described in the deed from L. N. B. Battle to the McIlwaines and in their deed to W. H. Arrington and L. F. Battle. Copy of said decree will be found among papers, marked 'A.'

"(23) That on the 21st April, 1874, the said commissioners sold said property for the aggregate amount of $10,967.70; that a report of sale was filed and confirmed at fall term, 1874, the commissioners being therein directed, after paying costs, $31.50, and retaining $300 for their services, to divide the residue of the proceeds of sale equally between the said W. H. Arrington and L. F. Battle, which was done accordingly. See Exhibits B and C, herewith filed.

"I find as matters of law:

"(1) That if all of the legatees and devisees of A. H. Arrington were jointly responsible for the debts of the testator, the effect of the deed of release from W. H. Arrington and Pattie D. B. Arrington to J. P. Arrington would be to discharge a part of the judgment debt described in the complaint equal to the ratable portion thereof chargeable on the land released.

"(2) That L. N. B. Battle had an equitable estate in the property conveyed to the McIlwaines, which was subject to the lien of the judgment described in the complaint.

"(3) That W. H. Arrington had full control over said judgment, with power to collect the same, or release or discharge it.

"(4) That W. H. Arrington is to be treated as having been paid on said judgment the amount he received from the commissioners, N. W. Boddie and Calvin Ward, less the amount he paid to the McIlwaines, ($2,640,) and the judgment is *pro tanto* discharged to that extent as to him and the plaintiff.

"(5) That the purchase of said property by the McIlwaines from G. N. Lewis, sheriff, inured to the benefit of the *cestui que trust*, L. N. B. Battle.

"(6) That the latter's interest in said property was not a pure, unmixed trust that could be sold under a *fi. fa.*, and hence said purchasers by said purchase acquired nothing.

"(7) That said Battle's interest in said property being certainly worth what it was sold for, less the amount of the debt secured to the McIlwaines, the judgment is to be credited as of April 21, 1874, with $10,967.70 less the secured debt due the McIlwaines, and $331.50 costs, with the interest, of course, added to McIlwaine's debt.

"(8) That the said L. N. B. Battle is not entitled to credit of $1,000 on account of cotton shipped the McIlwaines, as the evidence shows that this cotton was applied elsewhere than in discharge of said secured indebtedness.

"(9) That the said W. H. Arrington and

Digitized by Google

L. F. Battle had constructive notice of the trust existing in the hands of the McIlwaines sufficient to put them on inquiry.

"(10) That the following is a more exact statement, showing what credit ought to be applied to said judgment described in the complaint, (this aside from the discharge on account of the deed of release above mentioned:)

Property was sold April 21, 1874, for		$10,967 08
10 per cent. cash	$ 1,096 77	
Deduct costs and commissions	331 50	
	$ 765 27	
Int. to January 1, '75	31 88	
90 per cent. deferred payment due January 1, 1875	9,870 93	
	$10,668 08	
Amount received by W. H. Arrington		$ 5,834 04
Amount of McIlwaine's debt August 29, 1872	5,280 00	
Interest to Jan. 1, '75	739 25	
Making	6,019 25	
One-half paid by W. H. Arrington	3,009 62	
Leaving a difference between the amount paid by W. H. Arrington and the amount he received of		$ 2,824 42

—Which it is respectfully submitted should be applied to the discharge of the judgment described in the complaint so far as it will go, and this as of January 1, 1875. The said W. H. Arrington could have applied this amount to the said judgment, and equity will consider it so applied. Judgment will fix the undisputed rights of Mrs. Nancy Bunn, J. P. Arrington, Ex'r, and Spier Whitaker, trustee.

"All of which is most respectfully submitted. R. A. P. COOLEY, Referee."

The defendants, other than W. H. Arrington and his assignees, file 12 exceptions to the report, of which all but that mentioned, No. 2, were overruled, and that alone sustained, while the plaintiff, Pattie D. B. Arrington, filed 13, whereof those numbered 1, 3, 4, 6, 7, 9, 10, 11, and 12, were sustained, and judgment having been entered, which was subsequently modified, the defendants appealed. The referee disallowed the credit of $1,000, claimed upon the consignment of cotton to the McIlwaines, or any abatement of the debt by reason of the deed of release to John P. Arrington of the judgment lien upon his land, but does admit a deduction therefrom to the amount of the excess received on the sale of the land of L. N. B. Battle, the principal debtor, over the moneys expended in obtaining the title thereto. The rulings of the court disallow any abatement of the debt for these causes, and charge the estates of both sureties *in solido* with the whole debt, and fix the executors with personal assets to the amount of $3,500, derived under the Rowland mortgage. Without a minute inquiry into the terms of each of the exceptions specifically, the appeal, in substance, brings up for review the rulings upon points mentioned, and to such we confine our attention.

1. The appellants (and in using the term we do not include, in considering this part of the appeal, the said W. H. Arrington and his assignees, whose interests are those of the plaintiff herein) insist as follows: (1) The court erred in overruling the referee in disallowing the credit for the excess received in disposing of the land of the guardian obtained from the McIlwaines by which the referee reduced the judgment debt. This sum, it is said, belonged to the principal, and, being received by the husband while entitled to reduce into possession and apply to his own use the wife's choses in action, must be deemed a reduction into possession and discharge of so much of the debt as if a direct payment had been made. The facts connected with this exception are fully set out in the referee's findings, and do not require repetition. Sections 13 and 14 and again sections 16 to 23, inclusive. Whatever infirmities may enter in the conveyance from L. N. B. Battle to the McIlwaines from the fraudulent intent of the former, as between the parties, it was effectual, and subject to the condition for redemption contained in the contemporaneous sealed instrument given by the bargainees to the bargainor. The title was made good under the execution sale, under the judgment recovered by W. W. Parker, at which the said McIlwaines bought whatever estate remained in the judgment debtor, and took the sheriff's deed therefor at the instance of the latter. This, if the deed was fraudulent, would pass, not the right retained to redeem, but the full legal estate, as if no conveyance had been made. But it would still be held by the purchasers, in subordination to the debtor's right of redemption upon payment of the additional sum advanced to secure the title at the request of Battle. These sums constituted the incumbrance the removal whereof entitled him to a reconveyance. In this condition, and while Battle was negotiating to raise the requisite amount, which one William Rich agreed to pay and take the title and hold it as a security therefor, the said McIlwaines, through their attorney in fact, sold and conveyed, for the consideration of $5,280, the said land to said W. H. Arrington and L. F. Battle; this sum being claimed by the grantors as that for which the property was held as a security. An action was brought by the said purchasers against Battle, who had remained in possession, to recover the same, and for other relief, in which by consent a decree of sale was entered, and pursuant thereto the premises were put up for sale on April 21, 1884, and brought the sum of $10,967.70. This sum, after deducting expenses of the suit and sale, ($331.50,) was divided between the plaintiffs in the action. The appropriation of the moiety by the said W. H. Arrington to his own use was of moneys belonging to the principal debtor, Battle, for which, in equity,

Digitized by Google

the latter was entitled to a credit, and therefore must be regarded as a reduction into his possession of so much of the chose in action as if directly paid by him. The self-adjustment is but the enforcement of an equity to have the sum thus received applied as a payment upon the debt, the husband having then the right to collect it, or any part of it, and appropriate the sum collected to his own use. We therefore reverse the ruling of the judge, and restore that of the referee in respect to this sum.

2. The appellants claim a further reduction of the judgment by reason of the deed of release given the executor and devisee, John P. Arrington, on land of the value of $4,000, and an exoneration altogether or *pro tanto* of the remaining lands liable for the debt. We are unable to give either effect to the act of exoneration, as demanded by the appellants. If this was done to enable the devisee to make sale of the land unincumbered, the personal liability of the said John P. would remain to account for the funds received therefor in an apportionment of the loss among the different terre-tenants, and, if retained itself, would not escape the obligation to contribute. The rule in equity under which an exemption results from the release of one of several sureties to the same obligation to the others is personal, and does not prevail even in such cases, when there is but an agreement or covenant not to sue, and the relinquishment of a right to proceed against one of several tracts of land with different owners is in legal operation but an agreement to look only to other lands alike subject to a lien, as a means of satisfaction. Dudley v. Bland, 83 N. C. 220, and cases cited. If there were a right of exoneration, it would be confined to such excesses required of others over and above the aliquot portion of each, the relief operating only as would a payment, leaving to all others the duty of contributing their ratable parts. But here the judgment lien attaches to the entire real estate of the said A. H. Arrington, as a unity, and the subdivision into parts upon a partition proceeding cannot impair the creditor's right to enforce satisfaction out of any of its parts, as that right existed in the testator's life-time; nor can it impair the right of the respective tenants to be relieved of a common burden by causing all to share in it,—a right unaffected by the creditor's action in subjecting some portion to the entire burden in relief of the residue. The contribution is the consequence of the relation of tenants who have made partition which the creditor cannot destroy or impair. We therefore uphold the ruling of the court which sustains the action of the referee in refusing any abatement of the debt on this account.

3. The further reduction demanded in the McIlwaine debt for the proceeds of cotton consigned above the debt incurred for supplies, thereby enlarging by the value of the excess, $1,000, the sum with which the judgment should be credited upon the resale of the land, cannot be allowed, for the reason that this sum went into the hands of Battle as his homestead exemption. This was surrendered to him in the suit to recover the land, and, never having been received by W. H. Arrington, could not be applied as a payment upon the judgment; for if it ought to have been thus collected and applied, and a personal liability rests upon him for the loss, it is not money received, and cannot diminish the debt, as if in fact paid.

These embracing the substantial matters presented in the record, we do not find it needful to pursue and discuss the exceptions in detail, outside of those disposed of, and, in general terms, deem it sufficient to say that, except in the error pointed out, the judgment must be affirmed, when modified in accordance with this opinion.

Upon the trial of this issue the record of proceedings in said court was exhibited in evidence, and parol proof offered. The defendants W. H. Arrington, and W. H. Morris & Sons, his assignees, asked of the court the following instructions, predicated upon the evidence: "(1) That upon the whole evidence W. H. Arrington did not appear either personally or by any duly-constituted attorney in the said action for divorce, and therefore the decree pronounced in said action is null and void. (2) That the courts of Illinois had no jurisdiction of this cause of action, and hence the decree is null and of no effect in North Carolina. (3) That the courts of Illinois had no jurisdiction of or over W. H. Arrington, he never having been an actual resident of said state, and hence the decree in said cause is void and of no effect in North Carolina. (4) There is no evidence to show that an appearance by attorney gives the court jurisdiction of a party in the state of Illinois, and therefore, even though appearance had been made by attorney in said court of said state, unless the statutes of said state regulating said appearance had been proven, such decree cannot be sustained under our law. (5) That if Mrs. Arrington went to Illinois for the purpose of obtaining a divorce from the said W. H. Arrington, the decree granting such divorce is null and void. (6) There is no evidence to show that a residence of one year is sufficient to obtain a divorce in Illinois, for that the statutes of Illinois regulating the length of residence in that state requisite to render competent a suit for divorce in the courts of that state have not been proven as by law required."

The presiding judge instructed the jury as follows: "There is but one issue or question submitted to you to pass upon in this case, and that is whether the plaintiff and the defendant W. H. Arrington were divorced by the decree of the court in Illinois, which has been read to you in evidence. You see there was a decree or judgment of that court granting to Mrs. Arrington a divorce from her husband. And the question for you is whether that judgment is of legal, binding

Digitized by Google

effect here. If it is, your answer should be, 'Yes;' if it is not, and she is still his wife by the laws of North Carolina, you should answer, 'No.' You are the sole arbitrators of the fact, but your judgment is controlled by the law, and it is incumbent upon me to explain to you the principles of law which govern this case, and they are not difficult nor perplexing. In the first place, did Mrs. Arrington have such a domicile in the state of Illinois at the time the suit for divorce was instituted as gave the courts of that state jurisdiction over her cause? Ordinarily, the domicile of the husband is the domicile of the wife, and the authority to fix that domicile is in the husband. But there are circumstances which would warrant the wife in changing her domicile. For instance, if the husband should, by cruel or barbarous treatment, endanger her life, or should offer such indignities to her person as to render her condition intolerable and her life burdensome, in either of these cases the wife would have the right to change her domicile, and there is no law which would require her to remain in North Carolina. If it were more convenient to her or more pleasant to her to live in another state or another country, she would have the right to do so. Now, apply these principles which I have laid down. Did the husband, W. H. Arrington, afford to his wife the home which he ought to have done, and the treatment which is due from husband to wife,—and this is, at the least, kindness, support, protection,—or did he treat her in such a manner as to render her condition intolerable and her life burdensome? If he treated her with kindness, and afforded her the support and protection which he ought to have done, and was unwilling for her to change her domicile, she would have no right to leave him. But if he treated her with such indignities, or acted in either of those ways which I have cited to you as affording her just cause for leaving him, she had a right to leave him, and to select her own place of residence, either in this state, in Illinois, or anywhere else. If she left him without cause, and went to Illinois, not with the *bona fide* intention of living there, but simply for the purpose of obtaining through the courts of that state a divorce from her husband, it would be a fraud upon the jurisdiction of the courts of that state, even if she remained there for one year, as required by the statutes of Illinois, before bringing her action for divorce; and if, after considering the evidence which has been submitted to you, and the instructions which I am now giving you, you come to the conclusion that she had no just cause for this step, and was not acting in good faith as I have described, then you should answer, 'No;' *i. e.*, they were not divorced. But if she had good cause to leave him for any of the reasons I have given you, and did go to Illinois with the *bona fide* intention of residing there, even though she intended to sue for a divorce, and remained there a year, she had the right to bring her suit for divorce against him there, and if he appeared there in person, or by authorized counsel, and so recognized the jurisdiction of the court over him, he is bound by its decrees, and you will answer, 'Yes;' *i. e.*, they were divorced by the decree of the circuit court of Sangamon county, Ill. Now, if you have come to the conclusion that she did have cause to leave her husband, and went to Illinois with the *bona fide* intention of remaining there, I instruct you that the letter of defendant of August 5, 1880, to Clinton L. Conkling, attorney, gave him, Conkling, full authority to enter an appearance, and as he did enter an appearance in the month of August, the court of Illinois thereby acquired jurisdiction over him, which it could not have done by personal service in North Carolina, nor by publication, and you will answer 'Yes.' But if you find that she had no cause to leave her husband, and did not go to Illinois with the *bona fide* intention of remaining there, but simply to stay there long enough to enable her to bring her suit for divorce, the court had no jurisdiction, and you will answer, 'No.'" Defendants excepted to the refusal to give the special instruction as asked, and to the instruction as given. The jury responded to the issue, "Yes."

The sum to be paid being ascertained, we are next to inquire whether it belongs to the plaintiff, or is subject to the disposal of her husband or his assignees; and this depends upon the efficacy of the decree of divorce *a vinculo* obtained by her in the proceedings instituted in Sangamon circuit court, sitting in chancery in the state of Illinois, against him for that purpose, in dissolving the bonds of matrimony, and reinstating her in the possession of all her property rights as a *feme sole*. Upon an issue framed to raise the question, and under instructions of the court, the jury responded in the affirmative. In our opinion, the directions given to the jury in passing upon the issue properly presented the matter and the law bearing upon it for an intelligent rendering of the verdict. The *bona fides* in the act of removal was made an essential element in giving the jurisdiction invoked in a decree of separation that puts an end to the marriage relation.

We sustain, also, the instruction that the communication to the attorney in Illinois dated on August 5, 1880, conveys an authority to him to appear in the cause for the husband, and warranted his action in the premises. In it he uses these words: "I write to employ you as my attorney in the suit of myself and wife which is now pending here and in your court. I herewith inclose you ten dollars for advice and retaining fee in the case." It is true in the concluding part of the letter, after detailing his domestic troubles, he adds: "If it should be necessary that I should fight the case, then I am willing to pay you a liberal fee to appear for me. Please answer at once, and write me what you will charge me to appear in the case, or what you

Digitized by Google

will charge me to guaranty me my success in the case and possession of my children." This indicates some inquiry as to what course should be pursued, but does not recall the previous employment. When depositions in the cause were to be taken for the plaintiff, interrogatories on her behalf were sent out with the *dedimus potestatem* to one Harper, as commissioner in Nash county, to which were added cross-interrogatories signed, "CLINTON L. CONKLING, Attorney for Defendant," and with this indorsement: "Filed September 6, A. D. 1880. JAMES A. WINSTON, Clerk." The commission was executed, the depositions taken, the direct and cross interrogatories answered, and return made to the court. Again, the record contains this entry made on October 4, 1880, a term-day of said court: "Pattie Arrington, complainant, vs. William H. Arrington, defendant. In chancery, for divorce. Now, at this day, come the parties hereto, by their solicitors, and the complainant, by her solicitor, moves the court that defendant be required to file his answer to the bill of complaint; whereupon the defendant, by his solicitor, C. L. Conkling, moves that the time for filing defendant's answer be extended to the 4th day of November next, which is allowed, and it was thereupon ordered that the said defendant file his answer to said bill by said 5th day of November." Subsequently application to withdraw the appearance was made and refused, and the cause proceeded, without further interference from defendant's counsel, to a final determination. The understood and exercised power to interpose thus introduces the defendant into the action, and the court, thus having jurisdiction of the subject-matter and of the parties, may proceed to final judgment, and it becomes binding and conclusive on both as a dissolution of the relation.

We are not disposed to concede this effect to a proceeding wholly *ex parte*, and wherein no personal service of process is made on the defendant, and he is brought in by publication under the local law of the state, as is strenuously, but unnecessarily, pressed in argument, though in direct conflict with the case of Irby v. Wilson, 1 Dev. & B. Eq. 568, — a decision which has not been disturbed since its rendition, in 1837, by the eminent judges who then constituted the court, as to the extraterritorial effect of such a decree upon a non-resident defendant. There are cases, and some are cited in the brief of plaintiff's counsel, to the effect that an *ex parte* decree of divorce, obtained by one who has a domicile in the court of the state that grants it, operates as a change of the *status* of the plaintiff, and its efficacy prevails everywhere. Such is the ruling in Ditson v. Ditson, 4 R. I. 87, based on article 4, § 1, of the constitution of the United States. Such is declared to be the result when the husband, residing in Connecticut with his wife, deserted her and left the state, and she obtained her divorce in one of its courts. Hull v. Hull, 2 Strob. Eq. 174. Such a proceeding is recognized as valid in the state granting it, because authorized by its laws, as well as to the marriage relation as to rights of property growing out of the relation situated within its jurisdiction. Harrison v. Harrison, 19 Ala. 499. There are admitted difficulties in reconciling the rulings which determine the *status* of a resident plaintiff, without determining at the same time that of the non-resident defendant, when the relation subsists between the two, and what disunites the one fails to disunite the other; and, on the other hand, to take from one, who has never been served with personal process, by a foreign judgment, not only personal, but property, rights possessed beyond the jurisdictional limits. These difficulties may be removed by harmonious and consistent legislation which they seem to invite. But our province is to interpret, not to make, the law, and we must abide by that of our own state. The case most relied on, or at least most largely quoted from in the brief, (Cheever v. Wilson, 9 Wall. 108,) does not sustain the contention of counsel. The husband, who, with his wife, resided in Washington city, on her removal to Indiana, and instituting the suit against him for divorce, both put in his answer thereto, and filed a cross-bill against her, to which she appeared without process. The controversy was as to the residence of the wife, and the acquirement of jurisdiction in the circuit court of Indiana. The present case has peculiar features in its claims for recognition in this state. The marriage contract was entered into here, and the facts alleged which form the grounds of the divorce occurred here, and are insufficient here to warrant a disruption of the marriage tie, and are sufficient for a separation only, but they are adjudged sufficient in Illinois, whose court takes cognizance of the complaint, and decrees a dissolution. Could the courts of this state, were the defendant not a party, permit his rights of property in the wife's estate to be divested and taken from him? Would it not be, intended or not, an evasion and fraud upon our law to allow to the decree such an operation? We should be slow to recognize such a result. But the point does not arise though discussed in a contingent aspect of the case for the plaintiff, since the defendant, by the act of his counsel under his authority, has become a voluntary party to the action, and submitted to the jurisdiction of the court in the premises, so that he must abide the consequences.

The plaintiff, ceasing to be the wife, is to be reinstated to the right to all her choses in action not reduced to possession by her husband before the entering up the decree of separation. This is the settled law upon the subject. In Starr v. Peace, 8 Conn. 541, the effect of a legislative divorce upon right of property arising out of marriage in extinguishing it was earnestly contested as a violation of the contract, under the federal constitution, but it was sustained, and put upon

Digitized by Google

the same footing as a judicial divorce, and such is now the declared law in reference to each mode of separation *a vinculo matrimonii*. 1 Bish. Mar. & Div. § 693. "Personal choses in action which belong to the wife, reduced into possession by the husband," in the words of a recent author, "remain his; but as to rights, dependent on marriage and not actually vested, a full divorce or the legal annihilation ends them." Schouler, Dom. Rel. § 221, and authorities cited in the notes. It is supplemented by our act of 1871-72, (Code, § 1843,) which puts an end to an estate in dower or by curtesy, a claim to the year's provisions or distributive share in the estate of either, the right to administer, and "every right and estate in the real and personal estate of the other party which by settlement before or after marriage was settled upon such party in consideration of the marriage only." The judgment will be thus modified and affirmed.

(103 N. C. 54)

ELLINGTON v. ELLINGTON *et al.*

(*Supreme Court of North Carolina.* March 18, 1889.)

LIMITATION OF ACTIONS—TENANCY IN COMMON.

1. The statute of limitations to an action by an heir to set aside a deed of his insane ancestor commences to run at the execution of the deed, and is a complete bar after the lapse of seven years, unless the action is brought within three years after the ancestor's death.

2. The fact that the plaintiff and the grantees are heirs of the grantor, and but for the deed would take the land as tenants in common, makes no difference in the running of the statute.

Appeal from superior court, Vance county; GRAVES, Judge.

Action by a son and heir of Bevil Ellington, deceased, against Horace Ellington and William N. Ellington to set aside a conveyance of land and personalty to them by the said Bevil Ellington in his life-time, made when the grantor is alleged to have been insane. Verdict and judgment for defendants, on the issue of the statute of limitations, and plaintiff appeals.

Batchelor & Devereux, for appellant. *E. C. Smith*, for respondents.

SMITH, C. J. The complaint filed in this action, which was begun on December 17, 1887, alleges that Bevil Ellington, being the owner of the tract of land therein described, made up of several parcels, and containing about 443 acres, by deed executed in October, 1865, conveyed the same to the defendants, Horace Ellington, a son, and William N. Ellington, the husband of his daughter, Polly, together with the stock, farming implements, and other articles of personal property on the plantation, upon the sole consideration of the support of the grantor and his wife during the residue of their respective lives. It avers further, in reiterated allegations, that the said Bevil was at the time advanced in age, of enfeebled mind and body, unable to understand and measure the consequences of his act, to manage and dispose of his property from want of legal capacity, and was moreover susceptible to undue influence, taking advantage of which the defendants by false and fraudulent representations, and the exercise of that control which they had acquired over him, procured the making of said deed for the very inadequate consideration expressed therein. It states that thereafter the said Bevil broke up farming, and went himself to live with his son Horace, in whose house and with whose family he continued to reside until his death in August, 1869, while his wife went to and took up her abode with her daughter, Polly, where she remained until her death in 1867. The prayer of the plaintiff, also a son of the said Bevil, is that said deed be declared and adjudged void for the causes aforesaid, and he be admitted to share in the said property as in case of an intestacy, and for general relief. The answer distinctly and in detail controverts all the averments as to an unsound mind, and the want of legal capacity in the said Bevil to make an effectual disposition of his estate; denies the exercise of an attempt to exercise any undue or improper influence in procuring the deed, and the alleged inadequacy of the obligations assumed as the consideration of the deed; and sets up a defense under the statute of limitations to the action, and the possession under the deed, which, if invalid, is color of title, for more than seven years before the institution of the suit. The only issue submitted to the jury, and this without objection, was in these words: "Is the plaintiff's cause of action barred by the statute of limitations?" Under the instructions of the court as to the law arising upon the facts admitted as set out in the complaint for the purpose only of raising the question of the effect of the lapse of time, and reserving the other matters in controversy in the pleadings for further trial in the event of the defense under the statute, and from possession under the deed being overruled, the issue was found in the affirmative. Judgment being entered in conformity with the verdict rendered in pursuance of the direction given to the jury to so find upon the facts stated in the complaint, the plaintiff, understood as excepting thereto, appeals.

From the time of making the deed, the defendants held possession of the land thereunder until the death of the grantor in August, 1869, and thereafter for a period of more than 17 years, during all of which, except a half month, the statute was in full operation before the suit was brought. Assuming the deed to be voidable, the possession under it, as color of title merely, and in the absence of any indication of imperfection or infirmity apparent upon its face, would ripen into a good title after the expiration of seven years, unless, within three years after the "coming of sound mind," (according to the Revised Code, c. 65, § 1, and Code, § 148, the same language being used in each,) the

Digitized by Google

person so relieved commence his suit, or make entry on the land. If the disability continued during life, and for a period thereafter sufficient to complete the prescribed time of seven years, the title would be perfected in the occupant, subordinate only to a right in the heir to sue for the recovery of the land for the space of three years next after his death. The running of the statute against the action, and to consummate the title, would be concurrent after the decease of the grantor. The cause of action to set aside the deed arises at once upon its execution, while the running of the statute was so far arrested in favor of the grantor—supposing him to be of unsound mind—as to admit of the prolonged period of three years after the restoration of reason, or, as we think, after death, to those to whom the estate would have descended in the absence of any divesting conveyance, in which to institute suit. Summerlin v. Cowles, 101 N. C. 473, 7 S. E. Rep. 881. In this view of the case, and aside from the claim of title under the deed as affording color of title, with the support of the hostile possession held for the prescribed time, the bar to the action is complete and effective, whether the former statute or that substituted in the Code be applicable to the case. While we deem the law settled in this state, whatever may have been the ruling elsewhere, by the case of Riggan v. Green, 80 N. C. 236, that the deed of one *non compos* is voidable, and not void, it can make no difference, when such is offered as evidence of color of title only, whether it be the one or the other to sustain a possession under it. Color of title, in connection with an adverse claim and occupation, has been held to perfect the title, when furnished by a deed from husband and wife, where there has been no privy examination of the latter, (Pearse v. Owens, 2 Hayw. N. C. 234;) where the deed was executed in the name of a principal, and the agent professing to have authority had none to make it, (Hill v. Wilton, 2 Murph. 14;) where it was made by a person known by the grantee to have no title, (Reddick v. Leggat, 3 Murph. 539;) where the deed has never been registered, (Campbell v. McArthur, 2 Hawks, 33; Hardin v. Barrett, 6 Jones, N. C. 159; Hunter v. Kelly, 92 N. C. 285;) where the deed is fraudulent, and the possession has been adverse for the prescribed period after a sale by the creditor, (Pickett v. Pickett, 3 Dev. 6; Hoke v. Henderson, Id. 12;) where the possession is under an act that is unconstitutional, (Episcopal Church v. Academy, 2 Hawks, 233.) Color of title, as defined by GASTON, J., speaking for the court, (and with the hesitating assent of the chief justice, who favored a less circumscribed statement of the proposition in Dobson v. Murphy, 1 Dev. & B. 586,) requires a party to have "some written document of title purporting to pass the land, and one not so obviously defective that it could not have misled a man of ordinary capacity." Not dissimilar is the opinion given in Tate v. Southard, 3 Hawks, 119.

The contention of counsel that, inasmuch as, but for the deed, the inheritance would descend to the plaintiff and defendants as tenants in common, the relations thus created prevent the statutory bar until after the expiration of 20 years, according to the ruling in Hicks v. Bullock, 96 N. C. 164, 1 S. E. Rep. 629; Page v. Branch, 97 N. C. 97, 1 S. E. Rep. 625; and Breden v. McLaurin, 98 N. C. 307, 4 S. E. Rep. 136,—is not tenable. The adverse holding here is under a title derived from the deed, and began at its execution, and its character was not changed by the grantor's death. The estate, in its entirety, was in the defendants, and while the deed remained in force there was no estate to descend. The plaintiff, if his allegations were true, and the statutory bar did not intervene, could not bring his action, as he does, to annul the conveyance, and the relations between him and the defendants would be hostile, as they were before, between the latter and the maker of the deed. In no view of the case can the plaintiff prevail, and the judgment must be and is affirmed.

(32 W. Va. 387)

LAIDLEY v. SMITH'S EX'R.

(*Supreme Court of Appeals of West Virginia.* March 12, 1889.)

LIMITATION OF ACTIONS—RECEIVERS.

1. On the 16th day of June, 1865, in the chancery cause of Ruffner & Long v. Donally and others, pending in the circuit court of Kanawha county, a decree was entered directing the receiver to lend out certain money in his hands to the credit of said suit. In pursuance of said order, W., the receiver, loaned to S. $125, and took a promissory note therefor, payable on demand to W., receiver of the circuit court of said county, with interest from date, (the 5th day of January, 1866,) showing on the face of said note that it was borrowed from the chancery cause of R. &. L. v. D. *et als.* W. died, and L. was appointed general receiver of said court in his stead, June 2, 1877. G. S. L., as special receiver, was directed on the 10th of April, 1884, (he having been appointed such) to collect said fund, and in pursuance of said direction instituted this suit against S., and filed his declaration in the month of November, 1885. The defendant interposed the plea of the statute of limitations, to which the plaintiff objected, and replied generally, but filed no special replication. *Held*, that the claim upon which said suit was predicated was barred by the statute of limitations, and if the plaintiff relied upon any of the statutory or other exceptions to take said claim out of the operation of said statute it should have been set forth in a replication to said plea.

2. Section 1 of syllabus in the case of State v. Miller, 26 W. Va. 106, considered and reaffirmed.

(*Syllabus by the Court.*)

Error to circuit court, Kanawha county.

Miller & Gallaher, for plaintiff in error. *J. M. Laidley* and *W. Mollohan*, for defendant in error.

ENGLISH, J. This was an action of debt, brought in the circuit court of Kanawha county by Charles C. Lewis, receiver of said circuit court, the declaration in which case was filed on the first Monday in November, 1885. The action was founded on a promis-

Digitized by Google

sory note bearing date on the 5th day of January, 1866, which note is in the words and figures following:

"$125.00. On demand, we, or either of us, promise and bind ourselves to pay Levi J. Woodyard, receiver of the circuit court of Kanawha county, one hundred and twenty-five dollars borrowed money from the chancery cause of Ruffner & Long v. Donally & *als.*, with interest from date until paid. Witness our hands this 5th day of January, in the year 1866.

[Signed] "ISAAC N. SMITH.
"BENJAMIN H. SMITH.

"Credit May 23, 1868, paid by B. H. Smith, fifty dollars."

On the 22d day of January, 1886, the defendant demurred to the plaintiff's declaration, and plaintiff joined; and the court, having considered said demurrer, overruled the same, and thereupon the defendant pleaded *nil debit* and payment, and tendered a special plea in writing, to-wit, the statute of limitations, to which the plaintiff objected, and the court took time to consider thereof, and on the 11th day of July, 1888, the defendant B. H. Smith having departed this life, and Charles C. Lewis having been appointed the executor of his last will and testament and qualified as such, and George S. Laidley having been appointed as special receiver in the case of Ruffner & Long v. Donally *et als.*, in the place of said Charles C. Lewis, general receiver, to prosecute the suit at bar, and to collect the fund in litigation in this cause, the suit was revived in the name of said George S. Laidley as such special receiver therein, and by consent the same was revived against said Charles C. Lewis as executor of said B. H. Smith, deceased, as defendant therein, and the objection to the plea of the statute of limitations tendered by B. H. Smith in his life-time, being argued and considered by the court, was overruled, and said plea was ordered to be filed, and the plaintiff replied generally thereto, and the action was submitted to the court in lieu of a jury; and the court, having heard the evidence and arguments of counsel, found the issues therein for the plaintiff, and gave judgment for the plaintiff for the sum of $205.01, with interest thereon from the 11th day of July, 1888, and costs, to which ruling and judgment of the court the defendant tendered a bill of exceptions, which was signed, sealed, and saved to him, which bill of exceptions shows that upon the trial of said action the plaintiff, to support the issue on his part, gave in evidence said note, executed as aforesaid by B. H. and I. N. Smith, also a decree of the circuit court of Kanawha county dated June 16, 1865, made in the case of Ruffner & Long v. Donally and others, directing the receiver to lend out said money on good security, also the order entered in said chancery cause on the 10th of April, 1884, directing C. C. Lewis, general receiver, to collect all the money due to the credit of said suit, and, if necessary, to institute legal proceedings for that purpose; also an order of said court, made June 2, 1877, appointing Charles C. Lewis general receiver in lieu of Levi J. Woodyard, deceased, showing his qualification, and also directing the executor of said Woodyard to turn over all moneys, bonds, and securities in his hands, both as general and special receiver, to the new receiver, and directing said new receiver to do and perform such duties with regard to the funds and securities which may come into his hands as the said Woodyard was required by any decree or order of the court to do and perform, or as he was required by law to do and perform; also another decree in said chancery suit of Ruffner & Long v. Donally *et als.*, appointing G. S. Laidley special receiver, and directing him to collect said funds, and pay over the same to the parties entitled thereto.—which was all the evidence heard upon the trial of the cause for either party.

The note on which this suit was predicated bears date on the 5th day of January, 1866, and the declaration seems to have been filed on the first Monday in November, 1885. The writ is not made part of the record, but it is presumed it bore date from some day not exceeding 90 days anterior thereto. The suit then was instituted nearly 20 years after the note was executed. The plea of the statute of limitations was interposed, and one of the questions, and perhaps the most important question, in the case is whether said plea should have been sustained by the court. Under the statute which was in force at the time of the execution of said note, every action to recover money which was founded on any contract by writing signed by the party to be charged thereby or by his agent, but not under seal, should be brought within five years next after the right to bring the same shall have first accrued. When did the right of action accrue in this case? The note was made payable "on demand," and it is contended that the words "on demand" are not employed as a matter of course or idle form, but they were employed in making said note to carry out the order of the court as to the disposition of the fund, the money being money in the hands of the receiver, which he was directed to loan out; and it appears from the decree directing said loan that the receiver was directed to loan out said money on good security, to be subject to the order of the court. This would make the loan a loan on call, if the parties executing said note had full notice of said order, which the court would presume they had. The contract for said loan was made with the receiver, who was merely the agent of the court, and acting for the court in lending the money. When did the court have a right to institute suit upon said note? After it had been executed and delivered to the receiver it was under the control of the court, in the hands of its agent. Parsons, in his work on Mercantile Law, (page 248,) in discussing the question as to when the statute of limitations begins to

Digitized by Google

run, says: "And the general rule is that they begin when the action might have been commenced," referring to Odlin v. Greenleaf, 3 N. H. 270, where it is held: "An action of *assumpsit* is barred by the statute of limitations only in cases where the time limited in the statute has elapsed after the right of action accrued." Parsons further says: "If a credit is given, this period does not begin until the credit has expired; if a note on time be given, not until the time has expired, including the additional three days of grace; if a bill of exchange be given, payable at sight, then the six years begin after presentment and demand; but if a note be payable on demand, or money is payable on demand, then the limitation begins at once." See Stafford v. Richardson, 15 Wend. 302; Hickok v. Hickok, 13 Barb. 632. This note being payable on demand, it was optional with the court when it, through its agent, the receiver, should institute suit to collect the same. If the court was excusable in allowing so much time to elapse between the date of the execution of said note and the decree directing the collection of the same by the receiver, it would seem to us that, under the practice, when the plea of the statute of limitations was interposed, and the plea was objected to by the plaintiff, that, in addition to said objection, he should have filed a special replication, setting forth the facts relied on to excuse the delay and avoid the effect of said plea. See Ang. Lim. § 292, p. 315. But no such replication was filed, and none of the exceptions contained in the statute were relied upon by any such pleading to show that said plea did not apply, or was qualified in any manner. It is, however, contended here in argument that the statute of limitations cannot be pleaded against the court; that in this respect the court is like the state, and the old maxim, *nullum tempus occurrit regi*, applies. Our statute, (Warth's Code, § 20, p. 262,) however, provides that "every statute of limitation, unless otherwise expressly provided, shall apply to the state." The courts came into existence by virtue of the constitution and the laws which confer and define their powers, and in the same category is found a municipal corporation or a county. They derive their powers under the law; but this court held in the case of City of Wheeling v. Campbell, 12 W. Va. 53, that the statute of limitations runs against a county or other municipal corporation. See, also, Asylum v. Miller, 29 W. Va. 327, 1 S. E. Rep. 740, in which it is held, (page 329,) that "public corporations, whether they are municipal, or mere agencies of the state, are all more or less branches of the government, and necessarily clothed with attributes and incidents of sovereignty; yet, when they are clothed with the capacity to sue and be sued, to have a common seal, to take and hold property, and transact business, they are governed by the same laws, rules, and regulations, and subject to the same limitations, that natural persons are, except so far as they may be exempted or relieved by positive law." Ang. Lim. § 194, p. 202. Chief Justice MARSHALL, in 2 Wheat. 29, in the case of McIver v. Ragan, in speaking of the application of the statute of limitations, says: "Wherever the situation of a party was such as, in the opinion of the legislature, to furnish a motive for excepting him from the operation of the law, the legislature has made the exception. It would be going far for this court to add to those exceptions. It is admitted that the case of the plaintiffs is not within them, but it is contended to be within the same equity with those which have been taken out of the statute; as where the courts of the country are closed so that no suits can be instituted." Our statute neither excepts courts, or their agent, the receiver, from the operation of said statute, and although it seems necessary that a receiver should apply to the court for power to collect sums invested by him as such, yet it is really the court bringing the suit through its agent, the receiver; and if the receiver or those interested in the fund so loaned or invested by him have slept upon their rights unreasonably, and have neglected to make application to the court for leave to sue for such a length of time that the demand may be fairly regarded as stale, it would seem to furnish ample ground for a refusal by the court of the necessary leave to use its process to enforce the claim. I am therefore of opinion that, as the receiver to whom this note was made payable, or those interested in the chancery cause of Ruffner & Long v. Donally *et als.*, might have obtained leave of the court to bring suit upon said note by mere motion at any time, that in failing to do so they fall in the same category as any other suitor who neglects to invoke the aid of the court in the assertion and prosecution of his claims, and that said suit was delayed too long, and the claim upon which it was predicated was barred at the time said suit was instituted. It is contended in argument that unless the court had been moved for a new trial, and when said motion was overruled a bill of exceptions had been taken setting out the facts, no appeal can be granted. In the case, however, of State v. Miller, 26 W. Va. 106, this court has held that, "while it is the usual practice where a jury is waived and the case submitted to the court in lieu of a jury, if the party against whom the judgment is rendered is dissatisfied therewith, to except to the judgment, and have the court certify the facts proved, yet it is not necessary for the record to show that the judgment was excepted to; it is sufficient if the facts appear upon the record, either by the certificate of the court or otherwise." Under this ruling, then, where the case was tried by the court, it would not be necessary to move to set aside the finding of the court, and, upon said motion being overruled, to take a bill of exceptions setting forth the facts proved; it would be sufficient, as in this case, if the facts in evidence appear upon the record by the cer-

Digitized by Google

tificate of the court or otherwise. The judgment of the circuit court must be reversed; and, this court proceeding to enter such judgment as the court below should have entered, it is ordered that the plaintiff's action be dismissed.

SNYDER, P., and BRANNON, J., concurred. GREEN, J., absent.

(32 W. Va. 164)

RECE v. NEWPORT NEWS & M. V. CO.

(Supreme Court of Appeals of West Virginia. Feb. 11, 1889.)

CORPORATIONS—LEGAL EXISTENCE—REMOVAL OF CAUSES.

1. A corporation exists only in contemplation of law, and by force of law, and can have no legal existence beyond the state or sovereignty by which it is created.

2. While a corporation, by the same name, may be chartered by two states, clothed with the same capacities and powers, and intended to accomplish the same objects, and be exercising the same powers and duties in both states, yet it will, in law, be two distinct corporations,—one in each state,—with only such corporate powers in each state as are conferred by its creation in that state.

3. One state cannot, by a mere legislative declaration, make all corporations created by charter or the laws of other states domestic corporations of such state; at least it cannot, by such declarations, deprive the foreign corporation of its right to resort to the federal courts, in cases where such right is conferred by the constitution and laws of the United States.

4. So much of section 30, c. 54, of the Code of this state as declares that foreign railroad corporations, doing business in this state, shall in all suits and legal proceedings be held and treated as domestic corporations of this state, and requires any such corporation to file an agreement to that effect, is, so far as it attempts to deprive such corporation of the right to remove to the federal courts suits brought by or against it in the courts of this state, in cases in which it would otherwise be entitled to such right, inoperative and void; and such foreign corporation may exercise such right in any proper case, notwithstanding it has executed and filed such agreement in pursuance of the provisions of said statute.

(Syllabus by the Court.)

Error to circuit court, Cabell county.

J. H. Ferguson and *Simms & Enslow*, for plaintiff in error. *Gibson & Michie*, for defendant in error.

SNYDER, P. Action of trespass on the case, commenced June 29, 1887, in the circuit court of Cabell county by Edna E. Rece, administratrix of T. H. Rece, deceased, against the Newport News & Mississippi Valley Company, to recover damages from the defendant for its negligence in causing the death of the plaintiff's intestate. There was a verdict and judgment thereon in favor of the plaintiff for $5,000, and the defendant has obtained this writ of error. The first error assigned is that the circuit court improperly denied the motion of the defendant to remove the action to the district court of the United States. The declaration was filed at the July rules, 1887, and at the same rules the defendant filed its petition and bond, under the act of congress, passed March 3, 1887, to remove the action to the district court of the United States for the district of West Virginia, sitting at Charleston, in said district, and exercising circuit court powers. The petition was in proper form, and alleged that the matter in controversy exceeds $2,000, and is between citizens of different states; that the plaintiff was, at the commencement of the action, and still is, a citizen of the state of West Virginia; and that the defendant was, and still is, a citizen of Connecticut, where it was incorporated under the laws of said state, and that it is not a citizen of the state of West Virginia. At the August term, 1887, the plaintiff filed her answer, to which the defendant filed a written replication, and the court, after overruling the respective motions of the plaintiff and defendant to reject said answer and replication for insufficiency, decided that the defendant, by accepting the provisions of section 30, c. 54, of the Code of this state, had become a corporation of this state, and denied the defendant's motion to remove the action to the district court of the United States, and the defendant excepted. The facts upon which the court based its said ruling, as shown by the record, are as follows: Prior to the year 1886, the defendant, the Newport News & Mississippi Valley Company, was incorporated under the laws of the state of Connecticut, with power to construct, buy, hold, own, lease, equip, and operate any railroads, bridges, ferries, warehouses, telegraph and telephone lines, wharfs, steamboats, etc., in any state or territory of the United States or foreign country, provided that said corporation shall not have power to lease, hold, own, or operate any railroad within the state of Connecticut. This proviso was, by the general assembly of Connecticut, in January, 1887, amended by adding thereto these words, "unless such railroad shall be held, owned, or operated within said state, in conformity with the provisions of the general railroad laws of this state." The said company, prior to the date of the injury complained of in the declaration, became the lessee of the road, property, and franchises of the Chesapeake & Ohio Railway Company, a domestic corporation, and citizen of this state; and at said date, and since, as well as on and prior to the 27th day of July, 1886, the defendant company was engaged as a public and common carrier for hire of passengers and all kinds of freights from the town of Newport News, in the state of Virginia, in and through the states of Virginia and this state to the city of Lexington, in the state of Kentucky, as such lessee of the said Chesapeake & Ohio Railway Company, and other railroad companies, and that it was then, and still is, operating a continuous line of railways, and carrying on interstate commerce, in and through the states aforesaid, having its principal offices in the city of New York, in the state of New York, and in the city of Richmond, in the state of Virginia; and that the defendant company did, on said 27th day

Digitized by Google

of July, 1886, by a writing duly executed under its corporate seal and filed in the office of the secretary of state of this state, accept the provisions of section 30, c. 54, of the Code of this state, and agree to be governed thereby. The said section 30 of the Code of this state is as follows: "Any corporation duly incorporated by the laws of any state or territory of the United States, or of the District of Columbia, or of any foreign country, may, unless it be otherwise expressly provided, hold property and transact business in this state, upon complying with the requirements of this section, and not otherwise." Then, after defining the powers and liabilities of such corporation, and prescribing the manner of filing its charter with the secretary of state, etc., the act proceeds: "Every railroad corporation doing business in this state under the provisions of this section, or under charters granted or laws passed by the state of Virginia or this state, is hereby declared to be, as to its works, property, operations, transactions, and business in this state, a domestic corporation, and shall be so held and treated in all suits and legal proceedings which may be commenced or carried on by or against any such railroad corporation, as well as in all other matters relating to such corporation. No railroad corporation which has a charter, or any corporate authority, from any other state, shall do business in this state as the lessee of the works, property, or franchises of any other corporation or person, or otherwise, or bring or maintain any action, suit, or proceeding in this state, until it shall, in addition to what is hereinbefore required, file in the office of the secretary of state a writing, duly executed under its corporate seal, accepting the provisions of this section, and agreeing to be governed thereby; and its failure to do so may be pleaded in abatement of any such action, suit, or proceeding; but nothing herein contained shall be construed to lessen the liability of any corporation which may not have complied with the requirements of this section, upon any contract or for any wrong." The remaining portion of this section prescribes a penalty and the form of prosecution for the failure of the corporation to comply with the provisions of this section. No question is made as to the sufficiency of the bond, or the time at which the application for removal was made, or as to the form of the pleading by which the question of the right of removal was presented.

The only controversy before us is whether or not the facts above stated entitle the defendant to a removal of this action to the district court. It was suggested by the counsel for the defendant that the provision of the statute is that "no railroad corporation * * * shall do business in this state as the lessee," etc., and that, as the defendant does not purport to be a railroad corporation, the statute does not apply to it. This point was not pressed in the argument, and, I think, properly so; for, while the name of the defendant, the Newport News & Mississippi Valley Company, does not include the word "railroad," the said company is by its charter authorized to construct, hold, own, lease, and operate any railroad, and the record in this case distinctly shows that it is, and was on July 26, 1886, doing business as a railroad company in this state, and that it must therefore be regarded as such within the intent of said statute. In Railroad Co. v. Koontz, 104 U. S. 5, it was decided that a foreign corporation, operating a domestic corporation, under a lease of the road, property, and franchises of the latter, does not thereby forfeit or surrender its rights to remove into the circuit court of the United States a suit instituted against it in a court of the state which chartered the leased corporation, by a citizen of that state. In that case the lessee company was a Maryland corporation, and the lessor a Virginia corporation, and in its opinion the court says: "It is not denied that the Maryland company derived all its power, so far as the operation of the Virginia road was concerned, from the Virginia corporation; nor that, in respect to the business of that road, it must do just what was required of the Virginia corporation by the laws of Virginia, but that does not, in our opinion, make it a corporation of Virgina. * * * A corporation, therefore, created by and organized under the laws of a particular state, and having its principal office there, is, under the constitution and laws, for the purpose of suing and being sued, a citizen of that state, possessing all the rights and having all the powers its charter confers." So, in the case at bar, the fact that the defendant has leased and is operating the railroad of a corporation of this state, does not make it a citizen of this state, within the meaning of the constitution and laws of the United States. By a statute of the state of Wisconsin, enacted in 1870, it was declared that "any fire insurance company, association, or partnership, incorporated by or organized under the laws of any other state of the United States, * * * desiring to transact any such business, (fire insurance,) by any agent or agents, in this state, shall first appoint an attorney in this state on whom process of law can be served, containing an agreement that such company will not remove the suit for trial into the United States circuit court or federal courts, and file in the office of the secretary of state a written instrument, duly signed and sealed, certifying such appointment, which shall continue until another attorney be substituted." 1 Tayl. St. § 22, p. 958. While the statute was in force, the Home Insurance Company, a corporation of New York, established an agency in the state of Wisconsin, and, in compliance with the requirements of said statute, filed in the office of the secretary of state of that state, a written power of attorney, duly executed by said company, in which is contained this clause: "And said company agrees that suits commenced in the state courts of Wisconsin shall not be removed by

Digitized by Google

the acts of said company into the United States circuit or federal courts." Afterwards the company issued a policy of insurance to one Morse, and, a loss having occurred under it, Morse sued the company in one of the state courts of Wisconsin. The company appeared in the state court, and filed its petition to remove the case, under the act of congress, into the United States circuit court for the district. The state court refused to remove the case, and judgment was rendered by it for the plaintiff. This judgment was affirmed by the supreme court of Wisconsin, (30 Wis. 496,) and from this latter court the company took the case to the supreme court of the United States, which held that the aforesaid statute was repugnant to the constitution of the United States, and the laws made in pursuance thereof, and that it was therefore illegal, and void; and, further, that the aforesaid agreement, executed and filed in pursuance of said statute, is also void, and afforded no ground for the refusal of the state court to remove said action to the federal court. Insurance Co. v. Morse, 20 Wall. 445. The substance of this decision is that a foreign corporation, by a positive agreement, made in pursuance of a state statute, cannot take away its right to remove a suit brought against it in the state court to the federal court. Our statute (section 30, c. 54, Code 1887) and the agreement of the defendant filed in pursuance thereof, do not, directly or in terms, stipulate that the foreign corporation shall or will not remove any suit from the state to the federal courts, but the statute does declare that the corporation filing such agreement shall be, "as to its works, property, operations, transactions, and business in this state, a domestic corporation, and shall be so held and treated in all suits and legal proceedings, * * * as well as to all other matters relating to such corporation;" and thus it does indirectly take from the corporation the right to remove into the federal courts any suit brought against it by a citizen of this state, because, as a domestic corporation, it can possess no such right. The question then arises, does said statute make the defendant a corporation of this state?

The following propositions of law are settled by the decisions of the supreme court of the United States: *First.* A corporation exists only in contemplation of law, and by force of law, and can have no legal existence beyond the bounds of the state or sovereignty by which it is created. It must dwell in the place of its creation. *Second.* Where a corporation is created by the laws of a state, the legal presumption is that all its members are citizens of the state by which it was created; and in a suit by or against it, it is conclusively presumed to be a citizen of such state. *Third.* A corporation endued with the capacities and faculties it possesses by the co-operating legislation of two states cannot have one and the same legal being in both states. Neither state could confer on it a corporate existence in the other, nor add to nor diminish the powers to be there exercised. *Fourth.* The constitutional privilege which a corporation has as a citizen of one state to sue the citizens of another state in the federal courts cannot be taken away by simply declaring it to be a corporation of the latter state. Railroad Co. v. Wheeler, 1 Black, 286; Marshall v. Railroad Co., 16 How. 314; Insurance Co. v. French, 18 How. 404; Insurance Co. v. Francis, 11 Wall. 210; Railway Co. v. Whitton, 13 Wall. 270; Muller v. Dows, 94 U. S. 444; Railroad Co. v. Alabama, 107 U. S. 581, 2 Sup. Ct. Rep. 432. In Muller v. Dows, supra, the court decided that "a corporation created by the laws of Iowa, although consolidated with another of the same name in Missouri, under the authority of a statute of each state, is, nevertheless, in Iowa, a corporation existing there under the laws of that state alone." And the court, in its opinion, in Railroad Co. v. Alabama, supra, says: "The defendant, being a corporation of the state of Alabama, has no existence in this state as a legal entity or person, except under and by force of its incorporation by this state, and, although also incorporated in the state of Tennessee, must, as to all its doings within the state of Alabama, be considered a citizen of Alabama, which cannot sue or be sued by another citizen of Alabama in the courts of the United States." In the opinion in Railroad Co. v. Wheeler, supra, the court says: "It is true that a corporation by the name and style of the plaintiffs appears to have been chartered by the states of Indiana and Ohio, clothed with the same capacities and powers, and intended to accomplish the same objects, and it is spoken of in the laws of the state as one corporate body, exercising the same powers, and fulfilling the same duties, in both states. Yet it has no legal existence in either state, except by the law of the state, and neither state could confer on it a corporate existence in the other, nor add to nor diminish the powers to be there exercised. It may, indeed, be composed of and represent, under the corporate name, the same natural persons. But the legal entity or person which exists by force of law can have no existence beyond the limits of the state or sovereignty which brings it into life and endues it with its faculties and powers." 1 Black, 297. The conclusion from these authorities is that a corporation possessing the same name, powers, duties, franchises, and purposes, and composed of the same natural persons, if incorporated by two states, will be, under the constitution and laws of the United States, regarded and treated as two separate and distinct corporations of the respective states, and not one corporation existing in both states, and, consequently, no corporation of one state can be made a domestic corporation of another state by simply declaring that it shall be such. In order to make a corporation chartered by another state a corporation of this state, it must be chartered by this state. It will then be a do-

Digitized by Google

mestic corporation of this state, without reference to its charter in the foreign state, with such powers, duties, and franchises only as are conferred by the charter and laws of this state. The defendant, the Newport News & Mississippi Valley Company, is conceded to be a foreign corporation, created by the laws of the state of Connecticut, and it is not pretended that it has been chartered as a corporation of this state, unless the statute under consideration, which merely declares that it shall be a domestic corporation, and so held and treated in all suits and legal proceedings, as well as in all other matters relating to it, makes it such. The most that can be said to be done by this statute is that it attempts to adopt or naturalize this Connecticut corporation, and all other foreign corporations, and make them domestic corporations, and citizens of this state, without either chartering it as a corporation of this state by any special act of the legislature or requiring it to obtain a charter and organize itself into a domestic corporation under the general laws of this state. If we are to hold the defendant as a domestic corporation of this state, then we have the anomaly, or, rather, the absurdity, of a corporation without a charter, because, according to the settled law, we cannot look to the foreign charter in order to ascertain the powers, duties, and franchises of a domestic corporation, but alone to the authority conferred by its domestic charter and the laws of this state. The evident purpose of that provision of our statute which declares that the foreign corporation shall be a domestic corporation, "and so held and treated in all suits and legal proceedings which may be commenced or carried on by or against it," was to prevent such corporation from removing suits brought by or against it in the courts of this state to the federal courts. This provision, if applied to a foreign corporation, would be in conflict with the constitution and laws of the United States, and therefore inoperative and void. Insurance Co. v. Morse, 20 Wall. 445. The defendant here being, as we have seen, a foreign corporation, notwithstanding the declaration of our statute that it shall be a domestic corporation, the said provision of the statute, so far as it attempts to take from the defendant the right to remove any suit to the federal courts, as well as the agreement filed by it in pursuance thereof, must be held inoperative to prevent such removal in any suit in which it would have the right of removal under the constitution and laws of the United States. I am therefore of opinion that the circuit court erred in denying the petition and motion of the defendant to remove this action for trial into the district court of the United States, as prayed for in its said petition; and for said error alone the judgment of the said court is reversed, the verdict of the jury set aside, and the case is remanded to said circuit court, with directions to it to enter the order required by the act of congress in such cases, and to proceed no further in this case, unless its jurisdiction is restored by the action of the said district court of the United States.

ENGLISH and BRANNON, JJ., concurred. GREEN, J., absent.

(32 W. Va. 197)

WALKER v. RUFFNER *et al.*

(*Supreme Court of Appeals of West Virginia. March 4, 1889.*)

JUDICIAL SALES—IMPEACHMENT.

1. R., administrator of M., filed a bill in the county court of Kanawha county, in April, 1876, against W. and others to enforce a vendor's lien on a lot of land situated in Charleston, W. Va., then owned and claimed by W. R. acted as solicitor for plaintiff, and was appointed special commissioner to make the sale in June, 1876. After being offered on several occasions, and the sale postponed at one time to accommodate W., said lot was sold on the 25th day of November, 1876, for $700, at which time it appears to have been all it was worth. B. H. Smith and R., as such administrator, became the purchasers. The sale was confirmed without exceptions on the 20th day of December, 1876, and the purchasers went into possession, and have so continued. After applying the proceeds of said sale, it left a balance due said administrator, and a decree was rendered against W. for said balance, which was voluntarily paid by W., October 28, 1881. Since said sale said property has increased in value from several causes, and when this suit was brought, in 1887, was worth about $3,000. *Held*, the decree appointing R. a special commissioner to make sale of said lot, and the decree confirming the purchase by R. as such administrator, were voidable, and could have been so shown by W. in the suit which directed the sale to which he was a party, if he had been so disposed.

2. After the lapse of nearly 10 years, a party to a suit will not be heard to impeach a decree rendered therein by original bill under the circumstances shown in this case, unless some valid excuse is shown for this long delay.

(*Syllabus by the Court.*)

Appeal from circuit court, Kanawha county.

Brown & Jackson and *Miller & Gallaher*, for appellants. *Knight & Couch*, for appellee.

ENGLISH, J. At the May rules in the year 1876, David L. Ruffner, administrator of the estate of Maria MacFarland, deceased, filed a bill in chancery in the county court of Kanawha county against Henry S. Walker, the Charleston Institute, a corporation under the laws of West Virginia, Charles C. Lewis, Benjamin H. Smith, and Isaac N. Smith, defendants, in which he alleged, in substance, that said Charleston Institute, being possessed in fee of a parcel of land on the southeast side of Summers street, between Virginia and State streets, in the city of Charleston, Kanawha county, W. Va., laid off said parcel of land into lots, and proceeded to sell the same, and did sell lot No. 1 of said parcel of land to the appellee, Henry S. Walker, at the price of $1,600, of which sum said Walker paid $500 at the time of sale, and executed four notes, dated the 26th day of April, 1873,—the first for $20, payable one year after date; the second for $360, payable two years after date; the third for $360, payable three years after date; and the fourth for $360, payable four years after date,—all payable to the order of the Charleston Institute, at the First Na-

Digitized by Google

tional Bank of Charleston, and all bearing interest at 6 per cent. per annum from date until paid; to secure the payment of which the vendor's lien was retained upon said lot No. 1, which lot is described in a certified copy of the deed to said Henry S. Walker, which is filed as Exhibit No. 1 with said bill; that said Charleston Institute transferred to said Maria MacFarland, who was then in life, the second and third notes for $360 each, payable, respectively, at two and three years after date, in consideration for some stock she then held in said Charleston Institute, which was surrendered by her, and retired and canceled; that said Maria MacFarland died in July, 1874, and that the plaintiff, as her duly-qualified administrator, holds said two notes, one of which would fall due on the 29th day of April, 1875, and the other on the 29th day of April, 1876; that no part of said notes, or either of them, had been paid, and he exhibits them with his bill; that said $20 note was assigned by said Charleston Institute to C. C. Lewis, and had been fully paid; that the fourth of said notes, for $360, due four years after its date, was assigned by said institute to Benjamin H. Smith and Isaac N. Smith, and the plaintiff did not know whether any part of the same was paid or not. The plaintiff called on B. H. and I. N. Smith to discover how much, if anything, had been paid upon the note held by them; and prayed that said lot No. 1 might be sold by virtue of the lien reserved as aforesaid in said deed. C. C. Lewis answered said bill, admitting the payment of said $20 note by the defendant Henry S. Walker, and the defendants B. H. and I. N. Smith answered said bill, stating that they were the owners of the fourth purchase-money note given by Henry S. Walker as part of the deferred installments for said lot No. 1; that said note was for $360, dated April 26, 1873, and payable four years after date, with interest, subject to a credit of $200 paid May 15, 1874; and prayed that it might be decreed to be a lien upon said lot, and that their interest might be protected; and they filed said note, with the credit indorsed, with their answer. On the 28th day of June, 1876, a decree was entered in said cause, ascertaining the aggregate amount of the notes held by plaintiff, including interest to that date, to be $856.80, and that the balance due on said fourth note held by I. N. and B. H. Smith was a lien upon said lot No. 1; and decreeing that unless the defendant Henry S. Walker should pay said sum found due the plaintiff, with interest, within 30 days from the date of said decree, said David L. Ruffner, who was thereby appointed a special commissioner for the purpose, should advertise and sell said lot for cash as to 25 per per cent. of the purchase money, and as to the residue upon a credit of 12, 18, and 24 months. It appears from the report of David L. Ruffner, special commissioner, that said Henry S. Walker, having failed to pay, as required by said decree, the amount therein ascertained to be due plaintiff, he advertised said property for sale on the 12th day of October, 1876, and, after postponing said sale on several occasions, he finally, on the 27th day of November, 1876, sold said lot to B. H. Smith (who was the sole owner of said note assigned to B. H. Smith and I. N. Smith) and to D. L. Ruffner, as administrator of M. MacFarland, deceased, jointly, in proportion to their respective claims upon the said lot, at the price of $700, that being the highest bid for the same. On the 20th day of December, 1876, said sale was confirmed by the court, and the amount so bid on said lot, after deducting the costs and commissions, was so apportioned as to credit the amount due plaintiff from said defendant Walker with the sum of $495.82, leaving still due plaintiff from said Walker a balance of $382.40, and also to credit the amount due said B. H. Smith with $118.58, leaving still unpaid on said note as of November 27, 1876, the day of the sale, the sum of $91.66; which report, remaining unexcepted to, was confirmed, and judgment was rendered against said Walker for said balance of $382.40, and interest, and execution was awarded on said judgment, and William A. Quarrier, as special commissioner, was directed to convey said lot or parcel of land to said D. L. Ruffner, administrator as aforesaid, and B. H. Smith, jointly, in the proportion of 807-1000 to the former and 193-1000 to the latter; which deed was executed by said Quarrier, as special commissioner, dated on the 20th of December, 1876, and acknowledged the 11th day of July, 1881. On the first Monday in February, 1887, said Henry S. Walker filed a bill in the circuit court of Kanawha county against said David L. Ruffner, administrator of Maria MacFarland, deceased, the Charleston Institute, a corporation, Charles C. Lewis, B. H. Smith, D. C. Gallaher, administrator of I. N. Smith, deceased, and the unknown heirs at law of Maria MacFarland, deceased, the object of which was to vacate, annul, and set aside the sale made by said David L. Ruffner, as special commissioner, and to cancel and annul the deed made in pursuance of said sale to said David L. Ruffner, as administrator of the estate of Maria MacFarland, deceased, and B. H. Smith.

The plaintiff in said bill sets forth in detail the circumstances in reference to the purchase of said lot by himself from the Charleston Institute, the amount of purchase money he was to pay, the amount paid in cash, and the time and manner in which the residue was to be paid; also the manner in which the said Maria MacFarland's administrator asserted a vendor's lien against said lot No. 1; that said bill was filed by said D. L. Ruffner, solicitor for D. L. Ruffner, administrator, the two being one and the same person; that by the decree enforcing said alleged lien said D. L. Ruffner was appointed special commissioner on the 28th day of June, 1876, to make sale of said lot, to satisfy the lien ascertained to exist in favor of said D. L. Ruffner, administrator, etc.

Digitized by Google

that said D. L. Ruffner, as such special commissioner, on the 27th day of November, 1876, made sale of said lot under said decree, at which sale said D. L. Ruffner, as administrator as aforesaid, and B. H. Smith became the purchasers of said lot for the price of $700, less than one-half the amount which said Walker agreed to pay the Charleston Institute for same; that said lot brought at said sale less than one-third of its value; that, after applying the proceeds of said sale to the unpaid purchase money, with interest added to June 28, 1876, all the balance of said purchase money having been paid by the plaintiff, Walker, there was still a considerable sum due on the purchase money of said lot, for which a decree was taken against said Walker, which was afterwards paid by said Walker to said D. L. Ruffner, administrator as aforesaid, as shown by his receipt filed with the plaintiff's bill; that the said D. L. Ruffner, in making sale of the said lot under the said decree, was acting as the agent of plaintiff, and in purchasing, or attempting to purchase, the said lot at said sale, and under the circumstances, the said Ruffner violated his duty as such agent and as an officer of the court, and that by so doing he committed a legal fraud upon plaintiff, and thereby prejudiced and injured him greatly; that the said sale and purchase by said D. L. Ruffner, under the circumstances aforesaid, were fraudulent, illegal, and void, and could not divest the plaintiff of his interest in said lot. And he prays that said sale, and the deed made in pursuance thereof, may be set aside, canceled, and annulled, and that said lot may be again exposed to sale. C. Q. Smith, A. Q. Smith, and Harry B. Smith answered plaintiff's bill, stating that they and the infant children of Caroline Q. Smith, to-wit, Elsie, Isaac N., and Christopher T. Smith, were the sole devisees as to the property mentioned in the bill of Benjamin H. Smith, deceased, and they deny that the plaintiff, Walker, has ever paid in full for said property sold to him, and claim that he still owes them, as such devisees, about $100, with interest thereon, as more fully set forth in the answer of C. C. Lewis, executor of B. H. Smith, filed therein. They adopt the answer of Maria MacFarland's administrator, and they deny that plaintiff's claim has any equity as against them now, after so many years have elapsed, and that the acts and acquiescence of plaintiff himself in the proceedings claimed to have prejudiced him refute any such pretensions or claims. C. C. Lewis, as the executor of the last will and testament of B. H. Smith, deceased, also answered said bill, exhibiting a copy of said Smith's will, and claims that in the event the sale aforesaid to his decedent be set aside, that the court should decree him, as such executor, the sum of $91.66, with interest from November 27, 1876, being the balance due the estate of said B. H. Smith, there being that amount still unpaid by said Walker on the original purchase money. The devisees of said B. H. Smith also file a petition in said cause, showing how said balance of purchase money still remains unpaid by said Walker; alleging that said sale complained of in the bill was proper, fair, and just, and the rights of no one injured thereby; and that, by plaintiff's own admissions of payment, by virtue of the sale aforesaid, he acquiesced in said sale, and it is now too late for him to set up a claim so stale and unjust; and that they may be decreed the owners of the interests so purchased in said lot and confirmed to him by the decree of December 20, 1876. The infants, Elsie Smith, Isaac N. Smith, and Christopher T. Smith, answered by guardian *ad litem*. Said Ruffner demurred to said bill, and the same was overruled. The defendant David L. Ruffner, administrator of Maria MacFarland, deceased, also answered said bill, giving a full statement of the matters out of which said litigation originated, including the original sale to and contract with the plaintiff, Henry S. Walker, and the manner in which he, as the administrator of Maria MacFarland, came into the possession of the claims against said Walker, under which he sought to enforce the vendor's lien, as to the time a decree was obtained for the sale of said lot, and the terms and conditions of said sale; that said property was advertised and offered for sale by him, first, on the 12th day of October, 1876, and was postponed at the request of the plaintiff, Walker, until the 11th day of November, 1876, when the property was again offered for sale, and postponed on account of want of bidders, and said sale was again postponed until the 25th of November, 1876, on which day said property was again offered for sale, and, respondent having received another message from said Walker to go on with the sale, the crying of bids was continued for a while, and said sale again postponed until the 27th day of November, 1876, on which day said sale was concluded and the property was struck off to B. H. Smith and D. L. Ruffner, administrator of M. MacFarland, they being the highest bidders for the same, at the price of $700, which, he claims, was the most that could be obtained for said lot; and that on the 20th day of December, 1876, the court, having received the report of said sale, confirmed the same without exception; and that, the proceeds of said sale not being sufficient to satisfy the decree of June 28, 1876, the court gave the administrator of said M. MacFarland a judgment for the unsatisfied balance, amounting to $382.40, with interest from the 27th day of November, 1876, on which judgment execution was issued and returned, "No property found," and said judgment was docketed according to law; that said suit in equity was instituted by the plaintiff, Walker, 9 years and 10½ months after the decree was rendered in said cause confirming said sale; and that the bringing of said suit by said plaintiff, Walker, was the first intimation he had from said plaintiff that he had ceased to acquiesce in everything connected with said

Digitized by Google

sale. He also states that he at once took possession of said lot, and has been in quiet possession thereof ever since up to the institution of said suit; that he has paid all the taxes assessed upon said lot during that time, and also paid the delinquent taxes for 1875 and 1876, which were unpaid by Walker, and the auditor had placed the lot in the hands of the sheriff of Kanawha county for sale for such delinquent taxes in the fall of 1877. He also avers that $700 was a full price for the lot at the time it was sold, in November, 1876. The respondent then proceeds to discuss the rise and fall of real estate in the city of Charleston, its causes and consequences. He alleges that said lot in 1873 was assessed on the land-books at $178, and in 1875 at $400; that the lot, at the time of the sale, was low and wet, and that in 1881 he constructed a subterranean drain, at considerable expense, the entire length of said lot, about 133 feet, and had dirt hauled, and filled up said lot, thereby adding greatly to its value; that in October, 1881, the plaintiff's agent or attorney accosted the respondent on the street, and asked him for how much he would discount the judgment which he held against plaintiff under the decree of December 20, 1876; that he declined, as being a fiduciary, to discount said judgment, and a few days afterwards, on the 28th of October, 1881, said Walker voluntarily paid to respondent the whole of said judgment, thereby acquiescing in and admitting the validity, not only of said decree, but of all the proceedings leading to that decree. He also avers that, owing to many causes, (which he enumerates,) said lot has greatly enhanced in value, and for this reason, he alleges, the plaintiff has set up his claim. He denies that he was acting as the agent of plaintiff in making said sale, but claims he was acting as the agent of the county court in making said sale, and that if he was wronged by the court the said Walker should have excepted to its action, and his remedy would have been by appeal. In conclusion he denies that he has been guilty of any legal fraud; that if there was any error it was merely one of form,—a technical and not a substantial one; that he was the holder, without interest, of a naked, legal title, for and in behalf of the heirs of Maria MacFarland; that, if there was any legal fraud, the plaintiff has waived and lost his right to be heard in a court of equity by reason of his gross laches and negligence for nearly 10 years; that plaintiff is estopped from setting up any claim to said lot by silently standing by and permitting respondent to expend money in making improvements on said lot, and by voluntarily performing the judgment awarded to plaintiff by the final decree that confirmed the sale of said lot; that plaintiff's only remedy was by appeal, which was barred in five years, etc.

Upon this state of pleadings said cause came on to be heard on the 7th day of July, 1888, upon the depositions taken in the cause and the general replications to said answers, and upon consideration thereof the court below held that the plaintiff was entitled to the relief prayed for, and decreed that the sale made in the suit of D. L. Ruffner, administrator of Maria MacFarland, v. Henry S. Walker and others, lately pending in the county court of Kanawha county, on the chancery side thereof, by Special Commissioner D. L. Ruffner, on the 27th day of November, 1876, of said lot, and also the decree of the 20th of December, 1876, confirming said sale, and also the deed made to said purchaser by W. A. Quarrier, special commissioner, dated December 20, 1876, be, and the same were, all thereby set aside, vacated, and annulled, and the plaintiff was thereby allowed to pay the purchase money due from him on said lot to the parties thereto entitled, together with the taxes which had been paid by the purchasers on said lots, and the costs of the permanent improvements made by them thereon, less the rents received by them therefrom; and said cause was referred to a commissioner to ascertain and report (1) the amount of purchase money due from the said plaintiff on said lot, and to whom due; (2) the taxes which have been paid by the purchasers thereon, with interest; (3) the cost and value of any permanent improvements made by the purchasers on said lot, with interest; (4) the rents and profits received by the purchasers from said lot, with interest, etc. From this decree the defendants in said chancery suit, with the exception of the Charleston Institute, obtained an appeal to this court.

It seems to be conceded on all hands that David L. Ruffner, who, as administrator of the estate of Maria MacFarland, deceased, was the plaintiff in said chancery suit which was prosecuted in the county court of Kanawha county, was the same David L. Ruffner who was appointed to make sale of said lot of land in the bill mentioned, and who at said sale became the purchaser of the greater portion of said lot in the same capacity as he acted when prosecuting said suit. It is contended by counsel for the appellee that such a sale is not simply voidable, but absolutely void. I do not, however, consider that position to be in accord with the weight of authority either in the state of Virginia or in this state. In the case of Howery v. Helms, 20 Grat. 1, the second point of the syllabus reads as follows: "When the commissioner appointed by a decree in a partition suit to sell the land becomes himself the purchaser, the purchase is voidable at the election of any party interested in the land sold. And the law is the same where the purchase is made nominally by a third person, who is reported by the commissioner to the court as the purchaser, but who really purchased for the commissioner, and conveyed the land to him accordingly, after the purchase, as reported, had been confirmed." Also, that "the commissioner, by purchasing at his own sale, did an act which a court of equity treats

Digitized by Google

as a fraud upon the parties interested." In the case of Newcomb v. Brooks, 16 W. Va. 32, second point of syllabus, "a purchase by a fiduciary, while actually holding a fiduciary relation, of the trust property, either of himself, or of the party to whom he holds such fiduciary relation, is voidable at the option of the party to whom he stands in such a relation, although the fiduciary may have given an adequate price for the property, and gained no advantage whatever." Also, tenth point of syllabus: "But when such sales are sought to be avoided, the suit for the purpose must be brought in a reasonable time, though the property remains in the hands of the fiduciary." GREEN, J., in delivering the opinion of the court in that case, (page 69,) says: "The general rule we have laid down, that a fiduciary will not be permitted to buy the trust property, even when the purchase is fair, and the price adequate, and that the *cestui que trust*, or person bearing a similar relation, may, at his option, set aside such a sale, applies as strongly to a public sale by a fiduciary as to a private sale; nor will the fact that the sale is made under an adverse proceeding, and at a judicial sale, make any difference. He can with no more propriety purchase at such a sale than at one made by himself." (Quoting numerous authorities.) "The reason of this is obvious, for if the purchaser bears such a relation to the person interested in the property to be sold as to impose on him the duty of making the property bring the highest price possible, this duty is as incumbent on him when the property is sold under an order of the court, or by any other person, or at any other sale, as it is when made by himself, either privately or publicly, and therefore he cannot be permitted to put himself in a position in which it is his interest that the property should bring the least sum possible." In the case of Winans v. Winans, 22 W. Va. 678, it is held that "when a commissioner appointed by a decree, in a suit in equity to sell land, becomes himself the purchaser, the purchase is voidable at the election of any party interested in the land sold," etc.; and in the case of Ayers v. Blair, 26 W. Va. 559, it is held "that the same person cannot occupy the antagonistic positions of seller and purchaser of the same subject," etc. From these authorities, then, and many others that might be referred to, the law seems clear that a sale, made as this one was, by a special commissioner, who became the purchaser of a large portion of the property sold at his own sale, is clearly voidable in a court of equity. Upon that question I have arrived at my conclusions with very little hesitation; but there is another question in this cause, which is involved in more serious difficulty, and that is whether the plaintiff in this cause has not been guilty of such laches in the assertion of his demands that what he might once have obtained without hesitancy from the court has, by the lapse of time, the change of circumstances, the alteration and enhancement in value of the property sold, and the death of one of the purchasers, a party to the suit, been brought within that rule of equity which prevails in that class of cases "involving the specific execution or rescission of contracts for fraud, or some infirmity or defect, of which the plaintiff was fully apprised, but refused to act until subsequent events showed that it might be to his advantage to act; cases in which he was silent when it was his duty to have spoken or acted. He will not be heard when he should be silent." The appellee, Walker, in his bill, offers no excuse whatever for his delay of nearly 10 years in instituting his suit to set aside the sale made by said Ruffner, and the deed made in pursuance thereof. He was a party to the suit in which said sale was made, and was fully cognizant of the fact that said Ruffner had been appointed a special commissioner to make said sale, and when the property was exposed for sale the sale seems to have been postponed on three different occasions,—once, at least, by the request of said Walker to suit his convenience; and the decree which confirmed said sale, and gave a judgment over against said Walker for $382.40, the balance of the debt due said Ruffner, as administrator, on the original purchase money of said lot, (which he afterwards voluntarily paid,) also directed William A. Quarrier, as special commissioner, to make a deed to said Ruffner, as administrator, for the largest portion of said lot. Said Walker, by paying said judgment, thus performed and acquiesced in a part of the decree which directed the deed to the largest portion of said lot to be made to said Ruffner, which estops him from saying that he did not have full notice of the said decree and its contents. At the time of said sale, and for some time thereafter, said lot was low and wet; and Dr. Wagner, who attended said sale for the purpose of bidding on the lot, but was unwilling to bid more than $500, although the lot adjoined his residence, now says the property is worth $60 a front foot, or about $4,000. Other witnesses say that $700 was a fair price for the lot at the time it was sold. The evidence shows that the property has been improved by ditching and filling, and its enhancement in value has been occasioned also by many causes which have increased the value of property in the city of Charleston, and by the erection of the United States custom-house, and other buildings, in the immediate vicinity, of which the said Walker, residing in said city, had full notice. In addition to these facts, Benjamin H. Smith, who was a purchaser of a portion of said lot at said sale, about the time of, or shortly after, the institution of this suit, departed this life, having devised the portion of said lot purchased at the sale by him to Caroline Q. Smith, Harry B. Smith, Alexander Q. Smith, Elsie, Isaac N., and Christopher T.,—the last three being infants,—as a part of his real estate; and if said sale should be set aside it would necessarily be set aside entirely, thus disarranging the

Digitized by Google

final disposition made by said B. H. Smith of his real estate, which would have been avoided but for the delays of said Walker in instituting his suit.

In the case of Trader v. Jarvis, 23 W. Va., this court, on page 108, says: "Delay in the assertion of a right, unless satisfactorily explained, even where it does not constitute a positive statutory bar, operates in a court of equity as an evidence of assent, acquiescence, or waiver, and especially is such the rule in suits to set aside transactions on account of fraud or infancy. A court of equity, which is never active in relief against stale demands, will always refuse relief where the party has slept upon his right, and acquiesced, for a great length of time. Nothing can call into activity this court but conscience, good faith, and reasonable diligence. Where these are wanting, the court is passive, and does nothing. Laches and neglect are always discountenanced,"—referring to Smith v. Clay, 2 Amb. 645; Doggett v. Helm, 17 Grat. 96. In the case of Pusey v. Gardner, 21 W. Va. 470, sixth point of syllabus, this court holds that, "even where there is no absolute bar from the lapse of time or by the statute of limitations, it is a principle of courts of equity not to take cognizance of an equitable claim after a great lapse of time, and where, from the death of parties and witnesses, there is danger of doing injustice, and there can no longer be a safe determination of the controversy." In the case of Harwood v. Railroad Co., 17 Wall. 81, upon a bill filed to set aside as fraudulent completed judicial proceedings regular on their face, the court says, Justice HUNT delivering the opinion: "We are of the opinion, also, that there has been too great delay in initiating this suit, and that no sufficient excuse is given for it. The sale was made five years before the commencement of this suit, and it is fairly to be inferred from the bill that the plaintiffs were aware of the proceedings as they progressed. Their knowledge of the mortgage sale is expressly admitted. * * * They do not allege when they acquired the knowledge, nor give a satisfactory reason why it was not sooner obtained. For aught that appears, they have slept upon their knowledge for several years. Without reference to any statute of limitations, the courts have adopted the principle that the delay which will defeat a recovery must depend upon the particular circumstances of each case. This case does not show a sufficient degree of diligence to justify the overthrow of a decree of foreclosure, under which new rights and interests must have arisen."

When said sale was made in November, 1876, neither the plaintiff, Walker, nor any one for him, seemed disposed to bid upon the said lot, although the most ample opportunity was afforded him; and after repeated efforts were made to make sale of said lot, B. H. Smith and the representative of the estate of Maria MacFarland, who held the vendor's lien upon said lot, concluded to invest in the same in proportion to the amounts respectively held by them as liens thereon, and, to effect that purpose, bid in the property at $700, which the proof shows was a fair price at the time of the sale. If said sale was fraudulent and void, the facts which made it so existed in December, 1876, when it was confirmed without exception or objection on the part of plaintiff, who was before the court with full knowledge of the entire proceeding. If he had spoken then, or within a reasonable time thereafter, instead of waiting until February, 1887, to file his bill, a court of equity would have lent a willing ear to his complaint; but, under all the circumstances disclosed by the record, and the evidence in this cause, I am of the opinion that after so much delay, and so many changes, it was error in the court below to entertain the plaintiff's bill, or decree in his favor. The decree complained of must be reversed, and the bill dismissed, and the appellee must pay the costs of this appeal and the costs of the circuit court.

SNYDER, P., and BRANNON, J., concurred. GREEN, J., absent.

(32 W. Va. 233)

FARMERS' BANK *v.* CORDER *et al.*

(*Supreme Court of Appeals of West Virginia. Feb. 26, 1889.*)

DEED—CONSTRUCTION—SETTING ASIDE.

1. A deed of conveyance bearing date the 8th day of June, 1850, to a husband and wife residing in Barbour county, then in Virginia, for a tract of land situated in said county, did not confer upon the husband title to the undivided moiety of said land, but said husband and wife took by entireties.

2. A creditor of the husband files a bill to subject the real estate of the husband to the payment of his debt. It is error in the court, upon the above state of facts in regard to the acquirement of title by the husband and wife, to hold that the husband is entitled in fee-simple to the undivided one-half interest in said tract of land, and to direct said undivided half to be sold for plaintiff's debts.

3. Although a deed may be fraudulent and void as to creditors, it is nevertheless valid and binding between the parties to the fraud which brought it into existence, and it is error in the court to set aside and annul such deed *in toto*.

4. A deed of conveyance is made directly from the husband to the wife for a tract of land, and as part of the consideration she agrees to pay B. $300, and H. $100, with interest on said amount, which the husband owes to B. and H., and to secure which amount the vendor's lien is reserved. Although said deed may be set aside as to general creditors as fraudulent, the liens thus reserved must be respected as liens on the equitable title conveyed as of the date of the recordation of said deed, if said claims are valid in other respects.

(*Syllabus by the Court.*)

Appeal from circuit court, Barbour county.

John Bassel and *Dayton & Dayton*, for appellants. *Sam. V. Woods*, for appellee.

ENGLISH, J. In November, 1884, the Farmers' Bank of Phillippi filed its bill in the circuit court of Barbour county against Thomas Corder and Elizabeth Corder, his wife, Anthony F. Daniels, Erwin Douglas, John H. Daniels, Benjamin Bartlett, and

Digitized by Google

James E. Heatherly, under section 2, c. 133, Code W. Va., which allows a creditor, before obtaining a judgment or decree for his claim to institute a suit to avoid a gift, conveyance, assignment, or transfer of or charge upon the estate of his debtor which he might institute after obtaining such judgment or decree, under which section it is provided that "he may in such suit have all the relief in respect to said estate which he would be entitled to, after obtaining a judgment or decree for the claim which he may be entitled to recover." In said bill the plaintiff alleges that on the 10th day of May, 1884, the defendants Anthony F. Daniels, Erwin Douglas, Thomas Corder, and John H. Daniels executed to it their promissory note for $1,500, due 120 days after date, and thereby jointly and severally promised to pay plaintiff or order, at its banking house in Phillippi, the sum of $1,500, with interest after maturity at 8 per cent. per annum, the whole of which remains unpaid; that at the time said note was made, and at the time of making the voluntary conveyance thereinafter named, the defendant Thomas Corder was the owner in fee-simple of the undivided one-half of a certain tract of land in said county, containing 168½ acres, which was conveyed to him and his wife, the said Elizabeth Corder, as tenants in common, by Peter Zinn and wife, by deed dated the 8th day of June, 1850; also of a tract of about eight acres, being his share of the upper meadow, devised to him and David Zinn by the last will and testament of Peter Zinn; also about three acres which were devised by the same will, which bears date May 1, 1866, and also a tract of eight acres adjoining said 168½-acre tract, which was conveyed to said Thomas Corder by Nancy Heatherly and others, by deed dated May 1, 1854, and another tract of land containing 11½ acres, adjoining said 168½-acre tract, which was conveyed to him by Henry O. Middleton, by deed dated February 2, 1853. It is also alleged that on the 23d day of August, 1884, said Thomas Corder conveyed to his wife all of said real estate; also one bay horse, one white cow, three hogs, and ten sheep, part of the personal property then owned by him,—with intent to hinder, delay, and defraud the plaintiff in the collection of its said claim, for the pretended and false consideration of a debt of $964 therein recited to be due from him to his said wife for borrowed money, and for the further consideration of $300 to be paid by his wife, with its accrued interest, to the defendant Benjamin Bartlett, and $100 to be paid, with its accrued interest, by her to the said James E. Heatherly, which last two sums are charged upon said land as a lien by the terms of said conveyance; that at the time said conveyance was made said Thomas Corder was not indebted to his said wife, and that she well knew the intent with which said conveyance was made; that between the time of the execution of said note and the execution of said last-named deed the defendants Anthony F. Daniels and John H. Daniels became and still remain utterly insolvent and worthless, of which fact the defendant Thomas Corder had notice at the time he executed the said last-named deed, and that said deed conveyed all the real estate owned by said Thomas Corder; that at the time said suit was brought, to-wit, on the 18th day of October, 1884, the plaintiff sued out an attachment therein, which on the same day was duly levied upon all the lands of the defendant Thomas Corder, and the plaintiff prayed that the said conveyance made by said Thomas Corder to his wife, Elizabeth Corder, might be canceled and annulled as to the plaintiff's claim; that said claim might be charged as a lien upon the land and personal property thereby conveyed; that said attachment lien might be enforced against said land by subjecting the same to sale. At the December rules, 1884, the defendants Thomas Corder, James E. Heatherly, and Benjamin Bartlett demurred to the plaintiff's bill, the last two assigning as cause of demurrer that the bill is insufficient on its face, because it avers its demand to be a lien, and prays its enforcement as against the lands conveyed to Elizabeth Corder; that there is no lien in fact, unless it arise under the attachment, which is a suit by itself, apart from the matter of the bill, and which must stand or fall on the case made on it, nor is the attachment order by its levy a lien or charge, unless sustained at the trial thereof and final judgment thereon; that the deed of Corder creates a lien and charge from the date of its recordation in favor of demurrants for their valid debts set out in said deed, as to which said Elizabeth Corder is made their trustee, and they have a priority and valid lien and charge over the plaintiff on said land; that the plaintiff's bill is defective in making no allegations concerning their interest, neither admitting nor denying them; that if said bill was to be taken for confessed there would be no foundation for any decree against them, and that it would be manifest error for the court to annul said deed, and decree for the plaintiff to the prejudice of demurrants, in the absence of all such averments made in its said bill, and the recitals of the deed in favor of their demands must stand before the court as valid till assailed; that there are in fact no allegations for the demurrants to have or maintain any issue or controversy about, and they insist that the bill is demurrable, and should be dismissed, with costs. An amended bill was filed by plaintiff at November rules, 1885, merely alleging that since they became seised of the lands alleged to have been conveyed to them by Peter Zinn there have been born unto said Corder and wife many children capable of inheriting the estate, who are still living.

At the March term, 1885, said demurrers were overruled by the court, and on the 15th day of July, 1885, the defendants Thomas Corder and Elizabeth Corder filed their answers to the plaintiff's bill, in which they ad-

Digitized by Google

mit the execution of the note for $1,500 in the bill mentioned, payable as therein stated, and allege that said note provided for the payment of a usurious and illegal rate of interest after maturity. They deny that said Thomas Corder was the owner with the defendant Elizabeth, as tenants in common, of a tract of 168⅛ acres of land, as stated in plaintiff's bill, and claim that the deed from Peter Zinn, dated June 8, 1850, vested in each of respondents the entirety, with the right to the survivor to take the whole; and consequently said Thomas did not, on the 10th day of May, 1884, and on the 23d day of August, 1884, have the right and title to one-half of said land. They deny that said deed of August 23, 1884, for said 168⅛ acres, and the other parcels of land therein described, together with the personal property therein described, was made with intent to delay, hinder, and defraud the creditors of said Thomas Corder, and more particularly to hinder, delay, and defraud the plaintiff in the collection of its said debt, and they call for full proof thereof; they also say that on the 23d day of August, 1884, and for a period long prior thereto, the said Thomas did owe the said Elizabeth the sum of $964, for money of said Elizabeth, which was her separate estate, lent by her to said Thomas, and for which she had held his note since the 9th of February, 1880. They admit that they knew their co-defendant A. F. Daniels was insolvent when said deed of August 23, 1884, was executed, but deny that they knew that John H. Daniels was in the same condition. They admit that an attachment was sued out and levied upon the property as alleged in the bill, but allege that the allegations in the affidavit are not true. The defendants Heatherly and Bartlett filed their joint answer, denying any fraud in the deed of August 23, 1884, from Thomas Corder to Elizabeth Corder, so far as they are concerned, claiming that Thomas Corder was justly indebted to respondent Bartlett in the sum of $300 for borrowed money, and that he was also justly indebted to respondent Heatherly in the sum of $100, both of which sums were due and had been bearing interest for some time previous to that time; that said deed was made by said Thomas to said Elizabeth for the purpose of securing their just debts, and without any fraud or fraudulent intent on the part of any one, so far as these respondents knew, and certainly so far as their participation therein was concerned; that a vendor's lien was retained on the face of said deed to secure these respondents their just debts aforesaid; and they ask, by way of affirmative relief, that the decree setting aside said deed as fraudulent may be set aside, canceled, and annulled, at least so far as depriving them of the security therein contained for their just debts, which remain wholly unpaid, and that the vendor's lien therein contained may be enforced in favor of them, and for general relief.

On the 21st day of July, 1886, a decree was rendered in said cause, reciting that the same was heard upon the attachment sued out therein and levied on the 23d day of October, 1884, by the sheriff of Barbour county, upon the lands mentioned in said levy, upon the process duly executed upon all the defendants, etc., the joint answer of Thomas and Elizabeth Corder, general replication thereto, and upon the exhibits and arguments of counsel. On consideration whereof the court below held that the deed made by Thomas Corder to his wife, Elizabeth Corder, on the 23d day of August, 1884, is fraudulent and void as to the plaintiff, and set aside and annulled said deed, and referred the cause to a commissioner to ascertain and report the lands owned by Thomas Corder, the state and condition of the title thereto, the annual rental value thereof, the liens thereon, and their character, amount, and priority, and the annual rental value of the moiety of Elizabeth Corder in the 168⅛-acre tract, also the value of the personal property mentioned in said deed; and whether the same, or any part thereof, has been alienied since the institution of said suit.

Said commissioner on the 24th day of September, 1886, proceeded to execute said reference, closing his report on the 28th day of September, 1886, and reported that Thomas Corder was the owner of the following tracts of land: One tract of three acres, another tract or moiety thereof known as the "Upper Meadow," (see Peter Zinn's will marked "D;") also another tract of eight acres, conveyed to him by Nancy Heatherly, etc.; also another tract of 11¼ acres, conveyed to him by Henry O. Middleton, and a moiety of 168⅛ acres, conveyed to him and Elizabeth Corder and her heirs by Peter Zinn, referring to copies of said deeds and will, filed with plaintiff's bill, and reporting the title good, so far as he could ascertain. Said commissioner also reported the annual rental value of said lands, and the value of the personal property, and the following liens on said lands: (1) A judgment in favor of J. N. B. Crim v. Joseph Martiny and Thomas Corder, $130.84; (2) lien in favor of Farmers' Bank of Phillippi v. Thomas Corder and others, $1,708.33; (3) a judgment in favor of J. N. B. Crim v. Thomas Corder, $452.20; (4) a decree of the circuit court of Barbour county, dated March 17, 1886, for costs against Thomas Corder, for $25.55. Said commissioner also reported, by way of pertinent matter, at the request of Elizabeth Corder, Benjamin Bartlett, and James E. Heatherly, defendants in said suit, that they claimed their respective debts, with interest on each, named in the deed to Elizabeth Corder dated August 23, 1884, filed among the papers of the cause as Exhibit H. Said commissioner's report was excepted to by plaintiff, because it failed to report Thomas Corder as the owner in fee of said 168⅛-acre tract of land, instead of a moiety thereof. The defendants Thomas Corder and Elizabeth Corder also except to said report upon the ground that only the life-estate of Thomas Corder during the

Digitized by Google

joint lives of said Thomas and Elizabeth in the 168½ acres of land is liable to be subjected to the payment of plaintiff's debt. And the defendants Bartlett and Heatherly excepted to said report because their debts were not reported as vendors' lien upon the lands of said Thomas Corder.

This was the attitude of the case when it was brought on to a final hearing, on the 30th day of October, 1886, when the court overruled said exceptions to said commissioner's report, and confirmed the same in all respects; holding that the said Thomas Corder was the owner in fee of said 3-acre tract, said 8-acre tract, his share of the upper-meadow tract, of 8 acres conveyed to him by Nancy Heatherly, etc., 11¼ acres conveyed to him by Henry O. Middleton, and also of one undivided half interest in his home tract of 168½ acres, devised to him and his wife by Peter Zinn, situated in Barbour county, and confirming the finding of said commissioner as to the amount and priorities of the liens existing against said lands, and directing a sale of said lands, or so much thereof as may be necessary to pay off said liens.

The first assignment of error relied on by the appellants is that the demurrer to the bill should have been sustained, and although in this case the court, without acting *pro forma* upon the demurrer, proceeded to determine and adjudicate the principles of the cause in favor of the plaintiffs, yet, in accordance with the ruling of this court in the case of Hinchman v. Ballard, 7 W. Va. 152, fifth section of syllabus, "it will be considered that the court in rendering the decree adjudicating the principles of the cause considered the sufficiency of the bill, and substantially overruled the demurrer thereto," and for the purposes of this case the demurrer filed by the defendants must be considered to have been overruled. Did the court below commit an error in this ruling? As I understand the practice, a demurrer admits the matters stated in the bill which are well pleaded; that is, matters of fact. It does not admit matters of law which are suggested in the bill, or inferred from the facts stated. If, then, the facts alleged in the bill in regard to the conveyance made by said Thomas Corder be taken as true, the court acted properly in overruling the general demurrer filed by him. As to the demurrer filed by Benjamin Bartlett and James E. Heatherly, the plaintiff in its bill alleges that said Thomas Corder made said conveyance to his wife of said real and personal property for the pretended and false consideration of a debt of $964 therein recited to be due from him to his said wife for borrowed money, and the further consideration of $300 to be paid with its interest to Benjamin Bartlett, and $100 to be paid with its accrued interest by her to the said James E. Heatherly, which last two sums are charged as a lien by the terms of said conveyance, and the prayer of the bill is that said conveyance made by Thomas Corder to his wife may be canceled and annulled as to plaintiff's claim. Now, while it is true that no action is prayed against the defendants Bartlett and Heatherly, they are necessary parties to the bill brought by plaintiff to subject the said tract of land to sale. It is not alleged in the bill that their claims are fraudulent, or that the liens reserved in their favor by said deed are invalid; neither is there any prayer that the lien reserved in their favor may in any manner be disregarded. Their interests are not assailed by the bill, and I think the court acted properly in disallowing their demurrer; but upon the hearing I am of opinion that their liens should have been respected, and the commissioner should have given them a proper place in his account, in stating the liens against said land and their priorities, which would be the date said deed was recorded, as their liens created by said deed must be respected as of that date. Upon the case presented by the pleadings and exhibits, and in the absence of other evidence, as there seem to have been no depositions taken in the cause by either party, and under the circumstances appearing from the record, the defendant Thomas Corder having executed the promissory note for $1,500, payable four months after date, one or two of those who signed said note with him becoming insolvent, as is alleged in the bill and admitted in the answer, and about 3⅓ months after said note was executed, a conveyance having been made to his wife, not only of all the real estate he owned, but a considerable portion of his personalty, in consideration, as said Elizabeth says in her answer, for $964 out of her separate estate, which she loaned him and took his note for, as far back as February, 1880, I am of opinion, under the rulings of this court, that, in the absence of any proof on the part of defendants Thomas Corder and Elizabeth Corder of the good faith of the transaction between them, the court below properly concluded that a case was presented that would justify it in setting aside said deed of conveyance from Thomas Corder to his wife, Elizabeth Corder, as to his creditors. In the case of Burt v. Timmons, (decided by this court in March, 1887,) 29 W. Va. 442, 2 S. E. Rep. 781, fifth section of syllabus, the court holds that "a transfer of property, either directly or indirectly, by an insolvent husband to his wife, is justly regarded with suspicion, and unless it clearly appears to have been entirely free from intent to withdraw the property from the husband's creditors, or the presumption of fraud be overcome by satisfactory affirmative proof, it will not be sustained." In the case of Lockhard v. Beckley, 10 W. Va. 88, ninth section of syllabus, it is held, that "fraud is to be legally inferred from the facts and circumstances of the case, when those facts and circumstances are of such a character as to lead a reasonable man to the conclusion that the conveyance was made with the intent to hinder, delay, or defraud existing or future creditors." Also in Core v. Cunningham, 27

Digitized by Google

W. Va. 206, this court held that "transfers of property, either directly or indirectly, by an insolvent husband to his wife during coverture, are justly regarded with suspicion; and unless it clearly appears that the consideration was paid from the separate estate of the wife, or by some one for her, out of means not derived either directly or remotely from the husband, such transfers will be held fraudulent and void as to the creditors of the husband." The decree, however, rendered in this cause on the 21st day of July, 1886, holds that the deed made by Thomas Corder on the 23d day of August, 1884, to his wife, Elizabeth Corder, is fraudulent and void as to the plaintiff, and then proceeds to decree that said deed be set aside and annulled. This decree, as has been frequently held by this court, is erroneous in directing that said deed be set aside and annulled *in toto*, because the deed would be held good as between the parties, and should only have been set aside as to the creditors of the grantor, and it should have been held valid so far as it provides for securing the debts of Bartlett and Heatherly therein mentioned.

Again, the final decree rendered in this cause on the 30th day of October, 1886, overrules the exceptions to the commissioner's report, and, holding that the defendant Thomas Corder is the owner in fee of the undivided half of the 168½-acre tract conveyed to him and his wife, Elizabeth Corder, by Peter Zinn, directs the sale of said undivided half of said tract of land by a special commissioner therein appointed. The deed from Peter Zinn to said Thomas Corder and Elizabeth Corder bears date on the 8th day of June, 1850, and in the case of Breckenridges v. Todd, 3 T. B. Mon. 52, it is held that the date of a deed is presumed to be the time of its delivery. See, also, Renick v. Ludington, 20 W. Va. 512, 567. As the law then was at the time of the execution and delivery of said deed, and as it remained until the 1st day of July, 1850, when the Code of 1849 took effect, an estate given to a wife and husband was not a joint tenancy in such an estate. Each party took the entirety, and the survivor took the whole. See the case of Thornton v. Thornton, 3 Rand. (Va.) 179. As to the deed from said Thomas Corder to his wife, while inoperative and void at law, it was nevertheless valid in equity and conferred upon said Elizabeth Corder a good and equitable estate, which in all cases could be enforced against the husband by a court of equity. See McKenzie v. Railroad Co., 27 W. Va. 306. And such would be the effect of said deed, if free from fraud and valid in other respects.

Again, as to the character of the title acquired by husband and wife where a deed was made to them, as in this case. In the opinion rendered by the court in Bank v. Gregory, 49 Barb. 155, JOHNSON, J., says: "To my mind it is a very clear proposition that our recent statutes for the better protection of the separate property of married women have no relation to or effect upon real estate conveyed to husband and wife jointly. This was so held by SUTHERLAND, J., at special term, in Goelet v. Gori, 31 Barb. 314. In such a case the wife has no separate estate, but is seised with the husband of the entirety, neither having any separate or severable part or portion, but the two, as one in law, holding the entire estate. They hold thus, not as joint tenants or as tenants in common, but as tenants by entireties; and the same mode of conveyance which would make two other persons joint tenants will make the husband and wife tenants of the entirety,"—referring to Jackson v. Stevens, 16 Johns. 110; Rogers v. Benson, 5 Johns. Ch. 431; and also to 2 Kent, Comm. 132, where it is said: "If an estate in land be given to the husband and wife, or a joint purchase be made by them during coverture, they are not properly joint tenants, nor tenants in common, for they are but one person in law, and cannot take by moieties. They are both seised of the entirety, and neither can sell without the consent of the other, and the survivor takes the whole." In 1 Bish. Mar. Wom., under the head of estates by entireties, (section 621,) the author says: "If the husband undertakes to aliene the estate, it is nugatory as against the wife, who may enter as survivor on his death." The books contain plenty of expressions from which it would even seem further to follow that the sole conveyance of the husband, whether in terms broad or narrow, carries with it no estate, and is a mere nullity, not only as against the wife who did not join in it, but also as against himself. In section 622, in speaking of the liability of such estate for the husband's debts, the author says: "For the same reason that the husband's life interest in the estate under consideration may be conveyed by his deed, it may also in just principle be seized by his creditor for his debt. There are some doubts and contradictions in the books on this point, but such is believed to be the more prevailing doctrine on authority. And it has been held that in such a case the sale of the husband's interest for his debt takes from him all his estate, whatever it may be, in the land." Now, then, if these authorities propound correctly the law upon the subject under discussion, as it existed previous to July, 1850, the commissioner manifestly erred when he reported that the defendant Thomas Corder was the owner of a moiety of 168½ acres conveyed to him and Elizabeth Corder, his wife, and her heirs, by Peter Zinn. Said Thomas Corder is entitled to a life-estate in said land, and, in the event of surviving his said wife, to the entire estate, but, in the event she survives him, the estate would go to her. Whatever estate, then, the said Thomas Corder may eventually have in said 168½-acre tract of land, he surely did not own an undivided half of said land in fee-simple, as the plaintiff claims in his bill he owned, and as

Digitized by Google

a commissioner found in his report he owned, and I am of opinion that the court erred in confirming said report and directing a sale of the interest so ascertained in satisfaction of the plaintiff's claim.

The appellants assign as an additional error that "the court erred in not directing an inquiry as to the lands of the co-surety Douglas, attached in the cause," but, so far as appears from the allegations of the bill or the statements of the answers, no claim is made that said Douglas had or owned any land; neither does it appear from the allegations of the bill that the attachment was levied upon any other lands than those of Thomas Corder, and, under this state of pleadings and circumstances, I do not regard it as error in the court not to direct an inquiry as to the lands of said Douglas. But, on account of the errors hereinbefore mentioned, I am of opinion to reverse the decree complained of in this cause, and the same is remanded to the circuit court of Barbour county for further proceedings to be had therein, and the appellee must pay the costs of this appeal.

SNYDER, P , and BRANNON, J., concurred. GREEN, J., absent.

(32 W. Va. 211)

BUSHONG v. RECTOR.

(*Supreme Court of Appeals of West Virginia.* March 4, 1889.)

HUSBAND AND WIFE—EJECTMENT—EQUITY.

1. A wife living with her husband on land, and claiming the land as her separate estate, under a right derived from a person other than her husband, prior to commencement of the action, cannot be turned out of possession by a writ of possession in an action of ejectment against her husband to which she was not a party. In such case she is, as to her claim, a person distinct from her husband, and must be made a party to the action, like any other person, in order to bind her by the judgment.

2. In such a case equity has jurisdiction by injunction to restrain the execution of the writ of possession as to her. The parties will be left without prejudice from the decree to test their titles at law.

(*Syllabus by the Court.*)

Appeal from circuit court, Wood county.

R. Heber Smith, for appellant. *John A. Hutchinson*, for appellee.

BRANNON, J. In July, 1882, Enoch Rector brought an action of ejectment in the circuit court of Wood county against Daniel Bushong and O. M. Bushong, for 100 acres and 31 poles of land, and in November, 1883, recovered judgment and issued a writ of possession, when Elizabeth Bushong obtained an injunction against the enforcement of the writ as to her. Rector answered the bill, denying plaintiff's right, and depositions of numerous witnesses were taken, and the court dissolved the injunction and dismissed the bill, reserving right to Elizabeth Bushong to defend or prosecute any right or claim she might have relative to the land in any proceedings at law. The record shows that by deed of May 21, 1880, one Peter Curry conveyed the land to Elizabeth Bushong, who is the wife of O. M. Bushong, which deed was recorded June 3, 1881; and it also shows a deed dated February 16, 1874, recorded April 25, 1882, from Daniel Bushong to Rector. Daniel Bushong was in possession, though not under any title, so far as appears, eight years before he made the deed to Rector, in 1874. The land had belonged to an oil company, which suspended operations and abandoned the land, and Bushong simply took possession of it as if without an owner Rector was owner of $2,000 stock in the oil company, and set up a claim to the land on that account, and sought possession in order to thereby obtain title, as he says. Upon his conveyance to Rector, Daniel Bushong took a lease for one year in writing from Rector, and continued in possession under a verbal arrangement afterwards. He was to pay taxes, and did so for five years, (1867 to 1871,) and handed over to Rector the tax-receipts, which he files in the name of J. S. Hoffman for part of the time, and Imperial & Kanawha Oil Company for part of the time. O. M. Bushong is a son of Daniel, and was living with his father on the land when he married the plaintiff, Elizabeth Bushong, and he states that he and his wife lived there from 1869. He states that Daniel turned over the possession to his wife and himself in 1870, in consideration that they were to support Daniel and his wife. Elizabeth Bushong in one deposition states that she had been in possession since 1870, and, when asked who put her in possession, answered that Daniel Bushong did, under agreement by her to keep him and his wife; and in another deposition stated that Peter Curry put her in possession, and also that Daniel Bushong put her in possession, in consideration that she would keep him and his wife during life, and that under her agreement she had kept Daniel until his death, and was still keeping his wife. The evidence shows that O. M. Bushong recognized himself as a tenant of Rector, though later he repudiated it to Rector, and then he sued. Elizabeth Bushong appeals here for relief against the decree of the circuit court.

The plaintiff complains that she is to be turned out of house and home by a writ of possession upon a judgment in ejectment to which she was not a party. Herman on Executions, 530, says: "Under this writ it is the duty of the sheriff to remove all persons from the premises described in the writ, and all goods and property that may be thereon. The plaintiff must be put into full and complete possession of the premises." Properly understood, this is good law, but we must not be misled by its generality. The writ is only to execute the judgment, and can go no further than the judgment, and this statement must be taken subject to the general rule that a judgment does not bind strangers to it. Freeman on Executions, § 475, lays down the law thus: "The defendant and all the

Digitized by Google

members of his family, together with his servants, employes, and his tenants at sufferance, may be removed from the premises in executing a writ of possession. It has even been held that the defendant's wife must be removed, although she was not a party to the suit, and claimed the premises as her separate estate. Notwithstanding this decision, we doubt whether a wife, or any other member of the defendant's family not a party to the suit, can lawfully be dispossessed of his or her separate estate, unless possession was acquired by them after the institution of the action. No person in possession of the premises, claiming title thereto at the commencement of the action, can be dispossessed unless he was made a party to the suit, so as to be bound by the judgment; nor can the tenants or agents of such person be lawfully removed, although their entry was subsequent to the institution of the action. On the other hand, all persons acquiring possession from and under the defendant or defendants, during the pendency of the action, whether as vendees, lessees, or otherwise, are bound by the judgment, and should be removed under the writ. Persons acquiring possession of the defendant prior to the suit cannot be dispossessed, unless they were made parties defendant. All persons entering upon the possession of the property *pendente lite* are presumed to have entered under the defendant, and *prima facie* are liable to be turned out by the writ. It is obvious that the temptation to render the plaintiff's action fruitless, by turning over the possession to one not a party to the suit, is very great. All courts will exercise great caution in considering the right of a person to retain possession after the judgment, when it is clear that he entered *pendente lite*. His right will always be denied, unless it is clear that he did not enter under the defendant, nor by any collusion with him. Mere tricks and devises to rob the plaintiff of the result of his litigation will not be encouraged. But, if it clearly appears that any person has entered subsequently to the institution of the writ, not under the defendant, but in his own right, claiming adversely to the defendant, then the officer cannot lawfully dispossess such person." Section 35, c. 90, Code 1887, provides that a judgment in ejectment "shall be conclusive, as to the right of possession established in such action, upon the party against whom it is rendered, and against all persons claiming from, through, or under such party by title accruing after the commencement of such action." It does not affect persons not parties, claiming by title existing before the action, nor any one not claiming by, through, or under the defendant, a stranger in title to the defendant in the action. Law and reason and justice declare this. And a wife is as to her separate estate a stranger to her husband,—a wholly distinct person. Our statute giving her capacity to take and hold property as her separate estate as if she were a single woman has, as to such property, dissolved the unity of person of man and wife which existed at the common law. Code, § 3, c. 66. Now, suppose Elizabeth Bushong as in possession under a contract with Daniel Bushong. That contract, though with a defendant, was long before the commencement of the action, and her right to possession under it could not be affected by the action under the law above given. Then, suppose her in possession under her deed from Curry. Her title under it was both before the commencement of the action, and not under a defendant, but by a distinct claim, and it could not be affected by the action. Before the suit she is living on the land, with her deed in her pocket, conferring a separate estate, or a claim thereto; and the fact that she was living with her husband, though he were Rector's tenant, would not render her any the less in the possession for the purposes of this case; her possession was sufficiently actual to protect it from ouster by the writ. If a son had had a title to the land, distinct from his father, could he have been thrown out under the judgment to which he was no party? No more could the wife, for as to her separate estate she was just as distinct a person as the son. The Pennsylvania case (Johnson v. Fullerton, 44 Pa. St. 466) criticised above by Freeman is not supported by other cases, and is illogical, in view of the entire separation of the wife from the husband as to separate estate.

Before binding her by a judgment, she ought to have an opportunity to defend her property, and be given a day in court, and ought not to be precluded on the ground taken by the Pennsylvania case, that her husband should have defended on her right. And it is not consonant with the principles stated by Judge WOODS in Hughes v. Mount, 23 W. Va. 130, which, I think, substantially rule this case. In that case Mount and his wife lived on the land, he as tenant of Hughes and Murphy, she having deeds from other parties. Hughes and Murphy recovered against the husband a judgment in unlawful detainer, and under a writ of possession in it turned husband and wife out. She, finding no one in the house, re-entered into possession, and was sued in unlawful entry and detainer. Judge WOODS says that the possession of the plaintiffs assumed that the wife re-entered unlawfully and forceably, and that before the writ was executed possession was not in the defendant, but in her husband, and that by executing the writ against him the possession of the wife, if any she had, was divested and transferred to the plaintiff. This assumption he did not sustain. He said the questions whether she had a separate estate, and was entitled to the possession, were questions to be considered (in the second action of unlawful entry, as I understand it) in determining whether the writ, and all proceedings under it, were not, as to her, mere nullities, and whether the act of dispossessing her husband was not, as to

Digitized by Google

her, mere lawlessness, not depriving her of her right to reclaim her property by the right of lawful re-entry. He further said: "If, as the defendant claims, it be true that the land belonged to her in fee-simple as her separate estate, then said B. F. Mount had no interest therein, and the plaintiffs by the deed from Commissioner Sands acquired no title thereto. If said land, at the time of said sale under said decree to plaintiffs, so belonged to defendant, B. F. Mount could neither sell nor lease the same, or do any other act to deprive her of the possession and enjoyment of said land without her consent. If, under such circumstances, her husband undertook to lease her land from a stranger, he could acquire no possession by the lease, nor could he, at the expiration of his lease, surrender to his pretended landlord a possession which he has never acquired, nor could the landlord recover from him a possession he never had, and which he never transferred to his tenant. Whether such a state of facts exists or not are questions of title to be determined at the trial. It is true that if a husband should undertake to lease a wife's land from a stranger, that he could not resist his landlord's action, but it will scarcely be contended that the judgment recovered against him could be satisfied out of his wife's land, or that it could confer upon him any right to the possession thereof." So I hold that whether Mrs. Bushong's title was good or bad, whether it was better or worse than Rector's, whether he or she was entitled to the sole possession, are questions to be tried in a proper proceeding, and her right and her actual possession are not to be dissipated by a writ of possession against another, an absolute nullity as to her, but she is entitled to a day in court to have her rights weighed in the balance of the law, and passed on by due process of law by trial and judgment. The law gives her an advantage in an action of ejectment as one in possession which she can only lose by due legal process. Rector must bring an action against her, she being in possession.

Appellees' counsel urges that the appellant's deed from Curry is trumped up with fraudulent intent, as the work of a conspiracy to defeat the plaintiff's action. The answer is that before the action began she was on the land by a deed dated, acknowledged, and recorded before the action. If it had been executed after the action began, there might be force in the claim that it was born but to defeat the fruit of the action,—we might consider whether such was its purpose; but I fail to see how we can consider this matter, seeing that her possession and claim, be it good or bad, existed before the action. How can it be said it was originated to defeat an action not in being? I quote at this point Freeman's text: "No person in possession, claiming title at the commencement of the action, can be dispossessed unless made a party to the suit." If next it be said that the plaintiff's claim was conceived in fraud, to defeat, not the action of Rector, but his title, and to secure the land from one who had no title, Curry, (but what his right was does not appear,) I respond, that is a question, whatever be the effect of it, if true, to be determined in a suit to which plaintiff and defendant are parties. Therein the rights of the parties may be heard. This is but an injunction obtained by a wife to save her from expulsion from her home under a writ of possession against her husband, in an action to which she was not a party, she not being therein simply and only as a wife, but having a claim to the land independent of her husband; and we hold with her on the fact that she was no party to the action, leaving the titles of plaintiff and defendant to be litigated in another proceeding, without prejudice from the court's decree in this case.

I do not see that the principle of estoppel urged by appellee, by which a tenant and those claiming under him are hindered from denying the landlord's title, as expounded in Emerick v. Tavener, 9 Grat. 280, applies to this case. Tavener leased land to Emerick, and afterwards Emerick conveyed a portion to Alton. It was held that, in an action by Tavener against Emerick and Alton, that not only was Emerick estopped from setting up title against Tavener until he restored possession or disclaimed to hold as tenant, and brought home to Tavener notice of his disclaimer, but, further, that Alton, by entering as purchaser from Emerick, became subject to the same relations held by Emerick to Tavener, and neither could set up adverse title. But there Alton entered under a conveyance from the tenant, claimed under him; here Mrs. Bushong claims under, not her husband, but Curry. As far as her claiming under Daniel Bushong is concerned, so far as the evidence shows, the date of his giving her, or her and her husband, (whichever it be,) the possession, under agreement to keep Daniel and his wife, was in 1870, and Daniel did not become Rector's tenant till 1874, and her right and possession under Daniel as it existed before his lease of Rector would remain so after that lease, and not fall under the principle of Emerick v. Tavener, because earlier in date, and her continuing there afterwards could not change the state of things existing before; and, moreover, her presence on the land as the wife of O. M. Bushong, living with Daniel, the father, would not make her a subtenant, or hold a condition which would forbid her from acquiring from another a hostile title, her presence there being attributable to her duty of residing with her husband. It would make her a member of his family, and liable to go off under the writ, if she were no more than a member of the family, and had no separate claim, but would not establish a relation of landlord and tenant. The case cited by appellee's counsel (Higginbotham v. Higginbotham, 10 B. Mon. 369) does not apply. Sally Clarke, as the judge there says, merely resided with the defendant, by his permission, without any interest in or title to the prem-

Digitized by Google

ises,—a part of his family,—and as such the writ authorized the sheriff to turn her out. Mattox v. Helm, 5 Litt. 186, does not apply, because the parties there in question entered without title under Elliott, the defendant, and the court said they were mere tenants at will under Elliott, having no fixed right or term, and were liable to go out, no matter when they entered. This is consistent with the rule as stated by Freeman, that a writ of possession would turn out mere tenants by sufferance of the defendant in the writ. Sinclair v. Worthy, 84 Amer. Dec. 357, was a mere refusal of the court to stay a writ of possession on the suggestion that title was in some one else. It does not apply here. That an injunction will lie to enjoin expulsion from one's home under a writ of possession against one not a party to it is, we think, clear. Goodnough v. Sheppard, 28 Ill. 81; Stewart v. Lavender, 30 Ark. 594; Herm. Ex'ns, 615. The decree of the circuit court is reversed, and the injunction as prayed for in the bill is to be perpetuated, with costs to Elizabeth Bushong in both courts, without prejudice from this decree to the parties from asserting any title to the land they may have in any other suit.

SNYDER, P., and ENGLISH, J., concurred. GREEN, J., absent.

(32 W. Va. 239)

DAVIS v. TOWN OF POINT PLEASANT.

(*Supreme Court of Appeals of West Virginia.* March 4, 1889.)

TOWNS—CORPORATE LIMITS—TAXATION.

1. It is not necessary to the validity of an order made by the circuit court, under chapter 47, § 49, Code 1887, approving a change of the corporate limits of a town, that the order should show on its face that the town contains less than 2,000 inhabitants.

2. Where a town, under said chapter of the Code, extends its corporate limits so as to include agricultural or farming lands, and imposes municipal taxes on them, though they are not laid off into streets and alleys, and not laid out in lots, and are not so near streets or alleys as to be directly benefited by them or derive any peculiar benefit from the incorporation, the courts cannot affect its action or prevent such taxation.

(*Syllabus by the Court.*)

Appeal from circuit court, Mason county.

Gunn & Gibbons and *Tomlinson & Wiley*, for appellant. *Knight & Couch* and *W. A. Quarrier*, for appellee.

BRANNON, J. On 6th of September, 1886, the circuit court of Mason county made the following order: "*Ex parte* Town of Point Pleasant, in Mason county. This day came the town of Point Pleasant, in Mason county, by D. W. Polsley, its attorney, and filed a certificate of the council of said town, showing that a change had been made in the manner required by law in the corporate limits thereof, and that by such change the said corporate limits are as follows: Beginning," etc. "It is therefore ordered that said change in said corporate limits be, and the same is hereby, approved and confirmed; and the clerk of this court is ordered to deliver to the said council a certified copy of this order as soon as practicable after the rising of this court." In September, 1887, William E. Davis filed a bill in the circuit court of Mason county, setting forth that the town of Point Pleasant was incorporated by an act of the general assembly of Virginia passed 19th December, 1794, with certain given bounds, which remained the same until the order of the circuit court above given, and that the plaintiff was owner of a tract of 260 acres of farming land above said town; that between this farm and the town are the large farm of Charles Waggener and the large farm of Henry J. Fisher; that there was not, prior to 6th September, 1886, and was not at the filing of the bill, any house or other building on plaintiff's land, nor did any person live on it; that there were no streets, roads, or alleys from said tract of land to said town or elsewhere, except the old county road up the Kanawha river, and the Clarksburg road, which runs through plaintiff's farm about 100 yards; that no portion of said tract has ever been laid off or offered for sale as town lots, and there were no streets or alleys through said land, but the same was fenced and used purely as a farm. The bill further stated that the farms of Fisher and Waggener were practically in the same condition, except that there was a dwelling on each, and the farm of Waggener was occupied by Waggener and family, and the Fisher farm by a tenant, and that neither of them had ever been laid off into lots, streets, or alleys, or offered for sale in such divisions; that by the judgment and order of said circuit court at the instance of said town, on the 6th of September, 1886, the boundaries of said town were extended so as to include the Fisher farm, the Waggener farm, the MacCulloch farm, and the farm of the plaintiff, and also a large number of acres of mountain land, some farming land above the old town on the Ohio river, and the banks and bed and running stream of the Ohio river fronting the new and old town boundary, and one-half of so much of the Kanawha river as fronts the new and old boundary; that the present boundary would contain ——— acres, capable of containing a city population of 150,000; that Point Pleasant had been incorporated since 1794; that its population by the last census was 1,086, and in 1870, 773. The bill then alleged that the object and intent of the authorities of said town in so enlarging its boundaries, and including farms, mountains, and rivers upon which there were no population or town lots, or streets or alleys, was to embrace property and lands formerly outside the corporate limits, and to tax them for the purpose of improving property inside the town, without rendering any service or benefit to the new subjects of taxation; that the town had never made any effort to acquire streets or alleys over or through the plaintiff's farm, or the Waggener, Fisher, or MacCulloch farms; that said town had levied

Digitized by Google

for the year 1887 a tax of $181.50 on plaintiff's farm, and placed the same in the hands of its officer for collection. The bill charged that the act of the town council in so enlarging its boundaries for the purpose of taxing said farms, rivers, and mountains as town property was fraudulent and void. Also that it was *ultra vires* for the town, even if the extension be lawful, to impose taxes on his land until it acquired streets and alleys leading from the old town to the plaintiff's farm, and until it acquired streets and alleys through his farm, and worked and repaired the same, and until the blessings and benefits of the town government should be extended over said lands; and that the order of the circuit court enlarging it was null and void. The prayer of the bill was that the town be enjoined from collecting any tax on plaintiff's farm, and that the order of the court enlarging the town boundaries be vacated as illegal and void. An injunction was granted. Plaintiff filed an amended bill, which seems to be unnecessary, as alleging mere matter of law or argument. It alleges that the power to create, alter, or amend the charter of a municipal corporation is a high prerogative act of sovereignty; that by the constitution of this state the power to do so is vested in the legislature, except charters of a town less than 2,000 population, in which case the power is vested in the circuit court, and, if the town have more than 2,000 inhabitants, the court would have no jurisdiction; and that, to render the judgment and order of the circuit court valid, there must be a judicial finding on the face of the order that the village has less than 2,000 inhabitants, and in its absence the order is on its face void; and charged that this order was void.

After an order of the court overruling a motion to dissolve the injunction, the town filed its answer. This answer admitted the facts alleged in the bill, except that it denied "that there was not prior to that date, and is not now, any house or building on said land, nor did nor does any person live upon said land;" and averred that at the date of the order of extension, and for years before, there was one small dwelling in which a family resided on plaintiff's land. It admitted that it was true that there were no streets, roads, or alleys leading from said land to Point Pleasant, or elsewhere, except the county road up Kanawha river, and the Clarksburg road. It denied that no portion of said tract had ever been laid off into town lots, without any specification further than the simple denial. It admitted that plaintiff's land is fenced up and used as farming lands, and that the farms of Waggener and Fisher were practically in the same condition, except that there were some 15 dwelling-houses on the south portion of the Waggener farm, which portion is laid off into streets, and that more than 20 families occupy the buildings. It averred that a portion of the Waggener farm was sold, and laid off into lots, streets, etc., and had been built upon, and was then no part of the farm. It denied that the object of the extension was to embrace property and lands to tax them to improve property inside the town, without rendering it any benefit; and averred that since the extension the town had expended $2,500 in improving a street leading to and through plaintiff's land, known as the "Clarksburg Road," mentioned in the bill, and was contracting for improving a street leading up Kanawha river, to and through plaintiff's land. It denied that the town had never made any effort to acquire streets or alleys over or through plaintiff's land, or the Fisher, Waggener, or MacCulloch farms, but that before the suit commissioners had been appointed and had laid off a street through the Fisher and Waggener lands, to intersect the Clarksburg road at or near plaintiff's land, and was only waiting the termination of the suit to open and construct said street. It denied that the act of extension was fraudulent and void, and that it was *ultra vires* to assess taxes until the town acquired streets and alleys leading from the old town to plaintiff's farm. It denied that it had not pursued the statute, and that the order of extension was void. The answer averred that a large portion of lands taken into the town by the extension had been laid off into streets, and worked and improved, and a goodly number of lots laid off had been sold, and 15 new buildings erected thereon, and others being erected. The answer states that there were but five or six vacant lots within the old boundary, and those not for sale at any reasonable price; and that the number of inhabitants taken in by the extension was about 600. It denied the legal conclusion of the amended bill that the circuit court order was void.

There was a general replication to this answer. No evidence was taken. The case was heard on the bill, the answer, general replication, and a renewed motion to dissolve the injunction, and a decree pronounced perpetuating the injunction, and vacating the order of the circuit court enlarging the boundaries of the town, and the town appeals.

By section 47, c. 47, Code, it is provided that no special act shall be passed, incorporating or amending the charter of any town containing a population of less than 2,000. By section 48 it is provided that any five freeholders desiring to change the limits of such town may petition the council, setting forth the change proposed, and the council shall order a vote as directed in that section, and, when the result of the vote is in favor of the change, the council shall certify the same to the circuit court, which shall enter an order in substance as provided in that section, which order must approve and confirm the change, and direct a copy of the order to be certified to the council, and from the date of the order the corporate limits of the town shall be as set forth in such order. The plaintiff contends that, as the council

Digitized by Google

and circuit court have no powers under the statute to alter the charter or limits of a town, except in cases of towns with less population than 2,000, the order of the circuit court enlarging the bounds of Point Pleasant is void, because it does not ascertain or declare in any manner that the population was less than 2,000, that being a jurisdictional fact. The circuit court is a court of general jurisdiction, and, when proceeding in the exercise of its ordinary common-law powers, it is presumed to have jurisdiction of the particular case; and, if the contrary be alleged, it must be proven, (Mayer v. Adams, 27 W. Va. 251; Hall v. Hall, 12 W. Va. 1,) and proven by the record, (Wandling v. Straw, 25 W. Va. 692.) With inferior courts of limited jurisdiction the rule is reversed, and their jurisdiction must appear affirmatively; and in Judge GREEN'S language, in Mayer v. Adams, supra: "Even though a court be a superior court of general jurisdiction, still, when the particular proceedings are not according to the course of common law, but under a statute giving a summary remedy, the record on its face should show generally that the particular case comes within the statute, and that the statute has been followed." See Harvey v. Tyler, 2 Wall. 342; Thatcher v. Powell, 6 Wheat. 119; 7 Rob. Pr. 16; Pulaski Co. v. Stuart, 28 Grat. 872. We do not deny these principles in proper cases, but do not think them applicable here. The town council, under the statute, exercised the first and most important function in the proceeding. Before entertaining the petition and ordering a vote on the question of change of boundary, it should have been satisfied that the town contained a population of less than 2,000. It must be taken that it did so. The act requires the result of the vote to be certified to the circuit court, and without requiring the court to make any inquiry, give any notice or citation, or take any further steps in the matter, it declares that it "shall thereupon enter an order in substance as follows: A certificate of the council of the city (or town or village, as the case may be) of ——— was this day filed, showing that a change has been made, in the manner required by law, in the corporate limits thereof, and that by such change the corporate limits thereof are as follows: Beginning, etc. It is therefore ordered that said change in said corporate limits be, and the same is hereby, approved and confirmed, and the clerk of this court is directed to deliver to the said council a certified copy of this order as soon as practicable after the rising of this court." The court is required to enter that order. Nothing further is required of it by the statute. It has but to see that the certificate from the council is such as the statute requires to enable it to embody in its order the matter required by the statutory form. The specification by the statute of a particular order embodying particular matter makes it all sufficient, and dispenses with its showing on the face of its order the population of the town, if without it the court would be required to do so. The action of the circuit court is purely ministerial, and in a line specified by the statute, and *ex parte*, not judicial or *inter partes*.

Has the town the right to tax this farm? Where the corporate limits include rural or agricultural lands, never platted into lots, not needed or capable of use for town lots, and receiving no direct benefits from the municipal government or expenditures, questions have arisen in the courts as to the right to subject such lands to ordinary municipal taxation. The power to fix or enlarge the corporate limits is not disputed, but it is the power to require such lands to contribute to the municipal treasury that has been controverted. In Kentucky, the principle has been adopted that the "courts will, in such cases, control and limit the taxing powers to that point or line where it ceases to operate beneficially to the proprietor in a municipal point of view." The general rule there is that the right to tax for real municipal purposes extends only to such as has been surveyed and platted into lots, but the right to tax may, under circumstances, extend to property which has never been platted. Cheaney v. Hooser, 9 B. Mon. 330; Sharp v. Donavan, 17 B. Mon. 177; Covington v. Southgate, 15 B. Mon. 491. 2 Dill. Mun. Corp. § 794. Iowa has followed the Kentucky rule in several cases. Morford v. Unger, 8 Iowa, 82; Butler v. Muscatine, 11 Iowa, 433. These cases proceed on the theory that no benefit accrues to the owner of the land from the corporation; but, as Justice MILLER says in Kelly v. Pittsburgh, 104 U. S. 78, of the owner of the farm, it may be true he does not receive the same amount of benefit from some or any of these taxes as some living in the heart of the city. It is probably true that his tax bears an unjust relation to the benefits received. But who can adjust with precise accuracy the amount which each individual in an organized civil community shall contribute to sustain it, or insure absolute equality of burdens and fairness in their distribution? We cannot say judicially that Kelly received no benefit from the city organization. These streets, if they do not penetrate his farm, lead to it; The schools may receive his children. But it is plain that the Kentucky and Iowa rule is, as Judge Dillon in Municipal Corporations, § 594, and Judge Cooley in Constitutional Limitations, 501, remark, arbitrary, and the obstacles in the way of the practical application are almost insurmountable. Each case would turn on its own facts, and be a rule only unto itself. There is no fixedness of principle in it. It would be productive of endless litigation.

It would run counter to section 31, c. 47, Code 1887, that the tax levy shall be "on all real and personal estate therein (in the town) subject to state and county taxes," leaving it to the courts to exempt some property, while other property is taxable. The rule has been repudiated in Mississippi, Martin v.

Digitized by Google

Dix, 52 Miss. 53; also in Maryland, Groff v. City, 44 Md. 67; also by United States supreme court in Kelly v. Pittsburgh, 104 U. S. 78; also in Nebraska, Turner v. Althaus, 6 Neb. 54. I think it contrary to the principle of Powell v. City of Parkersburg, 28 W. Va. 698. Though in that case this particular question and the conflicting authorities upon it were not discussed, yet it was an effort to release from city taxes three acres of land used for agricultural purposes, not laid off into streets and alleys and lots, or in any manner connected with city property, and the court held the broad principle that the city could, under chapter 47 of the Code, levy taxes upon all real and personal property within its corporate limits. It seems that under this extension Point Pleasant has an area of 1,228 acres. It seems hard that the plaintiff's farm, separated from the town proper by two other large farms, and not likely to derive any benefit from inclusion within it, should pay municipal taxes. Objectionable as is this practice of extending corporate limits over large areas of agricultural lands, apparently, in some instances, for no other purpose than to gather taxes, yet the courts are powerless to afford relief. It is the voice and power of the people applied under authority granted them by the legislature, and the only relief must come from better legislation on the subject. The legislature has delegated to the town council and people this function. It is done, virtually, by the legislature. The appellant insists that the sole object of the extension was the imposition of taxes, which he denominates "fraud," and asks relief under that head. But fraud cannot be imputed to the legislature in the passage of an act, so as to overthrow it. Cooley, Const. Lim. 187, and note 1. Neither can a court impute fraud and corrupt intent to council and people in acting under color of law. 1 Dill. Mun. Corp. § 311. For reasons stated in the opinion in Powell v. Parkersburg, supra, I think equity had jurisdiction in this case. The decree of the circuit court is to be reversed, the injunction dissolved, and the bill dismissed, with costs to defendant in both courts.

SNYDER, P., and ENGLISH, J., concurred. GREEN, J., absent.

(32 W. Va. 328)

POINT PLEASANT BRIDGE CO. v. TOWN OF POINT PLEASANT.

(*Supreme Court of Appeals of West Virginia.* March 4, 1889.)

TOWNS—CORPORATE LIMITS—TAXATION.

1. It is not necessary to the validity of an order of the circuit court under section 49, c. 47, Code 1887, approving a change of the limits of a town, that the order show on its face that the town contains less than 2,000 inhabitants.

2. A town may, under said chapter of the Code, extend its corporate limits so as to include a railroad bridge across the Ohio river, and impose municipal taxes on such bridge. Such taxation is not *ultra vires*.

(*Syllabus by the Court.*)

Appeal from circuit court, Mason county.

Gunn & Gibbons and *Tomlinson & Wiley*, for appellant. *Knight & Couch* and *W. A. Quarrier*, for appellee.

BRANNON, J. The Point Pleasant Bridge Company exhibited its bill in the circuit court of Mason county against the town of Point Pleasant, complaining and stating that the original incorporation of said town in 1794 did not include the Ohio river; that the plaintiff, as a corporation, was owner of a railroad bridge across the Ohio, situate entirely without the bounds of said town at the time of its construction, except some of its approach; that immediately after its construction the town enlarged its limits so as to embrace therein all the river opposite the town to low-water mark on the Ohio shore, and include all of the bridge that was in West Virginia, as would appear from a copy of an order of the circuit court enlarging such limits, (see it in case of Davis v. Pt. Pleasant, ante, 228, decided this term;) and that the change in boundary, so as to embrace the river, was not made in good faith, nor for improving the new territory in front of the town, nor for legitimately benefiting the territory in the old charter, but falsely and fraudulently, for the transparent purpose of raising revenue on property outside the corporation, not in any way benefited or capable of receiving benefit from the change, so that the revenue might be used to improve property within the old charter; that the town had imposed and had in the officer's hands for collection $——— taxes for 1886, and $253.63 for 1887. Plaintiff averred: (1) That the power to levy taxes by a town must be based on "benefits, both actual and prospective, confined upon the taxed property, rendering it not unreasonable that the municipal government should be extended over it." (2) That the bed of the Ohio river could not possibly be laid off into lots or streets, and that the town had not the right, if it were possible to do so, to lay out the bed of the river into lots, or extend its streets into it, because it would obstruct navigation, and appropriate the river to purposes which were never intended; that the state of Virginia never parted to any one with title to the soil under the Ohio; that plaintiff had acquired from West Virginia and the United States authority to build its bridge; that defendant could not, without the consent of the state, extend its limits over land belonging to her, nor tax a bridge on land belonging to the state. (3) The plaintiff could never use its right of way across the river as city property, and could not receive any profit from it as such. (4) The town does not light the bridge; furnished no police for its protection. (5) That the taxation of the bridge was *ultra vires*, not as required by law. (6) That the extension was fraudulent and void. (7) That in making the extension the town did not comply with the law, and the extension was void. (8) That the order of court

Digitized by Google

extending the town was not made till September 6, 1886, yet the town was collecting taxes for 1886. The bill asked an injunction to restrain collection of the taxes, and the vacation of the order of the 6th of September, 1886, extending the town. An injunction was granted. An amended bill charged that the power to create, alter, or amend a municipal charter was a high prerogative act of sovereignty; that the power to do so is vested in the legislature, except in towns of less than 2,000 population, in which case the power is in the circuit court; and that, to render the order of the circuit court valid enlarging a town, there must be a judicial finding on the face of the order that the town has less than 2,000 inhabitants, otherwise the order is void. It charged that, as the order in this case had no such finding, it was void. A motion to dissolve the injunction was overruled.

The answer of the town alleged that the Ohio river was within the bounds of the old charter. It denied that the extension was made in bad faith, for fraudulent purpose, as alleged in the bill. It denied all allegations of the bill that the change was made only to collect taxes, and alleged that the town had spent $2,500 in improving streets, outside the old town, leading to the depot, where passengers and freight are received to be carried over the bridge, and that other improvements had been made outside the extension. It denied the legal propositions of the bill, and that it furnished no police to protect the bridge. It asserted its right to tax, and contended that the order of the circuit court was valid. It alleged that the bridge was completed in 1885, and the plaintiff refused to give it in for taxation, knowing that it extended from the old corporation to the middle of the Ohio, making at least half of the bridge liable. It asserted that the old town had but six vacant lots, and extension was necessary, and many lots had been laid out and improvements made outside the old limits within the extension. The cause was heard on the bill, amended bill, exhibits, answer, replication, and the injunction was by decree perpetuated, enjoining the town from hereafter assessing taxes on the bridge, and vacating the order of the circuit court approving the extension of the corporate limits, and the town appealed.

This court holds in this case, as in the case of Davis v. Point Pleasant, that the order of the circuit court is valid. As to this point reference is made to the opinion in that case delivered at this term. Can the town of Point Pleasant extend its limits over the Ohio? We think it can. The territorial jurisdiction of the state extends to low-water mark on the northwestern side of the Ohio, under the act of cession by Virginia to the United States of the north-west territory. Handly's Lessee v. Anthony, 5 Wheat. 374; Garner's Case, 3 Grat. 655; State v. Plants, 25 W. Va. 119; Ravenswood v. Flemings, 22 W. Va. 52. The legislature, representing the sovereignty of the state over its territory, has by the statute (chapter 47, § 48, Code 1887) delegated to municipal corporations the power of extending their limits without any limitation as to the location or character of the territory over which the extension may run, and inferentially and logically it may extend over any territory of the state, so that it go no further, whether such territory be land not covered with water, or rivers navigable or innavigable. Of course, as to navigable rivers, the powers of the town must be subject to the *jus publicum* of navigation. There is great reason why such extension should cover such a river as the Ohio. The exertion of ordinary police functions to suppress disorder, places of dissipation, bad repute, and illicit selling of liquors, and many other ends, render corporate powers there as necessary as on the land. The old charter of Point Pleasant could not, as contended by the town, have extended over the Ohio, as the act of 1794 organizing it enacted that the 200 acres owned by Thomas Lewis at the mouth of Kanawha river, as laid off into lots and streets, should be established as a town. This tract did not cross the river, as the boundaries of riparian owners on the Ohio are limited to ordinary low-water mark. Barre v. Fleming, 29 W. Va. 314, 1 S. E. Rep. 731. The state owns the bed of the river from ordinary high-water mark. Can the town tax this bridge crossing the river Ohio? We think it can,—so much of it as is within this state. It is property within the corporate limits of the town and the jurisdiction of the state. The state constitution as to state taxation declares that "all property, both real and personal, shall be taxed in proportion to its value." This means that all property must be taxed. Railroad Co. v. Miller, 19 W. Va. 408. Section 9, art. 10, of the constitution, provides that "the legislature may, by law, authorize the corporate authorities of cities, towns, and villages, for corporate purposes, to assess and collect taxes." Under this section the legislature has, by section 31, c. 47, Code, directed that the tax levy "shall be upon all dogs in the said city, town, or village, and upon all the real and personal estate therein, subject to state and county taxes." Property subject to state taxation being thus made expressly subject to town taxation, it follows that this bridge is not only liable to taxation for town purposes, but that it must be taxed, the council having no discretion to exempt it, but every tax-paying owner of other property having the right to demand its taxation. That a bridge, though it be across the Ohio, is liable to state taxation, cannot be doubted. Thomson v. Railroad Co., 9 Wall. 590; Railroad Co. v. Peniston, 18 Wall. 29; Lane Co. v. Oregon, 7 Wall. 77. It is conceded, even in Bridge Co. v. Louisville, 81 Ky. 189, which denies the right to a city to tax such a bridge. The United States supreme court, in opinion in Lane Co. v. Oregon, says of this power: "The extent to which it shall be exercised

Digitized by Google

the subjects upon which it shall be exercised, are equally within the discretion of the legislatures to which the states commit the exercise of the power." Towns are in a material sense a part of the general machinery of the state government, auxiliaries of that government, performing within limited districts various important functions helpful to the general order and welfare of the state, and the power of taxation is essential to their existence and efficiency. This taxing power vested in them, so far as the state has delegated it to them, is but a part of the state's taxing power, partakes of the nature of the source from which it emanates, springs from its sovereignty as to taxation, and is justified by the same necessity in legal contemplation. Having unlimited power to tax, it can retain a part, and delegate to a municipality a part of its power, and has done so. The appellee cites with confidence the case of Bridge Co. v. Louisville, supra. One of the points of its syllabus as to a bridge over the Ohio is: "Appellant's bridge is not subject to taxation by the city of Louisville. A city has no power to tax property which derives no benefit from its government." This holding is based on several decisions in Kentucky, holding that farming lands within towns, but not laid off into lots, and through which there were no streets, and not near enough to the occupied parts of the town and streets to be benefited from municipal government, cannot be taxed by the town, and that as no streets or lots can be laid out in the river, and the company cannot use its bridge save as its own property, it does not derive benefit from its use as city property. These cases are based on the idea that the property derives no benefit from the town. This idea is fallacious. The bridge is or may be in many way ways benefited by town authority. Its police protects it from wanton injury, it improves streets leading to stations where passengers and freight are received to pass, or which have passed, over it, and in other ways that may be not always apparent. Some benefit it does and may at any time receive. It may not be benefited as much as some others, but it is impossible to adjust benefits of municipal or any other government equally among all. But, be this as it may, the right to tax does not depend on the presence or absence of benefit to the property taxed from the town government. It arises from the fact that the bridge is property, owned by a private corporation, situate within the town, and liable like an individual's property from that fact to taxation. This court in Powell v. Parkersburg, 28 W. Va. 698, and Davis v. Point Pleasant, ante, 228, (decided this term,) disregarding the question of benefits that may or may not flow to the property from inclusion within the town, holds that all property, real and personal, within a town, is liable to town taxation. The able and lamented counsel for the appellee was able to cite us no other case than the Kentucky case to support him on this point, and I have not myself met with any other. It may be added that the statute regulating assessment of taxes, in section 63, c. 29, Code, requires railroad bridges to be assessed. The fact that the state owns the bed of the river on which the bridge rests, and that there exists a public right of navigation, cannot exempt the bridge. The company obtained from the state and the United States license to build, own, and operate the bridge,—obtained the right of way,—but the bridge is not a part of the state's property, but is the property of the company, separable from the soil for taxation purposes, and not exempt because the bed of the river is exempt. It is the company's property, in its use and occupation, under a mere right of way granted by the state.

As to the charge of fraudulent intent in the extension of the town limits. This charge is denied in the answer, and there is no proof of it. But we cannot as a court impute fraudulent motive to the action of a town council and the people in performing functions authorized by law. 1 Dill. Mun. Corp. § 311; Cooley, Const. Lim. 187, and note 1. The bill alleges that taxes for 1886 were assessed, whereas the order extending did not take effect until September, 1886; but the bill is blank as to the amount of taxes for 1886,—in effect, no allegation as to that matter. The decree of the circuit court is to be reversed, the injunction dissolved, and the bill dismissed, with costs to defendant in both courts.

SNYDER, P., and ENGLISH, J., concurred. GREEN, J., absent.

(32 W. Va. 283)

NEASE, Sheriff, *v.* ÆTNA INS. CO.

(*Supreme Court of Appeals of West Virginia.* March 4, 1889.)

INSURANCE—EQUITY—ESTOPPEL.

1. A doubtful or partial remedy at law does not exclude the injured party from relief in equity.

2. A suit may be maintained in a court of equity by or in the name of the sheriff, under section 15, c. 141, Code 1887, where there is a conflict between two or more execution creditors in respect to the same fund or property, and such suit will avoid a multiplicity of suits.

3. Where a policy of fire insurance provides that the policy shall be void in any case of a transfer or change of title in the property insured, or the foreclosure of a mortgage thereon, the execution of a trust-deed on the property after the insurance was made, under which no sale had been made at the time of the loss, will not avoid the policy.

4. An assignment of a fire insurance policy subsequent to the loss is valid, regardless of the conditions of the policy.

5. When the requirements of the policy make it the duty of the insured to submit, with the proof of loss, a certificate of the nearest magistrate, and a certificate is furnished, to which no objection is made within a reasonable time, the insurer will be estopped from making objections on the ground that it is not by the nearest magistrate.

(*Syllabus by the Court.*)

Appeal from circuit court, Mason county.

Tomlinson & Wiley, for appellant. *Simpson & Howard* and *Gunn & Gibbons*, for appellees.

Digitized by Google

SNYDER, P. The Ætna Insurance Company, a foreign corporation, in July, 1878, issued a fire insurance policy to C. M. Moore for $2,000. Of this amount $1,000 was on the dwelling-house of said Moore, situate on his farm in Mason county, $700 on his household furniture and other personal effects in said house, and $300 on a piano. By renewals from time to time this policy was continued in force until after the said property was destroyed by fire, as hereinafter stated. In October, 1878, said Moore executed a trust-deed upon the land on which said house was situated to secure debts due from him, and between that date and the time the fire occurred said Moore executed several other trust-deeds upon said land, and a number of judgments and decrees for money were recovered against him. In the fall of 1885, a suit in equity was brought in the circuit court of Mason county by Caroline Long against said Moore and others, to ascertain the liens on the lands of said Moore, and subject the same to the satisfaction of said liens. On February 18, 1886, by a consent decree entered in said cause, the liens and their priorities were fixed, the lands ordered to be sold, and a receiver appointed to take possession of the lands, and rent the same until January 1, 1887. The receiver at once took possession of the lands, but Moore continued to occupy and reside in the dwelling-house until after March 19, 1886, on which day the said house and a large portion of the insured property therein were consumed by fire. On the same day, but after the fire occurred, the said Moore assigned his policy and claim for insurance to A. A. Hanly, who, in payment therefor, drew his check for $1,500 on the Ohio Valley Bank, at Gallipolis, and placed the same in said bank, together with an agreement between him and Moore to the effect that said check was not to be delivered to Moore or paid by the bank until Hanly notified the bank that the Ætna Insurance Company had paid to him the amount of said insurance. On March 22, 1886, four executions were issued from the clerk's office of the circuit court of Mason county, and placed in the hands of H. G. Nease, the sheriff of said county. These executions were against said Moore, and in favor of C. P. T. Moore, the executors of John MacCulloch, deceased, and others. On the same day suggestions were sued out on said executions, two of which were served on said A. A. Hanly as garnishee, and the other two on the Ætna Insurance Company as garnishee. On May 19, 1886, the said H. G. Nease, as sheriff, suing at the relation and costs of said C. P. T. Moore, and the executors of John MacCulloch, filed his bill in the circuit court of Mason county against said C. M. Moore, the Ætna Insurance Company, the said A. A. Hanly, and the other execution creditors of said C. M. Moore, in which he set forth the foregoing facts, and charging that said executions were liens on the said insurance fund in the order of their respective priorities, either in the hands of said insurance company, or the said A. A. Hanly as the assignee thereof; and praying that an injunction issue to restrain the payment of said fund to either said C. M. Moore or said Hanly, and that the rights and priorities of the liens of said execution creditors be ascertained, and that the amount due from said garnishees or either of them be fixed, and the same applied to the payment of said creditors according to their respective rights. An injunction was awarded, and issued according to the prayer of the bill. The insurance company demurred to said bill, and filed its answer thereto, in which it denied that any considerable portion of the household property insured by it was in said house at the time of the fire, and destroyed thereby, or that the piano was the property of said Moore; that by reason of the acts and transactions of the insured the said policy had become forfeited and void according to the provisions contained therein, and that the company was not liable to the said Moore or the plaintiff for any part of said insurance; and prays that said policy may be declared void, and all relief denied to the plaintiff. Depositions and other proofs were taken and filed, the demurrer to the bill overruled, and on February 25, 1888, the cause was heard, and a decree entered therein by which it was found and decided that the Ætna Insurance Company was liable on said policy for $1,700, with interest thereon from May 20, 1886, that being the whole amount of the insurance, less the insurance on the piano; and, having ascertained the aggregate of said amount as of the date of the decree to be $1,878.50, the court ordered the insurance company to pay said amount and the costs of this suit to the plaintiff, and referred the cause to a commissioner to report the amounts and priorities of the liens on said fund. From this decree the Ætna Insurance Company appealed.

The first question is the demurrer to the bill. Our statute provides: "For the recovery of any estate, real or personal, on which a writ of *fieri facias* is a lien under this chapter, or on which the judgment on which such writ issues is a lien, or the enforcement of any liability in respect to any such estate, a suit may be maintained either at law or in equity, as the case may require, in the name of the officer to whom such writ was delivered. * * * But any person interested may bring such suit at his own costs, and in the officer's name." Section 15, c. 127, Acts 1882; Code 1887, p. 874. This statute plainly authorizes a suit of this character to be instituted or prosecuted in the name of a sheriff. The only question is whether it should be at law or in equity. The well-settled general rule, that equity has no jurisdiction where there is a plain and adequate remedy at law, does not of itself afford a sufficient test of the jurisdiction; for it is also true that a doubtful or partial remedy at law does not exclude an injured party from relief in equity, and hence a just discrimination becomes frequently a subject of doubt and perplexity. The application

Digitized by Google

of the principle to a particular case must depend altogether upon the character of the case as disclosed by the pleadings. It is safe to say, however, that, where it is doubtful whether or not there is an adequate and complete remedy at law, a court of equity will take jurisdiction. 1 Bart. Ch. Pr. 65, 67; Spotswood v. Higgenbotham, 6 Munf. 313; Swann v. Summers, 19 W. Va. 115. Jurisdiction in equity is sustained where it will avoid a multiplicity of suits, and it has also been sustained where there was a conflict between two execution creditors. Watson v. Sutherland, 5 Wall. 78. It seems to me that these authorities, and others that might be cited, fully sustain the jurisdiction of a court of equity in a suit such as the one at bar. Here we have four execution creditors claiming the same fund; a dispute about that fund, —Hanly, one of the garnishees, claiming that he owed the debtor nothing until the fund was paid to him by the insurance company, and the insurance company, the other garnishee, claiming that it owed neither the debtor nor Hanly; and, besides, the fund was likely to be lost by its payment to the insolvent debtor, and therefore it was proper to come into equity to enjoin such payment, and preserve the fund. The demurrer to the bill was rightfully overruled.

It is contended by the appellant that there is no liability upon it because of the several trust-deeds executed by C. M. Moore on the land upon which the insured property was located, and the decree ordering the sale of said land and placing it in the possession of a receiver. This contention is based upon that provision of the policy which declares that, "in case of any transfer or change of title in the property insured by this company, or any undivided interest therein, or foreclosure of a mortgage thereon, such insurance shall be be void and cease." This objection is fully answered by the decision of this court in Quarrier v. Insurance Co., 10 W. Va. 507. In that case, on page 539, the court says: "If the deed of trust was executed after the policy, it did not violate the provision of the policy; for it was not a sale of the property, or any change of the title, within the true meaning of this provision. For it has often been decided that a mortgage or deed of trust, before its foreclosure, is no alienation or change of title, according to the true interpretation of these words when used in a policy of insurance." In the case at bar, the proof is that no sale of the insured property had been made at the time of the fire, and that Moore, the insured, was then residing in it with his family. The policy provides that it shall not be assignable without the consent of the company, expressed by an indorsement made thereon. The policy in this instance was not assigned until after the loss had occurred and the liability of the company had been fixed. An assignment subsequent to the loss is valid, regardless of the conditions of the policy. Wood, Ins. § 94; Franklin v. Insurance Co., 43 Mo. 491; May, Ins. 468. This is the law, supposing the assignment of the policy by Moore to Hanly was valid and binding; but it was not, because the assignment was not only fraudulent, but conditional, and the condition never was and never will be performed.

It is further contended for the appellant that there was no competent evidence of the loss of the furniture and effects, or of the value of the house destroyed. Soon after the loss occurred, the insured made out proofs of loss in the form required by the policy, stating therein each article destroyed by the fire, and its value. This was furnished to the company, and no objection was ever made to it or any further proof required. It is admitted that, while the proof of loss thus made out is admissible as *prima facie* evidence of the facts therein stated in favor of the company, it is not admissible as proof of such facts, in favor of the insured; but there is other evidence in this case of the loss. C. M. Moore in his deposition says that, immediately after the loss, he made proof thereof, and files a copy thereof with his deposition, which he states to be a true account of the property lost, and its value. This is corroborated by the testimony of Gibbons, who assisted Moore to prepare said proof of loss. Other parts of the record show that the value of the house was from $1,000 to $1,200 at the time it was destroyed by the fire. This, it seems to me, in the absence of any contradictory or rebutting testimony, is sufficient proof of the property lost, and its value.

It is further claimed that the proof of loss was not certified by the magistrate or notary public living most contiguous to the place of loss, as provided for in the policy. As before stated, there was no objection by the company to the proof of loss, or to the certificate attached thereto. In order to take advantage of a certificate of the notary public of this character, the company must seasonably object thereto, specifically denominating the grounds of objection. Wood, Ins. § 417; McMasters v. Insurance Co., 25 Wend. 379. Where a certificate was furnished, but not of the nearest magistrate, and no objection was made on that ground, it was held that the insurer was estopped from proving that the magistrate was not the nearest. Taylor v. Insurance Co., 51 N. H. 50; Wood, Ins. § 416, p. 713, note. Upon the whole record, I have been unable to discover any error to the prejudice of the appellant, and am therefore of opinion to affirm the decree of the circuit court.

ENGLISH and BRANNON, JJ., concurred. GREEN, J., absent.

(32 W. Va. 343)

JONES *et al.* v. GILLESPIE *et al.*

(*Supreme Court of Appeals of West Virginia.* March 4, 1889.)

APPEAL—EFFECT OF REVERSAL.

1. A case in which a decree of the circuit court is reversed upon the facts.

Digitized by Google

2. Where a subsequent decree is based solely upon a previous decree in the same cause, the reversal of the latter will necessarily result in the reversal of the former.

(*Syllabus by the Court.*)

Appeal from circuit court, Wood county.

H. M. Russell and *W. P Hubbard*, for appellants. *Dave D. Johnson*, for appellee D. H. Jones.

SNYDER, P. This is an appeal from two decrees pronounced by the circuit court of Wood county in the consolidated suits of Jones & Haines against R. H. Gillespie, trustee and others, and A. P. Riggs & Co. against John A. Armstrong and others, on July 25, 1885, and March 12, 1887, respectively. Jones & Haines, having become deeply indebted, in the year 1881 conveyed all their property, real and personal, to R. H. Gillespie, trustee, for the benefit of their creditors, and in these consolidated suits the liens on the lands thus conveyed to Gillespie were ascertained and fixed. Among these lands was a tract of 87 acres in Pleasants county, known as "Tract No. 7 " According to the priorities of the liens, it was found that the defendants the Monitor Tow-Boat & Lumber Company and John A. Armstrong had the first liens on the said tract No. 7 for an amount largely in excess of its value, so that the said defendants were entitled to the whole proceeds of said tract. By a decree entered August 7, 1883, the sale of all said lands was directed, but upon the petition of D. H. Jones the sale of said tract No. 7 was by the same decree suspended until the matters arising upon said petition might be determined. In this petition D. H. Jones set up a claim to tract No. 7, and asserted that he was the owner of the said land, and entitled to conveyance thereof. Jones & Haines answered this petition, denying its averments, and evidence was taken by both parties in respect thereto, but it was not until the aforesaid decree of July 25, 1885, that the court took any action upon said petition. By that decree the court determined that D. H. Jones was entitled to said land, and directed it to be conveyed to him. In the meanwhile, however, on November 30, 1883, a decree was entered containing this clause: "On motion of the defendants Armstrong and the Monitor Tow-Boat and Lumber Co., and by consent of the petitioner, D. H. Jones, it is ordered that unless said Jones do, within sixty days from this date, give bond," etc., "the said petition shall be dismissed; so much of the decree of Aug. 7, 1883, as suspends the sale of said tract of 87 acres shall have no further effect; and the special commissioners heretofore appointed shall proceed to sell said tract as directed by other provisions of said decree of August 7, 1883." The said commissioners, after having waited more than 60 days, proceeded on March 11, 1884, to sell said tract No. 7, and John A. Armstrong became the purchaser at the price of $500, and on August 12, 1884, the court entered a decree confirming said sale, and directed the proceeds to be paid on the debts previously ascertained. But before said sale, to-wit, on March 8, 1884, without the knowledge of the commissioners, or notice to the parties interested, the court entered an order extending the time within which the said D. H. Jones might give the bond required by the decree of November 30, 1883, for 45 days from that date. The bond was subsequently given on March 29, 1884, which was 18 days after the sale of the land. After the said sale to John A. Armstrong had been confirmed, he executed a deed showing that he had purchased said tract No. 7 for the Monitor Tow-Boat & Lumber Company, which company, on July 17, 1885, before said decree of July 25, 1885, had been made, executed a general assignment of all its property, including the said tract of land No. 7, to Thomas O'Brien, for the benefit of its creditors. On July 27, 1885, D. H. Jones exhibited in the said court his bill in the nature of a bill of review, in which he set forth the decrees and orders hereinbefore mentioned, and avers that John A. Armstrong is in possession of said tract of 87 acres of land, and prays that the sale of said land may be set aside, and the said decree of August 12, 1884, confirming said sale, be reviewed and reversed, and the purchase money paid by said Armstrong refunded to him, etc. The defendants John A. Armstrong, the Monitor Tow-Boat & Lumber Company, and Thomas O'Brien answered this bill, claiming that the respondent, O'Brien, was a purchaser of said land without notice or knowledge of the claim of D. H. Jones thereto, and that R. H. Gillespie, trustee, under whom respondents claim, was also a *bona fide* purchaser without notice; and that therefore they are unaffected by any equity of said D. H. Jones, if he has any, in said land; and they also deny the sufficiency of said bill of review, and pray that the same may be dismissed. On March 12, 1887, the court entered the second decree, from which this appeal is taken, by which the court reversed and set aside the said decree of August 12, 1884, confirming said sale, set aside the sale, and directed the said O'Brien, assignee as aforesaid, to refund to John A. Armstrong the money paid by him on the purchase of said land and surrender to him his unpaid notes given therefor. The appellants here are John A. Armstrong, the Monitor Tow-Boat & Lumber Company, and Thomas O'Brien, assignee of said company, and the material errors they assign are as follows: *First*, in respect to the said decree of July 25, 1885, they claim that the trust set up in the petition of D. H. Jones was not such as could have been enforced, even if established, and that it was not established by the evidence; and, *second*, if enforceable against Jones & Haines, it could not be enforced against R. H. Gillespie, trustee, because he was a purchaser for value without notice; and, *third*, that the said decree of March 12, 1887, improperly sustained said bill of review, for the reason that said bill

Digitized by Google

made no sufficient or proper case for granting the relief prayed.

1. D. H. Jones, in his said petition, states that in August, 1876, he purchased from T. W. Ewart the said 87 acres of land at the price of $400, of which $100 was to be paid cash and the residue in annual payments of $100 each, with interest; and that Ewart executed and delivered to him a title-bond to make him a deed on the payment of the purchase money; that he made the cash payment, and executed his three several notes for the deferred payments; that when the first note became due he made an arrangement with Jones & Haines to pay the same to Ewart for him, and he would repay them by delivering to them staves, timber, etc.; and that in order to make said Jones & Haines perfectly safe in paying for said land he assigned and delivered said title-bond to them as collateral security; that said Jones & Haines, after permitting suit to be brought on said first note, paid the same, with the costs thereon, and charged the amount to him on their books; that subsequently, on July 20, 1877, he and they had a settlement of their accounts, and, after satisfying the amount paid by them on said note, he owed them a balance of $4.63; that afterwards he continued to deliver lumber and other materials to Jones & Haines, and up to March 15, 1881, he had furnished them more than enough to pay for said land and all the accounts they had against him; and that, notwithstanding this fact, the said Jones & Haines, on March 15, 1881, when they paid off the last note for said land, produced to said Ewart said title-bond, with the assignment thereon, and without authority and in fraud of petitioner's rights obtained from said Ewart a deed of that date for said land; that said R. H. Gillespie, trustee, to whom Jones & Haines conveyed said land by deed dated April 27, 1881, as well as John A. Armstrong, the Monitor Tow-Boat & Lumber Company, and the other creditors secured in said trust deed, were fully advised of the facts, and had notice that said land was owned by petitioner. He prays that said deed to Jones & Haines for said land may be declared void, and the land conveyed to him, etc.

Jones & Haines, in their answer to said petition, aver that after D. H. Jones had contracted to purchase said land Ewart refused to give him possession of it until he paid or secured the cash payment, and, being unable to pay it, at his request they indorsed his note for the amount; that Jones allowed this note to be protested and sued upon, and respondents were compelled to pay it; that then, in order to give Jones further time on the other notes, they indorsed them for him upon his promise to assign to them the said title-bond; that as these notes severally fell due the said Jones was unable to pay any part of them, and they were paid by respondents, but before they made the last payment Jones told them they might take the land, and thereupon he assigned and delivered to them the title-bond, and they paid the balance due on the land, and the deed was made to them by Ewart; that Jones has never repaid them one cent of the purchase money paid by them for the land, and that no part of said purchase money was ever charged to him on their books; that upon a settlement of the book-accounts between them and Jones, outside of the money they paid for said land, he will be indebted to them about $200, and that a suit has been brought against said Jones to recover this balance. They deny that said Jones ever paid one cent on said land, or that he has any claim, title, or interest therein whatever. They deny that there was any fraud on their part in said transactions, and aver that they were *bona fide* purchasers, and the rightful owners, of said land at the time they conveyed the same to R. H. Gillespie, trustee.

It would subserve no useful purpose to detail, or even review, the volume of depositions filed in respect to the issues raised upon said petition and answer; therefore I shall content myself by stating that I have most carefully and patiently read and considered all of said depositions, and the other evidence in the cause, and, after mature consideration of the whole record, it seems to me the petitioner has wholly failed to make out his claim, and that the decided weight and great preponderance of the proofs fully sustain the averments of the answer. I am therefore of opinion that the said decree of July 25, 1885, is erroneous, and must be reversed and set aside, and instead thereof a decree must be entered by this court, dismissing said petition, with costs to Thomas O'Brien, assignee, etc. This conclusion makes it unnecessary to consider the other errors assigned, because it follows as an inevitable consequence that the decree of March 12, 1887, which is based solely upon said decree of July 25, 1885, is also erroneous, and must be reversed and set aside, and the other decree of August 12, 1884, and the sale confirmed thereby, left and continued in full force. The said decrees are therefore reversed.

ENGLISH and BRANNON, JJ., concurred. GREEN, J., absent.

(32 W. Va. 335)

DAVIS SEWING-MACHINE CO. v. DUNBAR.

(*Supreme Court of Appeals of West Virginia.* March 4, 1889.)

EQUITY—BILL OF REVIEW—WHEN LIES.

1. The filing of a bill of review for newly-discovered evidence is not a matter of right, but rests in the sound discretion of the court.

2. A bill of review for newly-discovered evidence will not lie where the evidence is simply confirmatory or cumulative. It must be decisive in its character; such as ought, if true, upon rehearing, to produce a different decree, and of which the party was ignorant at the time of the decree, and could not have learned by the exercise of reasonable diligence.

3. If a party allege the finding of a document since the decree which would have been relevant evidence on the hearing for him, and he knew of its existence and contents, though he made dili-

Digitized by Google

gent search for it, before the decree, without finding it, yet if he could have proven its existence and contents by the evidence of witnesses he should have done so, and cannot, on that ground, sustain a bill of review.

4. Where the court of appeals decides the principles of a cause, and sends the cause to the circuit court, with a mandate to enter a decree of specific character, and for further proceedings merely to execute it, though there cannot be a bill of review for error of law, yet there may be for after-discovered matter. But to allow a bill of review in such case great caution should be observed, and the new matter should be very material, and newly-discovered and unknown to the party at the date of the decree, such as could not have been discovered by the use of reasonable diligence, and not simply confirmatory or cumulative in its nature, but decisive in effect; such as ought, if true, to call for a different decree.

(*Syllabus by the Court.*)

Appeal from circuit court, Wood county.

Loomis & Tavenner, for appellant. *Levin Smith*, for appellee.

BRANNON, J. A report of a decision in this cause is to be found in 29 W. Va. 617, 2 S. E. Rep. 91, where will be found a statement of the facts as the case then stood. When the case went back to the circuit court of Wood, that court, under a mandate from this court, entered a decree, giving the plaintiff its debt, annulling the deed dated 11th July, 1881, recorded 2d June, 1884, and subjecting the two tracts of land mentioned in that deed to sale. Then, it seems, James T. Dunbar applied to the circuit court for leave to file a petition in the nature of a bill of review, and leave was refused. This is not incorporated in the record, but is not material here. Later he presented what styles itself an "amended petition," and asked leave to file it as in the nature of a bill of review, but on 18th of February, 1888, leave was refused, and he appeals here. This petition avers that since the mandate of this court and the entry of the decree of sale of 6th March, 1886, he had discovered new and material evidence of which he was ignorant at the time of the entry of said decree; that before the entry of said decree he had diligently searched for, without success, an original deed executed by and between John V. Dunbar, Thomas J. Dunbar, and petitioner, dated July 11, 1881, not recorded, executed pursuant to, and was evidence of, the agreement in consideration, of performance of which John Dunbar executed the deed which had been set aside; that in March, 1887, while removing his household goods, he discovered the deed, acknowledged, as appears by Justice Bickel's certificate thereto, by Thomas J. Dunbar, 10th October, 1882, and by John V. Dunbar and petitioner, 6th April, 1883. He files this deed, which conveys the two tracts, making together 94 acres, to Thomas J. and James T. Dunbar, in consideration of their agreement to keep him and pay his debts. He files an affidavit of Bickel stating that Thomas J. Dunbar acknowledged the deed as stated in the certificate, and that on April 6, 1883, John V., James T., and Thomas J. Dunbar were together on the land described in the deed, and he was requested to take and certify their acknowledgment of the deed; that John V. Dunbar said the land was James T.'s, and the matter had been neglected, and ought to have been fixed a good while before; that a deed was produced and acknowledged by the Dunbars, and he certified it, and it was discovered that the wrong deed had been acknowledged, and that the deed acknowledged was a deed from John V. to James T. and Thomas J. Dunbar for another tract, and bore date May 19, 1876, which deed is also filed, (it is similar in consideration and phraseology, except as to the description of land, with the other deed;) that thereupon the deed dated July 11, 1881, was produced and acknowledged, and certified as to acknowledgment by John V. and James T. Dunbar, and the deed was left on a table in the house on the land where James T. and John V. Dunbar lived. Bickel further states that he knew James T. Dunbar had possession of the land before 6th April, 1883, and he had time and again seen him working on it, clearing and exercising acts of ownership over it, and treating it as his own, and he had cleared 20 acres, and remodeled the house. He further states that since 11th April, 1883, he had lived about five miles from James T. Dunbar, in a different neighborhood, and did not know of this suit until 1887, when he heard of the decree for its sale, and he did not mention the subject to James T. Dunbar, and did not talk with him on the subject until July, 1887. The petitioner further states that he had found in a box said original deed for the tract of 100 acres, dated 19th April, 1876; that both were in the writing of Thomas J. Dunbar; that neither of said deeds was ever delivered to him or Thomas J. Dunbar, but both were written pursuant to an agreement to that effect, and at the instance of John V. Dunbar. He files an affidavit of James L. Bailey that in July or August, 1882, John V. Dunbar brought to Bailey, a justice, a deed which had been already signed by John V. Dunbar, and, as he remembers, by James T. Dunbar and either Thomas J. or George H. Dunbar; that John V. acknowledged it, and left it to be acknowledged by the other parties, and he kept it some weeks, and returned it to John V. without any certificate, as the others had not acknowledged it. Bailey states that he believes it to be the same deed referred to in Bickel's affidavit. He also states that on said occasion John V. Dunbar told him that the land belonged to the boys. Petitioner files an affidavit, and gives it effect in his petition, made by Churchill Baxter, that he was near by and heard a conversation on Market street, Parkersburg, near Atkinson's store, between Handley, agent of plaintiff, and James T. Dunbar, wherein he heard James T. Dunbar tell Handley, when speaking of the sewing-machine business, that he and his brother owned the land, and if Tom wanted to go into the business he would buy his interest in the land. He also alleged the contents of and filed an affidavit of Preston Groves, that

Digitized by Google

Groves heard a conversation near the well on the farm between James T. Dunbar and Handley about the sewing-machine business, and heard James T. Dunbar tell Handley that the land belonged to him and his brother, and if his brother wanted to go into the business he would buy his interest in the land, and thus help him into it. Petitioner further states that, after his original petition had been presented to the circuit court for review and refused, George A. Loomis called his attention to facts set out in Loomis' affidavit filed with petition. It is to the effect that on April 19, 1876, John V. Dunbar came to him as attorney to get him to prepare some papers, stating that he and his wife were getting old and feeble, and that he had talked to his three sons, James, George and Thomas, and thought that he could make arrangements with them to pay his debts and support him and their mother; in consideration for which he proposed to convey to them his farm, and requested Loomis to draw a deed looking to that arrangement, which he could use as a form to copy from, if the boys were willing to go into it; and that he wrote the deed, before referred to, of 19th April, 1876; and, doubting whether the lien therein retained would compel the boys to comply with what was incumbent on them, he drew a separate contract to be signed by them; that afterwards he said this arrangement as to the Valley Mill farm, to which the form relates, had fallen through, and he returned the form so drawn; and Loomis thinks Dunbar told him he had made similar arrangements as to the Walker's Creek farm, but did not remember the details of what Dunbar told him as to this, (as to this, Loomis' affidavit is indefinite;) that these papers had been filed away, and had only recently come to light; he had forgotten them; and that he did not tell James T. Dunbar of them until after the decision of the case by this court, and he could not have learned it by any diligence.

The single question for the decision of this court is whether the circuit court properly denied James T. Dunbar leave to file his petition as a bill in the nature of a bill of review, and we think the circuit court was correct in so ruling. The application was based on newly-discovered matter, not on error of law apparent.

1. As to the discovery of the deed of May 11, 1881. What is its office in this cause? Not to confer title, for appellant says it was not delivered and could not take effect as a deed. Right under it was not claimed in the pleadings on which the decree rested. A similar deed, dated 11th July, 1881, for the same land, between the same parties, was in the record when this case was formerly before this court. James T. Dunbar as witness, denied its existence, declaring the agreement verbal. On cross-examination he was made to admit it, and to file it, and he declared it had been drawn up at the time of the alleged contract between John V. Dunbar and James T. and Thomas J. Dunbar, but never acknowledged or delivered. He said it was at home, in his bureau drawer. He denied any other memorandum than that unacknowledged deed, but now produces one regularly acknowledged. This deed is identical in language with the other; a *fac-simile*. He then, in defense, relied on the deed to him alone; that is, the one recorded 2d June, 1884, annulled by the decree. He did not want to rely in any way on the deed unacknowledged, commented upon by JOHNSON, P., because that gave half the tract to the debtor, Thomas J., and would make half of it liable. He risked his cause on the deed to him alone. Now, after this court has overthrown that deed as and because infected with fraud, when *in extremis*, as a *dernier* resort, he evokes from its hiding place this deed, just like the other two in date, consideration, and language, except that in one James T. is sole grantee, in the other two he and Thomas J. Dunbar. For what purpose does he call it forth? To prove (1) that this deed, acknowledged as early as 10th October, 1882, and 6th April, 1883, reciting a contract between John V. Dunbar and his sons, whereby he was to convey the land to them in consideration that they pay his debts and keep him and his wife, is evidence of such a contract,—an honest contract,—and that a deed was prepared to execute it long before the indebtedness, and thus remove the taint of fraud in the deed the court passed on. It is used, not to set up title, but as evidence to repel the charge of fraud. The main question in the cause was whether the deed attacked was fraudulent. The evidence bore on that chief point. This newly-found deed is only more evidence on that same point. The discovery of this deed is, if new matter, but evidentiary matter; is simply evidence on a fact in issue. It is *factum probans*, not *factum probandum*; for the fraudulent or honest quality of the other deed was the *factum probandum*. We must call it, therefore, newly-discovered evidence bearing on the main point.

There has been a question whether new evidence, to a fact already in issue, can be received to support a bill of review; but it seems if it be not simply confirmatory or cumulative of evidence in the case, but decisive, such as would, on rehearing, produce a different decree, it will justify a bill of review. It must be such as would produce a different decree. Nichols v. Nichols, 8 W Va. 174, point 3, syllabus; Douglass v. Stephenson, 75 Va. 756. I do not think this evidence is of that character of force, when we look at the whole case, and the opinion heretofore expressed in it. Before overturning a decree of any court on a bill of review on newly-discovered evidence, we should be clear that, if true, it would command a different decree, because, after a fair hearing, it is to the interest of all that the litigation should cease, especially as the filing of a bill of review is not a matter of right, but lies in the sound discretion of the court. It may,

Digitized by Google

therefore, be refused, although the facts, if admitted, would change the decree, when the court, looking to all the circumstances, shall deem it productive of mischief to innocent parties, or from any cause advisable. Nichols v. Nichols, 8 W. Va. 186. At any rate, it should be a clear case. But to call for greater caution in allowing the bill of review is the fact that this cause has been determined by this court, and the decree is under its mandate. While the decree of the highest appellate court is not exempt from a bill of review for newly-discovered evidence, yet it has been held that to sustain it in such case "the greatest caution should be observed, and the new matter, to be sufficient ground for the reversal of the decree, ought to be very material, and newly-discovered, unknown to the party seeking relief at the time the decree was rendered, and such as could not have been discovered by the use of due diligence." Henry v. Davis, 13 W. Va. 256; Campbell v. Campbell, 22 Grat. 649.

2. Another difficulty in the way of appellant is that this deed was signed by him and Thomas J. Dunbar, and he was present when his father executed it, and they all three acknowledged it, as appears by the certificate of Justice Bickel, and were all present when it was acknowledged by John V. and James T. Dunbar. Now, to get a rehearing, he says the deed is new and material evidence, of the existence of which and its whereabouts, at the date of decree, he could not have known by due diligence. Why not? He says he searched for it. Then he knew while taking evidence of its existence and contents, if he did not know of its whereabouts, and he could and should have proven its existence and contents by his own evidence, his brother's, and Justice Bickel's. His evidence that he searched and could not find it must be taken with caution; for the opinion in this case in 29 W. Va. 617, 2 S. E. Rep. 91, holds his evidence untrustworthy, applying to it the maxim, *falsus in uno, falsus in omnibus*. If we tolerate such negligence in not proving the contents of a lost document when three witnesses were attainable and known to the party, or let him say that he could not find so important a paper in his possession, or at his house, and come in after protracted litigation and undo a solemn decree, when will litigation stop? The suspicion arises that as this acknowledged deed gave half the land to his brother, the debtor, its presence was not desirable, except as a weapon of defense in the extremest necessity. He says it was among his household goods. Strange that it could not be found. This deed is the only point presented by appellant that requires much consideration. As to the evidence of Baxter, Handley was asked by appellant, on cross-examination, whether, in a conversation on Market street, Parkersburg, near Atkinson's store, he was not told by him that the land was the property of him and his brother, and Handley denied it. Baxter said he heard appellant so tell Handley. As to the evidence of Groves, Handley was asked whether, in a conversation on the farm, near the well, about the sewing-machine business, appellant did not tell him that the land belonged to him and his brother, and that if his brother wanted to go into the sewing-machine business he would buy his interest in the land, and thus help him into it, and he denied it, and said that, on the contrary, the appellant represented his father as owner. Groves says he heard this conversation, heard appellant tell Handley what is indicated in the question, and appellant, as a witness, states that he so told him. Now, as to both Churchill's and Groves' evidence, we may say that it is merely more evidence to show that appellant informed Handley that the land was not John V. Dunbar's, but his and his brother's; cumulative or corroborative merely, and not such as necessarily to produce a different decree. The evidence of Bickel and Bailey, in so far as it gives declarations of John V. Dunbar that his sons owned the land, and shows James T. Dunbar's possession and improvement of the land, is plainly only cumulative, and must have been known to appellant before decree, or could have been known by reasonable diligence. The evidence of Loomis, and the papers produced by him, showing the desire of John V. Dunbar in 1876 to convey another tract to his sons to get them to keep him, is either irrelevant, or, if relevant, in going to show such desire, and thereby rendering it probable that some years afterwards he did make an arrangement with two of his sons to pay his debts and keep him, in consideration of his conveying the 94 acres involved in this suit, is only cumulative or additional evidence on matter involved in the decree, and not of a decisive nature to call for a different decree. The decree of the circuit court of February 18, 1888, refusing leave to file said petition, is affirmed, with costs to appellee in both courts.

SNYDER, P., and ENGLISH, J., concurred. GREEN, J., absent.

(32 W. Va. 364)

FLACK v. FRY, Mayor.

(*Supreme Court of Appeals of West Virginia.* March 7, 1889.)

MUNICIPAL CORPORATIONS—ORDINANCES—HABEAS CORPUS.

1. F. was arrested in June, 1887, and brought before the mayor of the city of Charleston for a violation of one of the city ordinances in selling beer without license within one mile from the corporation limits; was tried and convicted by the mayor, and fined $50 and costs; and was committed to the street commissioner, to work out his fine. It appears that the warrant for his arrest was issued by the recorder, but it does not appear whether he was arrested within or without the city limits. F. petitioned for and obtained from the circuit court of Kanawha county a writ of *habeas corpus*. The return made by the mayor to said writ discloses the facts above stated, and also alleges that F. had violated said ordinance. F. demurred to said re-

Digitized by Google

turn, and upon the hearing the circuit court dismissed said writ with costs. *Held*, that the mayor of the city of Charleston had jurisdiction to hear and determine said cause.

2. Under the facts disclosed the circuit court acted properly in overruling said demurrer and dismissing said writ of *habeas corpus*.

(*Syllabus by the Court.*)

Error to circuit court, Kanawha county.

J. W. Malcolm, for plaintiff in error.

W. S. Laidley, for defendant in error.

ENGLISH, J. On the 23d day of June, 1887, one William Flack presented his petition in the circuit court of Kanawha county, praying a writ of *habeas corpus* be directed to one Foley, one of the policemen of the city of Charleston, commanding him to have the body of petitioner before said court at a time and place to be stated therein, together with the day and cause of his caption and detention, in order that justice might be done in the premises, and petitioner restored to liberty; setting forth in his petition that he was on the ——— day of June, 1887, arrested by a warrant issued by Joseph L. Fry, mayor of the city of Charleston, by the police of said city, which warrant charged petitioner with selling whisky without having first obtained a license therefor from the city council of said city of Charleston; that petitioner lives outside of the corporate limits of said city, and is deprived of the privilege of free schools, the protection of the police, and in fact of any and all privileges and protection conferred by the city of Charleston to the citizens thereof; and that, notwithstanding these facts, he is detained and held in custody by said authorities under and by virtue of an alleged judgment rendered as aforesaid by the said mayor of the city of Charleston for an alleged disobedience of petitioner to an ordinance of said city of Charleston, which provides that the jurisdiction of said city shall extend one mile beyond the corporate limits of the same. Petitioner further represented that he was a citizen of Charleston, district of Kanawha county, and outside of said corporate limits of said city of Charleston, and as such was not subject to be ordered and controlled by the process of said mayor's court in respect of the matters alleged against him; and further that there was no law which authorized the mayor to issue a warrant of arrest against petitioner, cause him to be arrested, brought into the jurisdiction of the city to try and convict said petitioner as said mayor did, and that any ordinance of said city based upon any statute which seems to give authority to said city to go outside of the corporate limits of said city, and interfere with citizens outside of said corporation as aforesaid, is unconstitutional and void. Joseph L. Fry, mayor of the city of Charleston, answered said petition, stating that he was the mayor of said city, and in obedience to said writ he produced the body of William Flack, and that as such mayor he was invested with all the rights, powers, and duties conferred upon him by the several acts of the legislature of West Virginia, pertaining to the city of Charleston, and to municipal corporations in general; that the city of Charleston has police jurisdiction for one mile beyond the corporate limits of the city, and to carry out this police jurisdiction the common council has power to adopt all needed ordinances and by-laws not contrary to the laws of the state; and that in pursuance of said authority the common council of said city had theretofore adopted an ordinance entitled "An ordinance relating to the city license," setting the same forth *in extenso* in his answer. Section 1 of said ordinance provides "that no person, without first having obtained a city license therefor, shall sell, offer, or expose for sale, spirituous liquors, beer, etc., within the city limits, or within one mile thereof, either on land or on the Kanawha or Elk rivers," etc. Section 11 of said ordinance provides that any person violating the first section shall, in addition to the other penalties prescribed for sales or gifts of spirituous liquors, etc., in violation of the prohibitions mentioned in the bond required in section 6, be fined not less than $20 nor more than $100, with costs. Said Joseph L. Fry further stated by way of answer that the said William Flack on May 29, 1887, violated said ordinance, and did sell beer within one mile of the city limits, and complaint was duly made to respondent as mayor of said city on the 1st day of June, 1887, that said Flack was violating said first section of said ordinance, and on that day a warrant was issued for said Flack, based on said complaint, and he was duly arrested and brought before respondent for trial for infraction of said ordinance; and on the 10th of June said Flack was tried and convicted upon said charge, and was fined $50 and costs, which failing to pay he was committed to the street commissioner of the city of Charleston to work out said fine; and respondent filed with his answer copies of the complaint, warrant, and testimony produced by the city of Charleston in support of said cause; and on the filing of said answer the petitioner, William Flack, demurred to said answer, in which demurrer the respondent joined, and, the matters of law arising upon said demurrer to said answer being argued by counsel and considered by the court, the court overruled said demurrer, and said writ of *habeas corpus* was dismissed, with costs. From this order of the circuit court a writ of error was awarded to said William Flack to this court, and the plaintiff in error assigns as error that the circuit court erred in overruling the demurrer; that the return to the writ of *habeas corpus*, together with the records and proofs filed therewith in the proceedings under which said Flack was arrested, tried, fined, and held in custody by said mayor, clearly showed that the said mayor had no jurisdiction in the premises, and his proceedings were null and void.

The offense with which the plaintiff in error was charged was a violation of section 1

Digitized by Google

of the ordinances of the city of Charleston relating to license in selling beer without license outside of the city limits and within a mile thereof, which section provides that no person, without having first regularly obtained a city license therefor, shall sell beer, etc., within the city limits, or within one mile thereof. Section 33, c. 47, of the Code provides that no license to sell beer, etc., within such town or village, or within one mile of the corporate limits thereof, unless it be within another city or town, shall be authorized or granted, except as provided in chapter 32 of the Code; that is, on application to the county court. Section 1 of said chapter 47 provides that the municipal authorities of a city, town, or village heretofore established, other than the city of Wheeling, may exercise all the powers conferred by this chapter, and, so far as powers are conferred on a city, town, or village not conferred by the charter of any such city, town, or village, the same shall be deemed an amendment to said charter. This provision from section 33 would constitute an amendment to the charter of the city of Charleston, and would cause the charter of said city to expressly forbid the sale of beer, etc., within one mile of the corporation limits, unless the party so selling was licensed by the county court. Section 1, then, of said ordinance of the city of Charleston would be in pursuance of the express provisions of the charter of said city, and by section 31 of the charter of said city (chapter 39, Acts 1875) it is made the duty of the mayor of said city to take care that all by-laws, ordinances, and orders of the council are faithfully executed. Under the fourth clause of section 1, p. 1000, of the Code it is provided that every city, town, and village, by its corporate authorities, in the exercise of its police force and fiscal affairs, may impose a license tax for any privilege for the exercise of which the state imposes a license tax, and for the right to tax such privilege, and for the purpose of enforcing the same, and such police regulations as may be prescribed for such city, town, or village, the jurisdiction of every city, town, or village shall extend one mile beyond the corporate limits of any such city, town, or village, as prescribed by the act of its incorporation. This statute was in force at the time the case of Kaufle v. Delaney, 25 W. Va. 410, was before this court, in which it was held that the section from which the above quotation was taken authorizing municipal corporations to impose a license tax for the exercise of certain privileges outside and within one mile of their corporate limits, does not authorize the imposition of such tax for general municipal purposes, but only for the liquidation of bonds issued under the authority of said act. Subsequent to that decision, however, and before the arrest of the plaintiff in error, the council of the city of Charleston passed the following ordinance, to-wit: "The sergeant is hereby instructed whenever he collects any license tax on any business carried on outside of the limits of the city to pay the same over to the treasurer of the city to the credit of the consolidated sinking fund, and the city treasurer is hereby instructed to place to the credit of said fund any moneys so paid him by the sergeant; said tax being imposed and collected solely for the purpose of discharging the bonds of the city." This, then, would remove the objection raised by the plaintiff in error in his assignment of errors, and would also remove the only objection which seems to have occurred to the court at the time Kaufle v. Delaney, supra, was decided, in the way of the collection of license tax from parties outside the city limits and within one mile thereof. It does not, therefore, seem to me that the city authorities, in making the arrest of the plaintiff in error under the circumstances of this case, and in proceeding to hear and determine the same, exceeded their jurisdiction, or acted *ultra vires*, as section 11 of said ordinance provides that any person violating the first section, in addition to the other penalties prescribed for sales or gifts of spirituous liquors, beer, etc., in violation of the provisions mentioned in the bond required in section 6, shall be fined not less than $20, or more than $100, with costs. It is, however, assigned as additional error in the proceeding that the circuit court erred in overruling the demurrer of said plaintiff in error because it appeared by the answer to said writ that the warrant was issued by the recorder, who had no authority to issue and sign warrants. Section 40, c. 47, of the Code, which must be regarded as amending the charter of said city, provides that in the absence from the city, town, or village, or sickness, of the mayor, or during any vacancy in the office of the mayor, the recorder shall perform the duties of the mayor, and be invested with all his powers. This court would presume that one of these circumstances occurred, and that the recorder acted in the line of his duty in issuing said warrant, if indeed he issued it. Said answer is to be taken as true upon demurrer, and it states that said Flack was violating the first section of said ordinance by selling beer, and complaint was made to the mayor of said city on the 1st of June, 1887, and on said complaint he was duly arrested and brought before the mayor for trial, and on the 10th day of June the mayor tried him, and convicted him upon said charge, and fined him $50 and costs. It does not appear where he was arrested. Under this state of facts I am of opinion that the demurrer was properly overruled, and the judgment of the circuit court must be affirmed, and the plaintiff in error must pay the costs of the writ of error and of the court below.

SNYDER, P., and BRANNON, J., concurred. GREEN, J., absent.

Digitized by Google

(32 W. Va. 357)

SPRING GARDEN BANK v. HULINGS LUMBER CO.

(Supreme Court of Appeals of West Virginia. March 7, 1889.)

CORPORATIONS—CONVEYANCE—VALIDITY.

After the corporators had signed an agreement to become a corporation, and before the charter had been obtained, a deed conveying land to such corporation by name was signed and acknowledged by the grantor, and delivered to a third party, with directions to retain it until the corporation obtained its charter and organized, and then to deliver it to the corporation; and, after the charter had been received, and the corporation organized under it, such third person delivered the deed to, and it was accepted by, the corporation. *Held*, the said deed operated as a valid conveyance of said land to the corporation from the date of the delivery of said deed to it.

(Syllabus by the Court.)

Appeal from circuit court, Tucker county.

C. Heydrick, *J. J. Davis*, and *L. D. Strader*, for appellant. *C. C. & W. L. Cole*, for appellee.

SNYDER, P. On December 7, 1886, the Spring Garden Bank, a Pennsylvania corporation, sued out of the clerk's office of the circuit court of Tucker county an attachment against the estate of Marcus Hulings, a non-resident of this state, and caused the same to be levied upon a number of tracts of land lying in the counties of Tucker and Randolph, in this state. At the January rules, 1887, the said Spring Garden Bank, suing on behalf of itself and other attachment creditors, exhibited its bill in said circuit court against the said Marcus Hulings, the Hulings Lumber Company, F. W. Mitchell, and others, to set aside a deed dated January 2, 1885, made by said Marcus Hulings to the said Hulings Lumber Company, purporting to convey to it the lands attached as aforesaid, and to subject said lands to the payment of certain debts due to the plaintiff and others from said Marcus Hulings. The bill assails said deed upon two grounds: *First*, that there was no such body or corporation as the Hulings Lumber Company, mentioned in the deed as grantee, at the time the deed was made; and, *second*, that the said deed was voluntary, and made for the purpose of delaying and defrauding creditors. Answers were filed by the defendants, and depositions taken, upon which the cause was heard, and a decree entered, September 7, 1887, holding the said deed to be void, and referring the cause to a commissioner, to ascertain and report the liens on said lands, etc. Upon the incoming of the commissioner's report, the court, on May 14, 1888, made a decree fixing the amounts and priorities of the various liens on said lands, and directed a sale thereof. From this decree and that of September 7, 1887, the defendant the Hulings Lumber Company obtained this appeal.

The facts disclosed by the record appear to be as follows: During the years 1882, 1883, and 1884, Marcus Hulings purchased certain timber lands, and took options to purchase other lands, in the counties of Tucker and Randolph, along or near the Cheat river and its tributaries. On some of said lands he paid parts of the purchase money, the whole amount paid by him not exceeding $10,000, and obtained deeds therefor, giving his notes for the balance, amounting in the aggregate to about $50,000, which were secured by vendor's liens retained in the deeds. On other portions of the lands he paid nothing, and for others still he had no deeds. By a written agreement dated April 30, 1884, the said Marcus Hulings, his son, Willis J. Hulings, and John E. Butler entered into copartnership under the name of Hulings & Co., for the purpose of dealing in petroleum, manufacturing lumber, and buying, selling, holding, and dealing in lands, and building and operating saw-mills, etc., and carrying on a general lumber business. The said Marcus Hulings, for the consideration stated in said agreement, sold to his son and said Butler a two-thirds interest in all of said lands and options, thus making the said Marcus Hulings, Willis J. Hulings, and the said Butler, each the owner of one-third of said lands, subject to the vendor's liens existing thereon; and on the same day the said Marcus Hulings, by a contract in writing, bound himself to convey all of said lands subject to the said vendor's liens to a trustee, to be appointed by the said firm of Hulings & Co., as soon as surveys thereof could be completed, and the titles passed upon by counsel. The said firm at once entered into the possession of said lands, and began to operate them in the lumber business, and purchased other lands with partnership funds, taking the title in the name of said Marcus Hulings, who was to convey the whole of said lands to a trustee, when appointed as designated in said agreement. The said firm also took up a large number of the notes which had been given by said Marcus Hulings for said lands. Before the conveyance of said lands, or the selection of a trustee to whom they could be conveyed, the said firm of Hulings & Co. decided to become an incorporate body, and that said conveyance should be made to said corporation instead of to a trustee. Accordingly, on January 2, 1885, the parties duly executed an agreement to become a corporation of the state of West Virginia by the name of the "Hulings Lumber Co.," and on the same day, but subsequent to the execution and filing of said agreement, the said Hulings & Co., by a writing duly signed by said firm, agreed that they would "cause to be conveyed unto said corporation" all the aforesaid lands to which Marcus Hulings held the title, and also the mills and other property that had been acquired by said firm in the lumber business subsequent to the date of the aforesaid agreement of April 30, 1884. In pursuance of this writing or contract of January 2, 1885, a deed was written, signed, sealed, and acknowledged by Marcus Hulings and wife, conveying to the Hulings Lumber Company all of said lands, subject to the vendor's liens still existing upon them

Digitized by Google

for unpaid purchase money, amounting to over $30,000. This deed was placed in the hands of John E. Butler, with the understanding that he was to deliver it to the Hulings Lumber Company as soon as it should be organized, and issued stock in payment for said lands to the corporators. On February 20, 1885, a certificate of incorporation was issued by the secretary of state of West Virginia for said corporation, and on March 28, 1885, the stockholders met and duly organized, and elected a board of directors, and on the same day the board of directors met and elected the following officers: Willis J. Hulings, president; John E. Butler, treasurer; and D. W. Osborne, secretary. At said meeting the president and secretary were authorized to issue $150,000 of the capital stock of the corporation in payment for said lands, and thereupon, at said meeting, John E. Butler delivered said deed, and it was duly accepted by the corporation, and the capital stock issued and delivered in payment for said lands. The corporation took possession of the lands, engaged largely in the lumber business, paid off part of the outstanding notes for the purchase money, and induced F. W. Mitchell & Co. to take up the balance, and executed a trust-deed on said lands, dated February 6, 1886, to secure F. W. Mitchell & Co. for the purchase notes so paid by them. The said deed to the Hulings Lumber Company was duly recorded in Tucker county on April 3, 1885, and in Randolph county on April 20, 1885; and the said trust-deed to secure F. W. Mitchell & Co. was duly recorded in said counties prior to March 6, 1886. On October 27, 1886, the plantiff, the Spring Garden Bank, recovered, in the supreme court of the state of New York in and for the city of New York, a judgment against Marcus Hulings for $3,374, with costs and damages; making an aggregate sum of $3,622.07. It is upon this judgment that this suit is founded. The note upon which said judgment was recovered was given by Hulings on September 29, 1884, but, according to the testimony of Marcus Hulings, which is not contradicted, the said note was not negotiated so as to make it a liability upon him until about the middle of June, 1885, more than two months after the date of the deed to the Hulings Lumber Company.

The first question presented is whether or not the deed to the Hulings Lumber Company is void because at the date of said deed the said company had not been incorporated. This inquiry involves the essentials of a valid conveyance of real estate. The law requires more form and solemnity in the conveyance of land than in that of chattels. It is only necessary here to consider conveyances by deed. A deed is a writing sealed and delivered, and to be duly executed it must be written on paper or parchment. Co. Litt. 35*b*. There must, of course, be both a grantor and grantee to every deed. In order to be a grantor the party must be *sui juris*, and capable of contracting; but such is not the case with respect to the grantee. Any person capable of holding lands, including corporations, idiots, persons of unsound mind, and infants, may be the grantee in a deed. Delivery is an incident essential to the due execution of a deed, for it takes effect only from the delivery. The delivery may be by the grantor to the grantee, or to any other person authorized by him to receive it. It may be delivered to a stranger as an escrow, which means a conditional delivery to a stranger, to be kept by him until certain conditions be performed, and then to be delivered over to the grantee. Generally, an escrow takes effect from the second delivery, and is to be considered as the deed of the party from that time; but this general rule does not apply when justice requires a resort to fiction. 4 Kent, Comm. 453; Fewell v. Kessler, 30 Ind. 195; Gilmore v. Morris, 13 Mo. App. 114. A writing delivered to a stranger for the use and benefit of the grantee, to have effect after a certain event, or the performance of some condition, may be delivered either as a deed or as an escrow. Hatch v. Hatch, 9 Mass. 307; 1 Devl. Deeds, § 275. According to all the authorities, delivery, whatever may be its form or the manner in which it is made, is absolutely essential. It is the final act, without which all other acts and formalities are ineffectual; and the deed takes effect only from its actual or constructive delivery. Id. § 260; Bish. Cont. § 26; 3 Washb. Real Prop. 300. The foregoing are elementary principles. The important question, however, in this cause, is whether or not the aforesaid deed from Marcus Hulings and wife to the Hulings Lumber Company is void and ineffectual for the want of a grantee. It is admitted that a grant *in præsenti* to a person not *in esse* at the time the deed is delivered would be inoperative; and, likewise, a deed to a corporation never created or organized would be void. Hulick v. Scovil, 4 Gilman, 191; Harriman v. Southam, 16 Ind. 190; Russell v. Topping, 5 Macl. 202. These cases and others of the same character fully sustain the doctrine that a deed to a corporation not in existence, or to one incapable by its charter of holding real estate, or to a person not *in esse* at the time of the delivery of the deed, is void; but I have been unable to find any case in which it has been decided that a deed made to a corporation having a potential existence at the date of the deed, and which had obtained its charter and completed its organization at the time the deed was delivered to it, was void or ineffectual as a conveyance to the corporation. On the contrary, in Wharf Co. v. Judd, 108 Mass. 224, the court held that a deed conveying land to a corporation, dated after the date of its charter and before its organization, was a valid conveyance. The court, in its opinion, on page 228, says: "The acceptance of the deed will be presumed as soon as the plaintiffs (the corporation) were competent to take it. Bank v. Bellis, 10 Cush. 276; Ward v. Lewis, 4 Pick. 518; Bank v. Dandridge,

Digitized by Google

12 Wheat. 64, 70. And these plaintiffs could accept a deed as soon as they became competent to make a contract under their charter." In Drury v. Foster, the court, in its opinion, says: "We agree, if one competent to convey real estate sign and acknowledge a deed in blank, and deliver the same to an agent with authority, express or implied, to fill the blank, and perfect the conveyance, its validity could not be well controverted." 2 Wall. 33. As before stated, it is the delivery of the deed that is the crowning act to complete its execution, and is as essential to the transmission of the title as the deed itself. Acceptance by the grantee, or some one for him, is an essential part of the delivery. It is true, an acceptance, where it is for the benefit of the grantee, will be presumed; still acceptance is a necessary incident to the conveyance. If, therefore, there is a grantee in existence at the time of delivery, and such grantee accepts the conveyance, I can see no objection, either in law or reason, why the conveyance should not be sustained, especially in a case where justice and equity require it. It is the duty of courts to uphold, rather than destroy, deeds. Sherwood v. Whiting, 54 Conn. 330, 8 Atl. Rep. 80; Flagg v. Eames, 94 Amer. Dec. 363; African M. E. Church v. Conover, 27 N. J. Eq. 157; Shed v. Shed, 3 N. H. 432.

In the case before us, the corporators of the Hulings Lumber Company on January 2, 1885, before the deed to it was executed, had duly signed and entered into articles in the form prescribed by the statute, by which they agreed to become a corporation; and at the instance of said corporators Marcus Hulings and wife, on the same day, but after said articles had been entered into, signed and acknowledged a deed to the corporation, thus agreed upon and partly created, for the lands in controversy. It is fully proved by both Marcus Hulings and John E. Butler that this deed was delivered by the Hulings to said Butler to be held by him until the Hulings Lumber Company received its charter, and organized, and then, upon the issuance of the stock in payment of the lands as agreed upon, Butler was to deliver the deed to the corporation; and it was also proved that on March 28, 1885, after said corporation had fully organized under its charter, and passed a resolution to accept the deed and issue the capital stock for the lands, Butler did deliver the deed to, and it was accepted by, the corporation; and afterwards, on April 3, 1885, it had said deed duly recorded in Tucker county. It seems to me that this deed, under the facts and circumstances hereinbefore stated, was a sufficient conveyance to vest the title to the lands therein mentioned in the Hulings Lumber Company. The said company was at the time the deed was delivered to and accepted by it a complete corporation, duly chartered and organized; and not only this, but it had at the date of said deed a potential existence, and it subsequently became an actual and legal corporation. I am therefore clearly of opinion that said deed did vest in the said Hulings Lumber Company the legal title to said lands. This conclusion renders it unnecessary to consider at any length the other ground upon which said deed is assailed by the plaintiff's bill. It appears from the testimony of Marcus Hulings, and there is no evidence in the record contradicting him, that the notes on which the plaintiff obtained its judgment were wholly without consideration, and never became legal and binding obligations upon him until they passed into the hands of *bona fide* holders, and that no part of them did so pass into the hands of the plaintiff or any person under whom it claims until about the middle of June, 1885, which was more than two months after the title to said lands had vested in said company. If, therefore, it were conceded that said deed was wholly voluntary, and without any valuable consideration, in the absence of any proof of actual fraud the plaintiff is in no position to assail or complain of it. There is no proof in the record of any actual fraud. On the contrary, the answers of both Marcus Hulings and the Hulings Lumber Company deny that the deed was either fraudulent or made without a valuable consideration. And these answers are supported by the evidence taken by and on behalf of the defendants. The plaintiff offered no evidence on these questions. For the reasons aforesaid I am of opinion that the decrees of the circuit court should be reversed, and the plaintiff's bill dismissed.

ENGLISH and BRANNON, JJ., concurred. GREEN, J., absent.

(32 W. Va. 348)

STATE v. RICHARDS.

(*Supreme Court of Appeals of West Virginia.* March 7, 1889.)

CONSTITUTIONAL LAW—TAXATION—LICENSES.

That clause of section 2, c. 32, Code, as amended by chapter 17, Acts 1885, which reads, "Nor shall any agent traveling with one or more horses sell any lightning-rod, sewing-machine, or organ or other musical instrument, without a state license therefor," is not unconstitutional, as applied to such agents selling Singer sewing-machines manufactured outside of this state.

(*Syllabus by the Court.*)

Error to circuit court, Wood county.

Cole & Miller, for plaintiff in error. *Atty. Gen. Caldwell*, for defendant in error.

BRANNON, J. J. A. Richards was indicted in the circuit court of Wood county on the charge that, as agent and salesman of the Singer Manufacturing Company, a corporation under the laws of the state of New Jersey, without a license, he unlawfully, as such agent, traveling with one or more horses, did sell, offer, and expose for sale sewing-machines known as "Singer Sewing-Machines." Defendant moved the court to quash the indictment, but his motion was overruled. He pleaded not guilty, and a jury convicted him, and, after overruling a mo-

Digitized by Google

tion for a new trial and in arrest of judgment, the court gave judgment against him for $10 fine. He also tendered a special plea to the effect that, at the time of committing the offense, he was engaged in selling as agent, and not otherwise, for the Singer Manufacturing Company, a corporation under the laws of New Jersey, and for no one else, Singer sewing-machines, which were manufactured by said company in New Jersey; and averring that section 2 of the act of the legislature of 1885, under which the indictment was found, was repugnant to the constitution of the United States; which plea was rejected, and exception therefor taken. It was proven that in 1886 defendant was employed by the Singer Manufacturing Company to sell sewing-machines called "Singer Sewing-Machines;" that he on June 30, 1886, sold one machine in Wood county, and others during the year prior to the indictment, and that in selling he traveled with one horse and wagon, and that he sold only Singer machines; and that they were all manufactured in New Jersey, and none in West Virginia, and that defendant traveled through the country, and sold machines; that it was his duty to sell and deliver machines received by him from the company's office in Parkersburg, W. Va. It was agreed that said company was a corporation under the laws of New Jersey. The defendant obtained this writ of error.

The defense is based on the contention that the statute on which the indictment stands is in violation of that clause of the constitution of the United States giving congress power to regulate commerce among the states. The statute involved here is found in chapter 17, Acts 1885. Section 2 provides that "no person without a state license therefor shall act as hawkers or peddlers. * * * Nor shall any agent traveling with one or more horses sell any lightning-rods, sewing-machines, or organ or other musical instrument, without a state license therefor." The statute contains a penalty section. It is contended that the closing clause of section 4 renders the above provision as to agents unconstitutional. Section 4, after specifying several exemptions from the license taxation imposed by the preceding sections, closes with the clause: "Nor shall any company or person engaged in manufacturing goods in this state be required to pay a license as peddler for selling such goods, either by himself or his agent." Let us first understand the effect of the statute in hand. If it could be said that under it an agent traveling with a horse, selling sewing-machines manufactured out of the state, must have license, while one so traveling selling machines manufactured in the state is exempt from license, I should think the act would be unconstitutional, as held by the supreme court of the United States in Webber v. Virginia, 103 U. S. 350, and Welton v. Missouri, 91 U. S. 275. See, also, Hinson v. Lott, 8 Wall. 148; Ward v. Maryland, 12 Wall. 418; Mobile v. Kimball, 102 U. S. 697. But I cannot hold that such is the construction of the statute. I think an agent so traveling selling sewing-machines manufactured in the state is subject to license as well as one selling machines manufactured out of the state. The said clause of section 2 expressly subjects them to license. Section 4 has for its purpose the taking out of sections 1 and 2 certain subjects, and exempting them from license taxes; and, to exempt any subject from taxation so plainly imposed, we must be sure the subject falls within the exemptions.

Exemptions from taxation should be closely construed. Remember that the closing clause of section 4 says: "Nor shall any company or person engaged in manufacturing goods in this state be required to pay a license as peddler." But for this a home manufacturer of goods, traveling and selling his goods himself like a peddler, would have to get a peddler's license, as he would be doing that which would make him a peddler. So, but for it, if his agent traveled and sold, he would, by even the defendant's construction, unless he were selling lightning-rods, machines, or musical instruments, be liable to peddler's license. But this clause takes him out of the category of peddlers. The statute clearly makes peddlers a class for license, and agents traveling with one or more horses selling those articles a separate and distinct class for license. This clause does not say he shall not pay a license as an agent so traveling, selling lightning-rods, etc., but that he shall not be required to pay a license "as peddler." Why make the statute say he shall not pay a tax as agent traveling with one or more horses selling lightning-rods, sewing-machines, etc., when it does not say so in terms, and when we know that this same act has just made two separate classes of peddlers and such agents for license taxation, and when to bring a subject under exemption from taxation clearly imposed by a preceding section we should have clear language? If the legislature had intended to exempt them from tax as agents, why did it not use the words "as agents," not the words "as peddler,"—make it exempt one tax of one amount, when it in terms exempts a different tax of a different amount? For chapter 20 of Acts 1885 makes different amounts of license taxes on such peddlers and agents. Another argument: The statute says: "Nor shall any company or person engaged in manufacturing goods in this state be required to pay a license as peddler for selling such goods;" and adding the words, "either by himself or his agent,"—adding those words, not to define who should be exempt, for it had already declared that any company or person manufacturing goods in this state should be exempt, but only to declare him exempt whether selling by himself or by agent. The office of the clause is not to exempt agents selling goods manufactured in this state, but to exempt the company or person manufacturing goods in this state

Digitized by Google

from the tax of a peddler and as a peddler, whether he sell by himself or his agent. If it be said that the legislature could hardly have regarded it necessary to put in this clause to exempt from peddler license, as it would not be thought that he would have to pay both peddler's and agent's license,—double tax for one right,—I reply that the object was to exempt the home manufacturer from peddler's license when selling as a peddler, which he would have to pay but for this clause, and as to an agent it was inserted out of abundant caution, to avoid any pretense of double taxes. I think this construction greatly strengthened by reference to another chapter of the Acts of 1885. The function of chapter 17 which we have been discussing is to declare what callings shall be subject to license, while the function of chapter 20 is to declare the amounts of license taxes, and, being *in pari materia*, can be properly considered together.

In section 4, c. 20, Acts 1885, fixing the rates of taxes on licenses, will be found the following language: "On Hawkers or Peddlers. On every license to act as hawker or peddler, if the person licensed travel on foot without a horse, fifteen dollars; if he travel with one or more horses, with or without a wagon or other vehicle, seventy-five dollars: provided, this clause is not to be construed as embracing what are known as 'farm' or 'produce' hucksters. But no company or person who is a resident of this state, and engaged in manufacturing goods in the state, shall be required to pay a license as peddler for selling such goods, either by himself or agent." Now, here, when the legislature comes to fix the tax on licenses, it names this same company or person engaged in manufacturing goods in this state exempted from license by the clause quoted above from section 4, c. 17; and he is exempted from what? Not from tax as agent traveling with horse or horses selling lightning-rods, sewing-machines, etc., but from license as peddler, using the same language used in said closing clause of section 4, c. 17. The draughtsman remembered that he had been exempted from peddler's license by the chapter prescribing the callings subject to license, and, to be consistent, exempts him from the same kind of tax when laying the tax. This shows that the legislature which passed both these chapters did not intend to exempt from license tax as agents the agents of a company or person engaged in manufacturing goods in this state, when traveling with a horse, selling sewing-machines, but only to declare them free from tax as peddlers, and tax them as a different class. And immediately following in the same section 4, c. 20, we find the following: "Salesmen of Sewing-Machines, Lightning-Rods, Organs, etc. On every license to sell sewing-machines, if the salesman thereof travels with one or more horses, twenty dollars; on every license to sell organs or other musical instruments, if the salesman thereof travels with one or more horses, thirty dollars; and on every license to sell lightning-rods, if the salesman thereof travels with one or more horses, fifty dollars." Now, evidently, from this language, this is the same agent whom we met and became acquainted with, and a short time since took leave of, in the closing clause of section 4, c. 17; but no exemption is found in his favor, when he comes to be taxed, though he be the traveling sale agent of a company or person manufacturing goods in this state. Our said statute, thus construed, makes no discrimination as to license taxation between agents selling sewing-machines manufactured in this state and those made without it, both being alike liable. If there be no such discrimination between the products of different states, the state has unquestionable power to license tax, as held by the United States supreme court in Woodruff v. Parham, 8 Wall. 125; Paul v. Virginia, Id. 177; and many other cases cited in Walling v. Michigan, 116 U. S. 453, 6 Sup. Ct. Rep. 454. And such being the construction of the state statute by the state supreme court, avoiding such discrimination, such will be its construction as a finality by the supreme court of the United States, and the statute, so construed, will be by that court held constitutional. Machine Co. v. Gage, 100 U. S. 676; Leffingwell v. Warren, 2 Black, 599. It is an accepted rule that a court will not declare a statute unconstitutional unless it be clearly so, unless there be no escape from such decision; and it is also an accepted rule that, among contesting constructions, that one should be given to a statute which will render it valid and consistent with the constitution, rather than one that will overthrow it, unless it be plain that the other should be given.

The counsel for defendant cites and relies on the case of Robbins v. Taxing Dist., 120 U. S. 489, 7 Sup. Ct. Rep. 592, holding that a statute of Tennessee that "all drummers and all persons not having a regular licensed house of business in the taxing district of Shelby county, offering for sale or selling goods by sample," should be required to pay taxes for the privilege, was void as contrary to the United States constitution as to persons soliciting the sale of goods on behalf of individuals or firms doing business in another state. It must be admitted that this case and the case of Asher v. Texas, 128 U. S. 129, 9 Sup. Ct. Rep. 1, are in advance of former decisions of the same court in restricting taxation on callings by the state, if not in conflict with them, as seems to be admitted by Justice BRADLEY in the latter case. But they were cases of persons selling by sample or soliciting orders for persons residing or doing business in other states, taxing the mere act of so soliciting, when the property had not arrived in the state. Here the party was in the state, perhaps a part of its population, traveling with the machines in his possession, inside the state, obtained from the store-house of the company at Parkersburg, in this state. Justice BRADLEY'S

Digitized by Google

opinion contains some strong arguments as to the practical hindrance of interstate commerce by compelling a person soliciting orders for the sale of goods in one state by persons doing business in another, the goods at the time being outside the state; thus taxing that immense business done by commercial traveling agents, by which in these days the greater part of the immense sales are made. His whole argument is plainly bearing on that. He distinctly says the states may impose taxes "on persons residing within the state or belonging to its population, and upon avocations and employments pursued therein, not directly connected with foreign or interstate commerce, or with some other employment or business exercised under authority of the constitution and laws of the United States, and the imposition of taxes upon all property within the state mingled with and forming a part of the great mass of property therein. But in making such internal regulations a state cannot impose taxes upon persons passing through the state or coming into it merely for a temporary purpose, especially if connected with interstate or foreign commerce; nor can it impose such taxes upon property imported into the state from abroad, or from another state, and not yet become part of the common mass of property therein; and no discrimination can be made by any such regulations adversely to the persons or property of other states, and no regulations can be made directly affecting interstate commerce." Elsewhere he inquires "whether it is competent for a state to levy a tax or impose any other restriction upon the citizens or inhabitants of other states for selling or seeking to sell their goods in such state before they are introduced therein." He then discusses the inconvenience to business men if they were not allowed to send their agents into other states to solicit orders. He then refers to the suggestion that thus the taxing powers of the states may be crippled, and says: "This may be true to a certain extent, but only in those cases in which the states themselves, as well as individual citizens, are subject to the restraint of the higher law of the constitution; and this interference will be very limited in its operation. It will only prevent the levy of a tax, or the requirements of a license, for making negotiations in the conduct of interstate commerce." As applied to taxing persons traveling and soliciting orders, there seems to be force in the argument. I do not understand it to go further,—not to the extent of denying the state right to require a license tax of peddlers or traveling agents carrying their property with them inside the state, and selling and delivering it, because of the accidental circumstance, in some instances, that that property came for sale from another state. Justice BRADLEY, as, I think, appears from the above extracts from his opinion, has in mind and hand the case of drummers selling by sample for principals in other states, who solicit orders for the sale of property not yet in the state. As the attorney general argues, I think "Robbins v. Taxing Dist. merely deals with a tax on a drummer selling by sample, and not with a man carrying goods with him for delivery as he sells, as in our case." I do not understand that high and able tribunal, the supreme court of the United States, to have gone to the extent claimed by the defense in this case, or to have denied the power to impose license taxes where they do not directly affect interstate commerce, or the right to tax salesmen having their goods in the state, and selling them, simply because, in instances, such goods are manufactured in or sold by owners residing in other states. No one will be more ready than I to accord to the constitution and laws of the United States their pre-eminence where I can see the conflict of state law with it; but I do not realize it in this case, nor do I construe the case of Robbins v. Taxing Dist. as operating to invalidate the statute of the state in question.

I think there was no error in rejecting the special plea. It states no other facts than the indictment contains, and the same question of the constitutionality of the statute sought to be raised by it was raised by the motion to quash; and the same remark applies to the overruling of the motion for a new trial, and the overruling of the motion in arrest of judgment. If the statute be valid, the facts appearing certainly sustain the indictment. Nor do I think the indictment bad because it does not negative that clause of the act that "no person engaged in manufacturing goods in this state shall be required to pay a license as peddler," etc. It is not a part of the enacting clause on which the indictment rests. The pleader need only negative exceptions in the enacting clause; not what comes in by way of proviso, or what is in nature but a proviso, and not in the enacting clause. Hill's Case, 5 Grat. 682. The fact that the indictment charges that defendant did "sell, offer and expose for sale," whereas "sell" is the only word used in the statute, and it is no offense to "offer or expose" sewing-machines for sale, is immaterial. Those words are merely surplusage. The old maxim is, *utile per utile non vitiatur*,—surplusage does not vitiate. 1 Bish. Crim. Proc. § 478; Code 1887, c. 158, § 10. I am of opinion to affirm the judgment of the circuit court, and the court so orders.

SNYDER, P., and ENGLISH, J., concurred. GREEN, J., absent.

(32 W. Va. 370)

SEARLE'S ADM'R *v.* KANAWHA & O. RY. CO.

(*Supreme Court of Appeals of West Virginia.* March 9, 1889.)

CARRIERS—INJURIES TO PASSENGERS—PLEADING—DAMAGES.

1. In an action under our statute, chapter 103, Code, to recover damages for causing the death of a party, the declaration is not demurrable simply because it names the widow and children of the

Digitized by Google

decedent, and avers that the damages claimed by the plaintiff accrued to them. Such parts of the declaration will be treated as surplusage.

2. The declaration, in an action under said statute, which avers that the decedent was killed by the oversetting and throwing down of the railroad car in which he was at the time being carried by the defendant as a passenger, and that said oversetting and throwing down of the car were caused by the negligence of the defendant, is not demurrable on the ground that the allegation is too general.

3. The following instructions are not erroneous in an action brought under said statute to recover damages for the causing of the death of a husband and parent by the negligence of a railroad company: "(2) The law, in tenderness to human life and limbs, holds railroad companies liable for the slightest negligence, and compels them to repel by satisfactory proofs every imputation of such negligence. When carriers undertake to convey passengers by the powerful but dangerous agency of steam, public policy and safety require that they be held to the greatest possible care and diligence. (3) The Kanawha & Ohio Railway Company, as a common carrier of passengers, was bound to exercise the utmost degree of diligence and care in safely transporting Daniel Searles upon his journey. (4) The slightest neglect against which human prudence and foresight might have guarded, and by reason of which his death may have been occasioned, renders such company liable in damages for such death. (5) Said railroad company is held by the law to the utmost care, not only in the management of its trains and cars, but also in the structure, repair, and care of the track and bridges, and all other arrangements necessary to the safety of passengers. (6) The jury are instructed that in estimating the pecuniary injury they may take into consideration the nurture, instruction, and physical, moral, and intellectual training which the children would have received from their father. (7) The jury are instructed that while they must assess the damages with reference to the pecuniary injuries sustained by the distributees in consequence of the death of Daniel Searles, they are not limited to the losses actually sustained at the precise period of his death, but may include also prospective losses, provided they are such as the jury believe from the evidence will actually result to the distributees as the proximate damages arising from the wrongful death."

(*Syllabus by the Court.*)

Error to circuit court, Mason county.

Geo. S. Couch, for plaintiff in error. *Gunn & Gibbons*, for defendant in error.

SNYDER, P. Action of trespass on the case commenced in June, 1886, by T. M. Harbour, as administrator of Daniel Searles, deceased, against the Kanawha & Ohio Railway Company, in the circuit court of Mason county. There was a demurrer to the declaration, which was sustained, and then an amended declaration was filed, to which and to each count thereof the defendant demurred, and this demurrer was overruled. Issue was joined on the plea of not guilty, and upon two special pleas denying that the plaintiff was, or ever had been, administrator of Searles. The action was tried by jury, a verdict returned for the plaintiff for $3,000, which the defendant moved the court to set aside, but the court overruled this motion, and entered judgment on the verdict, and the defendant obtained this writ of error. The defendant in error complains that the circuit court erred in sustaining the demurrer to the original declaration. The record shows that after the court sustained this demurrer the plaintiff was given leave to file an amended declaration, which he afterwards did, without objection. This operated as a waiver of any objection to the action of the court in sustaining said demurrer, and the amended declaration, when filed, superseded the original, and became the only declaration in the case. It is too late to make an objection of this character for the first time in the appellate court. The plaintiff in error, the railway company, insists that the court erred in overruling the demurrer to the amended declaration: *First*, because each of its three counts are bad, for the reason that they allege the damages claimed by the plaintiff accrued to the widow and children of the intestate; and, *second*, because the second count is bad for the further reason that it fails to aver how, and in what respect, the defendant was negligent.

1. Each count of the declaration, after alleging that the plaintiff's intestate was killed by the negligence of the defendant while being carried as a passenger upon one of its trains, avers that by reason of the premises the said widow and children of the decedent (naming each of them) have sustained damages to the amount of $10,000. And in its general conclusion the declaration avers that by reason of the matters contained in the first, second, and third counts, and by force of the statute, an action has accrued to the plaintiff, as administrator as aforesaid, to have and demand from the defendant damages to the amount of $10,000. In Railroad Co. v. Gettle, 3 W. Va. 376, which was an action brought under chapter 98, Acts 1863, it was held that the declaration was fatally defective for the reason that it failed to aver that the decedent had a widow or next of kin. After that decision the statute was changed so as to provide that the amount recovered shall be distributed to the parties entitled under the law to the personal estate of a decedent, but it shall not be liable for his debts, instead of providing, as the statute then did, that the amount recovered shall be for the exclusive benefit of the widow and next of kin of the decedent. Since this modification of the statute it has not been regarded as essential that the declaration should aver that the decedent had a widow or next of kin, or to mention his distributees by name or otherwise, and I think such is the proper interpretation of the statute. Railroad Co v. Wightman, 29 Grat. 431. But while it is not necessary to name the distributees, and allege that the action is for their benefit, still I do not think the making of such averment will be fatal to the declaration, but that it ought to be treated simply as surplusage. It seems to me this should be so treated, under section 29, c. 125, Code 1887, which declares that on demurrer no defect shall be regarded, unless it be so essential that judgment cannot be given according to law and the very right of the case. I think, therefore, this objection is not well taken.

2. The other ground relied on in support of the demurrer is that the second count of

Digitized by Google

the declaration is too general in that it fails to aver how, or in what manner, the defendant's car was overset and thrown down, whether by a defect in the car, the track, or carelessness of its employes, or otherwise. The averment is, in substance, as follows: The defendant, not regarding its duty, conducted itself so carelessly, negligently, and unskillfully that by reason thereof and the default of the defendant and its servants, and for the want of due care and attention, the car in which the said Searles was being carried was overset and thrown down, by means whereof the said Searles was greatly wounded and injured, and by reason thereof he died. Under the decisions of this court in Blaine v. Railroad Co., 9 W. Va. 252; Hawker v. Railroad Co., 15 W. Va. 628; and Berns v. Coal Co., 27 W. Va. 285,—we must overrule this objection to the declaration, and hold that its averments were sufficient. It avers that the decedent was killed by the oversetting and throwing down of the car, and that this was caused by the negligence of the defendant. This, it seems to me, is a sufficient averment of the negligent act which caused the injury, under the law of this state, as modified by our statutes, though it may not be such as required by the rigid rules of pleading of the common law. 2 Thomp. Neg. 1246, § 26; Railroad Co. v. Dunlap, 29 Ind. 426; Railroad Co. v. Harwood, 90 Ill. 425. The demurrer to the declaration was, therefore, properly overruled.

It is further assigned as error by the plaintiff in error that the court improperly refused to instruct the jury that the evidence of the plaintiff was insufficient to prove that the plaintiff was or ever had been legally appointed administrator of Daniel Searles. In order to prove such appointment the plaintiff introduced an order of the county court of Putnam county, dated March 15, 1886, in these words: "The clerk of this court presented here a list of fiduciary appointments by him made in vacation since the first day of the last regular term of this court, which list being seen and inspected by the court, it is ordered that each of the appointments be, and the same is hereby, confirmed." In connection with this order the plaintiff read in evidence a list upon which it appears that the plaintiff was appointed administrator of said Daniel Searles on February 27, 1886. It is contended that this was simply a private list of the clerk and that the order of confirmation referred to this list, and did not, therefore, confirm any appointment of which the clerk had made a record, as required by the statute. It would certainly have been better and more formal for the order of the county court to show that the clerk had reported, that is, exhibited, to the court the record of the appointments made by him in vacation; but, in the absence of any fact tending to show that the list referred to in said order was not the recorded list of the clerk, it seems to me the court ought to presume that it was the recorded list, and that the order of confirmation referred to the appointments made and recorded by the clerk. To hold otherwise would be extremely technical, and, I think, unwarrantable.

The court gave to the jury eight instructions at the instance of the defendant, and the same number at the request of the plaintiff. To the giving of the latter, or any of them, the defendant objected, but no objection is made to any of them in this court, except Nos. 2, 5, 6, and 7, which are in these words: "(2) The law, in tenderness to human life and limbs, holds railroad companies liable for the slightest negligence, and compels them to repel by satisfactory proofs every imputation of such negligence. When carriers undertake to convey passengers by the powerful but dangerous agency of steam, public policy and safety require that they be held to the greatest possible care and diligence. Any negligence or default in such cases makes such carriers liable in damages under the statute." "(5) Said railroad company is held by the law to the utmost care, not only in the management of its trains and cars, but also in the structure, repair, and care of the track and bridges, and all other arrangements necessary to the safety of passengers. (6) The jury are instructed that in estimating the pecuniary injury they may take into consideration the nurture, instruction, and physical, moral, and intellectual training which the children would have received from their father. (7) The jury are instructed that while they must assess the damages with reference to the pecuniary injuries sustained by the distributees in consequence of the death of Daniel Searles, they are not limited to the losses actually sustained at the precise period of his death, but may include also prospective losses, provided they are such as the jury believe from the evidence will actually result to the distributees as the proximate damages arising from the wrongful death."

Of the said instructions Nos. 2 and 5 are literal copies of instructions given, and approved by the appellate court, in Railroad Co. v. Wightman, 29 Grat. 431. In reference to these instructions, the court in that case, at page 445, says: "We do not deem it necessary to enter into any discussion of the propositions of law involved in these instructions. It is sufficient to say that they are fully sustained by the elementary writers, and by the opinions of the most respectable courts in this country. The decisions on this subject are given in Whart. Neg. §§ 627–661, inclusive; also section 422, and the notes to these sections; Redf. Bailm. § 346; Farish v. Reigle, 11 Grat. 697." It is, however, earnestly insisted by the counsel for the plaintiff in error that the concluding sentence of said instruction No. 2, to-wit: "Any negligence or default in such cases makes such carriers liable in damages under the statute,"—is unquestionably wrong, because to justify a recovery two things must concur: *First*, negligence by the defendant;

Digitized by Google

and, *second*, such negligence must have contributed to the injury sustained. It is certainly true that it is the conjunction of the negligence and the injury that creates the tort. Mere negligence does not become an actionable wrong, unless the other element is found in the same case, namely, an injury or damage suffered in consequence of the negligence or wrong. Cooley, Torts, 62; 2 Greenl. Ev. § 256. It is, therefore, apparent that this sentence, taken alone, does not propound a correct legal proposition; but, if considered in connection with the other instructions submitted with it, in one of which the jury were told that if they find from the evidence that the negligence of the defendant in nowise contributed to or occasioned the accident, then they must find for the defendant, I do not think it so objectionable as to warrant a reversal of the judgment. Instructions Nos. 6 and 7 are substantially the same as, and were evidently copied from, two instructions which were fully considered and approved by the court of appeals of New York in Tilley v. Railroad Co., 29 N. Y. 252. The New York statute under which that case was determined provided that "the jury may give such damages as they shall deem a fair and just compensation, not exceeding $5,000, with reference to the pecuniary injuries resulting from such death to the wife or next of kin of such deceased person." Laws 1849, p. 388. It was therefore contended in that case that the recovery must be limited and confined to a pecuniary loss, flowing necessarily from the death. And in support of that view counsel cited many English and American cases, in which it was held that the damages must be assessed with reference to the pecuniary loss resulting from the death of the person injured, and that neither the physical pain of the deceased nor the mental sufferings of the surviving family can be taken into the estimate. See, also, Shear. & R. Neg. § 610; Field, Dam. § 630, and cases cited. The court, in a unanimous opinion, says: "The charge of the judge was explicit that the damages must be limited to pecuniary injuries; and he said that in estimating them they had a right to consider the loss (that is, the pecuniary loss) which the children had sustained in reference to their mother's nurture and instruction, and moral, physical, and intellectual training. I think this does not imply that the children are necessarily and inevitably subjected to such loss, but leaves it to the jury to determine whether any such loss has been in fact sustained, and, if so, the amount of such loss. This is the fair scope and meaning of the charge, and, if it was not sufficiently explicit, should have been made so by a direct request for such purpose. This understood, I regard it as unexceptionable." Tilley v. Railroad Co., 29 N. Y. 285. And again, on page 288, the court says: "Nor do I think it was erroneous to instruct the jury that, while they must assess the damages with reference to the pecuniary injuries sustained by the next of kin in consequence of the death of Mrs. Tilley, they were not limited to the losses actually sustained at the precise period of her death, but might include also prospective losses, provided they were such as the jury believe from the evidence would actually result to the next of kin as the proximate damages arising from the wrongful death,"—citing Tilley v. Railroad Co., 24 N. Y. 473–477.

The foregoing views fully sustain the instructions here complained of, and I think they are consonant with reason and the purpose of the statute; and, if correct in that case, they are more truly so in the case at bar, because our statute does not, like the New York statute, limit the compensation "to the pecuniary injuries resulting," etc., but it provides: "In every such action the jury may give such damages as they shall deem fair and just, not exceeding ten thousand dollars." Section 6, c. 103, Code 1887, p. 709. It will thus be observed that our statute does not, in terms, limit the jury to giving compensation for pecuniary injuries, though such is, perhaps, its purpose and implied meaning; but still, as it is not express, the limitation ought not to be applied strictly. It is further contended that instruction No. 6 was improper because there was no evidence tending to support it. This is a mistake. There was evidence submitted to the jury that the decedent was 42 years old, made his living by days' work and laboring on his farm, had a wife and nine children, all of whom were living at the time of the trial; the oldest child was 19 years of age, and the youngest 16 months; that he was a church member, moral, religious, and industrious in his habits, a kind husband and parent, and had been sending his children to school. As was said by this court in Dimmey v. Railroad Co., 27 W. Va. 32, 57, quoting from Tilley v. Railroad Co., 29 N. Y. 286: "Within the statute, as to amount and the species of injuries sustained, the matter is to be submitted to the sound sense and justice of the jury. They must be satisfied that pecuniary injuries resulted. If so satisfied, they are at liberty to allow them from whatever source they actually proceeded which could produce them. If they are satisfied, from the history of the family or the intrinsic probabilities of the case, that they were sustained by the loss of bodily care or intellectual culture or moral training which the mother had before supplied, they are at liberty to allow for it. The statute has set no bounds to the sources of these pecuniary injuries. If the rule is a dangerous one, and liable to abuse, the legislature, and not the courts, must supply the corrective." If it was proper for the jury to consider these sources of injury, surely the defendant could not be prejudiced by having the jury instructed in respect to them. The instruction was therefore not improper. A new trial was not asked on the ground that the verdict was contrary to the evidence.

Digitized by Google

but only upon the ground that the court misdirected the jury. Having determined that there was no error in the instructions to the jury, we must hold that the motion for a new trial was properly overruled. If we had been asked to set aside the verdict on the ground that it was not sustained by the evidence, we should have refused to do so, because the evidence, to say the least of it, does tend to support the verdict, and, this being a case involving negligence, which is a mixed question of law and fact, and one peculiarly within the province and control of the jury, we would not disturb the verdict, unless the facts distinctly showed that there was no negligence. Washington v. Railroad Co., 17 W. Va. 190; Johnson v. Railroad Co., 25 W. Va. 570. Having found no error for which the judgment of the circuit court should be reversed, I am of opinion that said judgment should be affirmed.

ENGLISH and BRANNON, JJ., concurred. GREEN, J., absent.

(32 W. Va. 319)

CONNELL *v.* CONNELL *et al.*

(*Supreme Court of Appeals of West Virginia.* March 12, 1889.)

DEED—ESCROW—BONA FIDE PURCHASER—NOTICE—ESTOPPEL.

1. Where a deed is delivered by the grantor to a third person, to be held in escrow untill the grantee shall have paid a specified debt, and the deed is delivered before the debt is fully paid, but it is subsequently paid, *held* the delivery will be operative, and the deed valid, at least from the time the debt is fully paid.
2. Where those to be affected by the improper delivery and recordation of a deed were fully acquainted with the facts, and acquiesced therein for an unreasonable time, and until the rights of third parties have intervened, they will not be permitted to avoid such deed.
3. A case in which the trustee and *cestui que trust* are held to be purchasers for value without notice under the evidence and special facts and circumstances proven.
4. To charge a *bona fide* purchaser with notice, either express or implied, the notice must be something more than a vague statement that the vendor's title is subject to an equity.

(*Syllabus by the Court.*)

Appeal from circuit court, Kanawha county.

John H. Connell, on October 7, 1886, filed his bill in the circuit court of Kanawha county against Daniel F. Connell, Roman Pickens, and W. S. Laidley, trustee, in which he avers that in the year 1865 he contracted to purchase from Davis H. Estill a house and lot on Quarrier street in the city of Charleston at the price of $2,000, of which sum he paid about $500, and, in order to get the title from Estill, his father, J. S. Connell, raised the balance of $1,500 by borrowing the same from D. F. Connell, to whom he gave his note therefor, dated April 1, 1865; and that thereupon Estill conveyed the lot to said J. S. Connell, upon the agreement between the said J. S., Daniel, and the plaintiff that said J. S., the father of Daniel and the plaintiff, was to hold the legal title to said house and lot as security to Daniel for said $1,500 until paid, but in trust for the plaintiff for any surplus in case of a sale to pay said $1,500. The plaintiff went into possession of the property about that time, and has resided upon it ever since. A year or two before the death of his father, the said D. F. Connell requested that the said house and lot be deeded to him with the same trust and understanding that he should hold the title as security for said $1,500, and with this understanding the father executed and acknowledged a deed to Daniel for the property, and delivered it to his daughter, Sarah, to keep until a full settlement of accounts was had between him, Daniel, and the plaintiff. The father died, leaving the deed in the possession of his daughter; and five or six weeks thereafter Daniel got it from her, and had it recorded, but still admitting that he held the property as security for the money loaned, or any balance there might be due him on settlement, and such has always been the understanding, and that on such settlement, and the payment to Daniel of any balance found due him, the property was to be conveyed to the plaintiff free from any claim of Daniel. No such settlement has ever been made, though efforts to do so have been made without effect. Plaintiff believes, upon a fair settlement between him and Daniel, there will be due to him a sum sufficient to pay any balance that may be due to Daniel on said $1,500. The said Daniel is not, therefore, the true owner of said house and lot, but only the holder of the legal title in trust as aforesaid. The plaintiff further avers that D. F. Connell, by deed dated August 29, 1884, conveyed said house and lot, and another lot of nine acres of land worth $2,800, to W. S. Laidley, trustee, to secure to Roman Pickens the payment of a note of $3,000, which is now due, and said Laidley has advertised the property for sale under said trust-deed. The said house and lot are worth $5,000, and, if sold as advertised, would be sacrificed. The Ruffner Bros., as agents of Pickens, loaned said $3,000 to D. F. Connell for Pickens, and the plaintiff gave them notice that said D. F. Connell did not own said property. The bill prays that W. S. Laidley, trustee, be enjoined from selling said house and lot; that all proper accounts be ordered and taken; and that said D. F. Connell be required to surrender such title as he holds to said house and lot, and convey the same to the plaintiff, etc. The injunction was awarded as prayed in said bill. The defendant Pickens answered, denying the allegations of the bill, and especially denying that Ruffner Bros. had ever been his agents; or that they had made the loan to D. F. Connell for him; or that the deed from J. S. Connell to D. F. Connell had never been delivered; or that the said house and lot had been conveyed to D. F. Connell upon any trust, secret or otherwise; or that, if such trust existed, he had any notice of it; and averring that he was a purchaser for value without notice; and he also denied all the other material allegations of the bill. Subse-

Digitized by Google

quently, the plaintiff filed an amended bill, the time of filing which is not disclosed by the record, but, as it appears to have been sworn to on July 2, 1887, it was probably filed after the depositions had been taken and filed. In this amended bill the plaintiff avers, by way of supplement, that W. S. Laidley, trustee, before the trust-deed to him was executed, had notice, and was advised, of the equities of the plaintiff in said house and lot; and he was informed that D. F. Connell was not the true owner thereof; and also that since the filing of his original bill the plaintiff has been informed, and now distinctly charges, that the legal title to said house and lot never vested in D. F. Connell; that the deed thereto from J. S. Connell was never delivered, either by said J. S. Connell, during his life, or by any one authorized to do so, after his death; but that, after the death of said J. S., the said D. F. Connell wrongfully obtained the possession thereof from his sister, Sarah E. Connell, and improperly had the same recorded; that the said deed is null and void, and the legal title to said property is vested in the heirs of said J. S. Connell, deceased, for the use of the plaintiff as the real and true owner, subject to a charge in favor of D. F. Connell for any balance due on the purchase money advanced by him after a full settlement between him and the plaintiff. There is no prayer to this bill. Pickens also answered this bill, and all the other defendants filed their separate answers to the plaintiff's bill and amended bill. D. F. Connell, after detailing the transactions and state of accounts and settlements between himself and the plaintiff, and exhibiting papers signed by the plaintiff, which show that the plaintiff is largely indebted to him over and above the $1,500 advanced for the purchase of the house and lot, avers that in the year 1868, after the plaintiff had sold a part of the aforesaid lot for $450, the said J. S. Connell offered to convey the residue thereof to the respondent upon the surrender to him of the note held by respondent for the purchase money, amounting then to $1,790. Respondent accepted this offer, and delivered to his father the said note, and his father agreed to convey to him said lot. Not long after this his father died, and shortly thereafter the said deed was delivered to him by a member of the family, and he, with the full knowledge and consent of the plaintiff and the other heirs of his father, had it recorded, and he has ever since claimed and owned said property thereunder, without notice or knowledge of any adverse claim until after the execution of the aforesaid trust-deed to W. S. Laidley, trustee; and he positively denies that the plaintiff has any right or title to said house and lot, either legal or equitable. The defendant W. S. Laidley, in his answer, which is sworn to by him, says: "As to the allegation that this trustee was notified before the loan mentioned was made, and before the deed of trust was executed, of the plaintiff's equities as set out in said bill, this respondent remembers nothing whatever, * * * and he does not remember of having any consultation with J. H. Connell before the deed was written, or with any one else." He further says he sold the nine acres of land mentioned in the trust-deed on October 9, 1886, for $1,165. All the answers were replied to generally. On April 9, 1888, the cause was finally heard on the bill, and amended bill, the demurrer thereto, the answers of all the defendants, replications, exhibits, and depositions, and thereupon the court entered a decree dissolving the injunction, and dismissing the bill, at the plaintiff's costs. From this decree the plaintiff has appealed.

E. B. Knight and *J. H. Connell*, for appellant. *Brown & Jackson* and *W. A. McCorkle*, for appellees.

SNYDER, P., (*after stating the facts as above.*) If the deed from J. S. to D. F. Connell vested in the latter the legal title to the house and lot, and the appellee Roman Pickens, and W. S. Laidley, trustee, are purchasers of the property without notice of any equity or right thereto in the plaintiff, then it is wholly irrelevant to inquire in this cause as to the equities between the plaintiff and D. F. Connell in respect to said property, or as to the state of accounts between them. I shall therefore address myself to these questions: *First*, was D. F. Connell vested with the legal title to said house and lot by the deed to him from J. S. Connell, or otherwise? and, *second*, were the appellees Pickens and Laidley purchasers without notice of any equity in the plaintiff in respect to said property?

1. The record shows that this property was, in the year 1865, conveyed by D. H. Estill to J. S. Connell. On July 9, 1868, J. S. Connell and wife had a deed, absolute on its face, prepared, conveying said property, with covenant of general warranty, to D. F. Connell, in consideration of $2,500, the payment of which is therein acknowledged, which deed was on July 10, 1868, duly acknowledged by the grantors for record. The only evidence in respect to the delivery of this deed is that of Sarah E. Connell, the daughter of the grantor. She testifies that her father delivered to her this deed, and told her that it was a deed he had made to D. F. Connell for J. H. Connell's house, and that he did not intend delivering it yet. She put it away, and kept it until after her father died. She did not know what to do with it. She mentioned the matter to her brother Daniel, and he told her to give it to him, which she did. On cross-examination she says her father told her it was a deed that he had made to D. F. Connell on condition that he would pay a certain debt that her father was security for, and that he had nothing but D. F. Connell's word for it, and he was not going to deliver up the deed until D. F. Connell fulfilled the conditions. So far as she can remember, the debt referred to was the Babbitt & Good debt. Other testimony in

Digitized by Google

the cause shows that this deed was prepared by the plaintiff, J. H. Connell, and that the Babbitt & Good debt has been paid, though a part of it was paid by D. F. Connell after the deed had been delivered to him. J. S. Connell died September 24, 1869. D. F. Connell at the time resided in Ohio, and on his coming to Charleston soon after his father's death the deed was delivered to him, and he had it duly recorded in Kanawha county on November 10, 1869. The property has ever since been on the tax-books of the county in the name of D. F. Connell, and he has paid the taxes thereon. Not only the plaintiff, but the other children and heirs of J. S. Connell, knew that said deed had been delivered to Daniel, and that he claimed the property as his own; and none of them, so far as the record shows, ever questioned the delivery or validity of said deed. In a letter written by the plaintiff to Daniel on November 10, 1868, a few months after said deed had been written by him, he says: "I was applied to to-day to know if my house was for sale, and what the price was. I informed the party that I had let you have it, and that your price was $3,000." I think this evidence sufficient to prove that said deed was properly delivered to D. F. Connell. If it was delivered upon any condition, it must have been upon the payment of the Babbitt & Good debt; and, whether that debt was paid before or after the delivery of the deed, the delivery would certainly be operative, and the deed valid from the time the debt was in fact paid. 3 Washb. Real Prop. 313, 328. But, further, the plaintiff is estopped at this late day from denying the validity of said deed. He had full notice for nearly 18 years that said deed was upon the public records of the county, and he not only took no action to set it aside, but never questioned its validity until the property passed into the hands of a purchaser from his brother. Delay in the assertion of a right, unless satisfactorily explained, operates in equity as evidence of assent, acquiescence, or waiver; and this rule applies with peculiar force when the attempt is made to impeach a transaction like the one now in question. Trader v. Jarvis, 23 W. Va. 100; Doggett v. Helm, 17 Grat. 96; Evans' Appeal, 81 Pa. St. 302; Hayward v. Bank, 96 U. S. 611.

2. We come now to the inquiry, were Pickens and the trustee, Laidley, purchasers without notice? The plaintiff, in his original bill, does not allege or claim that Laidley had notice. In that bill the only allegation of notice is that the plaintiff gave notice to Ruffner Bros., the agents of Pickens, who loaned the money to D. F. Connell. The first claim we have from the plaintiff of any notice to Laidley is in the amended bill, which was evidently filed after the depositions of the Ruffners had been taken denying that they were the agents of Pickens. This fact is significant; for if the plaintiff went to Laidley, as he claims, to notify him of his equities, it is not likely he would have omitted that important fact from his original bill. The plaintiff, in his deposition, taken after the depositions of Pickens and the Ruffners had been filed, says that he never had any conversation with Pickens previous to the loan in reference to it, and knew nothing of it until about August, 1886. He further says that before the loan was made he was informed that his brother was negotiating with Pickens through the Ruffner Bros. for a loan of $3,000, and that his brother had gone away in a hurry, and wanted him to give Mr. Laidley any information he might want about the title to the property; that he then went immediately to the Ruffner Bros., "and told them about it, and told them that I claimed the property, and was not willing for it." He further says: "I did not wait for Mr. Laidley to come and see me, but I went to see Mr. W. S. Laidley, trustee in the deed from D. F. Connell for Pickens, the same or the next day. I saw him at the clerk's office. I told him of my claim to the property where I resided there, on Quarrier street. He remarked that D. F. Connell had another property on Quarrier street. I told him, no; that he had sold that to Ham. Morris. This was some place between the 27th and last of August, I think, 1884." He further says he had two or three conversations with Pickens after the loan fell due in regard to the payment of the interest on it. In another part of his deposition the plaintiff says that in 1879 his brother offered to give Polsley a trust-deed on this property, and that he told his brother "that he [I] would not object to his giving a lien on it to Polsley." This is the whole of plaintiff's testimony in regard to the question of notice, and it is the only evidence on his behalf in the record. On the other hand, we have the testimony of several witnesses which tends either directly or indirectly to contradict the plaintiff, and to show that Pickens was a purchaser without notice. The testimony of the Ruffner Bros., as well as that of Pickens himself, clearly proves that the Ruffners were not the agents of Pickens, and had no concern or interest in the money loaned or the trust-deed. All that the record shows is that at the time the loan was made Pickens had some money in the hands of Ruffner Bros., and upon inquiry of them by D. F. Connell they told him that it was probable he could borrow some money from Pickens. Connell then saw Pickens, obtained the loan, and Pickens gave him an order on Ruffner Bros., and on that order they paid the money to Connell. This, of course, did not make Ruffner Bros. the agents of Pickens; and, therefore, even if the plaintiff had given them notice of his claim to the house and lot, that would not be notice to Pickens, or in any degree affect him as a *bona fide* purchaser.

The sole question is, therefore, did Laidley, the trustee, have notice? We have already seen that Laidley, in his sworn answer

Digitized by Google

says that he remembers nothing whatever of having any conversation with the plaintiff, or notice of the plaintiff's equities, before the trust-deed was executed. D. F. Connell testifies that he told Mr. Laidley to investigate the title, and either give to him his deed for the property, or referred him to the records for that purpose. Pickens testifies that before the loan was made to D. F. Connell he had a conversation with the plaintiff on the subject; that the plaintiff appeared to be very anxious for his brother to get the money; and that "he did not apprise me at that time that he had a claim against the property." And then, in answer to the question: "When did he first tell you that he had any claim against this property?" says: "That was about six months ago; may be a little longer, and may be not so long." This witness further testifies that, after the loan had been made, he had several conversations with the plaintiff, and he said that his brother was going to pay it; that the plaintiff never told him he had any claim to the property until the money became due, and he wanted the interest on it. He further says that Laidley was not his retained counsel, and he does not remember that he employed him to examine the title to the property. It seems to me that this testimony and the facts and circumstances attending the transaction fully overcome the pretensions of the plaintiff that he notified Laidley of his claim. It is not reasonable to suppose, if he had done so, that Laidley could have forgotten it; and it is altogether improbable that, with such notice, Laidley would have passed the title, and become the trustee in the trust-deed, without informing Pickens; and still less probable that Pickens, if informed of any defect in the title, would have made the loan upon such security. Pickens testifies positively that he had a conversation with the plaintiff in respect to the matter before the loan was effected, and that the plaintiff, instead of objecting, appeared to be very anxious for his brother to get the money. This is corroborated by the testimony of the plaintiff, who admits that he had no objection to his brother giving a trust-deed on this property to Polsley. From the whole testimony, facts, and circumstances it seems to me to be apparent that the plaintiff, at the time the loan was effected, made no objection, and gave no notice of his claim to the property, but when the debt became due, and Pickens wanted his money, then for the first time he gave notice of his claim to the property. But be this as it may, I am clearly of opinion that the plaintiff has failed to establish the fact that he gave such notice, or that either Pickens or Laidley had such knowledge, as ought to deprive them of the position and rights of purchasers for value without notice. To charge a *bona fide* purchaser with notice, either express or implied, the notice must be something more than a vague statement that the vendor's title is subject to an equity. It must be such information as to bind the conscience of the purchaser. Wade, Notice, § 29. A court of equity will not be astute to charge a constructive trust upon one who has acted honestly, and paid a full and fair consideration without notice or knowledge. Wilson v. Wall, 6 Wall. 83, 90; Mundy v. Vawter, 3 Grat. 518. Having arrived at this conclusion, it is unnecessary in this cause to determine or consider the questions raised and discussed in respect to the controversy as between the plaintiff and the defendant D. F. Connell, and as to those questions we decide nothing. If the plaintiff has any rights or equities in the said property as against D. F. Connell, or has any other demand or claim against said D. F. Connell, they are such as do not concern the other defendants in this cause; and they must therefore be settled in a suit between themselves. For the reasons aforesaid the decree of the circuit court must be affirmed, but as a matter of precaution, though, perhaps, an unnecessary one, the said decree is affirmed without prejudice to the right of either the plaintiff or the defendant D. F. Connell to institute and prosecute any proper suit at law or in equity to settle any claim or equities between them in respect to the house and lot in the bill mentioned, or any other claims or accounts existing between them, and which are referred to in the pleadings in this cause.

ENGLISH and BRANNON, JJ., concurred. GREEN, J., absent.

(32 W. Va. 406)

BURTON *et al.* *v.* GIBSON *et ux.*

(*Supreme Court of Appeals of West Virginia.* March 12, 1889.)

FRAUDULENT CONVEYANCES—WIFE'S EQUITY.

G., who was a merchant in the town of Sissonville, Kanawha county, W. Va., became the owner of a lot in said town containing three-fourths of an acre, by a deed made to him by M. and wife, on the 17th day of August, 1871. When he acquired said lot, his wife, M. G., was the owner of a lot in the same town which had been conveyed to her by M. and wife by deed dated November 19, 1866, and which was recorded on the 3d day of June, 1867. On the 19th of June, 1877, G. agreed with O. to exchange both of said lots in the town of Sissonville for 390 acres of land owned by O. on Blue creek, in said county, which agreement was carried into effect on the 23d day of September, 1877, by G. and his wife, M. G., interchanging deeds with O.; said G. and wife conveying to O. said two lots in Sissonville, and O. conveying to said M. G., the wife of G., the said 390-acre tract. At the time of this interchange said G. had become involved in debt, and in February, 1879, a bill was filed by the creditors of G. praying, among other things, that the conveyance made by O. to the said wife of G. might be set aside as fraudulent, and said 390-acre tract of land might be subjected to sale to pay the creditors of G. represented in said bill. *Held*, that while, under the circumstances, it might be proper to decree a sale of said 390-acre tract of land to satisfy the claims asserted in the bill, yet that M. G., wife of G., was entitled to a return of the amount she contributed towards paying for said 390-acre tract, to be measured by the value of said lot in Sissonville owned by her, and that before a sale of said 390-acre tract was made the court should have directed a commissioner to ascertain the value of said lot in the town of Sissonville, which was in the name of the wife of G., on the 23d day of September, 1877, at the time it was

Digitized by Google

conveyed to O., in order that her rights might be respected in the distribution; and in order to do that the value of said lot in the town of Sissonville, held at that date by G., should also have been ascertained; that is, the said M. G. and the said G.'s creditors are entitled to share in the proceeds of the Blue Creek property in the proportion of the value of the respective Sissonville properties contributed by them respectively to the purchase of said property.

(*Syllabus by the Court.*)

Appeal from circuit court, Kanawha county.

E. W. Wilson, for appellants. *W. Mollohan* and *Brown & Jackson*, for appellees.

ENGLISH, J. This was a suit in equity, instituted by Gideon Burton and others against John A. Gibson and others in the circuit court of Kanawha county in February, 1879, the object of which was to set aside as fraudulent certain conveyances made to Mary L. Gibson of lands situated in the said county as fraudulent and void as to the plaintiffs and other creditors of said John A. Gibson, and subject the same to sale to satisfy certain judgments set forth in the plaintiff's bill. It appears from the pleadings and exhibits filed in said suit that the defendant Mary S. Gibson was the owner of a lot or parcel of land in the town of Sissonville in said county containing three-fourths of an acre, which was conveyed to her by one Diocletian Martin and wife, by deed dated November 19, 1866, and which deed was admitted to record on the 3d day of June, 1867; and her husband, the defendant John A. Gibson, was also the owner of three-fourths of an acre of land situated in said town of Sissonville, which was also conveyed to him by said Diocletian Martin and wife by deed dated August 17, 1871; and on the 19th day of June, 1877, an agreement in writing was entered into between said John A. Gibson and John O'Reilley and Bernard O'Reilley whereby said John A. Gibson agreed with said O'Reilleys to exchange his Sissonville property for 390 acres of land, more or less, owned by said O'Reilleys and some minor children jointly, the parties to said agreement covenanting with said Gibson to secure from the court a decree directing a conveyance of said minor children's interest in said tract of land, containing 390 acres, more or less, and lying on Blue creek in said county. Said decree was subsequently obtained, directing Bernard O'Reilley, guardian for said infants, and authorizing and empowering him to convey on behalf of said infants to John A. Gibson, by proper deed, the interest of said infants in said Blue Creek lands, and to deliver said deed to said John A. Gibson upon his (the said John A. Gibson's) making, executing, and delivering for record a deed with covenants of general warranty to said John James, Thomas Francis, Elizabeth, Sarah Jane, Peter, Charles, and Joseph O'Reilley for said two store-houses and two dwelling-houses, with the lots on which the same are situated; and in pursuance of said decree Bernard O'Reilley, as guardian for said infants, on the 23d day of September, 1877, conveyed to Mary Gibson, wife of John A. Gibson, said 390 acres of land, and on the same day the said John A. Gibson and Mary L. Gibson, his wife, conveyed to said O'Reilleys three-fourths of an acre of land, the same premises which were conveyed to said John A. Gibson by Diocletian Martin and wife by deed dated August 17, 1871, on which there was situated one dwelling-house and blacksmith shop, also three-fourths of an acre on which was situated a dwelling-house, two store-houses, and a stable, which lot was conveyed to Mary Gibson by deed dated November 19, 1866, from Diocletian Martin and wife. By a deed of conveyance bearing date December 14, 1877, Charles C. Lewis conveyed to said Mary L. Gibson a certain lot in the city of Charleston in consideration of the sum of $1,000, which sum seems to have been previously paid by said John A. Gibson, and this lot appears to have been exchanged for 150 acres of land with one John A. Wright, which tract of 150 acres is also located in Kanawha county, and which change was effected by an interchange of deeds made by said John A. Wright and John A. Gibson and Mary L. Gibson on the 26th day of August, 1868. The plaintiffs alleged that at the dates of the said conveyances made as aforesaid by the said Charles C. Lewis, by the said John A. Gibson and wife to the said John A. Wright, by the said John A. Wright to the said Mary Gibson, and of the pretended conveyance made as aforesaid by the said Bernard O'Reilley, guardian, to the said Mary Gibson, or immediately theretofore, the said defendant John A. Gibson was and had been for many years engaged in the mercantile business in the said county of Kanawha; and that the aforesaid judgments, (which are described in plaintiff's bill,) and the accounts and claims upon which said judgments were recovered against the said defendant John A. Gibson, were all contracted and made by him before the dates of said last-mentioned conveyance; and that the said debts were contracted by the said defendant John A. Gibson upon the faith and credit of the said real estate then owned by him; that said claims are due and unpaid, and that the said defendant John A. Gibson now holds in his own name no property from which the same may be paid and satisfied; that the said real estate conveyed to the defendant Mary L. Gibson, viz., said lot in the city of Charleston, said 150-acre tract, and the said 390-acre tract, which latter tract is claimed and held by said defendant Mary Gibson under said pretended conveyance from Bernard O'Reilley, guardian as aforesaid, was purchased by said defendant John A. Gibson, and paid for by him wholly and entirely by and out of his own money and property, and that no part thereof was paid for by or out of the money or property of the said defendant Mary Gibson; and that the said conveyance and the said pretended conveyance to the said defendant

Digitized by Google

Mary Gibson were made to her without any consideration deemed valuable in law moving from her or on her part, but they and each of them were so made to her at the instance of the said defendant John A. Gibson, with intent and for the purpose of delaying, hindering, and defrauding the plaintiffs and the other creditors of the said John A. Gibson in the collection and enforcement of their claims against him, and for the purpose of shielding the said real estate from subjection to the payment of said debts; that said conveyances made to said Mary L. Gibson are null and void and fraudulent, and the real estate so conveyed is liable to the said claims and judgments, and that plaintiffs are entitled to a decree for the sale of same, or so much thereof as may be necessary to satisfy and pay off said claims, debts, and judgments; and they pray that the said conveyance made by John A. Wright and Bernard O'Reilley, guardian as aforesaid, to said Mary Gibson, may be declared fraudulent, null, and void, and that said O'Reilleys be decreed to convey said 390 acres unto the defendant John A. Gibson; and that said 150 and 390 acre tracts may be decreed to be sold in satisfaction and payment of the debts, claims, and judgments aforesaid of plaintiffs.

The said Mary L. Gibson filed her separate answer to plaintiffs' bill, stating that she had no personal knowledge of the various judgments claimed in plaintiff's bill to have been recovered against him; admitting that her said husband, on the 2d of October, 1873, purchased of C. C. Lewis and J. Brisben Walker the lot situated in Charleston, Kanawha county, W. Va., for the sum of $1,000; that said Lewis acquired the interest of said Walker in said lot, and at the instance of her husband, on the 14th of December, 1877, conveyed said lot to her, which deed was duly recorded on the 10th day of January, 1878, and that her said husband paid the purchase money for said lot before any or either of the alleged liabilities in said bill mentioned had accrued against him; that she took possession of said lot under said deed, and continued therein until the exchange was made with John A. Wright for the 150-acre tract of land before mentioned; and at the time of taking possession of said lot neither of said liabilities had accrued. She also admits that her said husband had been for years the owner of a lot of land in Sissonville in said county, which only contained about one-fourth, instead of three-fourths, of an acre, and instead of the buildings alleged as situated thereon there was only a one-story frame dwelling-house with three rooms, and a mere skeleton frame blacksmith shop, and that the other buildings mentioned are on a lot of land formerly owned by her, and which was conveyed to her on the 19th day of December, 1866, by deed of that date, by Diocletian Martin and wife, which contained three-fourths of an acre, and adjoined the lot owned by her husband, which lot was paid for in full at the time said deed was made, and long before any of the alleged indebtedness in the plaintiffs' bill mentioned, and before her husband became acquainted with the plaintiffs. She exhibits a copy of said deed with her answer, from which it appears that said deed was admitted to record on the 3d of June, 1867. She also admits that said two lots in the town of Sissonville were exchanged for the 390-acre tract on Blue creek in said county, and that said 390-acre tract was conveyed to her by said O'Reilleys by deed dated September 23, 1877, which was acknowledged July 3, 1878, and admitted to record July 29, 1878.

The defendant John A. Gibson answered said bill, claiming that he always gave the representatives of plaintiffs to understand that he did not own said real estate; also denying that any of said real estate was purchased directly or indirectly with any of the goods or merchandise, or the proceeds of the sale thereof, purchased by him from them; giving a history of his purchase of the lot from C. C. Lewis in the town of Charleston, which was exchanged with John A. Wright for the 150-acre tract, and claiming that his wife paid part of the purchase money for said lot with money she had made by keeping hotel, and about $50 was paid in silver by his wife, which amount she had had for years previous; and as she had paid the principal part of said purchase money, and had by her industry and saving contributed largely to acquire it, he had the deed made to her, but not for the purpose of hindering or delaying his creditors from collecting their debts. He also denies that the exchange of the Sissonville property with the O'Reilleys for the 390-acre tract was made for the purpose of hindering or delaying his creditors from collecting their debts, but says that said exchange was fair, and free from fraud or wrong; that said Sissonville property belonged to his wife, and for that reason the deed was made to her; that a lot containing three-fourths of an acre in Sissonville was owned by him, but it was only worth about $300, and, although it went in as part of the consideration for said 390-acre tract, that the real substantial consideration was the three-fourths of an acre which belonged to his wife, which had valuable improvements thereon, consisting of a dwelling-house, two store-houses, and a stable, in all worth $3,500; and he claims that plaintiff knew that said last-named lot belonged to his wife.

On the 4th of December, 1879, said answers were filed, and the plaintiffs replied generally thereto, and H. D. Shrewsbury, one of the commissioners, was directed to take, state, and report an account showing—*First*, the amounts and priorities of the claims by judgment or otherwise against the defendant John A. Gibson; *second*, what were the amounts and character of the consideration for the conveyances made by deed dated September 23, 1877, from Bernard O'Reilley, guardian, and others, to Mary Gibson, wife of John A. Gibson, and by the deed dated August 28, 1878, from John A. Wright to Mary

Digitized by Google

A. Gibson, and by whom, and when, and how the same was paid. On the 14th day of June, 1886, said Shrewsbury, commissioner, tendered his report, which was ordered to be filed. By said report he ascertained the amount and priority of the claims by judgment or otherwise against said John A. Gibson, ascertaining the total amount as of June 1, 1886, to be $2,622.27. He also ascertained that by an agreement dated June 19, 1877, said John A. Gibson agreed to convey with covenant of general warranty and relinquishment of his wife's dower, to James O'Reilley and others, certain real estate situated in the town of Sissonville, Kanawha county, in consideration that the said O'Reilleys would convey to said John A. Gibson said Blue Creek land, and obtain a decree of the court authorizing the conveyance of the interest belonging to the minor children of said Bernard O'Reilley in said land, and said exchange was made, the title of said Blue Creek land being conveyed to said Mary L. Gibson. He also finds the facts in regard to the manner and date of the acquisition of the title to the lot in Charleston from C. C. Lewis and J. Brisben Walker, and the exchange of the same with John A. Wright for the 150-acre tract of land situated on Elk river; that both these transactions were exchanges of property by said Gibsons with said O'Reilleys and with John A. Wright; that the testimony and the presumptions are that the real estate contained in the deed from John A. Gibson and wife to the O'Reilleys, viz., said Sissonville property, as well as the real estate contained in said deed from John A. Gibson and wife to John A. Wright, viz., said lot of land in Charleston, were originally paid for by John A. Gibson during the coverture with the said Mary L. Gibson; and that a large portion of the purchase money was paid by the said John A. Gibson while merchandising, and subsequent to the contraction by him of the debts therein reported; and that the consideration for both said 390 and 150 acre tracts of land were really paid by John A. Gibson; that he bought and paid for the lots that were exchanged for said tracts of land, and had them conveyed to his wife; and that said deeds were fraudulent as to the creditors of the said John A. Gibson, therein reported, and that he procured said deeds to be made to his said wife for the purpose of hindering, delaying, and defrauding the creditors of the said John A. Gibson,—which report was excepted to by Mary L. Gibson and John James O'Reilley and Bernard O'Reilley, guardian, etc., so far as the same declares the deed of September 23, 1877, from Bernard O'Reilley, guardian, and others, to Mary Gibson, and the deed from John A. Wright to her, fraudulent as to the creditors of John A. Gibson, and as having been procured to be made to said Mary Gibson, his wife, for the purpose of hindering, delaying, and defrauding the creditors of the said John A. Gibson; and also every other statement in said report charging fraud or a purpose to delay, hinder, or defraud the creditors of said John A. Gibson, or vitiate any or either of the contracts or deeds mentioned in complainant's bill, etc.

Now, as regards the lot in the city of Charleston, which was conveyed to the defendant Mary L. Gibson by Charles C. Lewis, although it appears in evidence that the original agreement for the purchase of said lot bears date on the 22d day of October, 1873, yet said agreement was made by the defendant John A. Gibson with said Charles C. Lewis and J. Brisben Walker; that he paid $60 cash in hand, and executed 47 negotiable notes bearing date October 1, 1873, and payable monthly, with interest, until the entire $1,000 was paid. The evidence shows that these notes were paid by said John A. Gibson at irregular intervals between the years 1874 and 1878. The last payment of about $50 was made January 9, 1878, and the deed was executed to the defendant Mary L. Gibson by said C. C. Lewis and wife, bearing date December 14, 1877, but the deed does not seem to have been admitted to record until January 10, 1878, the day after the last payment was made; and C. C. Lewis states in his deposition that his recollection was that it was delivered on that day. Charles Kendall, a witness examined in the case, says, in answer to a question asked him in his deposition, that the goods sold by the plaintiffs Gideon Burton & Co. to said John A. Gibson, upon which said judgment is founded, were composed of several bills, as follows, to-wit: May 5, 1877, $432.08; June 1, 1877, $78.75; September 13, 1877, $358.75; and September 19, 1877, $71.40. It also appears from the deposition of J. M. Payne that he had in his hands for collection an account in favor of Lehman, Richman & Co. against said John A. Gibson, a part of which was contracted April 12, 1877, viz., $178, and a part October 18, 1877, for $156.40, and protest fees, $1.71, paid July 7, 1877, on which claims were some credits, leaving a balance of $152.13. So it will be perceived a large portion of the indebtedness asserted by the plaintiffs in this suit accrued shortly before the conveyance aforesaid was made by said C. C. Lewis and wife to said Mary L. Gibson for said lot in the city of Charleston, which was subsequently exchanged in August, 1878, for said 150-acre tract, with said J. A. Wright. It also appears that on the 19th day of June, 1877, the agreement for the exchange of the Sissonville property with the O'Reilleys was entered into between said John A. Gibson, John O'Reilley, and Bernard O'Reilley; that the deeds to carry into effect said exchange were dated on the 23d day of September, 1877, although not recorded until July, 1878. In this manner the conveyances for said 390 and said 150 acre tracts of land were made to said Mary L. Gibson about the time of or shortly after the bulk of the plaintiffs' claims originated. It also appears that the transfer of these tracts of land to the said Mary L. Gibson left the defendant John A. Gibson

Digitized by Google

with no other property out of which said claims could be made. This fact is alleged in the bill, and not denied in the answers. The plaintiffs in their bill, however, allege that on the 19th day of June, 1877, and for many years previous thereto, the defendant John A. Gibson had been the owner in fee of a valuable parcel of real estate situated in the village of Sissonville, Kanawha county, containing three-fourths of an acre, upon which a store-house and other houses were located, which was conveyed on the 17th day of August, 1871, to said John A. Gibson by one Diocletian Martin and wife, by deed of that date. Both the defendants, John A Gibson, and Mary L., his wife, deny that the lot described in the bill as conveyed to John A. Gibson by Diocletian Martin on the 17th day of August, 1871, is the lot on which the store-house and dwelling-house and stable were located, but allege that there was a blacksmith shop and a cottage with three rooms in it on said lot conveyed to said John A. Gibson in 1871; and they say in their answers that the lot on which said store-house and dwelling is located was conveyed to said Mary L. Gibson by said Martin and wife in 1866, on the 19th day of November, and exhibit a copy of said deed with their answer. They also claim that the lot owned by said John A. Gibson was only worth three or four hundred dollars, while the one owned by the defendant Mary L. Gibson was worth at least $2,000; and although the allegations of the bill are thus positively denied in regard to the character of the improvements on the lot in Sissonville owned by said John A. Gibson, the plaintiffs take no proof in regard to the matter; and although the plaintiffs allege in their bill that John A. Gibson owned the lot in Sissonville which was conveyed to him by said Martin and wife in 1871, the defendant Mary L. Gibson exhibits with her answer two separate deeds from said Martin and wife,—one to herself, dated in November, 1866; and one to her said husband, dated in August, 1871, showing that she and her husband owned different lots. The defendant Mary L. Gibson demurred generally to the plaintiffs' bill, which was overruled. The plaintiffs in their bill only have alleged that the lot conveyed to John A. Gibson by said Martin and wife in 1871 was exchanged for the 390-acre tract, when it appears that the defendant Mary L. Gibson also joined with her husband in conveying another lot containing three-fourths of an acre as part of the consideration, which lot she owned and held a deed for from said Martin and wife since November, 1866,—more than 10 years before it was conveyed by her to said O'Reilleys in exchange for said 390-acre tract; and it must be considered that the commissioner who stated the account in this cause, in finding that said Sissonville property was originally paid for by John A. Gibson, referred to the Sissonville property mentioned in the plaintiff's bill, viz., the lot conveyed to John A. Gibson by said Martin and wife in 1871, and not to the Sissonville property, which was conveyed to Mary L. Gibson in 1866, and which is not mentioned in plaintiff's bill, and which could not have been subjected by plaintiffs on account of the conveyance to her being voluntary, because more than five years had elapsed since said conveyance was made before the institution of this suit. It is neither alleged nor proven in this cause that John A. Gibson was indebted to any person in the year 1866, when said deed was made to Mary L. Gibson by said Martin and wife.

The plaintiffs in their bill only allege that the property that was conveyed to the O'Reilleys in exchange for the 390-acre tract was the lot conveyed by Martin and wife to John A. Gibson in 1871; and their bill is silent as to the other lot conveyed to Mary L. Gibson by Martin and wife in 1866; and, there being neither allegations nor proofs in regard to the ownership of said last-named lot, the statements made by the defendants in their answers, accompanied by the exhibit of a certified copy of the deeds, must be taken to be the true and correct statement in regard to the ownership of said property. There is no fraud alleged in the plaintiff's bill in regard to the manner in which said Mary L. Gibson acquired said lot, and, such being the case, this court will not presume that she acquired it fraudulently. It is alleged that the said John A. Gibson purchased and paid for said 390-acre tract to said O'Reilleys wholly and entirely out of his own money and property, and that no part was paid out of the money or property of the said Mary L. Gibson, and that said conveyances were made to her without any consideration deemed valuable in law moving from her or on her part; but that the 150-acre tract and 390-acre tract were each conveyed to her at the instance of said John A. Gibson for the purpose of delaying, hindering, and defrauding his creditors, and the commissioner in his report so finds; and, although his report is excepted to by the defendant Mary L. Gibson and the O'Reilleys, yet the court in its final decree, rendered on the 17th day of July, 1886, overruled said exception, and confirmed said report, set aside said conveyances to said Mary L. Gibson, and decreed against the said John A. Gibson for the amount of the debts found by said commissioner to be due to said respective plaintiffs, and directed that, unless the said John A. Gibson, or the said Mary L. Gibson, or some one for them, should within 30 days from the rising of the court pay said debts to said creditors, the special commissioners therein named should advertise and sell said lands as therein directed.

Now, although it has been held by this court in the case of Core v. Cunningham, 27 W. Va. 206, that "transfers of property, either directly or indirectly, by an insolvent husband to his wife during coverture are justly regarded with suspicion, and, unless it clearly appears that the consideration was paid from the separate estate of the wife, or

Digitized by Google

by some one for her, out of means not derived either directly or remotely from the husband, such transfers will be held fraudulent and void as to the creditors of the husband;" and the same, in substance, has been held by this court in the case of Lockhard v. Beckley, 10 W. Va. 87; Burt v. Timmons, 29 W. Va. 441, 2 S. E. Rep. 780, and a good many others,—yet in the case of Hunter's Ex'rs v. Hunter, 10 W. Va. 321, it is held that matters not charged in the bill or averred in the answer, and not in issue in the cause, are not proper to be considered upon the hearing. Also it is not error in a court to fail to pass upon the validity of a deed when the record does not show that it was called upon to do so by the pleadings in the cause. In that case it is also held that the limitation of five years as to voluntary conveyances above referred to under section 14, c. 104, of the Code, commences to run at the time the deed was made. No fraud is charged as to the deed made to said Mary L. Gibson by said Martin and wife in 1866. Its validity is in no manner attacked, and there is no allegation or proof that John A. Gibson then owed a dollar, and, for all that appears in this cause in any manner, she must be recognized as the true and lawful owner of the lot conveyed to her by the Martins in 1866, and to the extent of the value of said lot she must be held and considered as an owner of the 390-acre tract of land for which it was exchanged in part payment. In the case of Quidort's Adm'r v. Pergeaux, 18 N. J. Eq. 472, it was held that a deed taken in the name of the wife for property purchased with her separate estate is no fraud upon the creditors, even if the taking title in her name was to avoid any claim by judgment against her husband for debts which he then owed. But where the balance of the purchase money for such property was paid out of the earnings of a business carried on in the name of the wife, but to which the skill and labor of the husband largely contributed, such property will be decreed to be held by the wife in trust for his creditors, subject to her claim for the money advanced out of her separate estate. In Glidden v. Taylor, 16 Ohio St. 509, it was decided "that where a wife suffers her money to be employed by the husband, and blended with his earnings so that it cannot be separated, the most favorable position she can be allowed to assume is that of a preferred creditor in equity, and as such entitled to her money and interest." In this case, then, I am of opinion that the court below erred in directing a sale of said 390-acre tract of land, without respecting the interest of the said Mary L. Gibson therein. The court should have ascertained by a reference to a commissioner the value of the lot or parcel of land in the town of Sissonville which was conveyed to her, the said Mary L. Gibson, by said Martin and wife, in 1866; and in directing a sale of said 390-acre tract of land should have decreed that she was entitled to the proceeds of said sale in proportion to the amount of the purchase money paid by her on said tract with said lot; and in order to do that the value of the other Sissonville lot would also have to be ascertained at the time of said exchange; and, in order that this may be done, the decree complained of in this case must be reversed, and the cause remanded to the circuit court of Kanawha county for further proceedings to be had therein in accordance with the principles herein set forth, and the appellees must pay the cost of this appeal.

SNYDER, P., and BRANNON, J., concurred. GREEN, J., absent.

(32 W. Va. 378)

MACCUTCHEON v. INGRAHAM.

(*Supreme Court of Appeals of West Virginia.* March 12, 1889.)

VENDOR'S LIEN — RESCISSION OF CONTRACT — INSURANCE.

1. On the 12th day of April, 1882, M. executes to I. a deed of conveyance for certain lots of land in Greenville, Wirt county, W. Va., in consideration of $600, $200 of which is paid in cash, and the residue to be paid in one, two, three, and four years after date, in payments of $100 each, and the vendor's lien is retained to secure the payment of said deferred installments. In 1884, I. insures the house situated on said lots in the North British & Mercantile Insurance Company for $500, and the said house was destroyed by fire, February 5, 1886. Subsequently an agreement in writing dated in January, 1885, was entered into between M. and I., whereby it was stipulated that I. should remain in possession of said lots until the 1st day of March, 1886, on the following conditions, viz.: That she, the said I., should take care of said property, keep the taxes paid up to that date, and peaceably surrender possession of said property to the said M., give up the deed which she then held, and the said M. should give up the notes she might then hold against said I., and the whole former trade or sale of the property should be recanted; but if the said I. should meet all the payments due to that date, with a probability of meeting the remaining deferred payments, then the original contract to remain in full force; otherwise to be null and void. Upon a bill filed in June, 1886, to enforce said vendor's lien against I., she filed said agreement of January, 1885, with her answer, and relied upon the same as a release of said vendor's lien, and a rescission of the contract to pay the residue of said purchase money. *Held*, that by said agreement of January, 1885, said vendor's lien was released, and the contract to pay the residue of said purchase money was rescinded.

2. That notwithstanding said agreement to rescind said contract of sale, until said rescission was consummated by exchange of deed and notes, the defendant I. still retained an insurable interest in said property on the 5th of February, 1886 when said property was destroyed by fire, and was entitled to the benefit of said policy of insurance.

(*Syllabus by the Court.*)

Appeal from circuit court, Wirt county.

Suit to enforce vendor's lien.

Beard & Lockhart, for appellant. *V. B Archer*, for appellee.

ENGLISH, J. On the 25th day of April, 1882, Elizabeth D. MacCutcheon conveyed to Rachel C. Ingraham four town lots in the town of Greenville, in the county of Wirt and state of West Virginia, in consideration of $600, $200 of which was paid down in cash, and the remaining $400 was to be paid

Digitized by Google

in four installments, the first to be paid on the 1st day of May, 1884, and the residue in one, two, and three years thereafter, with interest from date, and to secure the payment of said deferred installments the vendor's lien was reserved. On the 1st day of August, 1884, said R. C. Ingraham paid the sum of $40 on said first note, and has paid nothing since. In June, 1884, said R. C. Ingraham insured said house for $500 in the North British & Mercantile Insurance Company. On the 31st day of January, 1885, an agreement in writing was entered into between said E. D. MacCutcheon and Rachel Ingraham, wherein it was covenanted that the said Rachel Ingraham should remain in peaceable possession of the property aforesaid until the 1st day of March, 1886, on the following conditions, viz.: That said R. Ingraham should take good care of said property, keep the taxes paid up to that date, and peaceably surrender possession of the same to said E. D. MacCutcheon, and give up the deed which she then held, said E. D. MacCutcheon to give up the notes she may then hold against the said R. Ingraham, and the whole former trade or sale of the property should be recanted; but if the said Rachel Ingraham should meet all the payments due to that date, with a probability of meeting the remaining deferred payments, then the original contract was to remain in full force; otherwise to be null and void. In the month of February, 1886, the house situated on said lots was destroyed by fire, together with some personal property belonging to the defendant, Rachel Ingraham. On the first Monday in July, 1886, the said Elizabeth D. MacCutcheon filed a bill in equity in the circuit court of Wirt county to enforce the vendor's lien reserved on the face of said deed, and to recover the residue of the purchase money which was then due from said Rachel Ingraham to plaintiff on said lots or parcels of land upon the notes in said deed described, and made Rachel Ingraham, the North British & Mercantile Insurance Company, and J. R. Timms, agent and in his own right, defendants; and, by way of auxiliary process, she sued out an attachment in said suit, and designated the defendant J. R. Timms, agent of said insurance company, as being indebted to or having in his possession or under his control the effects of said Rachel Ingraham, who was summoned to answer at the next term of said circuit court; and on the 30th day of June, 1886, said Timms, as agent of said insurance company, filed his answer in writing in open court, as garnishee, disclosing that he had in his possession a draft for $500, payable to Miss R. C. Ingraham, to pay the loss on said property. On the 26th day of October, 1886, the defendant R. C. Ingraham demurred generally to the plaintiff's bill, which demurrer was subsequently overruled.

On the 29th day of March, 1887, the defendant Rachel Ingraham filed her answer to the plaintiff's bill, and the plaintiff replied generally thereto. In said answer said defendant admitted the purchase of the lots in the bill mentioned, and the price she was to pay for the same. She filed the deed from plaintiff as an exhibit, with her answer, and admitted that the notes executed by her to the plaintiff were correctly stated in plaintiff's bill. She, however, denied that she owed the plaintiff on the 10th of June, 1886, $331 on account of the three notes then due, and claimed a set-off of $13 on account of taxes she was compelled to pay for plaintiff. She admitted that she had the dwelling-house insured in the year 1884 for the sum of $500, and claimed that, being the owner, she had a right so to do; and alleged that, said dwelling-house having been destroyed by fire on the 5th day of February, 1886, by such destruction the money mentioned in the policy became due and payable to her. She denied that said lots were worth only $75, and claimed them to be worth $250 or $300. She further alleged that, in order to collect said insurance money, she was compelled to sue said insurance company in the county of Wood, and that the jury gave her a verdict for $500, but at great cost and expense to her; that said sum was paid into the hands of one R. Heber Smith, the receiver of said circuit court of Wood county, where the same still remains; and that said sum of money had never at any time been under the control or in the possession of said defendant. She denied that plaintiff was entitled in equity to any portion of said insurance money, because she is indebted to plaintiff for the purchase money, or has occupied said property. She denied that she agreed to have said property insured, and assign the policy to plaintiff, if plaintiff would not sue her. She then recited the agreement in writing hereinbefore stated as entered into between her and plaintiff on the 31st day of January, 1885, and claimed that she fully complied with said agreement, and for that reason the sale of said property to her is wholly and fully rescinded and annulled under the terms of said agreement. She claimed that since the 1st of March, 1886, the plaintiff had taken possession of said property, and rented it to others. She tendered a deed reconveying said property, and demanded that said notes be surrendered to her. She also alleged that she proposed to surrender said property to plaintiff soon after said dwelling was burned, if plaintiff would surrender to her said notes; but she refused, and brought this suit to enforce her supposed lien, which had been rescinded and annulled by said agreement, etc.

A considerable number of depositions was taken on both sides, and filed in the cause, bearing principally upon the questions raised by the attachment proceedings, and the value of the lots after the house was burned, and the rental value of the property while occupied by said defendant, and its present rental value; and on the 29th day of June, 1887, the cause came on to be heard upon the papers formerly read and proceedings theretofore had,

Digitized by Google

and the proofs filed, and the court decided to enforce the vendor's lien on the property described in the bill, and decreed that the plaintiff recover from the defendant Rachel C. Ingraham the sum of $480.36, including interest to the 29th day of June, 1887, and directed a sale of said lots by a special commissioner therein appointed, unless said amount and costs were paid in 30 days from the date of said decree, after giving bond and advertising the property as therein directed. The said Rachel C. Ingraham, however, in her answer, claimed that by the terms of the agreement made and entered into between herself and the plaintiff, E. D. MacCutcheon, on the 31st day of January, 1885, she, respondent, was to remain in possession of said property until the 1st day of March, 1886, to take good care of said property, and keep the taxes paid up to that date, and on that day she was to surrender possession of said property to plaintiff, and also surrender the deed, and plaintiff was to give up the notes she then held, and the whole former trade was to be rescinded; and the only clause in said agreement which would confer upon her the right to insist upon said original contract was the one which provided that, by meeting all the payments due to that date, meaning the 1st day of March, 1886, with a probability of meeting the remaining deferred payments, the original contract should remain in full force; otherwise it was to be null and void. She further alleges that she complied with said contract so far as paying taxes and caring for the property was concerned, but that, being unable to pay any part of said deferred payments of purchase money then due, she failed to make said payments, nor did she have any probability of meeting said deferred payments; and she charges that the said contract, and the sale of said property, is wholly rescinded and annulled under and by the terms of said agreement.

Upon examination of said agreement it seems to us that the defendant Rachel C. Ingraham is correct in the construction she places upon said contract. She was to be allowed to retain peaceable possession of said property until the 1st day of March, 1886, upon condition that she took good care of the same, kept the taxes paid up to that date, and then she was to peaceably surrender possession of said property to the plaintiff, give up the deed she held, and the plaintiff was to give up the notes which she then held against the said Rachel, and the whole former trade or sale of the property should be recanted. The residue of said contract merely conferred upon said Rachel the right to keep said property if she met the payments promptly, and there was a probability of her meeting the payments that would fall due after the 1st of March, 1886. The defendant appears to have paid the taxes at considerable inconvenience to herself, and to have used ordinary diligence in caring for the property, and nothing in the testimony taken in the cause shows that she was to blame for the destruction of the house, which occurred when she was absent from home on a visit, she having left it in the care of a party who had made his home with her, and who swears she took good care of it. Said defendant tenders the deed with her answer, and also a deed reconveying the property to plaintiff, and demands a surrender of the notes held by plaintiff.

Giving, then, the agreement aforesaid, of January 31, 1885, the construction we have indicated, it would operate as a complete answer to the plaintiff's bill, so far as it seeks to enforce the vendor's lien, and would entitle the defendant Rachel C. Ingraham to a surrender of her notes upon the return of the deed and reconveyance of the title, as she offered to do in connection with the answer filed by her in this cause. The plaintiff in her bill, however, alleged that the draft for the sum of $500 in the possession of said Timms, as agent for said insurance company, was for the express purpose of paying the loss on the identical house sold by plaintiff to defendant Ingraham, and which was destroyed by fire in February, 1886; that it is just, equitable, and right that she should have the full benefit of said insurance policy, —the defendant having never paid but about one-third of the purchase money on said house and lots, and having used and enjoyed the same for about four years, without paying any part of the deferred purchase money, save and except the sum of $40, with which she is duly credited. She further says that her vendor's lien is a lien on said policy of insurance, and that said draft in the hands of said Timms, agent as aforesaid, is subject to the lien for the deferred purchase money, and that it was agreed between the defendant and herself that if the plaintiff would hold up and not sue her on said purchase money for said property that she, defendant, would get said property insured in some good company, and assign the benefit of the policy of insurance to plaintiff to indemnify her against loss and damage in case of fire; that said Ingraham did insure said house in said insurance company, but failed and refused to assign the benefit thereof to plaintiff, and now refuses to pay plaintiff any part of said policy; and she prays judgment against said J. R. Timms, agent and garnishee. Said Rachel Ingraham, in her answer, denies said allegations that the lien retained in said deed is a lien on said policy of insurance, or the draft in the hands of said Timms; or that the same, or the money realized thereon, is subject to said lien; and calls for proof. She also denied that she agreed with the plaintiff to have said house insured, and then to assign to her the policy of insurance if plaintiff would hold up and not sue her on said purchase money.

Now, although the plaintiff had her own deposition taken in the cause, she states nothing in regard to said alleged agreement between herself and said Ingraham that she should insure the property and assign her the policy, if plaintiff would not sue on said de-

Digitized by Google

ferred notes; and no other witness proves any such agreement. If such an agreement had been established, it would have constituted an equitable lien in favor of the plaintiff upon said policy of insurance; but having failed to prove any such agreement, and it being positively denied by the answer, it need not be considered further. The loss of said house, however, by fire, having occurred subsequent to said agreement of the 31st of January, 1885, in regard to the rescission of said contract of sale, and before the 1st day of March, 1886, when said agreement was to be consummated, a question presents itself as to whether this state of circumstances would entitle the plaintiff E. D. MacCutcheon to said insurance money or any part thereof. In Wood on Fire Insurance, p. 558, § 330, we find that "a mere contract to sell property covered by insurance, even though the insured has bound himself to convey upon the performance of certain conditions, does not affect the validity of the policy; and if a loss occurs before the conditions are performed a recovery may be had by the insured, even though the conditions are subsequently performed; and, if it was agreed that the policy should be assigned to the purchaser, the judgment will inure to his benefit. Neither will a conditional transfer of property avoid the policy, but, if the insured parts with all his interest in the property, the policy ceases to be operative." See, also, 2 Bart. Ch. Pr. p. 918, § 290; also Insurance Co. v. Morrison, 11 Leigh, 354. And in Fland. Ins. p. 458, § 11, we find that "a conveyance, and simultaneous reconveyance back, or a transaction which amounts only to a conditional sale, is not such alienation as avoids a policy of insurance." In Gilbert v. Insurance Co., 23 Wend. 43, the insured premises were conveyed in fee, and a mortgage taken back to secure a portion of the purchase money. The residue of the purchase money was left open to await the result of a controversy between the vendor and a third person, respecting incumbrances on the property; the deed and mortgage, although recorded, to remain in the hands of a third party until such controversy was settled. Meanwhile the premises were destroyed by fire, and it was held that the deed did not take effect as an operative instrument until the happening of the contingency provided for, and that the fact of its having been recorded was only *prima facie* evidence of a delivery, and might consequently be rebutted, and therefore the grantor was not divested of his insurable interest in the premises. See, also, Fland. Ins. p. 426, § 7. "A contract of sale, the vendor retaining the title as his security for the unpaid purchase money, does not divest his insurable interest. The vendor, before payment of the purchase money and delivery of the conveyance, is to all intents and purposes the owner of the estate." See Trumbull v. Insurance Co., 12 Ohio, 305. Considering, then, the facts and circumstances developed in this case in the light of these authorities, I am of opinion that the plaintiff, MacCutcheon, had no lien of any description upon said insurance money, but that the said defendant Rachel C. Ingraham had an insurable interest in said real estate, both at the time said property was insured, and at the time said loss occurred, and that she was entitled to said insurance money as between herself and the plaintiff. I am further of the opinion that the circuit court erred in its decree of June 29, 1887, in decreeing in favor of the plaintiff on the single bills described in the deed from plaintiff to said Ingraham for the sum of $480.36, or any other sum, and in decreeing a sale of said lots to satisfy the lien retained on the face of said deed. This being the case, it is unnecessary to express any opinion upon the regularity of the proceedings had upon the attachment sued out in the cause, as it was only auxiliary to the original suit, and all dependent proceedings must fall if the original suit is not sustained. The decree complained of must be reversed, and the bill dismissed, and the appellee must pay the costs of this appeal, and of the court below.

SNYDER, P., and BRANNON, J., concurred. GREEN, J., absent.

(30 S. C. 329)

BARRETT *et al.* v. JAMES.

(*Supreme Court of South Carolina.* March 9, 1889.)

JUDGMENT—ADMINISTRATIVE ORDER.

1. In an action to obtain a conveyance from defendant as equitable mortgagee in possession, and for an accounting, it being alleged that he had received from the rents and profits more than sufficient to reimburse him for his advances, with interest, the court made a decree, referring the cause to a master to take and state an account of the rents and profits, and also an account of the moneys advanced by defendant; "that the amount of rents and profits ascertained upon said accounting to be due by the defendant be deducted from the amount of" defendant's advances; that, if the amount of the rents, etc., should be insufficient to cover the advances, the land should be sold to satisfy the same; but if the amount of the rents, etc., should prove sufficient to fully reimburse defendant, he should convey to plaintiffs. The result of the accounting showed that the rents and profits largely exceeded the amount of defendant's advances. Thereafter the judge of the circuit court in which the decree was entered granted an order at chambers, after he had left the circuit, directing that there be inserted in that decree the words, "that the defendant do pay to the plaintiffs the excess of rents and profits received by him from said land over and above" his advances, etc. *Held*, that the original decree was not a final adjudication that plaintiffs were not entitled to such excess, if there should be any, but, on the contrary, that the terms of the decree implied that, if there should be any excess, plaintiffs should receive it; that the order last granted was an administrative order, proper to carry into effect the principles of the original decree, and not an amendment or order to supply an omission in that decree; that the order should have been granted by the succeeding judge of the circuit; and that, as it was not a correction of a clerical error, the judge who had left the circuit had no power to make the order.

2. The succeeding judge, on motion before him for a similar order to that granted by the judge at chambers, refused to hear correspondence which had passed between the latter judge and the attorney, offered for the purpose of showing what was

Digitized by Google

the intention of that judge as to the excess of rents and profits when he rendered his original decree, or what was the proper construction of that decree. *Held* no error. It was the duty of the succeeding judge to put his own construction upon the decree, from its actual terms, unaffected by any extraneous testimony.

Appeal from common pleas circuit court of Sumter county.

A. B. Stuckey, for plaintiffs. *Blanding, Wilson & Fraser*, for defendant.

McIVER, J. Without going fully into the scope and objects of this action, it will be sufficient, for the purposes of these appeals, to state in general terms that the main object was to obtain a conveyance from defendant to plaintiffs of certain real estate which it was claimed he held possession of as equitable mortgagee, under a deed which, though absolute on its face, was intended as a mortgage, to secure the repayment of certain money advanced by defendant. One of the allegations in the complaint, denied by the answer, was that the defendant had received from the rents and profits of the land a sum more than sufficient to reimburse him for his advances, with interest, and judgment was demanded in the following terms: "That the defendant be required to convey the said premises to the plaintiffs, to give possession to them, and account to them for the rents and profits, and for such other relief as the court may deem just, and for costs." The case was originally heard by his honor, Judge KERSHAW, who on the 15th of September, 1887, filed his decree, by which, among other things, he adjudged "that it be referred to the master to take an account of the rents and profits of the land in question, during the time the defendant was in possession thereof, and to state the same;" that he take an account of the moneys advanced by the defendant, with interest thereon, and state the same; "that the amount of rents and profits, ascertained upon said accounting to be due by the defendant, be deducted from the amount of purchase money paid by them, (him,) with interest as ascertained by the master;" that if the amount of the rents and profits thus ascertained should prove to be insufficient to pay the advances, and interest thereon, made by defendant, then that the land be sold to satisfy the same; but if the rents and profits should prove sufficient to reimburse defendant's advances, and interest thereon, then that the defendant do convey to the plaintiffs the land in question. This decree contained no provision for the disposition of any excess of the rents and profits over and above the amount of the advances made by defendant, probably for the reason that it was not then supposed that there would be any such excess. From this decree there was no appeal, and in accordance with one of its provisions the master held a reference for the purpose of performing the duties required of him, at which he was furnished with a statement, agreed to by the attorneys on both sides, showing the amount of the rents and profits of the land during the time it was in the possession of the defendant, as well as the amount of advances made by defendant, including the taxes paid him. From this agreed statement the master, on the 9th of January, 1888, made his report, showing that the rents and profits exceeded by a considerable sum the advances made by the defendant. To this report it does not appear that either party excepted, but at the succeeding term of the court the plaintiffs made a motion, before his honor, Judge FRASER, for an order requiring the defendant to convey the land to the plaintiffs, and to pay over to the master the excess of the rents and profits over the advances, as ascertained by his report, to be by him distributed among the plaintiffs after paying their attorney's fee out of the same. When the motion was submitted defendants' attorney handed to the attorney for plaintiffs a deed conveying the land to plaintiffs. On the 15th of March, 1888, Judge FRASER filed his decree refusing the motion for an order requiring the defendant to pay over the excess of the rents and profits over and above the amount of advances made by defendant, but saying that, "if it is thought important to have an order confirming the master's report, or an order of reference as to counsel fees, the application for such orders may be renewed." From this decree the plaintiffs immediately gave notice of appeal, and served their case on 17th of March, 1888. A few days after, to-wit, on the 24th of March, 1888, the plaintiffs gave to defendant's attorneys notice that they would apply to Judge KERSHAW, at chambers, "for an order to supply the omission of such words in his decree * * * as may clearly dispose of the excess of rents and profits received by the defendant, from the land referred to in said decree, over and above the purchase money paid by said defendant for said land, and the interest thereon, on the ground that said words or matter to be inserted is clearly consequential on the decree already pronounced and filed as above stated." This motion was heard by Judge KERSHAW, at chambers, and on the 3d of April, 1888, he granted an order that at the appropriate place, which was designated in the decree previously rendered by him, the following words be inserted: "That the defendant do pay to the plaintiffs the excess of rents and profits, received by him from said land, over and above the purchase money paid by him for the same, and the interest thereon;" and directing the clerk of the court to annex this order to the judgment roll in the action, indicating by entries on the margin of the original order that this insertion had been made. From this order defendant appeals, upon the grounds set out in the record.

We will first consider the appeal from Judge FRASER's order. We infer from what is said in the decree, and from one of the grounds of appeal, that at the hearing of the motion plaintiffs' attorney proposed to read certain correspondence which had passed between himself and Judge KERSHAW, for the

Digitized by Google

purpose of showing what was the intention of that judge as to this matter when he rendered his original decree, or what was the proper construction to be placed upon such decree. The judge declined to hear this correspondence, and in this there was no error. It was clearly his duty to put his own construction upon a decree he was asked to carry into effect, from the terms in which it appeared on record, unaffected by any extraneous testimony, no matter how high the source from which it came; and this duty he proceeded to perform, and the real question for us to decide is whether he erred in construing the decree. As we understand it, Judge FRASER construed the decree of Judge KERSHAW as a final judgment, which in effect, though not in terms, adjudged that the plaintiffs were not entitled to the excess of the rents and profits over and above the advances. If this be the proper construction, then there was no error in refusing the motion; for it is well settled that one circuit judge has no power to correct any errors or supply any omissions in a final judgment rendered by another circuit judge. But is this the proper construction of Judge KERSHAW's decree? We do not think it is. We do not think it can be regarded as adjudging that the plaintiffs are not entitled to the excess referred to. It certainly does not so adjudge in express terms, and the omission to provide, in express terms, for the disposition of such excess, in case there proved to be any, cannot have the effect of an adjudication that plaintiffs have no right thereto. On the contrary, it seems to us that the terms of the decree implied that if there was any excess it should be paid to the plaintiffs, but as it had not then been ascertained that there would be any excess, and of course, therefore, its amount could not then be known, the decree did not then provide, in express terms, that such excess should be paid to plaintiffs, as such a provision could more properly and effectually be made by a subsequent order, after the amount was ascertained, and such an order made for its payment as would authorize the issuing of an execution to enforce such payment. The demand of the complaint was that the defendant should account to the plaintiff for the rents and profits, and this accounting was adjudged by the decree. The language used in the decree—"that the amount of rents and profits ascertained on such accounting to be due by the defendant," etc.—plainly implies a recognition of plaintiffs' right to the rents and profits, subject only to the reimbursement of the defendant's advances. To whom else could the amount of the rents and profits "be due by the defendant" but to the plaintiffs. This is the logical and legal consequence of the principles settled by the decree, for it had adjudged that the plaintiffs were the real owners of the land, and as such entitled to an accounting from the defendant for the rents and profits during the time he held possession, subject only to a deduction for his advances, and the order applied for seems to us nothing more than an administrative order to carry in effect the principles of the judgment rendered. Suppose that Judge KERSHAW had in his original decree inserted a provision that, in case the accounting which he ordered should show an excess of rents and profits over and above the advances, such excess should be paid to the plaintiffs, before they could have issued an execution to enforce such payment, it would have been necessary for them to obtain an order confirming the master's report, ascertaining the specific amount of such excess, and an order requiring such specific amount to be paid to them. That would be merely an administrative order to carry into practical effect a previous judgment which the succeeding circuit judge would be fully authorized to make. To borrow an illustration suggested by Judge KERSHAW, suppose that, in an action for the foreclosure of a mortgage of real estate, the judgment should make no provision for the disposition of the excess of the proceeds of sale in case they should prove more than sufficient to satisfy the mortgage debt and the costs of the action, together with the expenses of the sale, can it be doubted that it would be entirely competent for a succeeding circuit judge, when called upon to make an order confirming the report of the sale, by which it is ascertained that there is such excess, also to order that such excess be paid over to the mortgagor? This would be nothing more than an administrative order, disposing of certain funds, clearly belonging to one of the parties, which the court by its previous order had brought under its control, and which, when ascertained, the court is bound to restore to its proper owner. So here, by the decree of Judge KERSHAW, it has been adjudged that the plaintiffs are the real owners of the land, and as such they are certainly entitled to the rents and profits, after satisfying the claims of the defendant thereon; and the court, after having adjudged that the defendant must account for the rents and profits, is bound to order so much thereof as may remain, after satisfying such claims, to be restored to the rightful owners, when the amount is ascertained by the result of the accounting previously ordered. We do not regard the order applied for by plaintiffs either as an order to amend the judgment of Judge KERSHAW, or to supply an omission therein, but simply an administrative order to carry into practical effect the principles settled by that decree, after the result of the accounting ordered had been reported to the court. It seems to us, therefore, that the order of Judge FRASER should be reversed. Under this view the appeal from Judge KERSHAW's order loses much, if not all, of its importance. But still, the question as to its correctness having been made, we are bound to decide it. While it is true that a circuit judge may correct a mere clerical error in a judgment or decree rendered by him, even after he has left the circuit in which such decree was made, (Cha-

Digitized by Google

fee v. Rainey, 21 S. C. 11,) yet we are not prepared to say that such correction can be made after the time for appealing from such decree has expired, as that might seriously prejudice the rights of parties. See Jeannerett v. Radford, Rich. Eq. Cas. 469. But we do not deem it necessary, at this time, to make any authoritative ruling upon this point, for we do not regard the application made to Judge KERSHAW as an application to correct a mere clerical error. On the contrary, as will be seen from what has been said in considering the first appeal, the order really needed and desired by the plaintiffs was an administrative order, and such an order we do not think a circuit judge has the power to grant after he has left the circuit to which the case belongs, unless, perhaps, by consent of parties. For this reason we think that the order of Judge KERSHAW should also be reversed.

The judgment of this court is that the order of Judge FRASER, as well as the order of Judge KERSHAW, be reversed, and that the case be remanded to the circuit court for such further proceedings as may be necessary to carry out the views herein announced.

SIMPSON, C. J., and MCGOWAN, J., concur.

(30 S. C. 335)

ALEXANDER *v.* MERONEY.

(*Supreme Court of South Carolina.* March 9, 1889.)

SET-OFF AND COUNTER-CLAIM—CLAIMS IN DIFFERENT RIGHTS.

1. In an action against M. and his wife to test the legality of a distress warrant levied upon the property of the plaintiff for the rent of a building owned by the wife, an amount owing to the plaintiff by a copartnership existing between him and M. could not be set off against the claim of the wife for rent, in the absence of an agreement of the latter to that effect.

2. In such action, where the plaintiff alleged a partnership between him and the wife, and the answer alleged a partnership between the husband and the plaintiff, and asked for an adjustment of the rights of the parties under the alleged partnership agreement, it was not error to dismiss the complaint as to the wife, though not dismissed as to the husband.

3. In equity, costs are under the control of the judge.

Appeal from common pleas circuit court of Kershaw county; WITHERSPOON, Judge.

Action by George C. Alexander against John S. Meroney and Kate E. Meroney, his wife. The complaint was dismissed as to the wife. Both the plaintiff and John S. Meroney appeal. The following is the decree of the lower court:

"Plaintiff alleges that in June, 1884, the defendant John S. Meroney, as agent of his wife, the defendant Kate E. Meroney, entered into an agreement with plaintiff for the manufacture of brick, and that under said agreement each party was to receive profits or bear losses resulting from said business in proportion to the money, material, or labor contributed. It is also alleged that John S. Meroney, as agent aforesaid, conducted said business until the following September, when there remained on hand 200,000 brick. It is also alleged that plaintiff contributed $307.79 to said business; that the profits exceeded the expenses of said business; and that J. S. Meroney, as agent aforesaid, appropriated to his own use all of the funds arising from said business, except the sum of $51.65, received by plaintiff. Plaintiff further alleges that he has an account of $68.04 against John S. Meroney, agent aforesaid. Plaintiff admits that on the 1st October, 1886, he was indebted to John S. Meroney, agent aforesaid, in the sum of $222, for office rent, which amount, under the agreement aforesaid, plaintiff alleges was to be credited upon amount due plaintiff from the brick business. Plaintiff alleges that there is due him by defendants on account of the brick business, $77.18, for which amount plaintiff demands judgment against said defendants. The defendants deny that the defendant Kate E. Meroney was a party to, or concerned in, the agreement with reference to the brick business. The defendant John S. Meroney admits that he, individually, entered into an agreement with plaintiff for the manufacture of brick, but alleges that under said agreement each party was to furnish one-half of the capital, and to share equally in the profits or losses in the business. The defendant John S. Meroney further alleges that the capital invested in said business amounted to $1,416.80, of which amount this defendant contributed $1,109.01, and plaintiff the sum of $307.79; that the total receipts from said business amounted to $813.14, and the total loss sustained in the business amounted to $603.56. This defendant admits that he individually owes plaintiff the account for $68.04, and not as agent, as alleged by plaintiff. This defendant denies that under the agreement as aforesaid the amount of office rent due by plaintiff was to be credited on amount due to plaintiff from the brick business. This defendant denies that he is indebted to plaintiff on account of said brick business; and, on the contrary, alleges that plaintiff is indebted to said defendant in the sum of $301.78, the one-half of the losses sustained in said business, for which amount, by way of counter-claim, the defendant demands judgment against plaintiff. By agreement, counsel framed certain issues which were submitted to a jury. The jury upon said issues found in substance as follows: (1) That Kate E. Meroney was a party to the copartnership, as alleged in the complaint; (2) that under the terms of the copartnership, each party was to share equally in profits or losses; (3) that the business resulted in a loss of $397.07; (4) that under the agreement, whatever was due by plaintiff for office rent was to be offset by what was due to plaintiff from the copartnership; (5) that plaintiff and defendants bore losses equally; (6) that plaintiff contributed $307.79, and defendants $921.42, to the capital of the business; (7) that there is due plaintiff by defendant $57.61 on ac-

Digitized by Google

count of brick business, and $68.04 by account. The cause was heard upon the pleadings, the issues submitted by consent of court to the jury, and the agreement of counsel.

"Plaintiff in this action seeks to obtain judgment against the defendant Kate E. Meroney for alleged indebtedness growing out of an agreement between plaintiff and the defendant John S. Meroney, acting as the agent of the defendant Kate E. Meroney, for the manufacture of brick. The fact of the agency is denied. The only testimony on this point is that of the plaintiff and the defendant, John S. Meroney, between whom the alleged agreement was made. There is no evidence to show that the defendant Kate E. Meroney was present when the alleged agreement was entered into between plaintiff and John S. Meroney. It appears that some time prior to the agreement between plaintiff and John S. Meroney with reference to the manufacture of brick, and whilst plaintiff was making brick on his own account, plaintiff had a conversation with Kate E. Meroney with reference to the building by Kate E. Meroney of a brick office for plaintiff to rent on the lot of Kate E. Meroney. This circumstance, in connection with the alleged declarations of the said J. S. Meroney as agent, is relied upon by plaintiff to establish the agency. John S. Meroney testifies that he individually entered into the agreement with plaintiff for the manufacture of brick, and that Kate E. Meroney was not a party to said agreement or concerned therein. I do not think that the evidence is sufficient to bind the defendant Kate E. Meroney under the agreement between plaintiff and the defendant John S. Meroney with reference to the manufacture of brick. I must therefore reject the finding of the jury as to the agency. The only evidence that the office rent due by plaintiff to Kate E. Meroney was to be offset by what was due plaintiff under this agreement for the manufacture of brick, is the alleged declaration of John S. Meroney. This is also denied by John S. Meroney, and as plaintiff has failed to show that John S. Meroney was authorized to bind Kate E. Meroney by such alleged declaration, the finding of the jury on this point must also be rejected. I find as a matter of fact that plaintiff and John S. Meroney individually entered into an agreement for the manufacture of brick; that under said agreement each party was to share profits or to bear losses equally; that of the $1,229.21 capital furnished in said business the plaintiff contributed $307.79, and that John S. Meroney contributed $921.42; that the total receipts realized from the business amounted to $832.14, of which amount plaintiff realized $51.65, and John S. Meroney realized $780.49; that the business resulted in a total loss, $397.07. As each party under the agreement was to share profits or bear losses equally, to ascertain what is due plaintiff out of the copartnership transaction each of the parties should be charged with one-half of the $1,229.21 capital employed with one-half of the $397.07 losses sustained, and with the amount realized by each out of the $832.14 received from the business. From this debit each should be credited with the amount of capital respectively contributed, as well as with one-half of the $832.14 realized from the business. By this mode of accounting between the parties, it will be observed that plaintiff's indebtedness to the firm amounts to $140.93, and the defendant John S. Meroney's indebtedness to the firm amounts to $256.14, an excess of $115.21 more than plaintiff's indebtedness. The defendant John S. Meroney should account to plaintiff for one-half of his indebtedness of $115.21 in excess of plaintiff's indebtedness to the firm, to-wit, the sum of $57.60. The defendant John S. Meroney, in his answer, admits his individual indebtedness to plaintiff in the sum of $68.04 by account independent of the brick-yard business, and states that he is willing to account to plaintiff for said indebtedness in a settlement of the partnership between plaintiff and said defendant. I conclude as matter of fact: (1) That the defendant Kate E. Meroney is not indebted to plaintiff, as alleged in the complaint herein; (2) that the defendant John S. Meroney is indebted to plaintiff in the sum of $57.60 on account of the agreement for the manufacture of brick, and that said defendant is further individually indebted to plaintiff in the sum of $68.04 by account. I conclude as matter of law: (1) That the complaint herein should be dismissed, with costs as to the defendant Kate E. Meroney; (2) that plaintiff is entitled to judgment against the defendant John S. Meroney for the sum of one hundred and twenty-four dollars and sixty-four cents, with costs. It is ordered, adjudged, and decreed that the plaintiff's complaint be dismissed, with costs as to the defendant Kate E. Meroney. It is further ordered, adjudged, and decreed that plaintiff have judgment against the defendant John S. Meroney for the sum of one hundred and twenty-four dollars and sixty-four cents, with costs."

W. D. Trantham, for plaintiff. *J. T. Hay*, for defendant.

SIMPSON, C. J. The property of the appellant was levied upon by a distress warrant, caused to be issued by the respondent, John S. Meroney, as agent of his wife, Kate E. Meroney, to whom it was alleged that the appellant was indebted in the sum of $222 for the rent of a brick office situate in Camden, belonging to the said Kate E. This property was released from the levy by appellant giving bond, etc., for the bringing of this action; whereupon the action below was instituted. In his complaint the plaintiff alleged that a copartnership had existed between himself and the said Kate E. Meroney for the manufacture of brick, upon certain terms, one of which was that each should share the profits and losses thereof in pro-

Digitized by Google

portion to the money, labor, and materials furnished or rendered by each; that said business was under the management of the said John S., as agent; that this business continued until in September, 1884, at which time they had on hand, besides what had been sold, some 200,000 brick; that no settlement had been made, but that, besides a small amount, $51.65, received by the plaintiff, the defendants were indebted to plaintiff at least $256.14, and also that the said John S. was indebted as agent aforesaid, $68.04; that it was understood and agreed that at any time during the continuance of the business aforesaid, pending a settlement, his indebtedness for rent, the correctness of which was admitted, should be paid from what might be due him from the copartnership; and he prayed judgment against the defendant for $77.18, balance claimed to be due him upon a fair settlement of the partnership matters, after crediting on the rent a sufficient amount to discharge the same. The defendants denied the partnership alleged, and claimed that, instead of a partnership existing between the plaintiff and the defendant Kate E. Meroney, there was a partnership between the plaintiff and defendant John S., of the kind mentioned in the complaint, to-wit, for the manufacture of brick; and, after alleging other matters in reference to said partnership, claimed that there had been a loss in the business of $603.56, for half of which the plaintiff was indebted to the said John S.; and judgment of the dismissal of the complaint was demanded, and a decree for the sum of $301.78, half of the loss above, against the plaintiff in favor of the defendant John S. Meroney. At the trial the following issues were by consent submitted to a jury, to-wit: "(1) Was the defendant Kate E. Meroney a party to the copartnership alleged in the complaint? *Answer.* Yes. (2) Were the terms of the copartnership that each party should share in the profits, and bear the losses, in proportion to what each contributed? *A.* No. (3) Or were the terms of the copartnership that each should contribute equally, and share profits and bear losses equally? *A.* Share profits or bear losses equally. (4) Did the business result in profits or loss? *A.* Loss. (5) If in profits, what was the profit? *A.* ———. (6) If in loss, what was the loss? *A.* Loss, $397.07. (7) Was there an agreement between plaintiff and John S. Meroney, as agent of Kate E. Meroney or in any other capacity, that what was due by plaintiff for rent of the office should be offset against what was due him from the copartnership? *A.* Yes. (8) What amount, if any, is due the plaintiff by the defendants on account of the brick business? *A.* $58.61; also $68.04, his account. (9) What amount is due the defendants by the plaintiff on account of the brick business? *A.* ———. (10) What proportion of the losses did the plaintiff bear? *A.* Equal. (11) What proportion of losses, if any, did defendants bear? *A.* Equal. (12) What amount of the capital did the plaintiff contribute? *A.* $307.79. (13) What amount did the defendants bear? *A.* $921.42." Upon the return of these findings by the jury, his honor, Judge WITHERSPOON, rejected the findings as to a partnership existing between the plaintiff and Kate E., and also as to the agency of John S. therein; and he found as matter of fact that there was a partnership between the said plaintiff and the said John S. He also rejected the finding as to the agreement between them that the rent of the office should be paid from the plaintiff's interest in the partnership. He also found that of the capital furnished the plaintiff contributed $307.79, and the defendant John S. $921.42, aggregating $1,229.21; that plaintiff realized $51.65, and defendant $780.49, and that the business resulted in a total loss of $379.07; that each party was to share equally in profits and losses. From these facts he concluded as a final result that the defendant was indebted to the plaintiff in the partnership matters in the sum of $57.60, besides his account admitted of $68.04; and he decreed in favor of the plaintiff the sum of $124.64 against John S., dismissing the complaint as to Kate E., with costs. Both parties have appealed upon exceptions:

(1) The plaintiff, upon the grounds that his honor erred in holding that John S. was not the agent of Kate E; (2) in dismissing the complaint as to Kate E., with costs; (3) that he did not hold that the plaintiff was entitled to have the sum of $124.64, adjudged to him, credited on his indebtedness of $222, for rent.

(1) The defendant John S., because his honor erred in deciding that defendant was indebted to plaintiff in the sum of $57.60, on account of the brick business; (2) that he should have dismissed the complaint as to both defendants; (3) that, this being an action of replevin, the action should have been dismissed, and the defendants authorized to proceed with their remedy by distress for rent; (4) that he erred in giving judgment in favor of the plaintiff against the defendant for any amount; (5) that he erred in giving judgment against the defendant for costs.

The action below, as heard, was a novel one in view of the fact that in its origin it was an action on the part of the plaintiff to test the right of a distress warrant levied upon its property for rent due; the ground taken by him being that there was a copartnership existing between him and his lessor in a brick business, and that it was the agreement between them that the rent should be paid out of his interest in this copartnership, and that said interest was more than sufficient to pay said rent; in fact, that above this he was entitled to a surplus, for which he prayed judgment. By the answer the case was converted into an action by the defendant John S. to settle a partnership in

Digitized by Google

said business between himself and the plaintiff; and the decree, after dismissing the complaint of the plaintiff resting upon the basis of an alleged partnership between the plaintiff and Kate E. Meroney with John S., the acting agent, proceeded to adjudge the rights of the parties plaintiff and defendant John S. in the matter of the partnership between them set up in the answer,—an entirely new case. This, we think, was stretching the Code to its utmost tension; but no objection seems to have been made by either party to this course, and we will not interpose, but will adjudge the matters before us, as they have been presented.

One of plaintiff's exceptions alleges error in his honor's findings of fact, to-wit, that he found that John S. Meroney was not the agent of his wife, Kate E. We do not see that this finding is either without testimony, or that it is against its weight, and therefore we cannot disturb it, under the well-established rule in such cases. Another involves a question of law, and also a question of fact, to-wit, whether the plaintiff was entitled to have the sum of $124.64, adjudged to him, credited on the $222, admitted to be due by him for rent. This rent was due Kate E. Meroney, as the office occupied belonged to her. There is nothing in the testimony showing that she ever agreed that the copartnership should pay this rent from the plaintiff's interest therein; and therefore his honor was correct in holding as matter of law as he did. As to the costs. This being an equity cause, the costs were under the control of the judge.

We see no error in the matter suggested in first exception of the defendant, as to the $57.60 found due to plaintiff in the brick business. Defendant excepts secondly, that his honor did not dismiss the complaint as to both of the defendants. Perhaps such would have been the result but for the defendant's answer setting up a partnership between himself and the plaintiff, and asking an adjustment of the rights of the parties thereunder. As to the defendant's third exception, we think the decree below, dismissing the complaint of plaintiff in so far as Kate E. Meroney was concerned, substantially authorizes her to proceed as she may be advised in the matter of the rent. The other two exceptions are overruled. It is the judgment of this court that the judgment of the circuit court be affirmed.

McIver and McGowan, JJ., concur.

(30 S. C. 614)

TATE *et al.* v. MARCO *et al.*

(*Supreme Court of South Carolina.* March 11, 1889.)

RES ADJUDICATA.

Plaintiffs employed defendants as their agents to sell their goods, defendants agreeing to guaranty the collectibility of the notes taken, to the extent of their commissions. Plaintiffs sued for damages for taking notes of insolvent parties, and for other misconduct, and the trial court held the defendants liable to the extent of their commissions for the uncollected residue of two of the notes taken out of defendants' hands, and partially collected by the latter, but the supreme court reversed the judgment in that respect, saying: "We do not think that the defendants should be charged with the uncollected balances upon the notes of B. and R.," (the notes mentioned.) *Held*, that the decision entirely exonerated defendants from liability for the notes mentioned, and eliminated them from further consideration in the case.

Appeal from common pleas circuit court of Darlington county; HUDSON, Judge.

Action by Messrs. Tate, Muller & Wittichen against S. Marco and I. Lewenthal for damages sustained by reason of defendants' misconduct as plaintiffs' agents. There was a judgment for plaintiffs for $1,023.08, and defendants appealed to the supreme court, where the judgment was modified and affirmed. 4 S. E. Rep. 71. The question arose after the case was remanded, as to the extent of the modification required by the supreme court's decision, and from the order of the circuit court construing the order favorably to defendants, plaintiffs appeal.

Dargan & Dargan, for appellants. *J. F. Nettles* and *R. W. Boyd*, for respondents.

McIVER, J. The only question involved in this appeal is as to the proper construction and effect of the former judgment of this court, rendered at the hearing of the previous appeal in this case, which will be found reported in 27 S. E. 493, 4 S. E. Rep. 71. For a full understanding of the facts reference must be had to the case as there reported, where they are fully and clearly stated in the opinion prepared by Mr. Justice McGOWAN. After the *remittitur* was sent down a controversy arose as to the proper construction and effect of the judgment of this court, which, by consent of the parties, was submitted to his Honor Judge HUDSON, at chambers, for determination. The question presented was whether the effect of the former judgment of this court was to relieve the defendants from all liability for the uncollected balances on the notes of Richards and Byrd, or whether they were still left liable to the extent of their commissions for such uncollected balances. Judge HUDSON held that the effect of the former judgment of this court was to relieve the defendants from all liability for these uncollected balances, and that the notes of Richards and Byrd must be entirely eliminated from the statement of accounts as made up by the special referee, and from his order the plaintiffs appeal upon the several grounds set out in the record.

We agree with Judge HUDSON in the construction which he has adopted. It is true that under the terms of the contract, which constitutes the basis of plaintiffs' claim, the defendants did guaranty the payment of all notes taken from purchasers of the fertilizer consigned to them for sale, to the extent of their commissions, but this was a guaranty of the solvency of such purchasers, and of the collectibility of such notes. It certainly could not be construed as a guaranty of the

Digitized by Google

payment of such notes, the collection of which was defeated by the act of the plaintiffs, for that would operate a fraud. Hence, under this guaranty the defendants were properly held liable to the extent of their commissions for the notes of Dargan, Alston, Gattison, and Wright, the collection of which failed from the causes stated in the referee's report, to which the plaintiffs did not contribute, and were in no wise responsible for. But the notes of Richards and Byrd stood upon a totally different ground. The failure to collect them was due to the fault, or at least to the action, of the plaintiffs, and it was for that reason that this court said in the former opinion: "We do not think that the defendants should be charged with the uncollected balances upon the notes of Byrd and Richards." The necessary effect of this language was to relieve the defendants from any liability for such balances, either by deduction from commissions, or otherwise. The defendants were not relieved, as in the case of the four notes above mentioned, because the notes, though good when taken, afterwards proved to be uncollectible from causes over which the defendants had no control, but because the failure to collect them was due to the action of the plaintiffs, and hence the defendants could not be held liable, even to the extent of their commissions. Suppose the plaintiffs, after taking into their possession, as they had a right to do under the contract, all the notes taken by defendants for fertilizers, had voluntarily released the maker of one of the notes from payment, surely the defendants could not be made liable, even in commissions, for the amount of such note, without extending the guaranty beyond its terms by making the defendants liable for a loss occasioned by the act of the plaintiffs themselves; and it was upon this principle that the defendants were exonerated from all liability for the uncollected balances on the notes of Richards and Byrd. The judgment of this court is that the order appealed from be affirmed.

SIMPSON, C. J., and MCGOWAN, J., concur.

(30 S. C. 614)

COLEMAN v. KEELS.

(*Supreme Court of South Carolina.* March 11, 1889.)

FINAL ORDERS—VACATING—APPEAL.

1. A trial justice being about to issue his warrant for the ejectment of a tenant, a writ of *certiorari* was issued from the court of common pleas, and an order entered on return of the writ, permanently restraining the justice from disturbing the tenant's possession. *Held*, that this order was a final disposition of the case, so far as the action of the justice was concerned, and, if there was any error therein, the proper remedy was by appeal within the time prescribed, and an appeal from a subsequent order vacating it cannot serve to raise any question as to the correctness of the first order.

2. *Held, also*, that, as the order was final, it could not be vacated by any circuit judge at chambers, not even by the judge who presided at the court when it was made, unless procured by fraud or misrepresentation.

Appeal from common pleas circuit court of Clarendon county; ALDRICH, Judge.

A. Levi, for appellant. *M. C. Galluchat*, for respondent.

MCIVER, J. On the 13th of March, 1888, defendant was served with a notice requiring him to show cause on the 16th day of that month, before a trial justice, why he should not be ejected from certain premises, alleged to have been rented to defendant by plaintiff under a parol lease. On the day appointed the parties appeared before the trial justice, when the defendant showed for cause (1) that the trial justice was without jurisdiction in the matter, as the complaint made by plaintiff did not fall within the provisions of section 1819 of the General Statutes, under which the proceeding was taken; (2) that defendant was not the tenant of plaintiff, but was the tenant of a third person, who claimed to be the legal owner of the premises. The trial justice overruled the objection to his jurisdiction, and proceeded to hear the testimony, and, after argument, decided that the cause shown was not sufficient, and, being about to proceed to issue his warrant to eject the defendant, his counsel applied to Judge FRASER for a writ of *certiorari*, which was granted, requiring the trial justice to certify to the court of common pleas for Clarendon county all the proceedings in the cause, and in the mean time enjoined and restrained the trial justice and the plaintiff from taking any further action in the matter until the further order of the court. In obedience to this writ the trial justice made a return of all the proceedings to the ensuing term of the court of common pleas for Clarendon county. At that term Judge ALDRICH, after hearing all the papers and the argument of counsel, made an order bearing date 22d May, 1888, making permanent the restraining order granted by Judge FRASER, and forbidding the trial justice and the plaintiff from disturbing the defendant in the possession of the premises until the right to such possession is decided by the court. From this order no appeal appears to have been taken, but on the 25th of May, 1888, counsel for plaintiff served upon the counsel for defendant a notice that he would move before Judge ALDRICH, at Sumter, S. C., to vacate the order of 22d May, 1888, made by him while holding the court of common pleas for Clarendon county; but upon what ground is not stated in the notice, nor does it appear from anything that we can find in the record. On the 7th June, 1888, the day named in the notice, after hearing counsel for plaintiff, (defendant's counsel not being present, as it is said,) Judge ALDRICH granted another order dissolving the injunction granted by Judge FRASER, rescinding his own order of the 22d May, 1888, and directing "that the trial justice proceed to act in the premises as the law directs;" and we infer from the terms of an order next to be noticed that the trial justice proceeded to eject defendant from the premises, though

Digitized by Google

that fact is not stated in the "case." On the 19th of June, 1888, Judge ALDRICH, without notice to the plaintiff or his counsel, at his chambers, in Barnwell, after he had left the circuit in which this case arose, granted still another order, in which, after reciting that the order granted by him at Sumter, on the 7th of June, 1888, was signed under a misapprehension of the facts of the case, he rescinded said order of the 7th June, and "reinstated and declared in full force" the order granted by him on the 22d of May, 1888, and further ordered the trial justice to put the defendant back into possession of the premises "from which he has been ejected." On the 29th of June, 1888, the plaintiff gave notice of appeal from the order granted at Barnwell on the 19th of June, 1888; and though his notice of appeal makes no reference to the order of 22d May, 1888, the time for appealing from which had then expired, yet in his exceptions he assails the order of 22d May on several grounds, as well as the order of 19th June, 1888. The defendant also appeals from the order made at Sumter on the 7th of June, 1888, upon the several grounds set out in the record.

We will first consider the plaintiff's appeal. It seems to us that the order of 22d of May, 1888, made by the court of common pleas for Clarendon county, to which the trial justice was required by the writ of *certiorari* to return the proceedings, was a final disposition of the case, so far as the action of the trial justice therein was concerned, and, if there was any error therein, the proper remedy was by appeal to this court, within the time prescribed for that purpose. But as no such appeal, so far as we can discover from the record, has ever yet been taken, we do not think that the propriety of the order can now be considered. The exceptions served under the notice of appeal from the order of the 19th of June, after the time for appealing from the order of the 22d May had expired, cannot serve to raise any question as to whether there was any error in said last-mentioned order. It was in no sense an interlocutory order, but was final. The only question, therefore, properly raised by the plaintiff's appeal, is as to the order of 19th June, about which there can be no doubt. It was made without notice, at chambers, by a circuit judge after he had left the circuit in which the case arose, and must therefore be set aside. Indeed, as we understand, this is conceded by defendant's counsel.

As to the defendant's appeal, we think there is as little doubt. Holding, as we have done, that the order of 22d May, 1888, granted by the court of common pleas, was final, it seems to us quite clear that it could not be vacated by any circuit judge at chambers, even by the judge who presided at the court when it was made, unless, perhaps, where such order was procured by fraud or misrepresentation, of which there is no allegation or even intimation. Upon what ground the vacating order was granted does not appear. No ground is stated in the notice of the motion, as should have been done, and, so far as we can discover, there is nothing in the record to show upon what ground the judge based his vacating order. As we have said, the proper remedy, if there was any error in the order of 22d May, 1888, was by appeal to this court, and not by an application to a circuit judge, especially at chambers, to vacate it. While it may be true that the order appealed from was granted during the term of the court of common pleas for Sumter county, as we suppose was the fact, still it must be regarded as made at chambers, so far as this case which had been pending in Clarendon county was concerned. The judgment of this court is that the order made at Barnwell on the 19th of June, 1888, as well as the order made at Sumter on the 7th of June, 1888, be reversed.

SIMPSON, C. J., and MCGOWAN, J., concur.

(20 S. C. 342)

STRAIN *et al.* v. BABB *et al.*

(*Supreme Court of South Carolina.* March 18, 1889.)

BONDS—LIMITATION OF ACTION.

1. Where a clerk of a court, after a decree rendered is given to him to be disposed of according to law, marks it "Filed," but neglects to enroll, enter, or index it, but puts it in a drawer, where it is found five years later, the sureties on his bond are liable to the plaintiffs in the decree where several judgments are meantime entered up against the execution debtor, and mortgages are executed by him, which sweep away his entire property.

2. Under Code Civil Proc. S. C. § 111, providing that actions on bonds other than for the payment of money may be brought with 20 years, action on a bond given under a penalty to answer for the neglect of duty of the clerk of the court is not barred for 20 years.

3. In such an action it is error to charge that plaintiffs are entitled to the full amount of their claim if the junior judgments and liens swept them away. *Non constat* but that the property thus swept away might have been insufficient to pay plaintiffs' decree.

Appeal from common pleas circuit court of Laurens county; KERSHAW, Judge.

Suit by Elizabeth Strain and J. C., her husband, against Martha H. Babb, as administratrix of M. E. Babb, T. M. Babb, M. Babb, W. L. Hopkins, and L. R. Brooks, sureties on the bond of M. E. Babb, deceased, to recover for his neglect of duty as clerk of the court. From a judgment against the administratrix, plaintiffs appeal.

Benet & McGowan, for appellants. *Haskell & Dial*, *Ferguson & Featherstone* and *Ball & Watts*, for respondents.

SIMPSON, C. J. The plaintiff (appellant) Elizabeth Strain, some time previous to November, 1880, obtained a decree against John T. McGowan for $1,000, which, on the 5th day of November, 1880, was handed to M. E. Babb, the then clerk of the court of common pleas for Laurens county, to be by him disposed of according to law. This decree seems to have been marked "Filed" by the said Babb, but nothing more was done. It was not enrolled, nor entered in the book of ab-

Digitized by Google

stract of judgments, nor indexed; and it was found by the successor of Babb in 1885, in an old desk in the office, who then enrolled it, etc. In the mean time Babb died, and the defendant Martha H. Babb, his widow, administered upon his estate. In the mean time, also, several judgments were obtained against McGowan, and one or two mortgages were executed by him, covering his real estate, which mortgages and judgments it is alleged swept away his property, with prior liens to Mrs. Strain's decree, because of the fact that her decree had not been entered as above mentioned. The action below was brought against Mrs. Babb, as administratrix, and the surviving sureties on the official bond of M. E. Babb, claiming to hold them responsible for the alleged neglect of duty of the said M. E. Babb as clerk in not properly entering, etc., the decree aforesaid; the plaintiff's demanding in their complaint judgment for the breach of the bond, and for the sum of $1,000, with interest thereon from November 5, 1880, and interest at 7 per cent., and costs. The defendants interposed, and relied mainly upon the statute of limitations, alleging in their answers that more than six years had elapsed since the cause of action accrued, to-wit, since the 5th of November, 1880, the day that the decree was delivered to Babb, the clerk, and marked by him "Filed." His honor, the circuit judge, charged the jury as to the neglect of duty on the part of the clerk, and also as to the damages incurred; and he ruled as matter of law that the cause of action was not the official bond of the clerk, but it was the neglect of duty on his part, and therefore that the limitation within which such an action should be brought was six years, instead of that applicable to certain bonds, to be mentioned hereafter The cause of action accrued on the 5th of November, 1880, and the action was brought in July, 1887,—six years and some eight months after the accrual of the right. Such being the admitted facts as to these dates, his honor ruled that the action was completely barred as to the defendant's sureties on the official bond; but as to the administratrix—Babb having died—this event suspended the statute for nine months, and consequently it did not protect her as the administratrix. The jury found for the plaintiffs $1,549, the amount of the decree, with interest from the 5th of November, 1880, against the defendant, Mrs. Babb, administratrix. The "brief" does not state whether the verdict mentioned the sureties or not. The notice of appeal, however, of plaintiff's attorneys, refers to the judgment entered up in favor of the sureties, and we suppose, therefore, the jury found for these defendants. After the finding of the jury, upon a motion being made for a new trial by attorneys of Mrs. Babb, administratrix, his honor set aside the verdict, and granted the motion for a new trial on account of misdirection in his charge, as he conceived, to-wit, that nine months should be added to the six years, on account of the death of Babb; his honor holding that section 123 of the Code had repealed this provision in so far as the case before the court was concerned, which section he had overlooked in his charge. From this order, and from the judgment entered in favor of the sureties, the plaintiffs have appealed on the ground of error alleged in granting the new trial for the reason stated, and in holding that the cause of action was the neglect of duty, and not the breach of the official bond, and therefore the action was barred both against the sureties and the administratrix, six years having clearly elapsed since the 5th of November, 1880, the day on which the neglect of duty occurred. The defendant administratrix gave notice that, if the order of new trial could not be sustained on the ground upon which it was granted by the judge, she would seek to sustain it on other grounds, to be noticed hereafter, if necessary.

Now, we think the fundamental error in the case was the ruling of his honor that the official bond of the clerk was not the cause of the action, but that the neglect of duty, independent of the breach of the bond, was the cause. If his honor had been correct in this ruling, then his subsequent holding as to the statute, we think, would have been correct as to the sureties; and also his ruling in the first instance as to the suspension of the statute for nine months after administration granted on account of the death of the clerk. We do not think, however, that section 123 of the Code had any application to the facts of this case. That section, in our opinion, applies only to those cases where no administration is taken out until after the expiration of the statutory period; the statute having commenced in the life-time of the decedent. But if his honor was in error in holding that the breach of the bond was not the cause of action, and that the neglect of duty was alone the cause, then the question would be as to the character of the bond, and the limitation prescribed by the statute as to such bonds. If the action was brought simply for the neglect of duty on the part of the clerk, the defendant sureties need not, and could not legally, have been made parties. They were guilty of no neglect of duty in failing to have the decree of the plaintiffs properly entered in the abstract of judgments. They did not hold the office of clerk, nor was it in any sense their duty to see to the enrollment of decrees and judgments, or otherwise attend to the duties belonging to said office. They were responsible only on their contract or bond given as a guaranty that the clerk would properly discharge his duty. Our understanding of the law in such cases is this: The law imposes certain duties upon the officer, for the failure to perform which he may or may not be liable alone in a separate action against him; but, in addition, he is required to give bond to the state, with sufficient sureties, in which all parties thereto bind themselves that he will discharge such duties, and this bond is breached by a

Digitized by Google

failure thus to discharge, and this breach becomes a cause of action against all of the obligors. It was for the alleged breach of the bond here that the action below was brought. The complaint in the demand for judgment, after stating the facts of Babb being clerk, and having given bond, and alleging a breach, etc., prayed judgment for said breach. True, the demand was not for the penalty, as it should have been, but was for a specific amount, to-wit, the amount of plaintiffs' decree and interest; but a demand is no part of the action, or, rather, it does not give character to the action. The facts alleged do this, and the plaintiff is entitled to such relief as these facts will warrant.

Having reached the conclusion that the action below was upon the official bond of the clerk, the next question is, what is the statutory limitation in such case? The Code answers: Section 111 provides that actions upon bonds other than for the payment of money may be brought within 20 years, or else they are barred; and this applies to all of the obligors, principal as well as sureties. Was the bond below a bond other than for the payment of money? True, it was a bond, the breach of which sounded in money,—damages,—and the penalty was for a specific amount, but yet it was not for the payment of money in the sense of the statute. It was in the nature of a covenant,—a contract under seal,—by which the obligors thereto bound themselves under the specified penalty to answer for the neglect of duty, if any, on the part of the clerk, to the extent of such injury as any party might sustain by such neglect, not to exceed the penalty. It was a bond other than for the payment of money, in the sense of the statute. Why the general assembly made this distinction between bonds we cannot conceive; but *ita lex scripta est*, and we have no alternative but to enforce it in proper cases. In the case of State v. Lake, 8 S. E. Rep. 322, (recently decided,) the bond sued on was executed before the present statute of limitations, and when bonds of this kind were held to be covenants, and subject to limitations applicable to covenants. Hence this court held that the action there was barred both as to principal and sureties, the statutory period having expired before action brought. Here, however, the bond was given after the statute was enacted fixing the period at 20 years as to bonds other than for the payment, hence that period must be applied. We think it was error for his honor to charge the jury that, if junior judgments and liens swept away all of the property of McGowan, that in such case the plaintiff was entitled to a verdict for the full amount of her claim and interest. This was error, because it closed the door to any inquiry on the part of the jury as to the amount and value of the property of McGowan thus swept away. *Non constat* but that McGowan's property might have been wholly insufficient to pay the full amount of plaintiff's decree, if it had not been swept away by said junior liens. We will remark here, though this question has not been raised in the case, that the proper practice in cases like this is for judgment to go for the penalty, which stands for the benefit of all injured parties, who by proper proceeding may have their damages assessed, with leave to issue execution. State v. Moses, 18 S. C. 366. The result of our conclusion is that there should be a new trial out and out, under the principles herein announced above, with leave on the part of the defendants to have the question of damages reopened and reconsidered; and to this end it is the judgment of this court that the order granting a new trial by the circuit court be affirmed, and that the judgment in favor of the sureties be reversed.

McIver, J., concurs. McGowan, J., did not sit in this case.

(30 S. C. 615)

Moore v. Willard *et al.*

(*Supreme Court of South Carolina.* March 14, 1889.)

Depositions—Objections.

1. Under act S. C. 1883, (18 St. 373,) relating to the taking of depositions, the admission of depositions in evidence cannot be objected to on the ground that they were taken without interrogatories having been first served, the statute not providing for interrogatories.

2. Where, on a notice to take depositions before a certain notary public, the defendant's attorneys indorsed their consent, and the depositions were returned with a certificate attached which recited that "I, W. C. P., a notary public, do hereby certify that the foregoing depositions" of certain named persons "were duly taken, sworn to, and subscribed before me," it sufficiently appears that the person before whom the depositions were taken was a notary public, and that the named witnesses were sworn, in the absence of testimony throwing suspicion on the execution of the deposition.

3. Where the admission of irrelevant testimony does not affect prejudicially the party objecting thereto, it is not ground for a new trial.

Appeal from common pleas circuit court of Union county; Kershaw, Judge.

Action by James Blythe Moore, trustee, against John Willard and John Rogers, partners trading under the firm name of John Willard & Co. Judgment was given for plaintiff, and defendants appeal.

Thomson & McKissick, for appellants. *Munro & Munro*, for respondent.

Simpson, C. J. This appeal raises—*First*. A question whether the circuit judge should have admitted as evidence the depositions of certain witnesses taken in Richmond, Va., before a notary public, under the act of assembly passed in 1883. (18 St. 373.) *Second*. The correctness of his honor's charge in several particulars, which will be noticed below; and also that his honor erred in not granting a nonsuit. The case was an ordinary action brought to recover a sum of money ($121.12) for one barrel of Emmett's choice whisky, alleged to have been bought by defendants of the plaintiff. The plaintiff, after notice to the defendants' attorneys that the depositions of the witnesses named would be taken be-

Digitized by Google

fore W. C. Preston, a notary public of Richmond, Va., who were residents thereof, and more than a hundred miles distant from Union, the place of trial, and upon which notice was indorsed by the defendants' attorneys the following, to-wit: "We consent to the taking of the within depositions on May 12, 1888." Defendants afterwards agreeing to substitute the date of June 26 in place of May 12,—proceeded to have said depositions taken, which were returned by the notary, as follows: "The depositions of George C. Barnes and Richard Schutte, taken before me, W. C. Preston, a notary public for the city of Richmond, in the state of Virginia, pursuant to notice, which is hereto annexed, at the office of W. C. Preston, cor. 11 & Bank streets, Richmond, Va., on the 25th February, 1888, at 10 o'clock, A. M., to be read as evidence in behalf of the plaintiff in a certain case pending in the court of common pleas for Union county, South Carolina, wherein George A. Lathrop is plaintiff, and John Willard and John Rogers are defendants. Law-Office. [Signed] W. C. PRESTON. Present: ALLEN G. COLLINS. *February* 25, 1888. The further taking of their depositions is continued until June 26, 1888, at the same hour and place. W. C. PRESTON, Notary Public. Law-Office, W. C. Preston. Present: ALLEN G. COLLINS, Counsel for Plaintiff. *June* 26, 1888." With the depositions attached was the signature of each witness, and a certificate at the bottom as follows: "I, W. C. Preston, a notary public for the city of Richmond, in the state of Virginia, do hereby certify that the foregoing depositions of George C. Barnes and Richard Schutte were duly taken, sworn to, and subscribed to before me at the time and place mentioned therein. Witness my hand and official seal this 26th day of June, 1888. [Signed] W. C. PRESTON, Notary Public," —with official seal.

The reading of these depositions was objected to by the defendants—*First*, on the ground "that they were taken without first serving interrogatories;" *second*, that there was nothing to show that the person before whom they were taken was a notary public; *third*, error in holding that the testimony of George C. Barnes and Richard Schutte, alleged to have been taken outside of the state, was properly admissible in testimony; *fourth*, in ruling that there was sufficient to show that the alleged witness Schutte was sworn. These depositions were taken under our act of 1883, (18 St. 373,) upon an examination of which it will be found that there is nothing therein requiring interrogatories to be served. Notice of time and place, etc., is required, but nothing is said as to interrogatories. The notice was given, and not simply accepted by defendants' attorney, but consent indorsed thereon to the taking of the testimony before the notary named, W. C. Preston, at the place and time mentioned. We think the certificate of the notary, with his official seal attached, afforded sufficient evidence that the witness Schutte was sworn, and also that he, W. C. Preston, was a notary, especially when considered with the indorsement of consent by defendants' attorneys on the notice; sufficiently so to warrant the judge in admitting the depositions, in the absence of a formal attack upon the papers, or at least some testimony throwing suspicion on their execution. The other exception to the admission of these depositions is defective in the fact that it states no ground upon which the objection is based. We suppose, however, from the argument, that it was because the witnesses resided permanently beyond the limits of the state, and had not simply gone out, and to a point beyond a hundred miles from the place of trial. We see nothing in the act which confines it to witnesses residing in the state or county, and who have gone temporarily beyond a hundred miles from the place of trial. On the contrary, we think it applies as well to non-residents as to residents. Appellant objects next "because his honor ruled, against objection, that Willard, the defendant, could be required to testify as to his indebtedness to, and his communications relative thereto with, Dodge, Carrier & Co." This testimony may have been irrelevant, but we do not see how it affected prejudicially the appellants, and therefore its admission, though perhaps erroneous, is not a sufficient ground for a new trial. There was no error in his honor's charge as alleged in exceptions 8 and 9, when the charge is read as a whole; and, inasmuch as there was some testimony offered by the plaintiff in support of his complaint, the truth and sufficiency of which was a matter for the jury, there was no error in refusing the nonsuit moved. It is the judgment of this court that the judgment of the circuit court be affirmed.

MCIVER and MCGOWAN, JJ., concur

(30 S. C. 348)

GERALD *v.* GERALD *et al.*

(*Supreme Court of South Carolina.* March 14, 1889.)

MORTGAGES—FORECLOSURE—APPEAL-BOND.

1. Code S. C. § 352, provides that "if the judgment appealed from directs the sale or delivery of possession of real property, the execution thereof shall not be stayed, unless a written undertaking be executed * * * to the effect that during the possession of such property by the appellant he will not" commit waste, etc., "and that, if the judgment be affirmed, he will pay the value of the use and occupation of the property, from the time of the appeal until the delivery of possession thereof, pursuant to the judgment. * * * When the judgment is for the sale of mortgaged premises, and the payment of a deficiency arising upon the sale, the undertaking shall also provide for the payment of such deficiency." *Held*, that the section plainly embraces appeals from judgments of foreclosure, and that the amount of the use and occupation of the mortgaged premises pending appeal is to be applied, so far as may be necessary, to the payment of any deficiency remaining after the sale.

2. Where such an undertaking was given by a purchaser from the mortgagor on appeal from a judgment of foreclosure, and the appeal resulted

Digitized by Google

in an affirmance, the lower court properly ordered the amount due on the undertaking, for use and occupation, to be paid into court, instead of to the plaintiff; there being at that time no means of ascertaining how much, if any, of that amount plaintiff would require to make up the deficiency remaining after sale of the premises.

Appeal from common pleas circuit court of Kershaw county; FRASER, Judge.

C. L. Winkler, for plaintiff. *J. T. Hay*, for defendants.

McIVER, J. The plaintiff brought this action to foreclose a mortgage of real estate executed to her by the defendant William C. Gerald, and Witte Bros. and others, holding judgment liens junior to the mortgage, as well as George W. Witte, who had purchased the mortgaged premises under said judgments, and was in possession, were made defendants. The junior lien creditors of William C. Gerald assailed the validity of plaintiff's mortgage, and upon that issue the case was originally heard, and judgment was rendered sustaining the mortgage, and ordering a foreclosure and sale of the mortgaged premises. From that judgment Witte Bros. and George W. Witte appealed, and for the purpose of staying the sale ordered by the judgment of foreclosure George W. Witte and A. F. Witte executed an undertaking payable to the plaintiff, one of the conditions of which was "that, if the judgment be affirmed, they will pay the value of the use and occupation of the premises from the time of the appeal until the delivery of the possession thereof, if delivery be adjudged pursuant to the judgment herein." The judgment appealed from having been affirmed by this court, the mortgaged premises were sold on the first Monday in June, 1888, and upon demand of the purchaser the possession thereof was surrendered by said George W. Witte on 21st June, 1888. At June term, 1888, of the circuit court an order was passed referring it to the master, "to ascertain and report the value of the use and occupation of the mortgaged premises above specified, saving and reserving all question as to the liability of the defendants for said use and occupation." In pursuance of this order the master reported that the value of the use and occupation from the date of the appeal to the 21st day of June, 1888, was the sum of $180.83. On the 18th August, 1888, the plaintiff gave notice that at the ensuing term of the court an application would be made for an order requiring the appellants herein to pay the amount ascertained by the master's report to be the value of the use and occupation of the mortgaged premises as above. This motion was heard by his honor, Judge FRASER, who rendered judgment requiring the said George W. Witte and A. F. Witte to pay into court "for the use of the parties entitled thereto, and subject to the order of this court," the sum so ascertained by the master's report within 60 days; "all questions as to any portion of the mortgaged premises, if there be any, not delivered, and in dispute between the parties, being reserved." From this judgment both parties appeal,—the plaintiff, because of error in not ordering the said sum of money to be paid to the plaintiff instead of into court; and the defendants George W. Witte and A. F. Witte, substantially upon the following grounds: (1) Because of error in holding that the judgment of foreclosure and sale, with directions to the master to execute a deed of the premises so sold, was equivalent to an order to deliver possession; (2) because of error in holding that the condition in the undertaking, as set out above, applies in cases of foreclosure of a mortgage; (3) because the mortgagor not being liable for use and occupation of the mortgaged premises, the purchaser from him, George W. Witte, could not be held so liable; (4) because of error in holding that the amount of the value of the use and occupation should go as a credit on the mortgage debt due to the plaintiff.

First, as to the plaintiff's appeal. It does not appear that when Judge FRASER heard the motion there was anything before him to show whether the proceeds of the sales of the mortgaged premises would be sufficient or insufficient to pay the mortgage, and in the argument for plaintiff it is conceded that the judge had no such information. It is true that there is incorporated in the "case" a statement showing that the proceeds of the sale, even with the addition of the value of the use and occupation, are insufficient to pay the mortgage debt, but we are not at liberty to consider that statement. The jurisdiction of this court in a case of this kind is of an appellate character only, and hence we have no right to consider any facts which were not before the tribunal whose judgment we are called upon to review. The question for us is whether there was any error in the judgment rendered by the court below, upon the facts as there presented; and not whether additional facts presented here would require a different judgment from that appealed from. This would involve the exercise of original jurisdiction on our part which we have no right or disposition to exercise. Looking at the case, then, as it was presented to Judge FRASER, we do not think he committed any error in ordering the money paid into court for the use of the parties who might prove themselves entitled to it, subject to the order of the court. The manifest object of the undertaking required for the purpose of staying a sale pending an appeal is to protect the respondent, as far as practicable, from any damage which may ensue from the delay caused by the appeal, in enforcing his claim. If no damages are shown to have ensued from such delay, it would seem clear that the respondent would not be entitled to claim anything. Inasmuch as Judge FRASER, at the time he rendered his judgment, was not furnished with any information which would justify him in ordering this money paid to the plaintiff, he took the only wise

Digitized by Google

and proper course by ordering the money paid into court, subject to its further order, when the necessary information should be furnished to enable the court to make a proper disposition of the money. If the proceeds of the sale of the mortgaged premises had proved sufficient to pay the plaintiff's debt in full, together with all costs and expenses, then clearly the plaintiff would not have been entitled to any portion of the rents and profits; and hence, in the absence of any information on this point, there was no error in ordering the money paid into court, subject to its order, instead of to the plaintiff. The plaintiff must therefore be left to make her application to the circuit court, which can exercise original jurisdiction, for an order to pay her the money in question, to which, as we shall presently show, we think she is entitled under the facts as they now appear, as this court, having no original jurisdiction, has no power to make such an order.

Next, as to the defendants' appeal. It seems to us that the fundamental question raised by this appeal is whether section 352 of the Code, under which the undertaking here was given, applies to cases for the foreclosure of a mortgage. While it is true, as the circuit judge says, that the language of that section is not as clear as it might be, yet we are entirely satisfied that it embraces a case for the foreclosure of a mortgage as well as a case in which the judgment directs, in express terms, the delivery of the possession of property sued for specifically. The section reads as follows: "If the judgment appealed from direct the sale or delivery of possession of real property, the execution of the same shall not be stayed, unless a written undertaking be executed on the part of the appellant, with two sureties, to the effect that during the possession of such property by the appellant he will not commit, or suffer to be committed, any waste thereon, and that, if the judgment be affirmed, he will pay the value of the use and occupation of the property from the time of the appeal until the delivery of possession thereof, pursuant to the judgment, not exceeding a sum to be fixed by a judge of the court by which judgment was rendered, and which shall be specified in the undertaking. When the judgment is for the sale of mortgaged premises, and the payment of a deficiency arising upon the sale, the undertaking shall also provide for the payment of such deficiency." This language shows that the intention was to embrace appeals from judgments of foreclosure, for that is a judgment directing the sale of real property, and the language of the section—"if the judgment appealed from direct the sale or delivery of possession of real property"—plainly indicates the intention to embrace two classes of judgments, those which direct a sale, as well as those which direct delivery of possession. Then, too, the last sentence of the section conclusively shows, not only that the intention was to embrace appeals from judgments of foreclosure, but also that the undertaking required in such cases should provide, not only for the payment of any deficiency, but also for the use and occupation of the mortgaged premises pending the appeal, for the language—that the undertaking "shall also provide," etc.—cannot be construed in any other way. The word "also," as there used, necessarily implies that the intention was that, in order to procure a stay of sale ordered by a judgment of foreclosure, pending an appeal from such judgment, the appellant must, in addition to his undertaking not to commit or suffer waste, and to pay the value of the use and occupation, also undertake to pay any deficiency arising from the insufficiency of the proceeds of the sale of the mortgaged premises to pay the mortgage debt. According to our construction of this section of the Code, as derived from its terms, the intention of the legislature was that, with a view to protect the plaintiff from any damage by reason of the delay caused by an appeal, in enforcing his judgment the appellant must enter into the undertaking there prescribed, as it would not be just to allow him to retain possession of the premises, after the court had adjudged the plaintiff's right to a sale thereof, without accounting for the use thereof during the time for which, by an unsuccessful appeal, the appellant delayed the plaintiff in enforcing a right found to have been properly adjudged to him. But, as Judge FRASER well says, it could not have been the intention to give the plaintiff, in addition to his mortgage debt, the amount of the value of the use and occupation, but only that such amount should go to aid in paying the mortgage debt in case the proceeds of the sale of the mortgaged premises should prove insufficient for that purpose. This, as we understand it, is what Judge FRASER plainly intended by saying that the value of the use and occupation must go as a credit on the mortgage debt; and, so construed, there was no error in this respect. The fact that in the section there is no provision as to whom the undertaking is to be made payable to is an indication that the legislature did not intend that the amount secured thereby should be paid to the plaintiff or respondent at all events, but only in case such payment should be necessary to supply any deficiency in realizing the debt, the enforcement of which would be delayed by the appeal.

The position taken by appellants that they cannot be held liable on the undertaking, as the judgment of foreclosure is not a judgment for the delivery of possession, cannot be sustained. This position is based upon the assumption that the section only provides for the payment of the value of the use and occupation from the time of the appeal until delivery of possession, as directed by the judgment, and hence, as the judgment of foreclosure in this case does not direct the delivery of possession, it cannot apply. But such is not the language of the section. The language there used is "from the time of the

Digitized by Google

appeal until the delivery of possession thereof, pursuant to the judgment." And it seems to us that when possession is delivered to the purchaser at a foreclosure sale he acquires such possession in pursuance of the judgment of foreclosure; as much so as if put into possession by a direct order of the court. Indeed, the words, "from the time of the appeal until the delivery of possession," are used merely to designate the beginning and the end of the period for which the appellant is to be held liable for use and occupation in case the appeal, which alone has enabled him to retain possession, shall be dismissed. Inasmuch as the question here arises under a special statutory provision, we do not see how the question as to the right of the mortgagee to the rents and profits of the mortgaged premises, growing out of the relation of mortgagor and mortgagee, can arise, and hence that question has not been considered. The judgment of this court is that the judgment of the circuit court be affirmed, without prejudice to the right of the plaintiff to move before that court for an order requiring the amount of the value of the use and occupation as ascertained by the master's report to be paid to her.

SIMPSON, C. J., and McGOWAN, J., concur.

(30 S. C. 356)

BROWN v. McWHITE *et al.*

(*Supreme Court of South Carolina.* March 14, 1889.)

PROBATE COURTS—JURISDICTION—APPEAL.

1. The probate court has no jurisdiction to determine the ownership of a promissory note executed by an intestate whose estate is before it for settlement, as between an indorsee who presents it for payment and the payee, who alleges the indorsement to have been as collateral security for a debt which has been paid.

2. Where the "case," on appeal from a judgment affirming a decree of the probate court allowing claims against an intestate's estate, does not set forth the facts proved upon which a claim was allowed, an alleged error in refusing to give interest thereon will not be considered.

Appeal from common pleas circuit court of Marion county; ALDRICH, Judge.

The estate of A. McWhite, deceased, being before the probate court of Marion county for settlement, on the petition of Julius Brown, administrator, M. Iseman filed a claim against the estate, based on a note executed by the said intestate to one S. F. Richardson, and indorsed by him to said Iseman. John Wilcox, Jr., administrator, intervened, claiming the note and its proceeds, and a decree was rendered, awarding the funds to him. Mrs. Sarah Iseman also claimed the fund, and both appealed to the circuit court, and from its adverse decision they appeal to this court.

W. W. Harllee, for Mrs. Iseman. *C. A. Woods*, for John Wilcox, Jr., adm'r, etc.

McIVER, J. Under proceedings instituted in the court of probate by the petitioner, as administrator of the estate of A. McWhite, against his heirs and distributees, for the settlement of said estate, creditors were called in to prove their demands. Among the claims proved was one presented by M. Iseman, based on a note under seal, bearing date 15th February, 1859, for $500, drawn by said intestate, A. McWhite, and payable to one S. F. Richardson or order, one day after the date thereof. After two credits indorsed upon this note, the last of which bears date 8th of March, 1866, both purporting to be signed by S. F. Richardson, the following language is found indorsed on the note, to-wit: "Pay to M. Iseman. [Signed] S. F. RICHARDSON." Exactly when this claim was proved, does not distinctly appear, but as the affidavit required for proof of claims appears to have been made by M. Iseman on the 23d of December, 1870, we presume the claim was proved about that time. It seems that some time afterwards this claim was transferred by M. Iseman to his wife, Mrs. Sarah Iseman, but when or how this transfer was made, does not appear, and under the view which we take of the case it is not important. The real estate of the intestate having been sold, and the proceeds realized, as we infer from the statement made in the "case" that the dividend due on the claim above mentioned had been ascertained to be something over $300, John Wilcox, Jr., as administrator of the estate of S. F. Richardson, served a notice on the judge of probate that the note above mentioned had been transferred to M. Iseman only as collateral security for the payment of a small account, amounting to $17, and that the balance realized on said note, after paying said account, should be paid over to him as the administrator of the estate of said S. F. Richardson, and notifying him not to pay out any money in his hands applicable to said note "until a hearing and adjudication of the rights of the parties claiming the said funds." The judge of probate proceeded to the hearing and determination of this controversy as to the ownership of the said claim, and on the 3d July, 1888, rendered his decree, by which he held substantially that the note had been transferred to Iseman only as collateral security for certain advances made by Iseman to Richardson, which, as ascertained by the decree, amounted to $47, which amount, with interest, Iseman was entitled to receive. The judge of probate also says in his decree: "Iseman is entitled to $18, paid Johnson, the surveyor." What this has to do with the question as to the ownership of the note we are at a loss to conceive, as we find no reference to this matter in the testimony, or anywhere else in the "case."

From this decree both Mrs. Sarah Iseman and John Wilcox, Jr., as administrator of S. F. Richardson, appealed to the circuit court, and both appeals having been dismissed by that court, the said parties both appeal to this court upon the grounds set out in the record, which need not, under the view which we take of the case, be specific-

Digitized by Google

ally stated here; for we do not think that the judge of probate had any jurisdiction of the controversy as to the ownership of the note. For this reason, without going into the merits of the controversy, which it is not competent for us to do under this appeal, we are of opinion that the decree of the judge of probate, in so far as it purports to adjudicate the controversy as to the ownership of the note, should be set aside, without prejudice to the right of either or both of the said parties to proceed as they may be advised to have their conflicting claims to the note properly adjudicated. The court of probate is a court of limited jurisdiction, marked out and defined by the constitution, and we think it clear that this controversy as to the ownership of the note in question does not fall within the limits there prescribed. There can be no doubt that when Richardson indorsed upon the note the words "Pay to M. Iseman," and delivered it to Iseman, the legal title to the note, as well as the money secured thereby, passed to Iseman, (Tryon v. De Hay, 7 Rich. Law, 12;) for according to that case such would be the effect even of an indorsement in blank on a note under seal. While there has been considerable conflict of opinion, and even of decision, as to whether such an indorsement on a bond or sealed note fixes any liability on the person making such indorsement, as may be seen by reference to the following cases: Bay v. Freazer, 1 Bay, 66; Parker v. Kennedy, Id. 398; Walker v. Scott, 2 Nott & McC. 286; Booth v. June, reported in a note to Lanneau v. Ervin, 12 Rich. Law, 32,—yet none of these cases question the doctrine that such an indorsement operates as an assignment of the bond or sealed note. If, then, the effect of the indorsement was to transfer the legal title in the note to Iseman, he, certainly, as the legal owner and holder thereof, had a right to prove the same against the estate of the maker of the note, and to receive any dividend which might be due thereon, unless prevented by some proper proceeding, instituted in a tribunal having jurisdiction of the controversy between him, or his assignee and the person claiming to be the real owner. Conceding, for the purposes of this discussion, that the note was transferred to Iseman, not absolutely, but only as collateral security for the payment of the account of $17, this would only give to Wilcox as administrator of Richardson a right of action against Iseman to account for the proceeds of the note after reimbursing himself the amount of the account which the note was transferred to secure, or, at most, to demand a retransfer of the note upon payment or tender of the amount which it was intended to secure. Of such an action the court of probate clearly could not take jurisdiction.

As to so much of Mrs. Iseman's appeal as alleges error in not allowing interest on the $18 paid the surveyor, we are unable to find anything which would warrant us in saying that the decree of the judge of probate was erroneous in this respect. There is not a word said about this matter in the "case," except the language which we have quoted above from the decree of the judge of probate, and nothing that there appears warrants us in holding that there was error in not allowing interest on that sum of money. It is true that in one of the grounds of appeal it is stated that this money was advanced by Iseman under some understanding or agreement that it was to be refunded to him when the proceeds of the sales of the land were realized, but, as we have often had occasion to say, this court has no authority to consider any fact which does not appear in the "case," as prepared for argument here, but appears only in the exceptions or grounds of appeal. The judgment of this court is that the judgment of the circuit court, in so far as it affirms so much of the decree of the judge of probate as purports to adjudicate the controversy between John Wilcox, Jr., as administrator of Mrs. Sarah Iseman, as to the note above mentioned, be reversed, for want of jurisdiction in the court of probate to adjudicate such controversy, without prejudice to the right of either party to institute such proceedings as they may be advised are proper for the adjudication of such controversy, but in so far as it affirms that portion of the decree of the judge of probate which adjudges the right of Iseman to payment of the $18, it be affirmed.

SIMPSON, C. J., and MCGOWAN, J., concur.

(82 Ga. 1)

POWELL *et al.* *v.* KELLY *et al.*

(*Supreme Court of Georgia.* March 1, 1889.)

ASSIGNMENT FOR BENEFIT OF CREDITORS.

1. A debtor conveyed his stock of goods, accounts, etc., to his creditor by an absolute bill of sale, containing no reservations or words of trust, nor was there any trust or secret reservation in fact. The creditor accepted the property in satisfaction of his debt, which was less than its value, but he also absolutely assumed and agreed to pay certain other creditors' claims, the whole amount exceeding the value of the stock and other property included in the conveyance. *Held* a valid sale, and not an assignment.

2. Code Ga. § 1953, provides that "a debtor may prefer one creditor to another, and to that end he may, *bona fide*, give a lien by mortgage or other legal means, or he may transfer negotiable papers as collateral security, the surplus in such cases not being reserved for his own benefit, *or that of any other favored creditor, to the exclusion of other creditors.*" By act Ga. Feb. 23, 1866, while the above section was in force, it was provided that a debtor might prefer one creditor to another, and no particular manner or form was prescribed for giving such preference. *Held*, that the latter act impliedly repealed that portion of section 1953 printed above in italics, and it should have been stricken out when the Code was revised.

Error from superior court, Walton county; HUTCHINS, Judge.

Powell, Brother & Co., by their petition, alleged that they were creditors of Kelly Brothers & Porter, and that Kelly Brothers & Porter, a mercantile firm, were possessed of assets of the value of about $100,000, and about December 14, 1888, being insolvent, said

Digitized by Google

Kelly Brothers & Porter made a pretended sale of all their assets to one S. M. Whitney, and this sale was made to defraud their creditors. No inventory of assets or list of creditors was attached to the conveyance, but it was claimed that the consideration to the conveyance was an indebtedness by them to Whitney, and an assumption by Whitney of debts due by Kelly Brothers & Porter to certain other creditors, many creditors being excluded by this conveyance; that it was understood between the parties that if there should be an excess after the debts thereby intended to be secured were paid, Kelly Brothers and Porter should have the benefit of it; that Whitney knew, or had reasonable grounds to suspect, a fraudulent design of Kelly Brothers & Porter; that Whitney has taken charge of the stock and other assets, and is proceeding to dispose of them. It was also alleged that the so-called bill of sale was really an assignment, its nominal consideration being much less than the amount of the assets covered by it; that the indebtedness to Whitney, and the indebtedness assumed by him, were not incurred for any of the stock of goods conveyed, or for any goods of which the notes and accounts conveyed were the proceeds; that there was great secrecy in the execution of the pretended bill of sale. It is further charged that complainants were induced to extend credit to Kelly Brothers & Porter by representations made by the latter that they were perfectly solvent, etc. A large number of other creditors of Kelly Brothers & Porter were made parties complainant to the bill.

The defendants demurred on the following grounds: (1) No equity in the bill. (2) Complainants have no lien. (3) Complainants have a remedy at common law. Kelly Brothers & Porter answered the bill and, so far as material, their answer was, in substance, as follows: Their stock of goods, notes, accounts, etc., while nominally of large value, were not really worth more than $40,000. They could not carry on their business, and on December 15, 1888, sold said stock, notes, etc., to Whitney for $55,151.92; "the three Kellys" conveying, in addition to the goods, notes, etc., certain lands and mules worth $7,000 to $8,000. The consideration of the conveyance was a certain debt due to Whitney amounting to $28,000 or $34,000, and the assumption by Whitney of other debts, making up the $55,000 mentioned. The sale was fair, absolute, without reservation of any kind, and with no intention to defraud. It was not an assignment, nor intended as such, but was a sale of part of the assets of the firm. Other assets were sold and conveyed on the same day to other parties to whom the firm was indebted. There was no understanding that the defendants were to have the benefit of any excess, or that Whitney should take the assets and pay the surplus to certain favored creditors. Attached as an exhibit to the answer is a copy of the conveyance in question. The conveyance is of all the stock of goods, etc., notes, mortgages, etc., of Kelly Brothers & Porter. The consideration named is $55,151.92, paid by Whitney as follows: "$34,198 is due to him for money advanced to us, and which is hereby settled; and the said Whitney has agreed, and hereby obligates himself, to pay, and now assumes the payment of, the following open cotton bills due by us to the parties named therein, and in the amounts opposite their names which appear in the list marked 'Exhibit A,'" etc., "and also the following amounts due to the parties named;" and then follows a list of names of certain parties, with amounts due them. Included in this list is a debt to Mrs. W. A. Kelly for $22.20, and a debt due to John T. Glenn, "his fees of $2,000, which is due by us to him." The instrument proceeds: "In the amount of $34,198 due to said Whitney by us is included the following debts, [then naming the indebtedness to four different firms, amounting to $2,300,] which the said Whitney agrees to pay, and has assumed the payment of; and the said Whitney also assumes and obligates himself to pay to the employes in our service the amounts which may be due to them, not exceeding $2,701.58;" also a certain other debt of $2,000. "The intention of the contract is that the said W. A. Kelly Brothers & Porter sell and transfer to the said S. M. Whitney the property above described, in consideration that the debt due by them to said Whitney is settled, and that said Whitney pays the debts due by them as described in the contract. The property hereby transferred and conveyed not being sufficient in amount, W. A. Kelly and brother, and the partners composing that firm, [mentioning them] have conveyed to said S. M. Whitney certain lands in other counties to make a sufficient consideration." The instrument bears date December 15, 1888, and is signed by Kelly Brothers & Porter, and by the members of that firm individually, by the members of the firm of W. A. Kelly Brothers individually, and by S. M. Whitney. Attached to it is an exhibit of the cotton bills, and in the list appears the name of Josiah Blassingame, for $86.58, and "Blank, $42.50."

Whitney answered the bill as follows: That the indebtedness of Kelly Brothers & Porter to him was for advances made by him as cotton factor. They were unable to pay him the money, and proposed to sell him their stock of goods, notes, accounts, etc., in payment, if he would furnish them money to pay certain other of their creditors. He agreed to take the property in payment, and to assume payment of debts specified in the written contract, if they would sell him said stock, notes, etc., and, in addition, certain lands and mules in Jasper county. The sale was absolute, unconditional, and in good faith, and he fears that he will lose $5,000 thereby. He has already paid about $4,000 on the debts he assumed. He cannot realize over $38,000 from the stock, notes, etc., and

Digitized by Google

not over $8,000 or $9,000 from the lands and personalty in Jasper county, while he has assumed the payment of over $25,000 besides his own debt. The sale was not an assignment, nor intended as such; was not made to defraud. There was no understanding that any excess should be for the benefit of Kelly Brothers & Porter, or either of them, or that any surplus should be reserved for certain favored creditors, as charged. The sale was absolute, and no surplus was mentioned or thought of. Kelly Brothers & Porter did not convey all their assets to respondent. They paid on that day, and since, other creditors, with assets with which respondent had no connection, etc. On the hearing for preliminary injunction the testimony, so far as material, was as follows: The complainants put in evidence an affidavit to the effect that since the conveyance Josiah Blassingame had stated that before Kelly Brothers & Porter made their sale to Whitney they paid him (Blassingame) all they owed him. Also that the Mrs. W. A. Kelly named in the conveyance was the wife of W. A. Kelly, one of the firm of Kelly Brothers & Porter. That she is dead, leaving her husband as sole heir. Also, that since the sale to Whitney, W. A. Kelly had stated that the stock of goods transferred was worth from $30,000 to $35,000, and the notes and accounts from $55,000 to $60,000, and, in addition, he and his brothers had conveyed to Whitney some of their real estate. That they owed Whitney about $30,000, and he has assumed the payment of about as much more. That the sale was absolute, but that all Whitney wanted was his money; and that Whitney had gotten all of the assets of Kelly Brothers & Porter as a firm and as individuals. The complainants also introduced a letter received by H. C. Leonard, the manager of the Bradstreet agency in Atlanta, between the 21st and 25th of November, 1888. The letter was from Kelly Brothers & Porter, per W. A. Kelly, and, so far as material, was a statement in a general way that said firm was worth $85,000 above all liabilities. The defendants read in evidence their answers, with the exhibits attached, together with various affidavits, which may be generally stated as tending to show the following: That the sale in question was not a secret one; that the entire contract was put in writing; that it was not made for delaying, hindering, or defrauding creditors; that there was no reservation as to excess or surplus; and that the value of the property conveyed is less than the amount of indebtedness to Whitney, and the indebtedness assumed by Whitney. The defendants also introduced a list of the realty and personalty in Jasper county conveyed by W. A. Kelly & Brothers to Whitney, and affidavits showing that this last-named property was worth but little over $9,000. The defendants also introduced the affidavit of W. A. Kelly to the effect that his wife had deposited about $32 with Kelly Brothers & Porter about November 15, 1888, and died November 28, 1888, and when she died she was indebted in an amount largely more than the property she left; that her name had been left by oversight on the list, as it was not the intention to make her estate one of the creditors whose debts were assumed by Whitney.

The judge rendered the following decision: "Being of the opinion that the transaction between defendants W. A. Kelly Brothers & Porter and S. M. Whitney was an absolute sale, and not an assignment, in the sense claimed by the petitioners, and there being no sufficient cause shown why the extraordinary remedies prayed for should be granted, the injunction and appointment of a receiver are refused," etc. Plaintiffs excepted, and assigned error as follows: (1) In ruling that the transaction was an absolute sale, and not an assignment. (2, 3) In holding that there was no sufficient cause for injunction and receiver. (4) Petitioners say that the court should have held that the transaction was an assignment, and was void for lack of inventories and schedules; that it was fraudulent and void because the names of Blassingame and Mrs. Kelly were included in the instrument of conveyance; that it was void because made to delay creditors; that it was void because made by debtors insolvent at the time, and reserved a benefit to one W. A. Kelly of the firm; and that it was void because it reserved a benefit for favored creditors to the exclusion of other creditors.

Candler, Thomson & Candler, B. S. Walker, and *John L. Hopkins*, for plaintiffs in error. *John T. Glenn* and *H. D. McDaniel*, for defendants in error.

SIMMONS, J. 1. We have carefully read the pleadings and affidavits in this case, and in our opinion there was no error in the court below in refusing the injunction, and the appointment of a receiver as prayed for, nor was there any error, under the facts as disclosed by this record, in holding that the transaction between these parties was a sale and not an assignment. The paper, on its face, is an absolute bill of sale. It sells and transfers to Whitney the whole stock of goods, mortgages, notes, accounts, etc., in payment of a pre-existing debt which Kelly Brothers & Porter owed to Whitney; and Whitney agrees therein that the indebtedness which he holds against said firm shall be settled in consideration of said sale to him of said goods. He also obligates himself to pay certain other preferred creditors mentioned in said bill of sale. The obligation assumed by Whitney is not to pay these other preferred creditors out of the proceeds of the goods, but he assumes the debts, and obligates himself absolutely to pay them, whether the proceeds of the sale of the goods are sufficient or not. Under this obligation, if the goods were destroyed, Whitney would still be bound to pay these debts. So far as we can discover from the bill of sale and the facts disclosed by this

Digitized by Google

record, this seems to have been a *bona fide* transaction between these parties,—a transaction which does not violate any law in this state, but which the law expressly sanctions, —that is, that a debtor may prefer certain creditors to others. So far as we can discover from the facts in the record, there is no trust reserved in this bill of sale, either expressly, impliedly, or secretly, to Kelly Brothers & Porter, or to any one of them. While the form and words of an assignment and bill of sale are generally the same, the element of trust, either express, implied, or secret, distinguishes an assignment from a sale. Burrill, in his work on Assignments, (page 9,) says: "An important distinction between the two modes of transfer arises out of the character of a trust, which belongs to an assignment. A sale, in cases free from fraud, is, on delivery of the thing sold, and receipt of the consideration, a complete transaction, passing absolutely and irrevocably all the seller's interest in the subject of it, without reversion or return under any circumstances. An assignment is likewise an absolute conveyance by which both the legal and equitable estate is divested out of the grantor, but the title vested in the assignee is subject to the uses and trusts in favor of the creditors, and upon their satisfaction a trust results in favor of the assignor in the residue of the unappropriated property or its proceeds. A transfer of specific property to a creditor in discharge of a pre-existing debt is, in effect, a sale. An assignment of itself does not satisfy the claims of the creditors to any extent, but provides a method for raising the means with which to pay them. Sales are often subject to covenants on the part of buyer and seller from which assignments are free. An assignee is not liable to the payment of incumbrances to the same extent as a purchaser."

This being the law, and the facts in the record showing that this was a *bona fide* sale between the parties, and that there was no trust, either spoken or secret, reserved to the grantors, or to any one for them, the court did not err in holding that it was a sale and not an assignment. Watkins v. Pope, 38 Ga. 514; Johnson v. McGrew, 11 Iowa, 151; Anderson v. Smith, 5 Blackf. 395. The case of Coggins v. Stephens, 73 Ga. 414, relied upon by counsel for the plaintiff in error, was a case in which the facts were very different from the facts in this case. The entire stock of goods and other property in that case greatly exceeded in value the consideration named in the deed, and there was evidence enough in that case to authorize a jury to find that there was a secret trust. In this case the trust element is lacking, and the evidence shows that the property sold is of much less value than the debt of Whitney and those which he has assumed.

2. But it was argued by counsel for the plaintiff in error that, whether this was a sale or an assignment, it is still void, under the last clause of section 1953 of the Code. That section is as follows: "A debtor may prefer one creditor to another, and to that end he may, *bona fide*, give a lien by mortgage or other legal means, or he may sell in payment of the debt, or he may transfer negotiable papers as collateral security, the surplus in such cases not being reserved for his own benefit, or that of any other favored creditor, to the exclusion of other creditors." It is argued that the facts of this case show that there will be a surplus left after the payment of Whitney's debt, and that this bill of sale reserves that surplus for other favored creditors than Whitney, and to the exclusion of these complainants, and that, therefore, under the latter part of this section, said sale to Whitney is void. If these words, "or that of any other favored creditor," are still of force as the law of this state, it would seem that this point is well taken. This part of the section at first gave us some trouble, but after a careful examination thereof, and an investigation as to how these words originated, or became incorporated in the Code, we have come to the conclusion that they were repealed by the act of 23d February, 1866, (Acts 1866, p. 20.) Prior to the act of 1866, the policy of this state, as shown by the act of 1818, was that a debtor should not prefer one creditor to another, but there was a proviso to that act that a debtor might extinguish his debt to a creditor by a *bona fide* sale of property for that purpose, not reserving any part thereof in trust for himself or any one else. Under this provision, this court made several decisions, notably in the case of Eastman v. McAlpin, 1 Ga. 157, and some others on the same line, where a debtor was allowed to sell his property to a creditor, and prefer other creditors as to the surplus. Other decisions were made somewhat in conflict with these. To the codifiers the former of these decisions doubtless seemed to be inconsistent with the act of 1818, because they allowed a preference of creditors in the disposal of the surplus. In order to harmonize these decisions, and make the policy of the law consistent with the plain provisions of the act of 1818, we think the codifiers added the words above quoted, which made the whole scheme and policy of the act of 1818 consistent; so that, while a debtor could still make a *bona fide* sale of his property to pay a debt, he could not, under these words, prefer one creditor to another by directing a surplus to be paid to the preferred creditor.

The law thus stood from the time of the adoption of the Code to 1866, when the legislature thought proper to change the policy of the state in regard to the preference of creditors by a debtor, and they passed the act of that year in which they allowed a debtor to prefer one creditor to another. That act, in our opinion, repealed by implication the latter part of section 1953, and those words should have been stricken from the section when the Code was subsequently revised. See End. Interp. St. § 195 et seq. These words are in direct conflict with the policy of

Digitized by Google

the act of 1866. That act, as said before, allows a debtor to prefer one creditor to another, and we do not see any reason now why a debtor may not sell his property *bona fide* to pay a debt, and devote the surplus, if there is any, to a particular creditor or creditors in preference to other creditors. The act does not prescribe any particular manner or form in which a debtor may prefer one creditor to another. In our opinion, he may do it by an assignment of all his property to one creditor, or a class of creditors, or he may do it by selling his property *bona fide* to one creditor in payment of his debt, and devoting the surplus to the payment of preferred creditors.

It is argued, however, that to allow sales of the kind now under consideration to stand would be a virtual repeal of the policy of the legislature in regard to assignments; that the policy requires the assignor to attach to the assignment a list of creditors, and the amount of indebtedness, and declares that unless this is done the assignment shall be void. This court has been very strict in the enforcement of these statutes in regard to assignments proper, because it seemed to be the policy of the legislature to require of the assignor a clean showing as to all of his property, his debts, and his creditors. This was required, as we have decided, for the benefit and protection of the creditors. These acts, as will be seen by a reference thereto, apply only to assignments, and do not apply to sales, especially sales like the one under consideration; the facts in this record showing that Kelly Brothers & Porter did not sell to Whitney the whole of their property, but only a part thereof, and sold the other portion to some other creditors.

3. It will be observed that we have not discussed the question of actual concealed fraud, or of this sale being made to hinder or delay creditors. These were matters of fact to be passed on, first by the court below, and then by a jury, and, as he did not see proper to grant an injunction upon these grounds, we cannot say that he erred therein. This case, we presume, will, if the parties desire, be submitted to a jury upon all these questions; and if they should find from the evidence that this was a fraudulent sale, or that it was made to hinder, delay, or defraud creditors, doubtless the learned judge below will sanction their finding, should the evidence authorize it. Judgment affirmed.

(82 Ga. 556)

DARNALL *et al.* *v.* WOOD *et al.*

(*Supreme Court of Georgia.* March 25, 1889.)

GARNISHMENT—COUNSEL FEES.

While the Code, § 3549, provides for taxing the plaintiff in garnishment with the expense incurred by the garnishee in "making" a true answer to the garnishment, it authorizes no allowance for counsel fees incurred for the purpose of upholding the answer against a traverse of the same, though the finding of the jury be against the traverse, and in favor of the answer. The expense of litigating the truth of an answer is not comprehended in the expense of making it, but is additional thereto.

(*Syllabus by the Court.*)

Error from city court of Savannah; HARDEN, Judge.

J. G. & D. Clark, for plaintiffs in error. *J. E. Wooten* and *R. R. Richards*, for defendants in error.

BLECKLEY, C. J. The single question is whether there is any authority of law for taxing the plaintiff in garnishment with the fee paid by the garnishee to his counsel for services rendered in resisting a traverse to the answer, the answer having been found true by the verdict of a jury. "In all cases where process of garnishment shall be served upon any person, and such person shall * * * answer truly that he owes the defendant nothing, if the garnishee shall have to incur any expense in making his or her answer to the garnishment * * * the amount so incurred shall be taxed in the bill of costs, under the approval of the court, and be paid by the party cast in the suit, as other costs are now paid." Code, § 3549. This is the statute under which the claim is made, and we think the intent of it is plain, and that there is no ambiguity in the letter. The expense incurred in making the answer is provided for, but the expense of vindicating the answer against a traverse of its truth is not within the statute. In the present case the court allowed $60 for expense incurred in "making" the answer, though the claim and the proof severed the expenses into two items,—$10 for the making and $50 for sustaining the answer. The $10 allowance was lawful, and is not resisted. The $50 allowance was unwarranted, and must be stricken from the judgment. What is denominated "cost" in Curry v. Bank, 58 Ga. 28, must have been the expense of making the answer, as in that case there was no traverse. Nor was there any in Sulter v. Brooks, 74 Ga. 401.

Judgment reversed.

(85 Va. 922)

MCDEVITT *v.* FRANTZ.

(*Supreme Court of Appeals of Virginia.* March 21, 1889.)

RESULTING TRUSTS.

A trust will not result to persons whose money has been used to pay off part of the purchase price of land, where such money was loaned to the purchaser under a decree of court.

Application for rehearing. For statement of the case, and former opinion, see 8 S. E. Rep. 642.

A. S. Segar and *Joseph Christian*, for appellant. *Thomas Tabb* and *Henley & Peachy*, for appellee.

HINTON, J. This case is before us on a rehearing, and has been again carefully examined. At the last term, the decree of the lower court was affirmed, when an opinion was delivered by Judge FAUNTLEROY, in which principles of law applicable to resulting trusts, so far as is necessary for the present case, are stated with sufficient fullness to render it unnecessary for us to further advert

Digitized by Google

to them. The contention of the appellants, to prevail in this case, must go to the extent of claiming that a trust will result to the persons whose money has been used in paying off part of the purchase price of property, although such money has been, under a decree of a court of competent jurisdiction, merely loaned to the purchaser. Such a doctrine finds no support either in the adjudged cases or in any principle of law with which we are acquainted. By the very terms of the decree of Cecil county, Md., the money in which these appellants claim an interest was directed to be made a first lien upon the real estate in controversy, a direction consistent only with a purpose on the part of the court to loan this money upon said property, and utterly at war with the idea of the appellants that it was the intention of the court to invest this money in the purchase of any part of said property. This, in our judgment, is sufficient to dispose of the case. We have carefully examined the cases cited by the appellant, and can find nothing in them in conflict with this view; indeed, in White v. Sheldon, 4 Nev. 287, the court expressly says: "So it must usually be shown that the money was not loaned to the trustee, for, from the mere circumstance of money being advanced for another, the law would presume a loan or payment of a debt." It is only necessary for us to add that Mrs. McDevitt and Mrs. Stewart were not competent witnesses, in the opinion of the president of this court and myself, not for the reason assigned in the previous opinion rendered in this case, but because, as Mrs. Sewell, one of the parties to the transaction under investigation, is dead, the other parties cannot, under the statute, be permitted to testify. The decree of the circuit court of Elizabeth county is right, and must be affirmed.

(103 N. C. 191)

PARKER v. SUTTON *et al.*

(*Supreme Court of North Carolina.* March 18, 1889.)

NEGOTIABLE INSTRUMENTS — ACCOMMODATION PAPER—CONDITIONS.

The facts that a negotiable accommodation note is sold to a private person instead of to one of the banks in a particular place, as was "understood and agreed upon" between the maker and the accommodation indorser, and that the purchaser had notice of the understanding, are of no consequence, where such restriction is not set forth in the note, and where it is apparent that the purpose of the maker and indorser was solely to enable the former to raise money on the credit of the latter's signature. It can make no possible difference to them who buys the note.

Appeal from superior court, Bladen county; CLARK, Judge.

Action on a promissory note, brought by W. J. Parker, administrator of J. McK. Mulford, against W. J. Sutton and John A. McDowell. Judgment for plaintiff, and defendant McDowell appeals.

T. H. Sutton, for appellant. *C. C. Lyon*, for appellee.

MERRIMON, J. The plaintiff brought this action to recover the money due upon a promissory note, whereof the following is a copy: "ELIZABETHTOWN, N. C., "$1,000. December 10th, 1882.

"Ninety days after date I promise to pay to John A. McDowell or order, one thousand dollars, value received, with interest after maturity at the rate of eight per cent. per annum.

[Signed] "W. J. SUTTON."

This note was indorsed by the payee in blank, and afterwards the blank was filled as follows: "Pay J. McK. Mulford or order." By consent of the parties the court settled the facts as follows: The defendant W. J. Sutton executed his promissory note for $1,000, on December 10, 1882, to the defendant John A. McDowell, to pay said sum 90 days after date, with interest at 8 per cent. after maturity. Said McDowell indorsed said note in blank for the accommodation of the defendant Sutton, and delivered said note to him that same day. Said Sutton sold and transferred said note for full value, and before maturity, to plaintiff's intestate. At the time of the indorsement by McDowell of the note, it was understood and agreed between him and Sutton that said note was to be negotiated in one of the banks in Fayetteville, N. C., and plaintiff's intestate had notice of such understanding before his purchase of said note. At the time of the execution of said note Sutton was not indebted to McDowell, and the indorsement by McDowell was solely an accommodation to enable Sutton to raise money. McDowell had no notice of the sale of the note to plaintiff's intestate till after the death of such intestate, on the presentation by the plaintiff of the note for payment. Upon the above facts the court rendered judgment for plaintiff. The defendant McDowell, having excepted, appealed to this court.

The note sued upon was plainly a negotiable instrument, and might, by indorsement of the payee thereof, be put upon the market, and bought and sold indefinitely. The original parties to it treated it as "accommodation paper," and the facts show that their chief and the material part of their purpose was to enable the maker thereof to borrow money upon it. It was expected that he would get the money from one of the banks in Fayetteville, but not necessarily from a bank, or in that town. If it had been so intended, some particular restriction in this respect would have been set forth in or about the note, but it was left at large, entirely without such restriction, to be sold to any person who might buy it. If a bank had purchased it, it could at once have sold it to the intestate of the plaintiff, or any other person, in the course of business. There was nothing in its nature or in the purpose of the parties in connection with it that rendered a sale of it to the bank necessary, or at all material to its sufficiency or efficiency as a negotiable instrument; nor would the mere sale of it to a bank have given the payee who indorsed it any material legal advantage.

Digitized by Google

There was no reason, certainly none that appears, why the intestate of the plaintiff should not have bought it on the same footing as a bank or any other person might have done. The simple fact that he had knowledge of the "understanding" that the money was to be obtained from a bank in the town mentioned, did not render it in any sense fraudulent on his part to buy it. This is a stronger case against the indorser than that of Parker v. McDowell, 95 N. C. 219. The note in that case was by its terms made "negotiable and payable" at a particular bank named. It was an "accommodation paper;" was not sold to the bank, but to a different person. Nevertheless it was held that the indorser was liable. The objection, therefore, that the intestate of the plaintiff had notice that it was "understood and agreed" that the note should be "negotiated in one of the banks of Fayetteville," cannot be sustained, and the judgment must be affirmed.

(103 N. C. 182)

ADRIAN *et al. v.* MCCASKILL *et al.*

(*Supreme Court of North Carolina.* March 18, 1889.)

NEGOTIABLE INSTRUMENTS—INDORSEMENT.

1. One who obtains possession of a note after indorsing it is restored to his original position, and cannot, nor can subsequent purchasers from him with notice of the fact, hold intermediate indorsers, who could look to him again.
2. The rule that a holder of a note may fill up a blank indorsement by making it payable to himself or some one else applies only where he obtains the note, not from the payee or a prior indorser, but as a *bona fide* purchaser, without any knowledge or notice of the relation sustained by prior indorsers to the note.
3. Where a note is purchased from one who appears thereon as the first indorser, the purchaser is charged, in law, with notice that persons whose names are subsequent in order on the back of the note do not occupy, as to him, the relation of indorsers.

Appeal from superior court, New Hanover county, SHIPP, Judge.

E. S. Martin, for appellants. *John D. Shaw*, for appellees.

DAVIS, J. Civil action tried before SHIPP, J., at January term, 1889, of the superior court of New Hanover county, upon the following statement of facts agreed: On the 10th day of January, 1884, one Mary J. Fairly executed her promissory note in writing, under seal, a copy of which, and the indorsements thereon, are as follows: "$1,386.65. LAURINBURG, N. C., Jan. 10th, 1884. On or before the first day of November next I promise to pay to W. C. Patterson or order the sum of one thousand three hundred and eighty-six dollars and sixty-five cents for value received. This note to bear interest at the rate of ten per cent. after maturity. *January 10th*, 1884. Payable at the office at McCaskill & McL. MARY J. FAIRLY. [Seal.]" Upon which were the following indorsements: "W. C. PATTERSON. MCCASKILL & MCLEAN." "Received on the written note forty-five dollars and ninety-seven cents. *Jan. 14th*, 1885. W. C. PATTERSON." That afterwards, in the month of January, 1885, and after the maturity of the note, the plaintiffs became the purchasers of the same for value from the said W. C. Patterson, indorsed as above set forth, without any actual notice whatever of any of the equities or defenses set up in the answer of the defendants, who were sued as indorsers. It is admitted that the following facts are true: That early in the year 1884 the defendants agreed with W. C. Patterson, the payee named in the note, to make advancements to him in money and goods during the year, to enable him to cultivate his farm, and to secure the defendants for such advancements as they might make to said W. C. Patterson, the said Patterson indorsed the note in blank, and delivered it to the defendants in February, 1884, to be held by the defendants as collateral security for such sum or sums of money as he, Patterson, might owe them at the end of 1884; and that on the 23d day of February, 1884, the defendants indorsed said note in blank, and, with the knowledge and consent of said Patterson, delivered the same to George W. Williams & Co., of Wilmington, N. C., to be held by said George W. Williams & Co. as collateral security for money loaned to the defendants in 1884, and that the indorsement on said note by the defendants was solely to secure said George W. Williams & Co., as above stated. That on the 15th of October, 1884, the defendants paid the said George W. Williams & Co. the money borrowed of them, and the said George W. Williams & Co. returned the aforesaid note at the same time to the defendants. That the defendants held the note thereafter, as collateral security as aforesaid, until the 5th day of December, 1884, when they returned said note to W. C. Patterson, they being satisfied to trust him for the balance then due them without said collateral security, and at the time the defendants returned said note to Patterson they, by accident, oversight, and mistake, failed to erase their names as indorsers on said note. That at the time the note was returned to W. C. Patterson it was well known to him that they were not liable as indorsers on said note, and they believe he well knew that they failed and omitted to erase their names through accident, oversight, and mistake, and that it was well known to W. C. Patterson at the time the defendants returned the note to him on the 5th of December, 1884, that the names of the defendants as indorsers in blank were not there for his accommodation, and that he well knew he had no legal or moral right to use their names as such, and that he well knew he had no right to deliver said note to plaintiffs with the indorsement of the defendants in blank on the same. The plaintiffs objected to the introduction in evidence of the said facts set up by the defendants, and insisted that, as it was admitted (as hereinbefore stated) that they had no actual notice of them, the evidence of said facts was not competent or admissible against them. His honor held that the evi-

Digitized by Google

dence was competent, and thereupon gave judgment for the defendants. From this judgment plaintiffs appeal. The note is dated January 10, 1884, and is payable to "W. C. Patterson or order" on the 1st day of November. It is indorsed by the payee and by the defendants, the name of the payee appearing as first in order. On the 25th day of January, 1885, more than 12 months after its date, and long after its maturity, the plaintiffs became the purchasers from the payee, with the indorsements as set forth.

Were the facts admitted to be true, admissible to explain the character and nature of the indorsement of the defendants? The plaintiffs say that, as they had no actual notice of "any such equities or defenses," and were purchasers for value, the evidence was not competent as against them. By statute, promissory notes, whether with or without seal, are made assignable, "in like manner as inland bills of exchange are by custom of merchants in England." They are, in the language of the mercantile law, "negotiable," and may be transferred and negotiated free from any equities which exist between the original parties to them. "Each indorser, including the payee, down the line, has and passes the legal title, and his indorsement in legal import is a contract with his indorsee, and all subsequent holders by indorsement, that the maker will pay the note or * * * he will." Hill v. Shields, 81 N. C. 251, and the cases there cited, and innumerable decisions, English and American, cited in Parsons, Daniel, Randolph, and other elementary writers upon the subject, indicate the solicitude of courts to protect *bona fide* purchasers and innocent holders of negotiable paper, so essential to commerce and trade; and the construction placed upon section 177 of the Code (Code Civil Proc. § 55,) in Harris v. Burwell, 65 N. C. 584, and Martin v. Richardson, 68 N. C. 255, has been limited to the makers of promissory notes, etc., and held not to apply as between indorsers. Conceding the importance of protecting *bona fide* holders of commercial paper "in its unchecked circulation," what are the liabilities of defendants in the present case? That the holder of a negotiable note is presumed to be the owner admits of no question, and that, after such a note is put in circulation, indorsers are liable in the order of succession is equally clear, if the indorsement be not limited or qualified. No prior indorser can look to any subsequent indorser. "One who obtains possession of a bill or note after indorsing it is restored to his original position, and cannot, of course, hold intermediate parties, who could look to him again." 2 Rand. Com. Paper, § 719. It must be equally clear that one who derives possession from him, with notice of this fact, cannot hold such intermediate indorsers liable; and, where such indorsements are in blank, parol testimony is admissible to show the relation in which they stand. Id. §§ 778, 833, 841. When the note was returned to Patterson, he became again the owner, and, as between him and any subsequent indorsers, the relation of indorser and indorsee ceased. The plaintiffs were not the indorsers of the defendants. Patterson could not, by reason of the blank indorsement of McCaskill & McLean, hold them liable for the note, for he stood in the relation to them of a prior indorser. The plaintiffs derive their title directly from Patterson, the original payee, who had reacquired the title, and not as successive indorsers deriving title through the indorsement of the defendants, and this distinguishes this case from Hill v. Shields, supra; Parker v. Stallings, Phil. (N. C.) 590, and similar cases. The plaintiffs were affected with and bound by notice of what appeared upon the note itself, and they took the note from the original payee, bearing upon its face the fact that he was the first indorser, and that the defendants were his indorsers. An indorsement in blank by the payee is presumed to have been intended as a transfer, and, though this may be rebutted by parol proof, (Davis v. Morgan, 64 N. C. 570,) the admitted facts in this case show that the indorsement by the payee was, in accord with the presumption, a transfer to McCaskill & McLean. But it was insisted that, as between the indorsers in blank, the holder may fill the blank by making it payable to himself or to any one he may choose. This is so where he obtains the note, not from the payee or a prior indorser, but holds it as a *bona fide* purchaser, without any knowledge or notice of the relation sustained by prior indorsers to the note. In the present case, if the plaintiffs, purchasing the note, not from the defendants, but from the prior indorsing payee, had filled the blank indorsement of McCaskill & McLean to themselves, it would not have been in accordance with what they knew the fact to be, and would have been a gross wrong, if not fraud, upon the defendants.

The plaintiffs further rely upon the well-settled rule "that, whenever one of two innocent persons must suffer loss by the acts of a third, he who by his negligent conduct made it possible for loss to occur must bear the loss, for it is against reason that an innocent party should suffer for the negligent conduct of another," and that the defendants, by neglecting to erase their indorsement, "induced the plaintiffs to rely on the legal import of the indorsement, and ought not to be allowed, against the plaintiffs, purchasers for value and without notice, to make proof of the alleged facts." Though the plaintiffs had no "actual notice," we have already seen that they were charged, in law, with notice of facts apparent upon the face of the paper which they purchased from Patterson. But the defendants may have been indorsers for accommodation, or as sureties or guarantors. True. And the indorsement of a note by a third person, made at the time of its execution, binds him according to the intention of the parties, either as joint principal or as

Digitized by Google

surety. Baker v. Robinson, 63 N. C. 191. If the plaintiffs looked to the defendants as accommodation indorsers or as guarantors, then, as they purchased the note from the payee after maturity, they were not "*bona fide* holders before maturity," but had notice, as appeared upon the face of the paper, of its dishonor. 2 Rand. Com. Paper, § 672; Bank v. Lutterloh, 95 N. C. 495; Chaddock v. Vanness, 35 N. J. Law, 517. So whether by the one way or the other, the plaintiffs cannot hold the defendants liable. There is no error.

(102 N. C. 137)

HUGHES *v.* BOONE.

(*Supreme Court of North Carolina.* March 11, 1889.)

EVIDENCE—ATTORNEY AND CLIENT—BONDS—USURY.

1. In an action by an executor upon notes payable to the testator, indorsements in the handwriting of testator on the back of receipts by railroad agents of shipments of cotton and statements of sales by commission merchants for the account of the testator, which show the quantity of cotton and proceeds, and recite that defendant was to be credited therewith, are admissible as admissions by the testator, though there was no evidence that the cotton or its proceeds was to be credited on the notes, there being no evidence that testator had any other claim against defendant.

2. Communications made by testator to his attorney, who drew the notes and deeds of trust securing them, made at the time they were drawn in the presence of defendant and the person from whom he bought the land to pay for which the money was borrowed, are not privileged.[1]

3. It is for the court to determine whether a communication to an attorney is privileged, and for this purpose it had the right to inspect the deed of trust to the attorney to secure the notes, which was drawn by the attorney at the same time as the notes.[1]

4. Under the present system, in which law and equity may be blended in one action, it is admissible in an action on a sealed note to inquire into its consideration, and to show that part of the recited principal was in fact usurious interest.

5. A statute which repeals a statute containing a penalty against usury does not have the retroactive effect to make the contract for usury lawful.

Thos. N. Hill and *W. W. Peebles*, for appellant. *W. C. Bowen* and *R. B. Peebles*, for respondent.

DAVIS, J. Civil action tried before GRAVES, J., at January term, 1888, of the superior court of Northampton county. William T. Stephenson died in 1876, and the plaintiff is his executor. The complaint alleges that on the 3d day of January, 1874, the defendant executed to his testator two bonds, each for the sum of $1,120, payable on the 3d day of January, 1875, with 12 per cent. interest thereon from January 3, 1875, till paid, the consideration being for money lent. It further alleges that divers payments were made on said bonds, setting them out in detail, leaving a balance due, October 1, 1885, of $1,727.29; and judgment is demanded for that sum, with interest at the rate of 12 per cent. on $893.27 from October 1, 1885, till paid. The answer admits the execution of the bonds, and alleges that the consideration of each was $1,000, and that 12 per cent. interest for one year was added to each, and the bonds given for the aggregate of principal and interest; that the same was usurious and contrary to law, and he pleads the said usury in bar of the recovery of interest; that the payments mentioned in the complaint of "interest up to January 3, 1876," were paid on the bonds, "and the said W. T. Stephenson was not authorized, and had no right to apply it to any interest." The defendant further alleges "that he placed in said Stephenson's hands a considerable quantity of cotton and other property for the purpose of paying the said bonds, and, being uneducated, and not able to calculate figures, he had to intrust the same entirely to said Stephenson, and he has recently had the same investigated, and he believes and alleges that by reason thereof the said Stephenson is largely indebted to the defendant." He then alleges, in detail, payments in addition to those mentioned in the complaint, and that he has overpaid the plaintiff's testator by $1,165.75, for which he demands judgment, with interest. The plaintiff replies that he has not sufficient knowledge or information to form a belief as to the averments in the answer as to the consideration of the bonds, or the averments of payment, and denies the other averments of the answer.

The record of the case on appeal is voluminous, and we condense it, as far as is practicable, consistent with a clear understanding of the numerous exceptions presented. The first three exceptions contained in the record are abandoned in this court. The defendant offered in evidence, one at a time, three papers marked "No. 2," "No. 3," and "No. 8," which purported upon their faces to be accounts of sales of cotton rendered to W. T. Stephenson by commission merchants in Norfolk and Petersburg, aggregating $821.49, each containing indorsements in the handwriting of W. T. Stephenson, showing the number of bales, the amounts, and dates when received, indicating that they were received by the person making the indorsement; No. 2, showing "sales, 7 bales cotton, Pete Boone;" No. 3, "sales of 3 bales, S. P. Boone, by Grandy;" and No. 8, "sales of four bales cotton, S. P. Boone." The plaintiff objected to the introduction of each of said papers, as well the indorsement in Stephenson's handwriting as the contents of the inside of said papers. The court sustained the objection as to the contents of said papers, but admitted the indorsement thereon, in the handwriting of the testator. The

---

[1] As to communications between attorney and client, privileged on the ground of the confidential relation, see Skellie v. James, (Ga.) 8 S. E. Rep. 607, and note; In re Whitlock, 8 N. Y. Supp. 855, and note; Hick's Estate v. Blanchard, (Vt.) 15 Atl. Rep. 401; Brigham v. McDowell, (Neb.) 27 N. W. Rep. 884, and note.

Digitized by Google

plaintiff excepted to each, and this is the first exception relied on. (1)

The defendant then offered in evidence an account of W. T. Stephenson with Hervey, Coker & Co. of Petersburg, in which said Stephenson is credited by net proceeds of four bales cotton, $163.86, and charged with certain sums named therein. On the back of said paper was the following indorsement:

"Sales, 4 bales cotton, S. P. Boone:

Hervey, Coker & Co.	$153 86
Express	75
	$153 11

"I am to give credit for above amount, $153.11, April 24, 1874."

The face of said paper was proven to be in the handwriting of P. E. Hervey, and the indorsement thereon in the handwriting of W. T. Stephenson. The plaintiff objected to the introduction both of the face of said paper and the indorsement thereon. Both objections were overruled, and the contents of said paper and the indorsement thereon were admitted, and the plaintiff excepted. (2)

The defendant then offered in evidence a receipt of the agent of the railroad at Seaboard, for four bales of cotton received from W. T. Stephenson, to Hyman & Dancy, Norfolk, Va., marked "S. P. B.," and on the back of which was the following indorsement in the handwriting of W. T. Stephenson: "Lawrence, Agt. Receipt, 4 bales cotton, S. P. Boone." The plaintiff objected to this evidence. Objection overruled, and plaintiff excepted. (3)

The defendant then offered in evidence a receipt of the railroad agent at Garysburg, for four bales of cotton received of W. T. Stephenson, to be shipped to Hervey, Coker & Co., Petersburg, February 20, 1874. On the back of this was the following indorsement in the handwriting of W. T. Stephenson: "4 bales cotton, S. P. Boone, Hervey, Coker & Co." The plaintiff objected to this evidence. Objection overruled, and exception. (4)

The defendant then introduced as a witness W. W. Peebles, one of the counsel of record for plaintiff, and who was then actively engaged in this case as such counsel, and asked the witness to state if he knew how much of the amount, to-wit, $2,240, stated on the face of the two bonds sued on, was principal, and how much was interest. The plaintiff objected to the question, on the ground that the witness derived his information from Stephenson (plaintiff's intestate) in the way of a confidential communication, and, as such, was privileged, being made to him as an attorney. The defendant insisted that the communication was not a privileged one; that the witness should state the circumstances under which it was made, if any such communication was made, so that the court could determine whether witness was correct in thinking it privileged. Defendant then offered, for the inspection of the court, a deed of trust from Boone to witness, securing one of the notes sued on. Witness admitted that he had drawn it, and that it was in his handwriting. Plaintiff objected to the court's inspection of the deed. Objection overruled. Plaintiff excepted. (5)

Witness was then examined by plaintiff, and stated that the deed was drawn by him at the same time the notes were written. That the deed and notes were written under the following circumstances, to-wit: The notes and deed were written in the office of the register of deeds. Defendant, (Boone,) Dr. W. S. Copeland, Stephenson, W. D. Coker, W. T. Buxton, the register of deeds, were all present, and I think R. B. Peebles came in, because he was a witness to the bonds. The witness then stated further that he was the attorney and counselor for Stephenson in the transaction, and that the communications made to him were made in his professional capacity as a lawyer; that he did not advise with Boone; that he could not remember whether the deed of trust was read over to Boone by him; did not remember that he saw him sign it. The court, after reading the deed in trust, held that the communications, if any were made at the time when the notes and deed were written, were not privileged, and required the witness to answer. Plaintiff excepted. (6)

The plaintiff then objected to inquiring into the consideration of the bonds. Overruled. Plaintiff excepted. (7)

Witness then testified as follows: "I do not know how much of the $1,120 mentioned on the face of each bond was principal, and how much was interest. All I know is what Stephenson said to me before I wrote the deed of trust. I asked him what should be the amount of the bonds. He asked me, if interest was not paid at maturity, how could he get interest on interest. I asked him how long the bond was to run. He said, 'One year.' I said, 'You can count interest from date of bond for a year, and add it to the principal, and then the principal and interest will draw interest from the time the bond falls due.' I knew that the rate of interest the bonds were to draw was twelve per cent. Stephenson then made some figures, and handed me on a slip of paper the amount of bond, $1,120. I then wrote one bond for that sum, drawing twelve per cent. interest from the time it was to fall due, and Stephenson then drew the other from it, making an exact copy thereof. Stephenson never told me, nor did Boone, the amount of money borrowed. I do not know how much Boone paid Copeland for the land. Stephenson let him have some, and W. D. Coker let him have some. Stephenson told me what rate of interest to make the bond draw. I know the defendant. He makes his mark. I don't think he can read or write. I do not remember that the bond was read over to Boone."

W. J. Rogers is introduced by plaintiff as a witness, and papers marked "B," "C," "D," and "E," are shown him, and he says he signed "B" and "C" as a subscribing witness, and that S. P. Boone signed or ac-

Digitized by Google

knowleged them before him; that he had never seen Boone to know him before that time; that it was done in the register's office, in December, 1874, or January, 1875; that the date was fixed in his mind from the fact that he had just qualified as administrator on his father's estate, and he was in the register's office looking up some land titles and boundaries. "Stephenson asked me to look over the account he had. He had another paper besides the ones I witnessed, [It was admitted that 'D' was that paper.] I examined the paper, and found no mistake in it, that I could see; the calculations therein were correct, and I so stated. Boone signed 'B' and 'C,' and Stephenson gave him some papers. I did not know what they were. They seemed to be accounts of sales of cotton. Stephenson then said to me: 'That is all right, is it not, Bug?'. I replied that it would be all right if he, Boone, and I lived, but if I should die it might not be all right; that he had not given Boone anything to show that he had paid the interest on the notes. Stephenson said: 'That is so. How shall I fix it?' I replied that he ought to indorse on the notes, 'Interest paid to January 1, 1875.' He said, 'Yes, that would be right,' and took out two papers, which he said were the notes, and indorsed something thereon. So far as I saw, it was fair. It seemed to me that they had talked the matter over. I did not detect any errors. There was no pressure. The statement was made before, and was brought to me for review." Cross-examined, witness stated that no money was paid to Boone. "The statement was not read to Boone. None of the papers were read to Boone, nor their contents explained to him. I only know what appeared on the papers that Mr. Stephenson had. I did not see the inside of the two $1,120 notes." The witness was then shown the said notes, and asked, if the face of said notes had been shown him by Stephenson, could he not have seen that in statement "D" Stephenson had charged Boone interest on said bonds before it was due, and he answered, "Yes;" that in statement "D," Boone was charged with interest on said notes up to January 1, 1875; that upon inspection of Exhibit D he thought both of the entries of interest was to January 1, 1875; that both of the indorsements on the $1,120 note: "Int. paid on this to the 3d day of January, 1876, eighteen hundred and seventy-six. W. T. STEPHENSON,"—seem to have been first written "1875," and afterwards altered to "1876;" that when Boone signed "B" and "C" he said little or nothing; relied entirely on Stephenson's statement, and whatever Stephenson said seemed to be all right with Boone.

Exhibit B, referred to in W. J. Rogers' testimony, is as follows, to-wit:

"Received of W. T. Stephenson one thousand and ten dollars and four cents, amount of cotton shipped by him for me to different commission merchants in Norfolk and Petersburg, Va., up to this 11th day of January, 1875.

his
"S. P. X BOONE.
mark.

"Witness: W J. ROGERS."

Exhibit C is as follows, to-wit:

"Received of W. T. Stephenson, as per credit, one hundred dollars, as per draft given by Lawrence Boone on Kader Biggs & Co., for one hundred dollars.

his
"S. P. X BOONE.
mark.

"Witness: W. J. ROGERS."

Exhibit D, referred to in the testimony of W. J. Rogers, is as follows, to-wit:

Amt. note		$1,120 00
Int. 12 mo. to 1st January, 1875		134 00
Amt. note		1,120 00
Int. to 1st January, 1875		134 00
Order		17 00
Note		15 00
Note		21 60
Receipt		70 00
		$2,631 60
		1,010 04
		$1,621 56
Credit by 7 bales	$403 69	
" " 4 "	153 11	
" " 3 "	122 64	
" " draft	100 00	
" " 4 bales	230 60	
		$1,010 04

On the back of the statement was the following indorsement (admitted to be in the handwriting of W. T. Stephenson,) to-wit. "S. P. Boone. Notes and Statements. Dec. 24th, 1874."

Exhibit E was as follows, to-wit:

$ 45 23	$ 17 25	$ 153 11
78 16	15 00	403 69
	21 60	122 64
$123 39	70 00	230 60
		100 00
$281 85	$123 85	
75		$1,010 04
$230 60		

W. H. Hughes, the plaintiff, was examined in his own behalf, and stated that he found Exhibits E and D wrapped up in papers B and C, among W T. Stephenson's papers. Exhibit F was shown to witness. Said exhibit is as follows, to-wit:

Sale of 10 bales cotton	$455 86	
Expr	1 75	
		$454 11
Paid for horse	$112 50	
One note and int	33 60	
Cash	10 00	
		156 10
		$298 01
Amount on note		172 64
		$125 87

To give Boone credit on his two notes for $125.31 and all interest is paid to January 1, 1877.

"Received, February 7th, 1876, of W. T. Stephenson, four hundred and fifty-five dollars and eighty-six cents, in full of ten bales cotton shipped by me in said Stephenson's

Digitized by Google

name to Hervey, Coker & Co., of Petersburg, Va.

his
"$455.86. S. P. X BOONE.
mark.

"Witness: WM. H. HUGHES."

The plaintiff testified that he was asked by Stephenson to witness the above receipt; that Boone was present. On cross-examination, he said that the paper was not read to Boone; that its contents were not explained; that he saw no money paid, and saw no papers except the one he witnessed; that S. P. Boone could not read nor write. Plaintiff's counsel proposed to ask plaintiff the following question, to-wit: "Did not the defendant, in W. W. Peebles' office, offer to pay you a certain amount, $370, about two years after Stephenson's death, claiming that that was the amount due on the notes?" The defendant objected, upon the ground that it was offered as a compromise. The witness answered: "I reckon it was offered as a compromise. I claimed more than was offered. The defendant's counsel, who was present at the time, acting for him, said that there was nothing due, and that they were willing to settle the matter upon the basis of allowing all principal, and 8 per cent. interest, if Boone was properly credited with the money and cotton furnished. I refused it." The judge being of the opinion that it was an offer of a compromise, so adjudged, and excluded the evidence. The plaintiff excepted. (8)

Hughes testified that, when Boone made payment to him, Boone did not claim that the debt was all paid, and said, if desired by Hughes, he (Boone) would get money from Odom to pay with. Hughes further testified that he did not know how much money Stephenson lent Boone, and did not know whether or not any interest was included in the face of the bonds.

The plaintiff introduced the pleadings as evidence.

S. N. Buxton, for plaintiff, testified that Boone was a man of good sense, but could not read nor write; and on the cross-examination said that when a man gained his confidence, that he relied upon him implicitly.

Plaintiff here closed, and defendant offered in evidence the deposition of plaintiff, W. H. Hughes, heretofore taken before Edwin Wright, as commissioner, appointed by the clerk of said court, in this cause, and filed with the papers, and signed by Hughes, the plaintiff. The plaintiff objected that the deposition was inadmissible except to impeach the witness. The defendant stated that it was offered for that purpose, and as a declaration made by plaintiff. Objection overruled, and plaintiff excepted. (9)

S. P. Boone was examined in his own behalf, and was asked if the contents of Exhibit F, which was witnessed by the plaintiff, Hughes, were read over to him, or understood by him. The plaintiff objected, under section 590 of the Code. The court, being of the opinion that the plaintiff had opened the door to that transaction by having himself examined as to the same, overruled the objection, and the plaintiff excepted. (10)

The witness answered: "No one read this paper over to me. I did not know what was in it. I did not know that I was charged therein $112.50 for a horse, $33.60 for note, $10 cash, or $172.64 for interest to January 1, 1877. From the time I made the deed in trust and mortgage, up to Stephenson's death, I bought only one horse. It was a bay horse I bought of a horse-drover by the name of Bass. I bought him in the hotel lot, in company with W. D. Coker. I had some money in Coker's hands from cotton,—cotton I had shipped to Hervey, Coker & Co., in Coker's name, and Coker paid for the horse $110." The defendant was asked how many bales of cotton he delivered to the Petersburg Railroad Company at Garysburg, between January 3, 1874, and March 1, 1876, to be shipped to Hervey, Coker & Co., of Petersburg, in the name of W. T. Stephenson. Plaintiff objected, under section 590 of the Code. Objection overruled, and plaintiff excepted. (11)

Witness answered: 31 bales of average size, 450 to the bale; that in 1874 and 1875, and early part of 1876, cotton was worth from 12 to 13 cents. Witness further testified that he borrowed the money to pay for land he bought of W. S. Copeland; that he paid Copeland for said land $3,000; that he got $1,000 of it from W. D. Coker, January 3, 1874; that he paid Copeland on the 3d of January, 1874. "I did not know what rate of interest I was to pay until after the bonds were signed. Mr. George Bowers was the first one who told me what interest I was paying. I never asked any one to look over my account with Stephenson until I consulted R. B. Peebles, about two years after Stephenson died. After he examined my papers, I never paid any more cotton or money on said notes." To corroborate witness Boone as to the amount he paid Copeland for his land, defendant introduced in evidence the deed from W. S. Copeland to S. P. Boone. It was dated January 3, 1874, admitted to be in the handwriting of W. W. Peebles, and recited $3,000 as the consideration paid for the land. The defendant did not deny his liability on the bonds executed to Stephenson for the sum which he actually got. One of the bonds sued on is as follows:

"$1,120.00. On the 3d day of January, 1875, with interest at the rate of twelve per cent. from said date, I owe and promise to pay W. T. Stephenson, the sum of eleven hundred and twenty dollars, for value received. Witness my hand and seal this 3d January, 1874.

his
"S. P. X BOONE. [Seal.]
mark.

"Witness: R. B. PEEBLES."

On the back of said bond is indorsed the following payments, in the order named, to-wit:

Digitized by Google

"January 11th, 1875. Received of S. P. Boone three hundred and eight dollars and sixty-nine cents, in part of this note.

"W. T. STEPHENSON."

"Int. paid on this to the 3d day of January, 1876, eighteen hundred and seventy-six.

"W. T. STEPHENSON."

"1877. Jan'y 1st. Received of S. P. Boone eighty-nine dollars and one cent, in part payment of this note, balance sales of cotton. Statement filed. W. H. H."

"1877. December 20th. Received of S. P. Boone four hundred and twenty-one dollars and twenty-nine cents, being net sales of ten bales of cotton, sold by N. E. Brooks, shipped by said Boone in my name.

"WM. H. HUGHES, Ex'r."

From inspection, it appears that the second indorsement was first written 1875, and then changed to 1876, and that the words "eighteen hundred and seventy-six" were written with different ink.

One of the bonds sued on:

"$1,120.00. On the 3d day of January, 1875, with interest at the rate of twelve per cent. from said date, I owe and promise to pay William T. Stephenson the just and full sum of eleven hundred and twenty dollars for value received. As witness my hand and seal this 3d day of January, 1874.

his

"S. P. X BOONE. [Seal.]

mark.

"Witness: R. B. PEEBLES."

On the back of said bond is indorsed, in the order named, the following, to-wit:

"January 11, 1875. Received of S. P. Boone the sum of three hundred and eight dollars and sixty-nine cents, in part of this note. W. T. STEPHENSON."

"Int. paid on this note to the 3d of January, 1876, eighteen hundred and seventy-six.

"W. T. STEPHENSON."

"April 4, 1875. Received one hundred and eighty-three dollars and ninety-two cents.

"W. T. STEPHENSON."

From inspection of said indorsements, it will appear that the date, January 3, "1875," was changed to "1876," and that the words "eighteen hundred and seventy-six" were written in different ink from the rest of the indorsement.

After all the evidence was in, the plaintiff handed to the judge a written request to refer the action to a referee, under section 421. This was not made known to the defendant. The court declined to do so without calling it to the attention of defendant's counsel, or to the attention of plaintiff's counsel, except by not granting the motion. In plaintiff's statement of the case, he noted an exception to this refusal. (12)

Plaintiff and defendant both tendered issues, which were settled by the judge, and submitted as follows: 1. Have the debts been paid? 2. If not, how much is due? 3. Has the defendant paid more than the debts? 4. If so, how much? Plaintiff excepted to third and fourth issues. (12½)

The plaintiff prayed the court to instruct the jury as follows:

1. "There is no statute of usury applicable to the notes declared on." This was refused, and plaintiff excepted. (13)

2. "There is no evidence that 12 per cent. interest on the sum of $2,000 for one year was incorporated in the notes, in order to make $2,240 principal sum." This was refused, and plaintiff excepted. (14)

3. "That if Boone paid 12 per cent. interest voluntarily, he cannot recover it back." 4 "That if Boone paid voluntarily money in excess of the amount he owed, he cannot recover it back, unless paid under a mistake of the fact." (14½) These two instructions were given by the court.

5. "There is no evidence that he paid either under a mistake of facts." This was refused, and plaintiff excepted. (15)

6. "There is no evidence that there was any unfairness or duress in the settlement between Boone and Stephenson." This was refused, and plaintiff excepted. (16)

7. "If the settlements between Stephenson and Boone were fair, Boone is bound by them." Given in substance. Plaintiff excepted. (17)

The court instructed the jury, as follows: "The legal rate of interest at the date of these notes was 6 per cent. per annum, and no subsequent statute has repealed that law; but there have been statutes enacted which repealed the penalties which were in force at the date of the notes, so that the defendant is liable for the legal rate of interest at 6 per cent., and the plaintiff is relieved from the penalties then in force." The plaintiff excepted. (18)

"Then the first question presented is to determine how much money the defendant got. If he got $2,240, then he is bound to repay that sum, but if he actually got a less sum, if he got only $2,000, then he was bound to pay only that sum." Plaintiff excepted. (19)

"If the defendant got $1,120 for each note, he is liable for that sum, with interest at 6 per cent., unless it has been paid. It is insisted by the defendant that he has paid off the entire debt. It is admitted by the plaintiff that some payments have been made, some at one time and some at another. The rule, then, for computing the interest is by what the school-boys call 'partial payments.' The principle underlying this rule is that the interest is first due; so when a payment is made on a note the interest is counted to the time of payment, and added to the principal, and from this amount the payment is deducted, and the balance becomes a new principal, bearing interest until the next payment, and interest is added and the payment deducted until all the payments are applied. If any payment is less than the interest due, it is to be applied to the interest, but the principal is not changed (it can never become greater) until it is reduced by payment over and above the interest due. And payment made

Digitized by Google

before interest begins to accrue must be applied to principal. You have, then, to ascertain what payments have been made and when made." The plaintiff excepts to so much of this portion of the charge as limits his recovery to 6 per cent. interest. (20)

"If the defendant has paid voluntarily more than the amount he was legally bound to pay under a mistake of law only, he cannot recover back such excess; but if he has, by mistake of fact, paid more than was due, he has the right to recover such excess. If the defendant delivered cotton, from time to time, shipped in the name of Stephenson, with the agreement that the proceeds were to be applied to the payment of 12 per cent. interest and the principal, the defendant cannot recover back any payment of interest voluntarily made by him, or any money applied by the plaintiff to the payment of such interest, if such application was made by the direction of the defendant, or by his consent, with full knowledge of the facts. If the defendant did not consent that the twelve per cent. interest should be paid, and the plaintiff or plaintiff's intestate received money or money's worth from the defendant, then the payment would be applied to the payment of the legal interest, six per cent., and then to the principal. And if the defendant, not intending to pay 12 per cent. interest, had, by a mistake in facts,—a mistake in calculation may be a mistake in fact,—paid more than the debt and six per cent. interest, he would be entitled to receive back so much as he had paid in excess of the debt due." The plaintiff excepted, upon the ground that there was no evidence of such mistake. (21)

"The relation between the plaintiff's intestate and defendant was a confidential relation. The plaintiff's intestate was the mortgagee, and the defendant was the mortgagor; and the law requires that dealings between them concerning the mortgage debt or mortgaged property shall be viewed more carefully than if the parties were dealing with each other at arms-length." Plaintiff excepted. (22)

"In order to bind a person who cannot read and write by a writing purporting to have been signed by him, it must appear that it was read over to him, or its contents fully stated, before it was signed, unless, after being signed, the contents of the writing were explained, and then, after knowledge of the contents, is consented to." Plaintiff excepted. (23)

"If the intestate of the plaintiff, Stephenson, was the mortgagee, and Boone was the mortgagor, a confidential relation existed; and if the defendant, reposing confidence in Stephenson, furnished cotton to him, to be sold and applied to the payment of the money borrowed from him, it was the duty of the intestate of plaintiff to have sold the cotton and to have applied it to the payment of his debt, with the legal rate of interest, and only the legal rate of interest, unless the defendant, Boone, with a full knowledge of the facts, voluntarily assented to the payment of a greater rate of interest than the legal rate." Plaintiff excepted. (24)

"If the defendant, Boone, with a full knowledge of the facts, voluntarily paid, or assented voluntarily to an application of, a greater rate, then he cannot recover it back. In determining whether in fact such payment was made voluntarily, the jury must bear in mind the relation of the parties, and consider what influence that relation produced on the mind of the defendant." Plaintiff excepted to the last sentence. (25)

"In estimating the value of the cotton shipped by the defendant the jury must allow to the defendant the price obtained by the plaintiff's intestate, Stephenson, when that is made to appear; and when it does not appear what price was actually obtained, then the jury must ascertain the market value of the cotton at the time it was sold by Stephenson." Plaintiff excepted. (26)

The jury responded to the issues set forth in the record, and after they had returned their verdict plaintiff moved to exclude from the judgment $89.01 and $421.29, paid by Boone to plaintiff. See complaint, answer, and indorsements on bonds. Motion refused. Plaintiff excepted. (27)

There was a verdict and judgment in favor of the defendant, and the plaintiff appealed.

The first, second, third, and fourth exceptions may be considered together, as they all rest upon the same general ground. The indorsements upon the papers, in the handwriting of the plaintiff's testator, were offered as declarations or admissions in regard to the cotton for the proceeds of which the defendant insists he was entitled to credit. That the admissions or declarations of a party to a matter in controversy in regard to that matter, whether oral or written, are admissible as against such party, is too plain to be questioned; but it is insisted by counsel for the plaintiff that there is no evidence that the cotton, or the amount of the proceeds of the cotton, to which the indorsements related, was to be applied to the notes upon which this action is brought. The indorsements tend very clearly to show that the cotton and the proceeds of the cotton were received for and on account of the defendant, and that he was to be credited therewith; and it nowhere appears that the plaintiff's testator had any other claims against the defendant other than a controverted charge for a horse, and two other items, aggregating $156.10. In fact, it sufficiently appears from Exhibit D, subsequently offered in evidence by the plaintiff, that the proceeds of the cotton referred to by the indorsements were to be credited by the testator on the notes. While the Exhibit D shows that the cotton was to be credited on the notes, it in no way tends to relieve the transaction from the imputation of unfairness, alleged by the defendant, for it there appears that the defendant is wrongfully

Digitized by Google

charged with interest on the two notes ($134+$134=$268) to January 1, 1875; and we find that the indorsements on the notes in January 1, 1875, instead of showing a credit for the full amount of cotton, less the sum of $123.85, applied otherwise in Exhibit D, it appears that only the sum of $308.69 was applied to each note, making the entire credit only $617.38; for the indorsement of the credit for interest on the notes is changed by the erasure of "1875," and substitution of "1876." It is insisted by the plaintiff that the mistake of writing "January 3d, 1875," instead of "1876," is easily accounted for by the fact that at the beginning of a year such a mistake as writing the preceding date is not uncommon. But this theory is fully met and destroyed by the fact, as appears by the indorsements of the testator, that the cotton was sold in April, November, and December, 1874, showing that in this respect Exhibit D was correct. The money received for cotton in 1874 should have been credited at that date. The first, second, third, and fourth exceptions of the plaintiff must be overruled.

The fifth, sixth, and seventh exceptions relate to the testimony of W. W. Peebles, and may be considered together. It is insisted that Mr. Peebles, having been counsel for the testator in the matters out of which this litigation springs, is not a competent witness to testify in relation thereto. Few rules of evidence are better settled, or founded on sounder reasons of public policy, than that whenever the relation of counsel or attorney and client exist, all communications made to the counsel or attorney on the faith of such relation, and in consequence of it, are privileged; and the counsel or attorney, if so disposed, would not be permitted to disclose them. The seal of law closes his mouth as to them, and can only be removed by the client himself. Without his consent it is perpetual. This elementary principle is too well established by Greenleaf and other writers upon the law of evidence, and has been sustained by too many adjudications, to need the citation of authorities. In many states of the Union it is regulated by statutory provisions, and in our own state by statute. Code, § 1349. Communications to counsel in cases of fraud where the state is concerned are not privileged. To the general rule, as laid down, there are several qualifications: "As, where the attorney, having made himself a subscribing witness, and thereby assumed another character for the occasion, adopted the duties which it imposes, and become bound to give evidence of all that a subscribing witness can be required to prove." 1 Greenl. Ev. § 244. So, what occurred in his presence, though his presence was in consequence of his employment as counsel. Patten v. Moor, 29 N. H. 163. So, where the witness was counsel for both the plaintiff and defendant, as between them the matter was not in its nature private and confidential. Michael v. Foil, 100 N. C. 189, 6 S. E. Rep. 264, and cases cited. So it has been held by numerous adjudications, the rule does not apply to communications between parties to an agreement made before an attorney, or between such parties and the attorney of one of them, or when made by one party to his counsel in the presence of the other party, or where made by one party to the attorney of the other party. So, while communications made to an attorney employed to prepare a deed would be privileged, yet he may be required to testify as to what transpired at the time of the execution, when all the parties were present, and to prove any fact which then occurred in relation to the transaction, and still more clearly would he be competent if he were a party to the transaction. 1 Greenl. Ev. § 242. So the rule does not apply when advice is sought to aid in the violation of the law; but the violation must be an act criminal *per se*, not simply *malum prohibitum*. But it is insisted that the attorney must determine for himself as to whether the communication is confidential, and that the court had no right to inspect the deed. This is a mistake. It is for the court to determine whether, under the circumstances, the communication is privileged or not; and in order to do so it is competent for the court to make the preliminary inquiry. The deed was written by the witness at the same time the notes were, conveying the property purchased of Copeland to the witness, in trust to secure the payment of the notes, and it refers to a mortgage, executed the same day, and for the same purpose, conveying the land to Stephenson. The notes and deeds were written at the same time. The defendant, Copeland, —from whom the land was purchased by the defendant, and to pay whom the money was borrowed,—the plaintiff's testator, and others, were present. His honor "held that the communications, if any were made at the time when the notes and deeds were written, were not privileged," and in this we think there was no error. By the clear and explicit ruling of the court the inquiry was limited to the time when the notes and deed were written, when, as appears from the evidence, the plaintiff's intestate, the defendant, and others, were present. But when the witness said, "All I know is what Stephenson said to me before I wrote the deed of trust," the counsel for the plaintiff says the judge "ought to have stopped him." It does not plainly appear from the record that what Stephenson said to the witness was "at the time" when the notes and deed were written, but it must be assumed that it was, and that, in the order of events at that time, it preceded the writing of the deed; for otherwise it would not have been within the limit of his honor's ruling, and it would have been the right and the duty of the plaintiff to have objected, and no objection was made. But we cannot see how the answer of the witness could prejudice the plaintiff, for the facts stated by him are clearly deducible from the

Digitized by Google

face of the notes. It is said, however, by counsel: "The evidence of the witness was injurious to the plaintiff, inasmuch as its tendency was to show usury." If lending money at 12 per cent. interest be usury, that appears upon the face of the notes, and certainly the evidence of the witness cannot show it more plainly. It is further objected that the consideration of the bonds cannot be inquired into. Under the present system, in which law and equity may be blended in one action, fraud or mistake in the consideration may be shown, and, while fraud in the *factum* might have the effect to avoid the bond altogether, fraud or mistake in the consideration, so far as the consideration was legal, would not have that effect. Hall v. Commissioners, 74 N. C. 134. There was no error in overruling the fifth, sixth, and seventh exceptions.

The eighth exception relates to the exclusion of the evidence in regard to the offer of $370 as a compromise. There was no error in this. A proposition to compromise, not acceded to, leaves the rights of the parties precisely as they were before the proposition was made. Poteat v. Badget, 4 Dev. & B. 209; Sutton v. Robeson, 9 Ired. 380. But counsel for the plaintiff says this was not an offer of compromise. We think it is manifest from what occurred that it could admit of no other construction.

The ninth exception is to the admission of the deposition of the plaintiff. This exception was not pressed before us, and we can see no ground upon which it can be sustained.

The tenth and eleventh exceptions relate to the competency of the defendant to testify, under section 590 of the Code, in relation to the matters involved in the questions. As to the tenth, the plaintiff himself had testified in relation to the same transaction; and it is quite clear that the eleventh related to no transaction or communication between the witness and the deceased. It was a fact in no way involving such a communication or transaction. Lockhart v. Bell, 86 N. C. 443, and cases cited.

The twelfth exception is to the refusal of his honor to refer the action to a referee upon the request of the plaintiff, made after all the evidence was in. Whatever may have been the discretionary power of the court to order or refuse a compulsory reference if the application had been made in proper time, there was no error in refusing it after the close of the evidence.

The third and fourth issues were clearly presented by the answer and replication, and 12½ cannot be sustained.

The thirteenth exception is to the refusal of his honor to instruct the jury that there is no statute of usury applicable to the notes declared on. When the notes were executed, chapter 24, Acts 1866, (Battle, Revisal, c. 114,) in regard to usury, was in force. That act fixed the rate of interest at 6 per cent., "and no more," unless for money loaned, for which 8 per cent. might be charged, if specified in the contract; "and if any person shall agree to take a greater rate of interest, * * * the interest shall not be recoverable at law." The penalty for usury was a forfeiture of all interest. Coble v. Shoffner, 75 N. C. 42. It is insisted by the plaintiff that the act of 1866 was repealed by the severely penal statute of 1874–75, which, in its turn, it is insisted, was repealed by the act of 1876–77, (Code, §§ 3835, 3836;) and the argument of the learned counsel is that "usury laws are the creatures of statutes; and when there are none, the matter is at common law, and a question of contract, and the stipulated rate can be recovered. The penal provisions of usury laws are the only prohibition of this, and where they are repealed there is no obstacle. The judge erred when he charged the jury that the plaintiff could only recover 6 per cent. interest. The establishment of 6 per cent. as the lawful rate, without a penalty for violation of the law, would mean simply that that should be the rate when no other was expressed. It would not prevent the recovery of any amount or rate stipulated to be paid. To prescribe a legal rate without a means of compelling men to observe the law would be of no avail as a preventive of usury." It would perhaps be as correct to say that interest is the creature of statute, and usury has been unlawful from the days of Moses. The act of 1875, § 4, declares that it shall not apply to existing contracts, and repealed only laws in conflict with it. The act of 1877 is "substituted" for the act of 1875, and, so far as the rate of interest allowed, is the same as that of 1866, and there has never been a repeal of the law limiting the rate of interest. Neither by the language of the acts of 1875 and of 1877, nor by implication, can such effect be given to them. Jones v. Insurance Co., 88 N. C. 499; Brinkley v. Swicegood, 65 N. C. 626; State v. Woodside, 9 Ired. 500. We believe there has never been a day in North Carolina, since long before it was a state, that it was lawful to take a greater rate of interest than 6 per cent., or 8 per cent. when stipulated, and the law would be treacherous to itself if it were to allow the enforcement of forbidden usurious contracts because no penalty was attached. This case is clearly distinguishable from Ewell v. Daggs, 108 U. S. 150, 2 Sup. Ct. Rep. 408, and similar cases. Neither of the statutes in this state authorized a greater rate of interest than that of 1866, whether by contract or otherwise. The numerous cases cited by counsel in regard to the effect of repealing statutes have no application to the case before us. When the contract was made, it was unlawful to charge a greater rate of interest than 6 per cent., (or 8 per cent. for money loaned, when stipulated in the contract,) and the penalty was a forfeiture of all interest. The effect of the act of 1876–77 was to relieve against the penalty. It could not have the retroactive effect to make the contract for usury lawful. The

Digitized by Google

money loaned, with legal interest, can be collected, because the penalty (forfeiture of interest) is repealed; but it does not make that lawful and enforceable which was not lawful at the time. It was lawful to take 6 per cent. with or without contract. Such an interpretation of the legislative will would do violence to the legislative history upon the subject of usury. The language of the statute gives it no such retroactive effect, and we cannot give it by any fair construction. The repeal of a statute which makes an act unlawful, or forbids a contract in relation thereto, cannot make the act lawful, or validate the contract. Puckett v. Alexander, 8 S. E. Rep. 767, (at this term.)

The fourteenth exception cannot be sustained. There is evidence tending to show that the defendant paid Copeland $3,000, and that he borrowed $1,000 from Coker, and the balance from plaintiff's testator. It also appears upon the face of the notes that they were payable January 3, 1875, with interest at 12 per cent. from that date. Exhibit D shows that 12 per cent. was charged on the 1st of January, 1875, on the whole amount. This also disposes of the exception to his honor's charge numbered 19.

Exceptions 15, 16, 17, 21, 22, 23, 24, and 25 relate to instructions asked and refused, and to instructions given and excepted to, and may be considered together. It was in evidence that the defendant is an illiterate man; that he cannot read and write; that he was confiding, relying implicitly on those who gained his confidence; that he delivered a considerable quantity of cotton to or for the plaintiff's testator, and "relied entirely on Stephenson's statements." It does not appear that the notes or mortgage and deed of trust were read over to him. In fact, it pretty clearly appears that they were not; and it does not appear that their contents were explained to him, or that he had any knowledge of their contents. It appears from the testimony of Rogers, which bears upon its face evidence of candor and fairness, that he suggested that in the event of death of the parties the defendant would have nothing to show for certain credits; whereupon the testator took out two papers, which he said were the notes, and indorsed something on them. He further said that if the face of the notes had been shown to him, he would have seen that interest was charged for one year before it was due, as appeared in statement D. This was in January, 1875. Upon a review of the evidence, we think there was no error in refusing the instructions asked, or in giving those excepted to.

The eighteenth and twentieth exceptions relate to his honor's charge in respect to interest. As we have already seen, the defendant was chargeable with interest at 6 per cent., and there was no error in his honor's instructions upon this question.

The twenty-sixth exception relates to the instruction in regard to the value of the cotton. We can conceive of no possible objection to the rule for ascertaining the value of the cotton as laid down by his honor.

The twenty-seventh exception is to the refusal of the court to exclude from the verdict the sums named, paid by Boone to plaintiff. The issues were fairly submitted to the jury, and if, by mistake, the defendant has paid more than the notes and legal interest, we are unable to see why the sums named should not be excluded. There is no error.

(102 N. C. 334)

WOODY *v.* BROOKS.

(*Supreme Court of North Carolina.* March 18, 1889.)

MASTERS IN CHANCERY — REFERENCE — ADMINISTRATORS—LIMITATION OF ACTIONS.

1. It is error to direct a reference to a master while a good plea of the statute of limitations, dependent on a question of law, remains undisposed of.

2. Code Civil Proc. N. C. §§ 154, 155, requiring actions on the official bond of an administrator to be brought within six years after the filing of his final account, and also requiring such an action, as against the sureties, to be brought within three years from the breach of the bond, does not apply to an action, brought against the administrator alone, to surcharge and falsify his final account.

DAVIS, J., dissenting.

Appeal from superior court, Person county; W. M. SHIPP, Judge.

Action by ——— Woody, one of the distributees of the estate of Moses A. Woody, deceased, against J. W. Brooks, administrator *de bonis non* of said estate, to surcharge and falsify the final account of the defendant. From an order referring the cause to a master the defendant appeals.

W. W. Fuller and *E. C. Smith*, for appellant.

SMITH, C. J. This was a civil action tried before SHIPP, J., at September term, 1888, of Person superior court. The plaintiff alleges that he is one of the next of kin of Moses A. Woody; that the defendant, as administrator of said Woody, on the 17th of May, 1879, "made a final settlement *ex parte*, before the clerk of said court, * * * showing a large amount of money received by him, and a large amount due" plaintiff on a final settlement. The fifth allegation is "that said final settlement is false, and a fraud upon the rights of the plaintiff, and all the heirs and distributees of said Woody." The sixth allegation is that "the facts contained in article five of the complaint did not come to the knowledge of the plaintiff before the last three years previous to the beginning of this action, but were discovered within said three years." He prays that the said final account "be declared false, and a fraud upon the rights of the plaintiff, that it be restated by order of the court, and for other and further relief." The defendant substantially admits the allegations of the complaint, except articles 5 and 6. These he denies, and, as a further defense, he pleads the statute of limitations, for that more than six years have elapsed since the filing and auditing of said

Digitized by Google

final account. The plaintiff moved for a reference to state the account. The defendant objected, and insisted that he was entitled to judgment upon the pleadings. This action was commenced on the 6th of April, 1888. The court declined to give judgment as prayed for by defendant, and ordered a reference to state an account, without passing upon the plea in bar.

The plea of the statute as a defense to the action, if its applicability depended on any disputed fact, should have been disposed of before making an order of reference by the finding of the jury, or of the court with the consent of the parties. But there was no controversy here as to the facts, and hence a question of law was raised which it was the duty of the court to decide, and thus put the defense out of the way, or put an end to the action, as the court should determine. It was irregular to postpone the ruling until after a reference and report, even though it was reserved, and the defendant was entitled to a ruling upon the point; and if the objection is valid, and a fatal impediment to the prosecution of the action, the refusal to pass upon it, made as it was at the proper time, was the denial of a right, and in effect an adverse ruling, open to correction as error in an appeal to this court, as decided in numerous cases. Dean v. Ragsdale, 80 N. C. 215; Sloan v. McMahon, 85 N. C. 292; Commissioners v. Raleigh, 88 N. C. 120; Humble v. Mebane, 89 N. C. 410; Grant v. Hughes, 96 N. C. 177, 2 S. E. Rep. 339.

The inquiry is then presented whether, upon the admitted facts, the action is obstructed by the statutory bar by the lapse of time since the filing and auditing the final administration account in the office of the clerk. It will be noticed that a distinction is made in the enactment that interposes a barrier to suits prosecuted against the personal representative in his fiduciary capacity, upon the liability that results from it, and those which seek to enforce the obligation created by his bond. The creditor must bring his action within seven years next after the qualification of the representative, "and his making the advertisement required by law for creditors of the deceased to present their claims, where no personal service of such notice in writing is made upon the creditor," and this bar is applicable alike to a surety to the debt. Code, § 153, subsec. 2. To give effect to this provision, both conditions must concur and be shown,—the prescribed period of inaction, and the making the advertisement directed in the Code. Cox v. Cox, 84 N. C. 138. The action upon the bond, as superadding a legal to an equitable obligation, incurred in the assumption of the office, must be begun "against any executor, administrator, collector, or guardian on his official bond within six years after the auditing of his final accounts by the proper officer, and the filing of such audited account." Code, § 154, subsec. 2. While the sureties have this protection in common with their principal, they have a further exoneration, unless sued within three years after breach of the bond. Id. § 155, subsec. 6.

The rulings upon this subject, in cases that have come before the court requiring a construction to be put upon the statute, do not seem to be in entire harmony, yet on examination they will be found to be so. In Bushee v. Surles, 77 N. C. 62, the action was for the recovery of the distributive shares claimed by the plaintiffs against the administrator of one Patience Bushee, and, delivering the opinion, BYNUM, J., says: "The defendants relied on the statute of limitations in the court below, but do not press the point here. The statute does not run in favor of administrators against the suit of the next of kin for their distributive shares." In Vaughan v. Hines, 87 N. C. 445, the suit was instituted by the administratrix *de bonis non* of one Henry Vaughan, appointed on February 21, 1881, on April 4th thereafter, against a surety to the bond of the former administrator, who died in 1874, to recover the unadministered assets in his hands. The recovery was resisted on the ground that more than six years had passed since the return of the final account by the deceased in May, 1873, before the issuing of the summons. It was held that the statute was a bar to the action, and this ruling was sustained in this court. This was an action on the bond, not at the instance of the next of kin, but of the succeeding administrator, and yet it was declared that the statute began to run against the next of kin, and continued to run against the plaintiff. This determines, in effect, that in an action on the bond it must be prosecuted within the six years after the filing the specified account, as well by the next of kin as by creditors, in order to escape the statutory obstruction. In Grant v. Hughes, 94 N. C. 231, the administrator *de bonis non* sued the executor of the first administrator for an account and settlement, and the qualification of the former was during the same year as the death of the latter, and the suit was instituted shortly after the plaintiff's appointment. The defense was twofold,—the alleged conclusiveness of the final account of the state of the assets, and the bar of the statute. Both objections were overruled, and MERRIMON, J., speaking for the court, declares: "The court properly held that the statute of limitation invoked by the defendant did not bar the action. The action is not brought upon the official bond, as administrator of the testator of the defendant. It is brought to compel an account and settlement of the estate of the intestate of the plaintiff in his hands in his life-time. He was a trustee of an express trust, and the statute of limitation did not apply." In Andres v. Powell, 97 N. C. 155, 2 S. E. Rep. 235, the action was by the administrator *de bonis non* of one A. J. Shipman against the executors of A. F. Powell, one of the sureties to the ad-

Digitized by Google

ministration bond of J. W. Ellis, the first administrator, who relied upon the six-years bar under section 154, and the defense, as in Vaughan v. Hines, supra, was sustained.

This review of the adjudications establishes the proposition that confines the operation of the section which fixes the filing and auditing the final account, as the initial point at which the statute begins to run, to actions upon the bond for a breach of its obligations, but leaves the representative, in his fiduciary capacity, exposed to the demand of the fiduciary or creditor; the latter losing his remedy under the conditions set out in section 153. It would be a singular, and not to be accepted, result, unless plainly declared, that the representative holding the trust fund in his hands, an uncontested residue of the estate, could, after the defined period, disown responsibility to any one therefor, and keep and apply the fund to his own use; and this might happen when there has been no violation of fiduciary duty under the bond or otherwise, and when the estate is kept intact awaiting the demand of the party entitled to it. It is most obvious this was not intended in the discriminating provisions of the statute, and that the representative is left, under such circumstances, responsible as any other trustee. There was no error, then, in disregarding the plea, which is unavailing as a defense to the action, and in ordering the reference; the reservation of the ruling upon it being without prejudice to the appellant.

We do not mean, however, to say that in no case does the statute bar the next of kin. Until a final account is filed and audited, there can be no bar; nor is there any as to a balance admitted to be due by such final account, unless the executor or administrator can show that he has disposed of it in some way authorized by law, or unless there has been a demand and refusal to pay such admitted balance, in which case the action is barred in three years after such demand and refusal. Section 155. When such final account is filed and audited, an action to impeach it must be brought within 10 years from the filing and auditing of the same. The period of limitation is not specifically declared, but we think such a case falls within section 158, which applies to actions "not herein provided for." It must come within this section, or none, as section 154, subdiv. 2, expressly applies to actions upon the "official bond," subdiv. 6 to sureties only, and section 155, so far as executors, administrators, and guardians are concerned, is applicable only when there has been a settlement either by acts of the parties or a decree of court. The final account having been filed within 10 years before the commencement of this action, there was therefore no error in disregarding the plea, which is unavailing as a defense, and in ordering the reference; the reservation of the ruling thereupon being without prejudice to the appellant. The judgment must therefore be affirmed.

DAVIS, J., (*dissenting.*) I cannot concur in the opinion that, where a final account is filed by an executor or administrator, there is no limitation to an action against him by the next of kin, unless the action be on the bond. Except in actions commenced before the 24th of August, 1868, or in cases where the right of action accrued before that date, all civil actions must be commenced within the periods prescribed in title 8, c. 10, Code, "except where in special cases a different limitation is prescribed by statute." Code, §§ 136, 138. There is now no such thing as a statutory presumption, and all persons having a right to sue, unless under some of the disabilities named in the statute, must bring their actions within the times limited, or an absolute bar may be interposed. Section 154, subsec. 2, Code, requires that an action not against sureties, but against any executor or administrator, etc., on his official bond, shall be commenced within six years from the filing and auditing of his final account as required by law. Section 155, subsec. 2, requires the action to be commenced within three years, "upon a liability created by statute, other than a penalty or forfeiture, unless some other time be mentioned in the statute creating it." The duties and liabilities of executors and administrators are prescribed in the various sections of chapter 33, Code, and among these sections 1488 and 1489 define their duties in regard to paying over, to persons entitled to the same, money remaining in their hands, specifying what may be retained; and, if they do not know to whom to pay, they may file petitions against all parties interested, under section 1525 et seq., or they may pay it into the clerk's office under section 1543. By section 1402, they may be required to file their final accounts for settlement at any time after two years from their qualification, and this at the instance of any one interested in the estate; and sections 1510, 1511, give to legatees and distributees the right to sue executors and administrators for legacies or distributive shares at any time after the lapse of two years from their qualification. Section 1504 directs when money shall be paid to the university. Section 155, subsec. 6, limits an action against the sureties to three years after the breach for which the action is brought. So that, as I understand the law, the limit to an action against the executor or administrator individually and on his bond is six years after the filing and auditing his final account, and against his sureties on his bond three years after a breach or failure to discharge any of the duties required of him by law. The ultimate limit of liability is three years after filing and auditing his account, unless against him individually and on his bond, and there six years is the ultimate limit. The filing and auditing the final account is the initial point at which the statute begins to run against the executor or administrator; and this, it seems to me, is not only the proper construction to be placed on the sections of the Code referred to, but, as we shall presently see, is, I think, the only construction that has been placed on them by this court since the Code went into effect.

It is admitted that the statute is a bar to an action on the bond by the next of kin. The bond is given to insure a faithful discharge of his duties by the fiduciary, and one of these duties is to deliver and pay over to the person entitled to the same all sums in his hands at the expiration of two years, with the exceptions referred to in sections 1488 and 1489 of the Code. If the person or persons entitled shall be vigilant enough to do so, he or they may bring an

Digitized by Google

action on the bond against the principal and his sureties within three years from the breach, or against the principal alone within six years after the filing and auditing the final account. It will not do to say that the six-years bar is to protect the sureties on the bond; they are protected by a much shorter limit. Three years from the filing and auditing the final account is the longest possible time by which they can be held bound, and what possible necessity can there be for the six-years bar to an action on the bond given to insure the faithful discharge of the duties of the executor or administrator, if there be an equal remedy as against him, by suit not on the bond, to which there is no limit? It seems to me contrary to all analogy and to all precedent to say that there shall be a limit to a right of action for breach of fiduciary duty secured by the solemnity of a bond, and no limit at all to an action for the same breach of fiduciary duty, if you choose to ignore the bond, and sue on the simple liability. It was not so with the statute of presumptions, where no such distinction existed. The statute of presumptions began to run when the cause of action accrued: so now the statute of limitations begins to run from the respective periods designated in the statute, and, where none is designated or provided for, then "within ten years after the cause of action shall have accrued." Code, § 158. This last referred to section applies to every action not otherwise "provided for," and there is now no action to which some limit, according to the subject-matter, does not apply.

The administrator, after his final account and settlement, has no right to retain in his hands the money of the estate to await the demands of those entitled to it, but it is his duty to pay it over, and it is the right and duty of those entitled to it (if laboring under no disabilities) to see that this is done within the time limited, or they will be barred. After the filing and auditing of the final account, he has no duty to perform in relation thereto, except to pay what he may have in his hands to the persons entitled to it. The action before us is based on section 155, subsec. 9, Code, and the complaint recognizes the fact that the statute would bar the action, but for allegations 5 and 6, in which it is charged that there were frauds in the final settlement, and that the frauds did not "come to the knowledge of the plaintiff before the last three years previous to the bringing of this action, but were discovered within said three years, and not without." These allegations of fraud and recent discovery were denied, and presented issues upon which depended the plea of the statute of limitations, and the right of plaintiff to recover, and the defendant had a right to have these issues passed upon. After the time prescribed in section 1 3 of the Code, the statute is an absolute bar to creditors, (Lawrence v. Norfleet, 90 N. C. 584; Worthy v. McIntosh, Id. 536;) and after the time prescribed in section 154, subsec. 2, and section 155, subsec. 2, the statute is an absolute bar to the next of kin, (Vaughan v. Hines, 97 N. C. 445; Spruill v. Sanderson, 79 N. C. 466.)

But it is said that Bushee v. Surles, 77 N. C. 62, and Grant v. Hughes, 94 N. C. 281, are in conflict with this position. I think not. In Grant v. Hughes the action was governed by the law as it was prior to 1868, the original administration having been taken out in 1861, and, so far as the question before us is concerned, has no application; and, as was said in Vaughan v. Hines, distinguishing it from Bushee v. Surles, "in that case (Bushee v. Surles) there had not been any final account filed by the administrator;" and besides, as will be seen by reference to the original record of the case on file, though it does not appear in the report, the administration was prior to 1868, and that case does not apply. But it is said Vaughan v. Hines and Andres v. Powell were actions on bonds. This is true, but in Vaughan v. Hines it is expressly said that the statute of presumptions has been repealed so far as it applied to actions upon the bonds of administrators, etc., and the statute of limitations substituted therefor. There being now no statute of presumptions, the statute of limitations, according to the subject-matter, applies to all actions whatever. I think the reasoning in Vaughan v. Hines is predicated upon the idea that the limitation to an action upon the bond is the ultimate time within which an action can be brought by the next of kin, and the following citation from that case is, to my mind, conclusive of the question before us. After stating that the statute of limitations prescribed by the Code applied to that action, it is said: "That being so, the question arises, does the statute of limitations prescribed by the Code run in favor of an administrator against an action brought by the next of kin for their distributive shares? It was held in Ivy v. Rogers, 1 Dev. Eq. 58, (a case decided in 1827, and recently approved by this court in the case of Hodges v. Council, 86 N. C. 181,) 'that where there was a return made by an administrator to the county court, admitting a balance against him, the statute of presumptions was put in motion, and after ten years from the date of the return a bill filed by the next of kin to recover that balance was held to be too late.' Chief Justice TAYLOR, who delivered the opinion of the court, said: 'This case is of purely equitable jurisdiction, and not subject to any legal bar, by force of the statute of limitations, yet this court, from an early period, has adopted rules as to barring an equity, drawn as nearly as possible from analogy to the rules of law.' And in answer to the objection [the very objection that is made in the present case] that the defendant, who was an administrator, was a trustee, and therefore could not avail himself of such a defense, proceeded to say: 'I deem it unnecessary to examine the doctrine relative to express and implied trusts, because the settlement of the account by the administrator presents a clear ground of decision, whatever the defendant's original character may have been. From that time the trust ceased to be open, and the defendant stood in a new relation to the complainant as his debtor. Could the complainant have sued at law, his cause of action would then have begun to run from that time.' The principle to be deduced from this decision is that, if the action could be brought at law upon the bond of an administrator, who had filed his final account in the proper office, the statute of presumptions would begin to run in his favor against the next of kin, and the claim would be presumed to be paid after the lapse of ten years from the time of filing the account." Where the statute of presumptions began to run under the old law, I think the statute of limitations begins to run under the new; and whether under the one or the other, the filing of the account is the initial period of time at which it begins to run in favor of an administrator or executor against next of kin or legatees. As was said by Chief Justice TAYLOR in Ivy v. Rogers (quoted in Vaughan v.

Digitized by Google

Hines as Ivy v. Cox) the doctrine in regard to express trusts has no application after the filing of the final account. Certainly, if it could have none under the law as it then stood, it can have none now, and, as was said by this court in regard to the return of the administrator in Vaughan v. Hines: "It was such a statement as showed to all persons interested in the distribution of the estate that the administration of the estate was finished." Whenever the right of action accrues to the *cestui que trust* against the trustee, whether the trust be express or implied, and certainly after the "trust ceased to be open," by the plain and unmistakable language of the statute it begins to run, and the action must be brought within the time limited, if there be no disability. The right of action accrues to the legatee or distributee after two years from qualification of the executor or administrator, and he must, if no disability exists, bring his action within six years after the filing and auditing the final account, or he may be barred. For the reasons given I think the defendant had a right to have the issues of "fraud" and "discovery within three years," raised by the allegations of the complaint and denials of the answer, passed upon before reopening the account.

NOTE. Since this dissenting opinion was filed, the opinion of the court has been so changed as to make 10 years a bar, and, to that extent, what was said does not apply.

(103 N. C. 189)

FREDERICK *et al* v. WILLIAMS.

(*Supreme Court of North Carolina.* March 12, 1889.)

MORTGAGES—REDEMPTION—STATUTE OF LIMITATIONS.

Four years after the death of the mortgagor, and about three years after the equity of redemption had become barred, the infant heirs of the mortgagor brought suit to redeem from the foreclosure sale. *Held*, that the statute of limitations, having begun to run against their ancestor, was not interrupted by the fact of infancy, and that their action was barred.

Appeal from superior court, Duplin county BOYKIN, Judge.

D. B. Nicholson and *Batchelor & Devereux*, for appellants.

SHEPHERD, J. Civil action tried before BOYKIN, J., December term, 1888, of Duplin superior court. The parties, waiving a trial by jury, agreed to the following facts, with the understanding that the court should render judgment thereon according to his opinion of the law arising therefrom: (1) Norris F. Frederick made a mortgage deed for the lands in dispute on April 18, 1873, for $596. (2) After maturity of said mortgage, the mortgagee advertised and sold said lands, and himself became the purchaser. (3) Under and by virtue of said sale and purchase the mortgagee (the defendant in this action) entered into the adverse possession of said lands on January 1, 1874, and has held and used them as his own ever since, and has put valuable improvements thereon. (4) That at various times since such sale the defendant has received as rents for said premises large sums of money, some of which has been paid by his tenant within three years prior to the commencement of this action. (5) At the time of such sale the mortgagor was residing in a remote part of the state. (6) Norris Frederick, the mortgagor, died about the 1st day of January, 1883. (7) There has been no administrator or executor of his estate. (8) The plaintiffs in this action are infants of tender years, heirs at law of the mortgagor, Norris Frederick, and are without any general or testamentary guardian, and have never had any guardian. (9) That this action was commenced on the 6th day of June, 1887. Upon a consideration of the foregoing facts, the court, being of the opinion that the defendant was entitled to judgment on his plea of the statute of limitations, adjudged that the plaintiffs go without day, and they appealed.

The defendant, after the maturity of the mortgage debt, entered into "the adverse possession" of the property on the 1st day of January, 1874. The mortgagor died about the 1st of March, 1883. The statute of limitations (Code, § 152, par. 4) had therefore run against him for a period of nine years. This action was brought on the 6th day of June, 1887, and is barred unless the plaintiffs can bring themselves within some of the disabilities prescribed by the Code. It is well settled that when the statute of limitations begins to run nothing stops it. "So, where it begins to run against the ancestor, it is not suspended by any statutory disability in the heir at the time of descent cast." Wood, Lim. 11; Pearce v. House, Term R. N. C. 722. Four years after the death of the mortgagor, and about three years after the equity of redemption had been barred, (Bruner v. Threadgill, 88 N. C. 367,) the heirs of the mortgagor, who are infants, bring this suit to redeem. We see nothing in section 148 of the Code, cited by counsel, which changes the law as it formerly existed; nor do we see how section 168, Code, can help the plaintiffs. Conceding that this section relates to actions other than personal, the plaintiffs have not brought themselves within its terms by suing within a year after the death of their ancestor, and there is no saving as to infancy in the section referred to. There is no error in the ruling of his honor, and the judgment will be affirmed.

(103 N. C. 159)

CHANCEY *et al.* v. POWELL *et al.*

(*Supreme Court of North Carolina.* March 25, 1889.)

LIMITATION OF ACTIONS—DISABILITIES.

1. Where the statute of limitations had begun to run against plaintiffs' ancestor, the fact that the *feme* plaintiffs were infants at the time of his

Digitized by Google

death, and that they married before coming of age, did not stay the running of the statute.

2. The fact that the ancestor died in 1862, during the time when the statute was suspended, does not support the contention that there was in effect an absolute repeal of the statute in May, 1861, and a re-enactment in January, 1870; thus giving rise to a new cause of action, while the heirs were under disability.

Appeal from superior court, Columbus county; JAMES H. MERRIMON, Judge.

Ejectment by S. J. Chancey and others against Eli M. Powell and others. Plaintiffs were nonsuited, and appeal.

D. J. Lewis and *Pearson Ellis*, for appellants. *Schulken & Hines*, for appellees.

SHEPHERD, J. The right of action in this case accrued to D. W. Baldwin, the ancestor of the plaintiffs, in the year 1856, when the defendants, or those under whom they claim, entered into the adverse possession of the land in controversy. D. W. Baldwin lived until 1862, and was under no disability. The defendants have been in adverse possession up to the commencement of this suit,—the 19th of July, 1887. Eliminating, therefore, the time from the 1st of May, 1861, to the 1st of January, 1870,—the period during which the statute of limitation and presumption was suspended,—the law would presume that the defendants were the owners of the land, and the plaintiffs would be barred. In order to meet this aspect of the case the plaintiffs asked the court to "instruct the jury that if they believe from the evidence that the defendants and those under whom they claim took possession of the land in controversy in 1856 or 1857, and that D. W. Baldwin, ancestor of the plaintiffs, died in 1862, and the *feme* plaintiffs were under the age of 21 years at the time of his death, and that they were intermarried with the male plaintiffs before they arrived at the age of 21 years, this cause of action is not barred by the statute of limitation or presumption." His honor very properly declined to give this instruction. We regard it as well settled that "if the statute begins to run against the ancestor or devisor, it continues to run after his death, notwithstanding the infancy of the heir or devisee. There is no difference between voluntary and involuntary disabilities." Malone, Real Prop. Tr. 294. PEARSON, J., in Mebane v. Patrick, 1 Jones, (N. C.) 23, says that neither the doctrine of presumption at common law, nor the act of 1825, have any saving in regard to the rights of infants, *feme coverts*, or persons *non compos*. In the statute of limitations there is an express exception in favor of the rights of those who may be infants, etc., at the time the right accrues, but if at that time there is no disability, although the right may on the next day pass to an infant, it is not within the proviso, so that it has grown into a legal adage, "when the statute begins to run, it continues to run." To the same effect are the cases of Seawell v. Bunch, 6 Jones, (N. C.) 195, and Frederick v. Williams, ante, 298, (decided at this term.) The cases of Day v. Howard, 73 N. C. 1, and Clayton v. Rose, 87 N. C. 106, cited by the plaintiffs, are in affirmance of the principle we have mentioned. The chief questions in Day v. Howard, supra, were as to the time when the plaintiff's cause of action accrued, and how long a period of delay was required to bar the plaintiff's right of action,—she being a tenant in common with the defendant. In Clayton v. Rose, it was held that, inasmuch as the heirs of the trustee were infants when the cause of action accrued, the *cestui que trust* was entitled to avail herself of their disability, and her action was not barred. The plaintiffs, however, contend "that, inasmuch as the statute of limitations was suspended at the time this cause of action accrued to the plaintiffs, the case stands upon the same footing as it would if the statute of limitations had been absolutely repealed in May, 1861, and re-enacted in January, 1870, after the death of the ancestor, D. W. Baldwin, and while the heirs at law were under disability." This position finds no support, we think, in Lippard v. Troutman, 72 N. C. 551, and Davis v. Perry, 89 N. C. 420, cited by counsel. The plaintiffs stand in the same position as would their ancestor had he lived, and brought this suit. There is no error.

(103 N. C. 170)

TUCKER v. TUCKER.

(*Supreme Court of North Carolina.* March 18, 1889.)

HOMESTEAD—RIGHTS OF WIFE.

Under Const. N. C. art. 10, § 5, and Code Civil Proc. § 514, providing that the homestead of a husband who dies childless shall inure to the benefit of his widow, and, if not already set off to him, may be allotted to her after his death, the widow of a childless husband, whose personalty is exhausted in the partial payment of his debts, is entitled to a homestead allotted while such debts existed, as against the heir, though he afterwards pays the residue of the debts.

Appeal from superior court, New Hanover county; SHEPHERD, Judge.

The plaintiff, who was the brother and sole heir of William Tucker, deceased, brought this action against Flora Tucker, widow of said William Tucker, to have her dower in land of her late husband assigned to her. There was a judgment for defendant, holding that she was entitled to a homestead in the land, and plaintiff appeals. Const. N. C. art. 10, § 5, provides that if the owner of a homestead die leaving a widow but no children, the same shall be exempt from the debts of her husband, and the rents and profits thereof shall inure to her benefit during her widowhood, unless she be the owner of a homestead in her own right. Code Civil Proc. § 514, provides that if a person entitled to a homestead exemption die without having had the same set apart, his widow, if he leave no children, may proceed to have such homestead set apart according to law.

J. D. Bellamy, for appellant. *Thos. W. Strange*, for respondent.

Digitized by Google

DAVIS, J. This action was commenced in the superior court of New Hanover county to have the defendant's dower allotted to her in the land mentioned in the pleadings, and heard, upon appeal from the clerk, before SHEPHERD, J., upon the following facts, found as a special verdict: "William Tucker, the husband of the defendant, died seised and possessed of the property in controversy, leaving the defendant as his widow, and the plaintiff as his only heir at law,—said plaintiff being an adult brother; and that said William Tucker died in the year 1880; that at the date of his death said William Tucker left some debts, but that said debts have been since paid by the plaintiff in the year 1887; that in the year 1880, while said debts were existing, defendant had her homestead laid off and allotted according to law; that the personal property was exhausted in the payment of the debts, and was insufficient to pay them, and the final account of said Flora (defendant) as administratrix, who was duly qualified as such, was filed and approved on February 1, 1882." Upon these facts his honor adjudged that the plaintiff was not entitled to the relief demanded, and that the defendant was entitled to the homestead which had been set apart to her. From this judgment the plaintiff appealed.

It is said for the plaintiff that if the husband dies, leaving no debts and no children, the widow will not be entitled to a homestead, but only to dower; and it is insisted that, this being so, the homestead is conferred simply as a protection against creditors, and that, if the homestead has been assigned, and the heir, representing the deceased debtor, pays off the debts, there will no longer be a necessity for the continuance of the homestead estate, and the heir will become entitled to the land, subject only to the widow's right of dower; and for this position Hager v. Nixon, 69 N. C. 108, is cited. It is there said that where no homestead was laid off in the life-time of the husband, it may be laid off as a protection against creditors, but it is valid and available against them only. "As between the widow and the heirs, the estate goes under the general law;" and there is a *quære* as to what would be the result if the heir should procure the creditor to release and extinguish the debt, which seems to have been done in the present case. It appears from the statement of facts agreed that there were debts, and that the homestead was allotted to the widow (defendant) according to law, and the allotment or assignment was valid. Smith v. McDonald, 95 N. C. 163, and cases there cited. We are clearly of the opinion that the homestead, whether laid off to the husband in his life-time, or, when he leaves no children, to his widow, after his death, cannot be divested in favor of the heir by the release or extinguishment of the debts of the deceased husband, but it shall inure to the benefit of the widow "during her widowhood." Const. art. 10, § 5; Code, § 514. There is no error.

(108 N. C. 173)

BORDEN *et al.* *v.* WARD *et al.*

(*Supreme Court of North Carolina.* March 19, 1889.)

WILLS—ELECTION—WHAT CONSTITUTES.

A testator, with full knowledge that his estate terminated at his death, and that the remainder then vested in his sons, among whom was P., devised the property as if it were his own in fee, together with other property which he owned, to all his children and his widow. The children whose shares were given by the will to P. and the widow made no resistance, and P. enjoyed the life-estate devised to him in the land, of which he had a fractional interest in fee, and recognized the title derived under the will by selling and conveying the land. *Held*, that he had elected to take under the will, and not under the deed as remainder-man, and that he and those claiming under him must abide by such election.

Appeal from superior court, Carteret county; SHEPHERD, Judge.

C. R. Thomas, Jr., and *F. H. Busbee*, for appellants.

SMITH, C. J. William Borden being the owner in fee of the tract of land described in the complaint, the possession whereof is demanded in the action, on the 1st day of May, 1790, by deed of gift conveyed the same with other lands to his son, Joseph Borden, Sr., "during his natural life only, and then to return to the male children of the said Joseph Borden, lawfully begotten of his body," with further limitations contingent upon his having such. The donee for life entered accordingly into possession of the said tract, and held the same until his death, in 1825. Two years previous thereto he made a will sufficient in form to pass both real and personal estate, which was admitted to probate at March term, 1825, of the county court of Carteret. The testator had acquired a large landed estate in Carteret and Hyde counties, besides that obtained under the deed of his father, which he devises in distributive parts, as well as personally among his children, of whom were living at the time of his decease six sons,—William Hall, Thomas R., David W., Joseph, Jr., Benjamin, and Isaac Pennington Borden,—and a daughter, Mary. His wife, Esther, also survived him. In one of the clauses of the will the testator devises to his son Pennington Borden, with other real estate mentioned, to use his own words, "the plantation where I live, between Harlow's creek and the water fence at Paquanet's landing, on New Port river, and running with the fence and boundary described to my son Joseph, that part next to said creek,"—this being, as we understand the case agreed, the territory in dispute, which in the first dispositive clause is given to his wife, Esther, for her use during life, and in the latter clause to said Pennington, qualified by the words: "To be by my son Pennington enjoyed during his natural life, without any impeachment or waste, and, after the death of my said son Pennington Borden, I give the same to the children of my son who may be living at his death, to them and their heirs, forever, and if any of the children of my said son should die in his

Digitized by Google

life-time, having children, such children shall take the share of lands to which their father or mother would have been entitled had they have lived, with one-ninth of my movable estate." Pennington Borden and Esther took possession of the lands devised to them in manner aforesaid, and by their deed bearing date the 25th day of September, 1835, for the recited consideration of $2.500 sold and conveyed the disputed portion of the devised lands and some others to Benjamin Borden, Sr., and his heirs, with warranty of title in fee. Pennington Borden died intestate on the 25th day of December, 1878, leaving three children,—William W. Borden, Emma H. Borden, and Ann F. Gervin,—who, as plaintiffs, prosecute the present action. Esther, the widow, died on August 19, 1853. The defendants claim title under the deed to Benjamin Borden, Sr., who at his death devised the land to Benjamin F. Borden, by whose deed, dated in 1843, it was conveyed to Rufus Ward, and descended at the death of the latter to the defendants, in whose possession successively it has been since the execution of the deed of Pennington and Esther in September, 1835.

The present action was begun by the issue of a summons on October 14, 1884,—not quite six years after the death of said Pennington, and the vesting in possession of the plaintiffs' claimed estate in remainder under the will of said Joseph Borden, Sr. The value of the annual rent is by agreement fixed at $15, and the foregoing statement of facts is submitted to the court for an adjudication of the title, to the end that, if it rules in favor of the plaintiffs, judgment shall be entered for the recovery thereof, and for damages ascertained as aforesaid from a period beginning three years before suit, and extending to the trial; and, if for the defendant, judgment of nonsuit shall be entered. The court, being of opinion that the plaintiffs were entitled to the premises, gave judgment accordingly, and the defendants appealed.

The construction and operation of a deed executed at the same date, and by the same original owner, William Borden, Sr., to another son of the donor, bearing his name, and conveying by gift other lands with essentially similar limitations as that now before us, came before this court for determination in Borden v. Thomas, 6 Ired. 209. The lessor, the son William, donee of a life-estate, conveyed the land, as if the owner of an estate in fee, to James Porter, from whom the defendants deduced their title. The lessor was the only son of the donee, William Borden, Jr. The court held, DANIEL, J., delivering the opinion, that the said William had but an estate during his life, and the estate in remainder vested in his only son, who brought the action in fee, and that he was entitled to recover; the warranty having no other effect than as a covenant under section 8, c. 43, Rev. St., now found in the Code, § 1334. The words of inheritance which follow the last limitation to the male children of the sons of Benjamin and Joseph, being equally applicable to the male children of said William, enlarged his remainder also into a fee. The decision determines an interpretation of the deed before us, which gives a life-estate only to the said Joseph Borden, Jr., and the estate in remainder, after its termination, in fee to his seven sons as tenants in common under the act of 1784, (Code, § 1326;) the said Pennington being entitled to an undivided seventh part thereof. The cases are similar, in that the life-tenants undertake—the one by deed, the other by will—to convey the absolute property in the respective tracts, while they are unlike in that the estate in remainder, in that cited, vested in one, and in our case in several; but the principle involved is common to both, and each endeavored to dispose of land as his own when he had but a limited estate in it. It is true, the testator Joseph devises in terms a full estate for life, subject to his widow's life-estate, to a devisee who had an undivided share therein under his grandfather's deed; but, if accepted, and acquiesced in by the other tenants, it was a different and enlarged estate, except in duration and time of possession, than that which he could have claimed under the deed had he refused the provisions made for his benefit by the will. It is a rule of general application that one cannot claim under and against a written instrument. If it undertakes to dispose of his property to others, and gives him property which he would not otherwise have, if he takes the latter, he must surrender his own. This is called an "election," and most frequently in testamentary dispositions one is called on to make it, or by his acts is held to have made it, and binds himself thereby. "It is sufficient to raise a case of election," says Story, J., "that the testator does dispose of property which is not his own, without any inquiry whether he did so knowing it not to be his own, or whether he did so under the erroneous supposition that it was his own. If the property was known not to be his own, it would be a clear case of election." 2 Eq. Jur. § 1093. Again: "It may be added that when a party by his will disposes of the absolute right in property in which he has a limited interest only, he necessarily shows an intention to extinguish all other conflicting adverse rights, whether they are present or future, vested or contingent; and consequently it must be wholly unimportant whether the interests so extinguished are great or small, immediate or remote, valuable or trifling." Id. § 1096. In the same direction are our own adjudications. Sigmon v. Hawn, 87 N. C. 450; Isler v. Isler, 88 N. C. 576. The principle enunciated clearly takes in the facts of the present case, which show an election to have been made. The testator had full knowledge that his own estate expired with his life, and that he had no futher control of the property, which then passed to his sons. Treating it as his own,

Digitized by Google

he makes a distribution of it with his own large estate among his children, in a manner he seems to have considered just and fair, and which they seem to have acquiesced in, and left undisturbed; the other six, whose shares he gives to Pennington and his mother, making no resistance thereto, content to keep what the will gives them. Pennington acting in a similar manner, sharing with his mother the full estate for his own life in the land of which he had a fractional interest only, recognizing the title derived under the will in selling and conveying the land with warranty to the before-named vendee, surely he cannot not be allowed to repudiate the will in so much of it as gives the remainder after his death to the plaintiffs, his surviving children. It is manifest that he, as well as the others, so far as appears, has accepted the beneficiary provisions of the will, and in doing so surrendered any right under the deed of his grandfather inconsistent therewith, and must, as must those claiming under his deed to Benjamin, abide by his election, and take the estate given in the will. Then, at Pennington's death terminated his estate in the land, and the remainder vested in possession in the plaintiffs. There is no error, and the judgment must be affirmed.

(102 N. C. 390)

FARRELL *et al. v.* RICHMOND & D. R. Co.

(*Supreme Court of North Carolina.* March 18, 1889.)

SALE—STOPPAGE IN TRANSITU.

1. The fact that at the time of a sale of goods the vendee was insolvent will not defeat the right of stoppage *in transitu* of the vendor, if the latter was not aware of such insolvency.
2. Such right cannot be defeated before actual or constructive delivery of the goods to the consignee by a levy of an attachment upon the property by creditors of the consignee.
3. A clause in a bill of lading by which the carrier has a lien upon goods shipped for all arrearages of freight and charges due by the owners or consignees on other goods will not enable the carrier to hold the goods on account of freight due from the vendee on preceding shipments, to the prejudice of the vendor's right of stoppage *in transitu*.
4. Where goods shipped under such a bill of lading have reached their destination, and are stored awaiting delivery to the consignee, evidence that the latter told the carrier to hold the property as security for arrearages of freight due from him is not sufficient to go to the jury on the question of delivery, so as to defeat the right of stoppage *in transitu;* there being no actual change of possession of the property, and no evidence that the carrier made any response to the offer of the consignee.

Appeal from superior court, Durham county; MERRIMON, Judge.

Action by Farrell & Co. against the Richmond & Danville Railroad Company. Judgment was given for plaintiffs, and the defendant appeals.

C. M. Busbee, for appellant. *E. C. Smith* and *W. W. Fuller*, for respondents.

SHEPHERD, J. This was a civil action tried before MERRIMON, J., and a jury at June term, 1888, of the superior court of Durham county. The plaintiffs alleged, in substance, that they were residents of Philadelphia, Pa.; that they sold a safe on credit to Robertson & Rankin, of Durham, N. C.; that they delivered it to the defendant company for transportation to Durham in said state, directed to said Robertson & Rankin; that after said shipment, and before its delivery to the purchasers, the plaintiffs learned that the purchasers were insolvent, and that they notified the defendant not to deliver the safe to said purchasers, or any other persons but the plaintiffs, at the same time tendering to defendant the freight and all other charges on said safe, and demanding the delivery thereof; that defendant refused to surrender said safe, but retains the same wrongfully, etc. There was no objection to the issues. Only so much of the answer of the defendant as relates to them and the exceptions will be stated. The answer denied that defendant wrongfully withheld the safe from the plaintiffs, and alleged that, Robertson & Rankin being indebted to defendant in the sum of $130, defendant sued out a warrant of attachment against the said property before defendant had any notice of the plaintiffs' claim on said safe, and before any demand was made by them for the same, and that under the judgment and execution in said proceeding defendant purchased said safe. Defendant also alleged that, after the safe was received at its warehouse in Durham, it was delivered to Robertson & Rankin, and by them delivered to John A. Holt, agent of defendant at Durham, to be held by him as security for certain indebtedness then due and owing to the defendant by the said Robertson & Rankin.

The following issues were submitted to the jury: "(1) Did the defendant deliver the safe to Robertson & Rankin? *Answer.* No. (2) If it was delivered, did the plaintiffs demand possession before it was delivered, and tender freight and charges, as alleged in the complaint? *A.* Yes. (3) What damage, if any, have plaintiffs sustained? *A.* One hundred dollars, with interest from September 10, 1885."

The plaintiffs introduced the deposition of Jordan Matthews, as follows: "I am a member of the firm of Farrell & Co. The other members of the firm are John Farrell and George L. Remington. The business of the firm is manufacturing and selling fire-proof and burglar-proof safes. Our agent in May, 1885, for the state of North Carolina, was E. F. Hall, of Greensboro, N. C. Through him we sold a No. 5 Champion safe at one hundred dollars, at Philadelphia, to the firm of Robertson & Rankin, of Durham, N. C., upon an order dated May 21, 1885, signed by Robertson & Rankin. (Witness produces and identifies the order referred to in Exhibit A.) By the term 'at Philadelphia,' which I have just used, I mean that we deliver the safe free on board at Philadelphia, and the purchaser pays the freight. (We delivered the safe to the steam-ship company named in the

Digitized by Google

order, only in the capacity of a common carrier. When the safe was shipped we believed Robertson & Rankin to be solvent; otherwise we would not have shipped it.) I did not personally stop the delivery of the safe. (That I believe was done by our agent, Mr. Hall. It was within the scope of the authority given by us to the said agent to stop the delivery of any safe shipped to any person, upon the discovery that the vendee was insolvent.) Robertson & Rankin have never paid us a cent for this safe. (We have taken no security for the payment of the safe, except the printed clause in the order reserving the title to us until the safe should be paid for.)" The defendant objected to that portion of the foregoing testimony embraced within brackets. The court overruled the objections, and permitted the entire deposition to be read, and the defendant excepted. No point was made as to the right of the defendant to object, it being admitted that by an agreement made when the deposition was opened the defendant had the right to make the objections on the trial.

"EXHIBIT B.

"THE ASSOCIATED RAILWAYS OF VIRGINIA AND THE CAROLINAS—PIEDMONT AIR LINE. BILL OF LADING.

"PHILADELPHIA, 6–14, 1885.

"Received by Philadelphia and Richmond S. S. Line, (The Clyde S. S. Co.,) of Farrell & Co., under the contract hereinafter contained, the property mentioned below, marked and numbered as per margin, in apparent good order and condition, (contents and value unknown,) viz.:

"Marks and numbers: One iron safe, 1,184.

"Shippers' weight.

* * * * * *

"The several carriers shall have a lien upon the goods specified in this bill of lading for all arrearages of freight and charges due by the same owners or consignees on other goods."

The above extracts are all of Exhibit B which is necessary to an understanding of this case.

W. W. Fuller, witness for plaintiffs, testified that, a few days before the sale of the safe, E. F. Hall, plaintiffs' agent, and W. W. Fuller, plaintiffs' attorney, went to the depot of the Richmond & Danville Railroad Company, in Durham. Saw the safe in the warehouse, covered with bagging, marked to Robertson & Rankin, from Farrell & Co., and demanded the delivery to Hall and Fuller of the safe, at the time asking the amount of freight and charges thereon; which amount not being given, they tendered to Holt, agent of defendant, a sum of money not less than $10, and offered to pay said freight and charges. Holt refused to receive the money or to deliver the safe. Plaintiffs rested, it being agreed that they might later give evidence of the insolvency of vendees of the safe at time of demand by Hall and Fuller.

John A. Holt, witness for defendant, testified that he was agent at Durham station for the defendant company, and was such agent at the time the safe was received at the warehouse. Robertson & Rankin were and had been receiving a lot of lumber, the freight on which amounted to considerably over $100, which was then owing by them to defendant company. Witness had been sending to them, demanding payment of these freight bills, and had seen them in person about it. "That he went down the side track we term 'Lumber Track,' and found they had been taking off lumber after having been notified not to do so. That he had sent for Robertson, whom he knew to be the one attending to the firm's business. He came down to the warehouse, and witness met him at the upper end of the warehouse, where safe was standing. Asked him if I had not notified him time and again not to remove any lumber without first paying the freight. He said I had. I told him he had placed himself in a very bad situation, and that I was compelled to take steps against him. We were then standing right beside the safe, both of us leaning upon it. He said to Holt: 'Here is a safe I paid one hundred dollars for in Philadelphia. It is true I have disappointed you in my promises about coming to pay you those freight bills, but I have been disappointed myself in not receiving money.' He mentioned about having a large amount of money at several places, and said, pointing in the direction of Webb & Kramer's warehouse, that he was having an office put up there, and it would be completed the next day or the day after. He then said, placing his hand on the safe: 'I place this safe in your hands as security for what I owe, until the next day or the day after, when my office will be completed, and I will come and pay all freight bills, and remove the remnant of lumber and the safe, and take it over to my office.' I held the safe till some little time after that, when I got news that he had run away. This was before the time Mr. Fuller came after it,—some weeks before; may have been a month or two months,—considerable time. Don't remember exactly what time it was. *Cross-Examination.* The safe came about the 9th or 10th June; had been here three or four or five weeks before my conversation with Robertson. The defendant sold the safe on the 10th of same month,—either August or September. The place where Robertson came at the warehouse was the same place where the safe was first placed. Robertson & Rankin were notoriously insolvent here when Mr. Fuller came and made demand, and had been so long before. Defendant has no receipt from Robertson & Rankin for the safe. Defendant took out attachment proceedings after Robertson & Rankin left here, and levied upon the safe under the proceedings, as Robertson & Rankin's, and it was afterwards sold under these proceedings, and bought by the defendant, who paid nothing for it, but credited Robertson & Rankin on their debt to the defendant.

Digitized by Google

It is a rule of the defendant company not to deliver goods to any one without their signing receipt and paying freight. *Redirect.* At the time the safe was shipped to Robertson & Rankin they were entirely insolvent. *By the Court.* It is a rule of the defendant company not to deliver goods until the freight is paid. I had the power and could have delivered it, but it would have been disobeying orders, and would have thrown the entire responsibility on me. I was seeking to secure the freight on the lumber as well as on the safe. It is also a rule of the defendant that, if freight is not paid in thirty days, notice is given to the shippers to pay. The safe had been in the warehouse fully thirty days before Robertson pledged it to me, but no notice had been given the plaintiffs by me. I do not remember positively about this; it was some two, three, or four weeks. Never made any memorandum of it. I meant to say the safe was in the warehouse thirty days before it was sold under the attachment."

The defendant asked the following special instructions: "(1) That upon the testimony the plaintiffs are not entitled to recover. (Refused, and defendant excepted.) (2) That, if the jury believe the testimony of John A. Holt, they must respond to the first issue, 'Yes,' and to the second issue, 'No.' (Refused, and defendant excepted.) (3) That if the jury shall find that Robertson & Rankin were insolvent at the time the safe was shipped to them by the plaintiffs, the plaintiffs are not entitled to recover. (Refused, and defendant excepted.)"

His honor charged the jury that there was no evidence that Holt, the defendant's agent, was authorized to accept the safe from Robertson & Rankin as a pledge to secure the freights due on the safe and lumber by them to the defendant, and, even if he was authorized so to do, that what transpired between Holt and Robertson did not amount to a delivery of the safe to Holt, and was not sufficient to deprive plaintiffs of any rights they might acquire in respect to the safe; that while the defendant might ratify Holt's act, if there was any pledge, yet if the safe had been pledged the jury might consider the fact that the defendant took out attachment proceedings against Robertson & Rankin as evidence of the repudiation by defendant of any contract of pledge; that if the jury should find that the plaintiffs, or any of them, knew, or had reason to know, that Robertson & Rankin were insolvent at the time the safe was shipped, the plaintiffs were not entitled to recover. His honor then instructed the jury that there was no evidence of any delivery of the safe to the defendant, or its agent authorized for such purpose, and directed them to answer the first issue in the negative, and the second in the affirmative. The defendant excepted to the charge of the court and to the instructions given the jury. The jury rendered a verdict as set out in the record. Motion by defendant for new trial. Motion overruled. Appeal by defendant. Notice of appeal waived. Appeal-bond fixed at $50. By consent, 30 days allowed to file bond and serve case on appeal, and 30 days thereafter allowed plaintiffs to object to defendant's statement of case or to file counter-statement.

Upon the appeal taken in the above-entitled action the defendant assigns as errors: (1) The admission in evidence of the portions of the depositions of Jordan Matthews objected to by defendant. (2) The refusal of the court to give the special instructions asked by defendant. (3) That the court erred in instructing the jury that Holt was unauthorized to accept its safe from Robertson & Rankin as a pledge, and that, even if he was authorized, what transpired between Holt and Robertson did not amount to a delivery of the safe to Holt, and was not sufficient to deprive plaintiffs of any rights they might acquire in respect to the safe. (4) That the court erred in instructing the jury that they might consider the fact that the defendant took out attachment proceedings against Robertson & Rankin as evidence of the repudiation by defendant of any contract of pledge. (5) That the court erred in instructing the jury that there was no evidence of any delivery of the safe, and in directing the jury to answer the first issue in the negative and the second in the affirmative. There was a verdict for the plaintiffs. The defendant moved for a new trial, the motion was overruled, and defendant appealed.

Several objections were made to the testimony, all of which, we think, were properly overruled. That which relates to the witness' speaking of the contents and effect of Exhibit A would have been tenable, but as the exhibit was subsequently introduced, and was entirely consistent with the witness' statement, the defendant was in no wise prejudiced, and the exception is therefore without merit.

It is proper to notice that the third instruction asked by the defendant was that, if the jury should believe a certain state of facts, "the plaintiffs are not entitled to recover." The same words are used by the court in one of the instructions given. Such language is not pertinent to any of the issues submitted. These present questions of fact, or mixed questions of law and fact, and upon the findings it is for the court to say whether or not the plaintiff is entitled to recover. Such instructions were proper upon the general issues submitted under the old practice, but are confusing when applied to our present system. It is true that in the present case no harm has resulted, as we can dispose of the appeal upon the testimony of the defendant, but we have adverted to this improper manner of asking for and giving instructions in order that the loose practice in this resp ct may be discontinued. We can very readily conceive how juries may be perplexed and misled by such general charges when they come to pass upon the specific issues submitted to them, and how new trials may be thus made necessary which could otherwise

Digitized by Google

have been easily avoided. The plaintiffs' action is based upon their alleged right to stop the property *in transitu*. This right "arises solely upon the insolvency of the buyer, and is based on the plain reason of justice and equity, that one man's goods shall not be applied to the payment of another man's debts. If, therefore, after the vendor has delivered the goods out of his own possession, and put them in the hands of a carrier for delivery to the buyer, (which, as we have seen, is such a constructive delivery as divests the vendor's lien,) he discovers that the buyer is insolvent, he may retake the goods, if he can, before they reach the buyer's possession, and thus avoid having his property applied to paying debts due by the buyer to other people." It is "highly favored on account of its intrinsic justice." 2 Benj. Sales, §§ 1229-1231. It "is but an equitable extension or enlargement of the vendor's common-law lien for the price, and not an independent and distinct right." Note to section 1229, supra. "It is quite immaterial that the insolvency existed at the time of the sale, provided the vendor be ignorant of the fact at that time." Loeb v. Peters, 63 Ala. 243, and a number of cases cited in note to section 1244, Benj. Sales, supra. These last authorities fully sustain his honor in refusing the third instruction asked by the defendant. The mere fact that Robertson & Rankin, the consignees, were insolvent at the time of the sale, could not defeat the lien of the plaintiffs, unless they knew of such insolvency. The charge as given was correct in this particular, and the jury having found substantially that the plaintiffs were, nothing further appearing, entitled to avail themselves of the right of stoppage *in transitu*, and that they exercised that right through their agent, Mr. Fuller, we will now consider the several defenses made by the defendant. No agreement or usage having been shown to the contrary, the right of stoppage *in transitu* continued until the safe was actually or constructively delivered to the consignee. Id. § 1269; Hause v. Judson, 29 Amer. Dec. 377, and notes. The first defense, though not seriously pressed upon the argument, is that the defendant acquired title by reason of the sale under the attachment proceedings instituted by it against the consignee for arrearages of freight due on lumber. "The vendor's right of stoppage *in transitu* is paramount to all liens against the purchasers, (Hill. Sales, 289; Blackman v. Pierce, 23 Cal. 508;) even to a lien in favor of the carrier, existing by usage, for a general balance due him from the consignee, (Oppenheim v. Russell, 3 Bos. & P. 42.) An attachment or execution against the vendee does not preclude the stoppage *in transitu*, for this is not a taking possession by the vendee's authority; the proceeding being *in invitum*." Note to Hause v. Judson, supra, where a large number of authorities sustaining the text are collected. These authorities conclusively settle that the defense under the attachment proceedings cannot be maintained.

The second defense rests upon the following clause of the bill of lading: "The several carriers shall have a lien upon the goods [shipped] for all arrearages of freight and charges due by the said owners or consignees on other goods." The counsel for the defendant could give us no authority in support of this defense, and none, we think, can be found, to the effect that such a stipulation should be construed to take away this "highly-favored" and most important right of the vendor to preserve his lien, in order "that his goods may not be applied to the payment of another man's debts," much less to those of his agent to whom he delivers them for carriage. Shippers would hardly contemplate that, in accepting such a bill of lading, the well-established and cherished right of stoppage *in transitu* was to be made dependent upon whether a distant consignee was indebted to the carrier, and the commercial world would doubtless be surprised if it were understood that, whenever such a stipulation was imposed upon consignors, they were in effect yielding up their lien for the purchase money, and substantially pledging their goods for the payment of an existing indebtedness due their agent, the carrier, by a possible insolvent vendee. If such is the proper construction, we can well appreciate the language of Lord ALVANLEY, in Oppenheim v. Russell, 3 Bos. & P. 42, when he said that he hoped it would "never be established that common carriers, who are bound to take all goods to be carried for a reasonable price tendered to them, may impose such a condition upon persons sending goods by them." He doubts whether an express agreement between the carrier and the consignor would be binding, and BEST, J., in Wright v. Snell, 5 Barn. & Ald. 350, in speaking generally of such contracts, said he "doubted whether a carrier could make so unjust a stipulation." Chancellor Kent, in the second volume of his Commentaries, remarks that "it was again stated as a questionable point in Wright v. Snell whether such a general lien could exist as between the owner of the goods and the carrier, and the claim was intimated to be unjust. It must, therefore, be considered a point still remaining to be settled by judicial decision." Page 638. It is unnecessary, however, for us to say whether such a condition or agreement would be reasonable and binding, as it seems very clear to us that the the stipulation in the present case is not susceptible of the construction contended for, and that it is entirely subordinate to the right of stoppage *in transitu*. The exercise of this right revested the right of possession in the plaintiffs, and, they having tendered all they owed the defendant, no interest was ever acquired by the vendee to which the claim of the defendant could attach.

The third and most plausible defense is that, according to the testimony of the agent, Holt, there was a constructive deliv-

Digitized by Google

ery to the consignee, and that this defeated the rights of the plaintiffs. The doctrine is well settled that "where goods are placed in the possession of a carrier, to be carried for the vendor, to be delivered to the purchaser, the *transitus* is not at an end * * * until the carrier, by agreement between himself and the consignee, undertakes to hold the goods for the consignee, not as carrier, but as his agent; and the same principle will apply to a warehouseman or wharfinger." 2 Benj. Sales, supra, § 1269. Was there any such agreement in this case? The most that can be said is that the consignee offered to pledge the safe to the defendant for the freight already due on lumber. There was no actual change of possession. The safe was in the defendant's warehouse, and Holt, the agent, and the consignee were both leaning upon it. The consignee, placing his hand on it, said: "I place this safe in your hands as security for what I owe." There was no response whatever by Holt. He simply states that he "held the safe till some little time afterwards," when he heard that the consignee had run away, and that he sued out the attachment proceedings mentioned in the answer. The majority of us are of the opinion that there was no reasonably sufficient evidence to be submitted to the jury upon the acceptance of the offer and of delivery. There being no actual delivery, a constructive one can only be effected by a valid agreement on the part of the common carrier to hold for the consignee. Mr. Benjamin, from whom we have so largely quoted, says "that the existence of the carrier's lien for unpaid freight raises a strong presumption that the carrier continues to hold the goods as carrier, and not as warehouseman; and, in order *to rebut this presumption*, [the italics are ours,] there must be proof of some arrangement or agreement between the buyer and the carrier, whereby the latter, while retaining his lien, becomes the agent of the buyer to keep the goods for him." But, conceding that the acquiescence of Holt was some evidence of the acceptance of the offer, would this in law amount to such a delivery as will defeat the plaintiffs' right? Passing by the question as to whether the defendant bailee was not estopped to set up such a transaction in favor of itself and against its principal, (2 Wait, Act. & Def. 57,) and also the fact that the alleged agreement was not to hold as agent of the vendee, but for itself, we are of the opinion that what transpired between the defendant's agent and the vendee did not alter in the slightest degree the relation in which they stood to each other. It will be borne in mind that there was no actual delivery; that the defendant had a lien for the freight due on the property, and under the stipulation in the bill of lading it had, as against the consignee, also a lien for the arrearages of freight due by him. There was no new consideration, and the proposition of the consignee, and its alleged acceptance by the defendant, left them in precisely the same position as before. It amounted virtually to the defendant's saying: "If you will pay the freight and arrearages, I will deliver you the safe." This was, as we have seen, the effect of the bill of lading. In the leading case upon this subject, (Whitehead v. Anderson, 9 Mees. & W. 517, cited with approval by Benjamin, supra,) the agent of the consignee went on board of the ship when she arrived in port, and told the captain that he had come to take possession of the cargo. He went into the cabin, into which the ends of the timber projected, and saw and touched the timber. When the agent first stated that he came to take possession, the captain made no reply, but subsequently, at the same interview, told him that he would deliver him the cargo when he was satisfied about his freight. They went ashore together, and shortly after an agent of the consignor served a notice of stoppage *in transitu* upon the mate, who had charge of the cargo: "Held that, under these circumstances, there was no actual possession taken of the goods by the consignees, and that, as there was no contract by the captain to hold the goods as their agent, the circumstances did not amount to a constructive possession of the goods by them. There is no proof of any such contract. A promise by the captain to the agent of the consignees is stated, but it is no more than a promise, without a new consideration, to fulfill the original contract, and deliver in due course to the consignee on payment of freight, which leaves the captain in the same situation as before. After the agreement he remained a mere agent for expediting the cargo to its original destination." This, it seems to us, is conclusive of our case. Here there was no new consideration whatever moving from the vendee, nor was there any definite understanding that the defendant was to forbear pressing the vague proceedings suggested by him. 1 Add. Cont. 11, note. There was therefore no new contract, and the defendant held the safe in the same character as he did before, when, as we have shown, it was subject to the paramount claim of the plaintiffs. We have been able to find no case where a pledge of this kind has been asserted, but we have observed that all the cases we have examined lay down the rule that constructive delivery is only made by the carrier, either agreeing, expressly or by implication, to hold as the agent of the consignee.

While the amount involved in this suit is small, we have thought it our duty, in view of the importance of the questions of law presented, to carefully examine many of the multitude of cases upon the subject, and our conclusion is that his honor was correct in telling the jury that what transpired between Holt and Robertson (one of the consignees) did not amount to a delivery, and was not sufficient to deprive the plaintiffs of any rights they might acquire in respect to the safe. There is no error.

Digitized by Google

(103 N. C. 100)

McLAUCHLIN *et al. v.* HOPE MILLS MANUF'G CO.

(*Supreme Court of North Carolina.* March 19, 1889.)

WATERS AND WATER-COURSES—OBSTRUCTIONS.

The authority over unnavigable streams used by the public for rafting timber, turpentine, etc., down stream, such as Big Rockfish creek, including the power to remove all improper obstructions, and to see that all persons who erect dams for mill purposes provide good and sufficient slopes, is by 2 Code N. C. c. 56, vested in the boards of commissioners of the several counties through which such streams flow; and where permission to erect a dam has been applied for and granted under the authority of and in the manner prescribed by that chapter, and the dam has been erected in compliance with such permission, its maintenance cannot be interfered with by the courts, in the absence of fraud.

Appeal from superior court, Cumberland county; SHEPHERD, Judge.

Thos. H. Sutton, for appellants. *Wm. A. Guthrie*, for appellee.

DAVIS, J. This was an appeal from a judgment of SHEPHERD, J., rendered on the 11th day of December, 1888, dissolving the restraining order theretofore granted, and refusing the motion to continue the injunction; said motion having been heard by consent, at Rockingham, Richmond county. It is alleged that the defendant is an incorporated company, engaged in the manufacture of warps, yarns, plaids, etc., in the county of Cumberland, and that said company has commenced the erection of a large factory on the waters of Rockfish creek, in said county; that the plaintiffs and other citizens of Cumberland county have for a great many years used the waters of said creek for the purpose of transporting produce, such as rosin, timber, turpentine, etc., to market; that for many years the said stream was "regularly worked by overseers, duly appointed to clear the same of obstructions;" and that it was made a "navigable stream by public enactment of the general assembly of North Carolina;" and by long-continued and uninterrupted use by the public, the public have acquired the privilege and paramount right to the free and uninterrupted use of its waters as a navigable stream for the transportation of produce. It is further alleged that the defendant company is erecting a dam across said stream, claiming that it has the right so to do, upon "the erection of slopes, slips, or locks, of the dimensions of 12x30 feet," which are totally inadequate for the purpose of transportation; that the construction of said dam and locks will obstruct the navigation "of said waters, and deprive the plaintiff and all other citizens of their long use and right of navigation of said stream, and the same, if allowed by the courts, or persisted in by the defendants, will be a nuisance to the public and people who have a right to the navigation of said waters, and work irreparable damage to the plaintiffs, and all others interested;" that the plaintiff had no notice of the intention of the defendant to build the dam so as to obstruct the navigation of said creek until after the same had been commenced, and made known to the defendant his complaint as soon as he had heard of it. The plaintiff asks that the defendant be enjoined, etc. The action was commenced November 20, 1888. By chapter 197, Acts 1848–49, the courts of pleas and quarter sessions of the counties of Robeson and Cumberland are authorized to appoint overseers, with an allotment of hands, "to clear out and render navigable Big Rockfish creek, in said counties." By section 3 of that act it is made unlawful and indictable to obstruct the free navigation of said creek; and section 4 provides that all owners of dams across said stream "shall cause to be constructed and kept open, and in good repair, good and sufficient slopes for the free passage of all rafts of lumber, timber, turpentine, and other products." The plaintiff offers the records of the county court of Robeson county at its January term, 1854, showing the appointment of overseers of Rockfish creek, and affidavits tending to show that it was under the charge of overseers in the county of Robeson down to the beginning of the late war; that no work has been done by authority of law since the beginning of the war. The plaintiff also offers numerous affidavits tending to show that Rockfish creek has been used by the public for many years, —as many as 40, 50, and 55 years, within the knowledge of witnesses, and by reputation as many as 100 years; and some of the affidavits tend to show that the lock erected at the dam of defendant is not sufficiently long to permit the shipment of rosin, tar, etc., without serious loss to shippers.

The defendant company answers at great length, and sets out the circumstances under which the dam in question was erected. The defendant filed, as appears from the record, a petition to the board of commissioners of Cumberland county, on the first Monday in February, 1888, as follows: "The petition of the Hope Mills Manufacturing Company respectfully represents that it is desirous of erecting a dam across Big Rockfish creek, in the county of Cumberland, on the lands of the petitioner, adjoining the lands of J. W. Emmett and others, for the purpose of erecting the necessary buildings and machinery for a cotton factory. That your petitioner is informed and believes that for many years last past said Big Rockfish creek has not had overseers appointed, nor hands assigned to work the same, under the provisions of chapter 56, 2 Code N. C., for many years last past, and said creek has not for a long time been treated as a stream within the provisions of said chapter. But as your petitioner proposes to expend large sums of money in the erection of said dam and buildings and machinery, before doing so, and out of abundant caution, your petitioner desires an expression of the sense of your honorable board as to the object contemplated, and whether or not the erection of the proposed dam across said Big Rockfish creek meets with your approval.

Digitized by Google

That your petitioner requests, in case the erection of said dam shall meet with your approval, that your body shall appoint a committee under the provisions of sections 3710, 3712–3714, c. 56, 2 Code N. C., aforesaid, clothed with the duty of determining whether any gates or slopes in said dam are necessary, and, if so, the plan, dimensions, and construction of the same, to the end that your petitioner may be apprised beforehand as to what will be required, and that all provisions of law in that behalf may be observed by your petitioner, and all controversy relating to the same obviated in the outset." The petition was granted by the unanimous vote of the board of commissioners, and the following resolutions unanimously adopted, viz.: "Resolved, that the erection of a dam across Big Rockfish by the Hope Mills Manufacturing Company on the lands of said company, adjoining the lands of J. W. Emmett and others, meets with the approval of this board. Resolved, that A. B. Williams, Jas. D. McNeill, and John Blue be appointed commissioners to ascertain whether or not gates and slopes are necessary in said dam, and, if so, the plan and dimensions of the same, giving hereby to said commissioners all legal authority and power relating to the same provided in chapter 56, 2 Code N. C." It appears that when the petition was filed and acted upon many people from different parts of the country were in the commissioners' office, and in and about the court-house; that William Alderman, a resident near Big Rockfish creek, discussed the subject-matter of the petition, in behalf of turpentine and timber men, who used said stream for rafting, etc., and at his suggestion one of the commissioners was appointed by the board on account of his residence in that part of the country, to represent them. It further appears that the action of the board of commissioners was published in the Fayetteville Observer, a newspaper of considerable circulation, and to which, as appears from the affidavit of its editor, the plaintiff was a subscriber; and that the commissioners appointed to ascertain what was necessary in regard to gates and slopes, pursuant to previous notice, met at the place where it was proposed to erect the dam, at which meeting persons representing the timber and rosin interest were present, and a plan for the construction of the dam was agreed on by the commissioners appointed by the board, and reported to the board of commissioners at their meeting on the 5th of March, 1888, and unanimously adopted; and soon thereafter the defendant company commenced the erection of the dam in accordance with the plan reported, and had expended a large sum of money; and on the 9th day of October, after the expenditure, as the defendant alleges, of at least $75,000, a petition was presented to the board of county commissioners praying "for relief in regard to the obstruction of Rockfish creek" by defendant's dam. The board of commissioners, against the protest of the defendant, and after hearing both sides, granted the petition, and resolved that "the case be reopened for the purpose of securing full information in regard to the locks and dams proposed to be put in said stream." Thereupon a resolution was adopted, to the effect that the committee again visit "the grounds, after full notice to the citizens interested of the time, * * * and report to the board at its next meeting what action should be taken in regard to said obstruction." This committee made a report, in which, after setting forth that after giving notice they met at the mill of the defendant, and, after stating that "several parties interested in the navigation of Big Rockfish, who were not at the previous meeting, were present this time," and giving the contention of each side, they concluded as follows: "At the first meeting of your committee to take action upon the application to dam the stream, the present size—12 feet x 30 feet—was unanimously agreed upon by all present, and we therefore, having made that report to you, and it having been acted upon and accepted, do not feel that we have any right or power to make any change, and therefore ask to be discharged from any further service in this matter."

The evidence, in the shape of affidavits, is voluminous, and the plaintiff, by affidavit, alleges that the delay in bringing action was, in substance, the frequent and repeated promise of the defendant company, by its agent, "that they would endeavor to make the required changes," and, relying on these assurances, and believing that there would be a satisfactory adjustment, suit was delayed, and only resorted to when all other means had failed.

In State v. Glen, 7 Jones, (N. C.) 321, BATTLE, J., after a very full review of the authorities upon the subject, gives the following as a summary of the law of North Carolina in relation to the water-courses of the state: "(1) All the bays and inlets on our coast, where the tide from the sea ebbs and flows, and all other waters, whether sounds, rivers, or creeks, which can be navigated by sea vessels, are called 'navigable' in a technical sense, are altogether *publici juris*, and the soil under them cannot be entered and a grant taken for it under the entry law. In them, too, the right of fishing is free. See Collins v. Benbury, 3 Ired. 277, and the other cases to which we have referred on this point. Where the tide ebbs and flows, the shore between the high and low water is also within the prohibition of private appropriation under the general entry law, but may be the subject of a direct special legislative grant. Ward v. Willis, 6 Jones, (N. C.) 183. (2) All the rivers, creeks, and other water-courses not embraced in the above description, but which are in fact sufficiently wide and deep to be navigable by boats, flats, and rafts, are technically styled 'unnavigable,' and are open to be appropriated by individuals by grant from the state, under the entry laws. When the bed

Digitized by Google

of the water-course is not included in the grant, but the stream is called for as one of the boundaries, the grantee is entitled, as an incidental easement, to go to the middle of the stream, and may exercise and enjoy that easement for the purpose of catching fish, or in any other manner not incompatible with the right which the public have in the stream, for water communication, between different points on it. The mode and the extent of the enjoyment of this easement may be regulated by statute, and, as the riparian proprietors paid nothing into the public treasury for it, the soil which composes the bed of the river may be granted to others, and the legislature may perhaps resume the incidental rights for the public use, without making compensation for them, though we believe it has often given such compensation. See Ingram v. Threadgill, 3 Dev. 59; Smith v. Ingram, 7 Ired. 175; and the various charters granted to companies for improving the navigation of nearly all our largest rivers. (3) All the rivulets, brooks, and other streams which from any cause cannot be used for intercommunication by inland navigation, are entirely the subjects of private ownership, are generally included in the grants of the soil, and the owners may make what use of them they think proper, whether it be for fishing, milling, or other lawful trade or business. The only restriction upon this right of ownership arises, *ex necessitate*, from the nature of running water; and it is that the owner shall so use the water as not to interfere with the similar rights of other proprietors above or below him on the same stream. See Pugh v. Wheeler, 2 Dev. & B. 50. Rights acquired in streams of this class by grants from the state, or in water-courses of the second class by grant from the state for the bed of the stream, cannot be taken from the owners by the government, except in the exercise of the powers of eminent domain, and then only for public use, with a provision for the just compensation. See Railroad Co. v. Davis, Id. 460." Rockfish creek has not been used for navigation by boats, but only for rafting timber, turpentine, etc., down the stream; and it would seem to come within the third class of Judge BATTLE'S summary.

But it is insisted by the plaintiff that, however this may be, by long and uninterrupted use, and by legislative enactment, the public has become entitled to its use as a highway for the transportation to market of their timber, turpentine, and other products, and it is denied that the county commissioners can authorize its obstruction. What is a good and sufficient passway for rafts must be a question for the determination of some authority; and in the case of Rockfish creek, prior to the adoption of the present system, this authority, under the supervision of the county courts of Cumberland and Robeson counties, was in overseers, whose duties were to remove all obstructions, and see that those who erected dams for mills provided good and sufficient slopes. The authority over all such streams is now vested in the board of county commissioners of the several counties through which the streams may flow, to be exercised in the manner prescribed by chapter 56 of the Code, and the defendant company applied for, and, it appears, erected its dam under, the authority conferred by that chapter. What action was taken by the board of commissioners upon the last report of the committee does not appear; and, whether they had the power, after the defendant had expended money in the erection of the dam and lock under the authority conferred, to revoke that authority, and require the defendant to change the passageway for rafts, or remove its dam, without compensation, is not a question for our consideration. The authority of the board of county commissioners, while it stands, and is unimpeached by allegations of fraud or other illegal conduct, is a bar to the remedy sought by the plaintiff in this action. No special damage is alleged; and whether, if the dam be "a nuisance to the public," the action could be maintained by the plaintiff, as insisted by his counsel and denied by the defendant, is not necessary for us to determine. There is no analogy between this case and that of State v. Narrows Island Club, 100 N. C. 477, 5 S. E. Rep. 411. The subject is fully discussed in Wood on Law of Nuisances, in the chapter on navigable streams, §§ 575 et seq. He concludes that in this country there are three classes of navigable streams: "(1) Tidal streams, that are navigable in law; (2) those that, although non-tidal, are yet navigable in fact for "boats or lighters," and susceptible of valuable use for commercial purposes; and (3) those which are floatable, or capable of valuable use in bearing the products of the mines, forests, and tillage of the country it traverses to mills or markets." The extent to which the riparian owner may go in the erection of dams, etc., to apply the use of the water to the propulsion of machinery, and the extent to which the state may authorize obstructions, present interesting questions, the consideration of which is not necessary for the determination of the case before us. There is no error.

Digitized by Google

(102 N. C. 442)

DIOCESE OF EAST CAROLINA v. DIOCESE OF NORTH CAROLINA.

(*Supreme Court of North Carolina.* March 18, 1889.)

WILLS—RELIGIOUS SOCIETIES.

In 1881 testatrix by will devised certain property to the "board of trustees for the Protestant Episcopal church in the diocese of North Carolina." At that time the diocese of North Carolina embraced the whole state. In 1883 it was divided into the diocese of North Carolina and the diocese of East Carolina. Testatrix died in 1885. Code N. C. § 3065, provides that an organized church can hold property by gift or otherwise, and that the estate therein shall vest absolutely in the trustees of said church. *Held*, that the devise being to the trustees for "the church in the diocese of North Carolina," and not to the "diocese" as such, on the subdivision of the diocese in conformity to the usages of the church, without secession or schism, the property devised should be equally divided between the trustees of each diocese.

Appeal from superior court, Wake county; J. F. GRAVES, Judge.

George Davis and *John Hughes*, for plaintiff. *R. H. Battle* and *John Manning*, for defendant.

MERRIMON, J. This is a controversy submitted to the court without action, as allowed by the statute, (Code, § 567,) and the following is a copy of the case agreed upon:

"The parties above named, plaintiffs and defendants, claiming rights and interests which are mutually disputed and denied, and desiring to have the same legally and amicably settled and adjusted, do submit to your honor this controversy without action, upon the facts hereinafter stated, which are mutually admitted and agreed:

"(1) That the Protestant Episcopal Church in the United States is, and for many years has been, a collective unincorporated body or society of Christian men, united and organized under laws established by themselves for the worship and service of Almighty God, and the promotion of the Christian religion.

"(2) That the said church is divided into dioceses having a greater or less territorial extent, and known by a certain name or designation, each diocese being presided over by a bishop regularly and duly consecrated according to the laws and ceremonies of the said church, and each diocese is divided into a greater or less number of parishes or congregations.

"(3) That the ultimate jurisdictional authority of the said church in each diocese is vested in a diocesan convention or council, composed of clerical and lay delegates from each parish, and presided over *ex officio* by the bishop, which assembles annually for the regulation and government of the affairs of the church within the diocese.

"(4) That the ultimate jurisdictional authority of the said church for the whole of the United States is vested in a general convention which is composed of a house of bishops, consisting of all the bishops of the said church in the United States, and a house of clerical and lay deputies, elected by the diocesan convention or counsel of each diocese, and which general convention assembles every third year.

"(5) That by the constitution of the said church, art. 5, it is provided as follows: 'Whenever the division of a diocese into two or more dioceses shall be ratified by the general convention, each of the dioceses shall be subject to the constitution and canons of the diocese so divided, except as local circumstances may prevent, until the same be altered in either diocese by the convention thereof.'

"(6) That by the general canons adopted for the government of the said church it is provided as follows: 'Canon 4. Section 1. Whenever any new diocese shall be formed within the limits of any other diocese, * * * and the same shall have been ratified by the general convention, the bishop of the diocese within the limits of which another is formed * * * shall thereupon call the primary convention of the new diocese for the purpose of enabling it to organize, and shall fix the time and place of holding the same, such place being within the limits of the new diocese.' 'Sec. 4. Whenever the formation of a new diocese shall be ratified by the general convention, such new diocese shall be considered as admitted under article 5 of the constitution so soon as it shall have organized in primary convention, in the manner prescribed in the previous sections of this canon, and the naming of the new diocese shall be a part of its organization.'

"(7) That prior to the year 1883 the Protestant Episcopal Diocese of North Carolina embraced the whole territory of the state of North Carolina.

"(8) That at the annual convention of the said church in the diocese of North Carolina, which assembled in the month of May, 1883, the following resolution was duly adopted and passed, to-wit: 'Resolved that, the general convention assenting, a new diocese be formed out of the present diocese of North Carolina, consisting of counties of Hertford, Bertie, Martin, Pitt, Greene, Wayne, Sampson, Cumberland, and Robeson, and of all the counties lying between those counties and the Atlantic ocean.'

"(9) That at the said diocesan convention of 1883 the following additional resolutions were also duly adopted and passed: 'Resolved, (1) that the convention hereby ratifies and confirms the action of the convention of 1882 in regard to the expediency of a division of the diocese. Resolved, (2) that the bishop is hereby respectfully requested to give his consent to the formation of the proposed new diocese; and in case such assent shall be given, the deputies from this diocese to the general convention, to be held in October next, are hereby instructed to take the necessary steps for securing the consent of the general convention to the erection of a new diocese within the limits of the present diocese of North Carolina, as described in the foregoing resolution. Resolved, (3) that the securities and

Digitized by Google

property of all descriptions at present constituting the "Permanent Episcopal Fund," the fund for "Education of Children of Deceased Clergymen," and the "Fund for Relief of Disabled Clergymen, and Widows and Orphans of Deceased Clergymen," with such additions thereto as may accrue up to the date of the organization of the new diocese, shall be divided equally, dollar for dollar, between the two dioceses within this state, as may be agreed upon by a joint committee of four laymen, of which committee two members may be appointed by the convention of each of the two dioceses concerned.'

"(10) That the bishop of the diocese of North Carolina consented to the formation of the said new diocese, with the territorial limits above set forth, and the general convention of the said church in October, 1883, duly and legally ratified the same as required by the canons aforesaid.

"(11) That afterwards, on the 12th day of December, 1883, the primary convention of the said new diocese, which had been duly called according to the requirements of the said canons, assembled at Newbern, within the limits of the new diocese, which was the place legally fixed for such assembly, according to the said canons, and the said new diocese was thereby fully, duly, and legally established and organized by the name of the 'Diocese of East Carolina,' and the plaintiff Alfred A. Watson was duly elected bishop thereof, and has been duly consecrated to the said office, and has entered on the discharge of its duties.

"(12) That the formation as aforesaid of the said diocese of East Carolina was occasioned solely by motives of policy for the well-being of the church, and not by any disputes or differences in matters of faith, doctrine, discipline, form of worship, or polity, all of which continued to be the same, without alteration, in both of the dioceses, as they had been before the division; and the said creation and organization of the new diocese were made and done in strict conformity with the law and usage of the said church.

"(13) That before the formation of the said new diocese, to-wit, in the month of February, 1881, Miss Mary Ruffin Smith, of Orange county, in the state of North Carolina, duly made and published her last will and testament in writing, a copy of which is hereunto annexed, and is to be taken as part of this agreed statement of facts.

"(14) That after the formation of the said new diocese, to-wit: on the 13th of November, 1885, the said Mary R. Smith died without having revoked or in anywise altered her said will, and on the ——— day of November, 1885, the said will was duly admitted to probate before the clerk of the superior court of Orange county, and the defendant, Kemp P. Battle, the executor therein named, was duly qualified as such, and received into his possession a large amount of personal property belonging to the estate of his testatrix.

"(15) That the plaintiffs are the trustees duly and lawfully appointed under the laws of this state for the purpose of taking and holding the title and managing the property of the Protestant Episcopal Church in the diocese of East Carolina; and the defendants Theodore B. Lyman, Richard H. Battle, and William E. Anderson are the trustees in like manner duly and lawfully appointed for similar purposes in the diocese of North Carolina, and were such trustees before the formation of said new diocese of East Carolina.

"(16) That in and by her said will the said Mary R. Smith devised and bequeathed as follows, to-wit: '(1) I devise the tract of land on which I reside, about 1,500 acres, of several tracts originally, but now used as one tract, including all the land in Orange county I own, outside of Chapel Hill, and also all the stock and farming implements used on said land, to my dear friend Maria L. Spear, during her life, and after her death to the board of trustees for the Protestant Episcopal Church in the diocese of North Carolina, appointed to hold the property of the diocese not otherwise provided for by the general convention of said diocese, as authorized by act of the general assembly of North Carolina in such case made and provided, said trustees to have full power to dispose of the same in fee simple and absolutely as said convention may direct, specially or by general ordinance; this devise, however, subject to the exceptions hereinafter mentioned. (2) Out of the aforesaid tract I devise to Cornelia Fitzgeral, wife of Robert Fitzgeral, (colored) for her life, free from the control or debts of her said husband,—after her death, to her children,—one hundred acres out of the aforesaid tract. (3) I devise to Julius Smith (colored) likewise out of the tract of land on which I now live, twenty-five acres in fee. It is my will that the devise to Cornelia Fitzgeral and to Julius Smith shall take effect at my death, and the tract given them be good land, equal to the average of the whole tract, with a fair proportion of wood and arable land, and to be laid off by metes and bounds by three white commissioners,—one to be chosen by the said trustees of the church, the other by the devisee or devisees interested, the mother, if living, to choose for herself and children, and those two to choose a third; my executor to make conveyances according to the report of the said commissioners, or a majority of them, whose report shall be final, and the terms of this will.' '(6) Whatever of my kitchen and household furniture Miss Maria Spear wishes to have I bequeath to her absolutely; what she does not want I give to Cornelia Fitzgeral, Emma Morphis, Annette Kirby, and Laura Tirle, (all colored,) equally to be divided between them. (7) I bequeath, out of any money on hand or due me, to Ed. Cole, (colored,) one hundred dollars, and to my namesake, Mary Ruffin Smith, daughter of Rev. Columbus Smith, deceased, of Mis-

Digitized by Google

sissippi, two hundred dollars. The residue of all moneys due me, and also any property not specifically willed, I give to the trustees of the Episcopal Church aforesaid in trust for the diocese of North Carolina.'

"(17) That Maria L. Spear, the devisee for life in the said will, is dead, having died before the testatrix.

"(18) That a large amount of personal property, constituting the residue of the estate above mentioned, has come into the hands of the defendant Kemp P. Battle, as executor, and is now held by him as a part of said estate, and subject to the trusts of the said will.

"(1) Upon the foregoing facts the plaintiffs claim that they are entitled to an equal division of all the real and personal estate devised and bequeathed by the said will to the trustees of the diocese of North Carolina in trust for the church in said diocese.

"(2) If not entitled to an equal division, then they claim that they are entitled to such a proportion of the said real and personal estate as the whole number of members and pew-holders of the said church in the diocese of East Carolina at the time of the organization thereof bore to the whole number of the members and pew-holders in the present diocese of North Carolina at that time. These claims are denied by the defendants, who insist that all of the said real and personal estate legally belongs to the defendants, the trustees of the present diocese of North Carolina, in trust for the church in said diocese. And these conflicting claims are respectfully submitted to the adjudication of the court upon the foregoing agreed statement of facts."

Thereupon the court gave judgment for the plaintiffs, whereof the following is a copy: "Upon consideration of the agreed facts set forth as the basis of this controversy without action, and the cause having been debated by counsel on both sides, it is considered, adjudged, and decreed by the court that the plaintiffs are entitled to share in all the real and personal estate devised and bequeathed by will of Mary Ruffin Smith to the board of trustees of the Protestant Episcopal Church in the diocese of North Carolina, and that the said real and personal estate be equally divided between the plaintiffs and the defendants the trustees of the diocese of North Carolina. It is further adjudged that an account be taken of the personal estate in the hands of the defendant Kemp P. Battle, as executor of said Mary R. Smith, and belonging to the residue bequeathed to the board of trustees for the diocese of North Carolina; and the parties may agree on a referee for that purpose."

From this judgment the defendants, having excepted, appealed to this court.

The Protestant Episcopal Church in the United States is an organized body of Christian people, and in its ecclesiastical organization it has a constitution, canons, rules, and regulations for its government. It is divided into "dioceses," each designated by an appropriate name, and having greater or less territorial extent. It has existed in this state for a long period of time,—about a hundred years,—and prior to 1883 the whole territory of this state was designated as the "Diocese of North Carolina." Under the statute (Code, § 3665) the church thus organized was capable of taking and holding property of every kind by purchase, gift, grant, or will; and it is provided, as to such cases, that "the estate therein [the property] shall be deemed and held to be absolutely vested, as between the parties thereto, in the trustees, respectively, of the said churches, denominations, societies, and congregations, for their several use, according to the intent expressed in the conveyance, gift, grant, or will; and, in case there shall be no trustees, then in the said churches, denominations, societies, and congregations, respectively, according to such intent."

Thus the devisee of the will and of the particular devise under consideration had certainty and distinctiveness of character and capacity to take and hold the property devised. The testator must be deemed to have known and understood the nature, the constituent elements, the purposes and territorial extent, of the collective object of her bounty. She knew that it was a subdivision of the Protestant Episcopal Church in the United States; that it was composed of all the clergy and laity of that church within the limits of this state. Having such knowledge, she duly made and published her last will and testament in writing in the month of February, 1881, whereby she devised and bequeathed the property in question "to the board of trustees for the Protestant Episcopal Church in the diocese of North Carolina," etc. If this were all of the matter, there could be no question as to the intention of the testatrix; the whole church in the state would share in her bounty without distinction. But afterwards, in 1883, a new diocese, designated as the "Diocese of East Carolina," was created strictly as allowed by the canons and usages of the church, having prescribed boundaries, within the diocese of North Carolina; the latter retaining its name unchanged. The formation of the diocese "was occasioned solely by motives of policy for the well-being of the church, and not by any disputes or differences in matters of faith, doctrine, discipline, form of worship or polity, all of which continued to be the same, without alteration, in both dioceses as they had been before the division." The testatrix, having executed her will in 1881, continued to reside and have her domicile within the diocese of North Carolina until her death, on the 13th of November, 1885. She never resided within the new diocese.

The appellants contend—*First*, that, properly interpreting the devise, it is exclusively to the diocese of North Carolina as it is now constituted; and, *secondly*, that the clergy and laity of the new diocese, having volun-

Digitized by Google

tarily abandoned the old one, must be treated as having abandoned or lost any possible right they may have had under the will in question.

We are of opinion that these contentions are not well founded, and that the judgment must be affirmed. The intention of the testatrix in disposing of the property in question, as expressed in her will, and not otherwise, must prevail. The court have no authority to look beyond the will in ascertaining its true meaning, and consider what she may have said before or after its execution, at one time or another, or to one person or another, as to her intention. This must be ascertained from the will itself, its reference to the property disposed of, and the persons to whom, or organization to which, it is devised and bequeathed. The very purpose of putting it in writing was to declare and express her settled intention as to the property, in a solemn and unequivocal manner, and thereby provide certain and permanent evidence of it, not to be thereafter altered or modified, except by an intentional destruction of the will by herself, or by her direction, or by a codicil thereto, or by a subsequent one properly executed. Nor could the changed condition or circumstances of the devisee and legatee surviving, subsequent to the execution of the will, change or affect the intention of the testatrix as therein expressed, as to the property embraced by it, in the absence of any provision contemplating such change, except as such intention may be in such case affected by some rule of law or statutory provision. This must be so, because the intention, once expressed in the will, could not be effectually changed otherwise than in one of the ways above indicated.

Then, what was the intention of the testatrix as to the property in controversy? Her will was executed in 1881. At that time the diocese of North Carolina embraced the whole territory of this state; that of East Carolina did not then exist, and, so far as appears, it had not been thought of. The devise was "to the board of trustees for the Protestant Episcopal Church in the diocese of North Carolina." Obviously, she had in view, and intended at the time she executed her will, the whole church within this state, and not that part of it in one section or locality more than another. She said so in express terms. She could not have intended or contemplated a subdivision, such as has come about since 1881, because none existed, and the language employed does not imply or suggest any such thing. The devise is not to the "diocese" as such, nor to the "board of trustees," for it as a "diocese," but to the church,—to the trustees for the church within the diocese. And upon the death of the testatrix the statute above recited vested the property in the trustees for the church, and, in the absence of trustees, directly in the church itself. The statute so expressly provides. The mere subdivision of the diocese, the change of its boundaries or its name, could not change or render the devise inoperative. The church would remain sufficiently designated and identified, and the church, and not the diocese, was the religious organization to be benefited. If, in the division of the diocese of North Carolina into two parts, one part had been called the "diocese of West Carolina" and the other "East Carolina," this would not have affected the devise adversely, because the church (the real object contemplated and sufficiently designated) remained to take and be benefited. The diocese was not the church, nor an essential part of the devise. It was only a part of the machinery of the church through which it effectuated its purposes, that might be changed, modified, or dispensed with as to its name and territorial extent, or altogether, by the proper ecclesiastical authority. This could be done without affecting the entity of the church generally, or in a particular locality, or within a fixed boundary. Hence the testatrix in making her will had in view and intended to benefit, not the mere name and form of church organization, but the Protestant Episcopal Church within North Carolina; and neither the church nor the diocese could change or give direction to her intention as expressed in her will by anything they could do. She alone had the right to designate the object of her bounty, and that object as a whole has the right to accept and take benefit of it accordingly as she directed in the devise, although, for its convenience and advantage, it has changed its name, bounds, and relations, not affecting materially its nature and substance, since the execution of the will. There is nothing in the will, or in the particular devise under consideration, that indicates the slightest purpose on the part of the testatrix to modify, limit, or restrict at all the devise in the contingency that the diocese should be divided, or in any other contingency; it is unrestricted and absolute as to the devisee to be benefited.

It was said on the argument that the diocese of North Carolina continued to exist at the time of the death of the testatrix, and therefore the devise should be construed as applying to it as it existed at that time. This argument is specious, but certainly not sound. It is true that diocese existed at that time in name, but it was not the same in territorial extent, nor did it then embrace a very large and substantial part of the certain and well-defined object embraced by the intention and purpose of the testatrix as expressed in her will. At the time of her death, a large part of the church, which she clearly intended to benefit, had been detached from that diocese, and nothing appears in terms or by reasonable implication in the will to show that she intended to modify her expressed purpose so as to exclude the detached part of the church. This church within North Carolina, within the diocese embracing the whole state, as she contemplated it at the time she made her will and therein expressed her in-

Digitized by Google

tention, continued in all material respects to exist at the time of her death just as it did at the time she made her will. It had only been changed into two dioceses. The church as defined and specified in the will remained the same, capable of taking benefit under the devise as contemplated and intended by the testatrix.

As is said above, the mere division of the diocese could not modify or defeat her intention. This was settled and expressed, not to be modified, except in the way already specified, at the time she executed her will. Richmond v. Van Hook, 3 Ired. Eq. 581; Tayloe v. Bond, Busb. Eq. 18; Garratt v. Niblock, 1 Russ. & M. 629; Parker v. Marchant, 1 Young & C. Ch. 299; Boreham v. Bignall, 8 Hare, 131; 1 Redf. Wills, p. 384, par. 9. Nor can that part of the church embraced by the new diocese of North Carolina be deemed and treated as having lost, abandoned, or forfeited its right to have benefit of the devise. The division of the diocese of North Carolina was made by common consent of the clergy and laity of the church within it, for the common good of the church and its purposes, strictly as allowed by and in accordance with its canons and usages. It was not prompted by any spirit of rivalry or insubordination, or dissent from the doctrines of faith, the polity, usages, or practices of the church. There was neither secession nor schism. It continued, and continues now to be, in its substance, integrity, spirit, and life, just as before the division and the creation of the new diocese, and just as when the testatrix made her will. The church within the diocese of East Carolina is as certainly now within her intention and purpose, as expressed, as it was then. It has done nothing to put itself without such intention, or to forfeit its right to share in the devise. It has done nothing, in the eye of the church or the law, that was or is culpable, or that justly subjects it to censure in any respect. On the other hand, the creation of the new diocese was praiseworthy, and to be commended, because it was intended by and through it as a legitimate instrumentality to accomplish increased and greater good. As the church within it comes, as we have seen, within the purpose of the testatrix, we cannot discover the slightest reason why it should not share in her generous bounty to the church of her choice. Why shall it not do so? What has it done that in the eye of the law of the church or the law of the land prevents it from doing so? We cannot conceive of a just reason why it may not. It might and no doubt would be otherwise if the clergy and laity of the new diocese had abandoned the faith, doctrines, usages, and practices of the church,—had seceded from it, and set up an independent church organization; but it is not suggested that anything inimical to the church or at all improper has been done by that part of it within the new diocese. The views we have expressed, it seems to us, are founded on principles of justice, and are fully sustained by the numerous authorities cited by the learned counsel of the appellees in the course of his able argument, some of which we cite: Smith v. Swormstedt, 16 How. 288; Ferraria v. Vasconcellos, 31 Ill. 53; Niccolls v. Rugg, 47 Ill. 47; Wiswell v. Church, 14 Ohio St. 44; Gartin v. Penick, 5 Bush, 110; Hale v. Everett, 53 N. H. 80; Friends v. Friends, 89 Ind. 186.

It seems to us that the authorities in respect to the division of counties, towns, and the like, cited on the argument by the learned counsel for the appellants, have no proper application in this case. In those and like cases, simply rules of law applicable determine the rights and liabilities of the county or town, and the detached parts thereof. In this case the intention of the testatrix expressed in her will, not inconsistent with established rules of law, settles, directs, and controls the right of the diocese of North Carolina, and the detached part thereof forming the new diocese, as to the property embraced by the devise in question. If the devise were to a county, and, pending the lifetime of the testator, a part of the county were detached and made a new county or part of another, the detached part would certainly share in the property devised, if it should appear that the testator so intended; and this is so, because his intention must prevail, if it be lawful and practicable. It has been suggested that the testatrix really intended that the present diocese of North Carolina alone should have benefit of the devise. This, if so, can avail nothing. As we have already said, we can only know her intention as expressed in her will. If she so intended, she ought to have modified the devise by a codicil or in some other effectual way. But with her change of purpose, if she had one, we have nothing to do. We cannot doubt that we have properly interpreted her intention as expressed in her will. In view of the interpretation we have given of the devise in question, there is no objection to the judgment appealed from, and so it must be affirmed. By consent of the parties, the cost of this controversy must be paid by the defendant executor out of any fund arising from the sale, rents, or hires of the property, or any part of it. To the end that further proceedings may be had in the controversy let this opinion be certified to the superior court. It is so ordered.

Digitized by Google

(103 N. C. 266)

STEPHENS v. KOONCE.

(*Supreme Court of North Carolina.* March 19, 1889.)

COSTS—TROVER AND CONVERSION—JUDGMENT—INTEREST.

1. Code N. C. § 573, provides that defendant, before trial or verdict, may offer in writing to allow judgment for the sum or property or to the effect therein specified, and, if plaintiff fails to obtain a more favorable judgment, he must pay subsequent costs. In an action for conversion it was alleged that the property was wrongfully taken from a plantation, and the answer stated that if any trespass was committed on the plantation in removing the property defendant disclaimed title to the property, and offered judgment for its possession and for $1.80. The jury assessed the value of the property converted at $300. *Held*, that plaintiff was entitled to costs after such offer.

2. Code N. C. § 530, provides that the amount of a judgment shall bear interest till paid, and the judgment shall be rendered accordingly. In an action for conversion the verdict was for a given sum "without interest." *Held*, that the judgment properly provided for interest on its amount from its date.

3. In an action for damages for conversion an alternative judgment for the property, and, if delivery cannot be had, for its value, with damages for the detention, should not be entered.

Appeal from superior court, Onslow county; PHILIPS, Judge.

Action by Stephens against Koonce. Defendant appeals. Code N. C. § 573, provides that "defendant, at any time before trial or verdict, may serve upon the plaintiff an offer in writing to allow judgment to be taken against him for the sum or property, or to the effect therein specified, with costs. * * * If the notice of acceptance be not given, the offer is to be deemed withdrawn, * * * and if the plaintiff fail to obtain a more favorable judgment he cannot recover costs, but must pay the defendant's costs from the time of the offer."

S. W. Isler, for appellant. *C. M. Busbee*, for appellee.

AVERY, J. This was a civil action tried before PHILIPS, J., and a jury, at the fall term, 1887, of the superior court of Onslow county. The action was brought to recover damages for the unlawful conversion by the defendant of "a steam-engine, boiler, and fixtures, also a cotton-gin, condenser, cotton-press, with fixtures" etc., alleged to be the property of the plaintiff. The declaration in the complaint is in the nature of trover and conversion, and the demand is for money as damages. The defendant in his answer sets up a number of defenses. He states in his first defense, in detail, the manner in which he acquired title, as he avers, to the property, which he admits he has converted to his own use. But it is not material for the elucidation of the questions involved in this appeal to give even a summary of the answer. The defendant insists that he made a tender, which is embodied in his answer, and that, as the plaintiff failed or refused to accept the offer of compromise so made, the latter cannot, under the provisions of section 573 of the Code, recover costs after the date when the offer was so made. The portion of the answer relied on as a sufficient tender, being the second defense, is as follows, to-wit: "That if any trespass was committed by this defendant upon the real estate claimed by the plaintiff, and described in the first article of the complaint as the 'Miller Plantation,' situate in Richlands township, in Onslow county, in removing said steam-engine and boiler and saw-mill, two belts, and grist-mill from said Miller plantation, the defendant for himself disclaims to set up any title to said lands in himself, and said trespass was involuntary on the part of the defendant, and the defendant hereby disclaims any title to said steam-engine and boiler, one saw, two leather belts, and one grist-mill, and hereby offers a judgment in favor of the plaintiff for the possession of said steam-engine and boiler, one saw, two leather belts, and one grist-mill, and for other machinery described in the complaint, (except one rubber belt and one chest of mechanic's tools,) or for the sum of one and 80-100 dollars, or about that amount, being the amount of defendant's bid for said articles and for the costs of this action." The issues and responses to them were as follows: "(1) Is the plaintiff the owner of the property described in the complaint or any part thereof? *Answer*. Yes. (2) Did the defendant unlawfully convert the same or any part thereof? *A*. Yes. (3) If so, what is the value of the property converted? *A*. Three hundred dollars, without interest."

It was alleged in the complaint that the property was wrongfully taken from the Miller plantation. The offer made by the defendant in the answer is not sufficient to subject the plaintiff to liability for costs for refusal to accept it. The plaintiff, in the exercise of unquestionable right, elected to bring his action for damages for the conversion of certain property, instead of an action in the nature of detinue, or in the nature of replevin, with the right to the ancillary remedy of claim and delivery. It is presumed that the plaintiff adopted the action for the recovery of damages only with a view to some advantage expected from pursuing his remedy to judgment on a demand of that kind. The defendant would have no right under the provisions of section 573 of the Code to force the plaintiff to accept the property, when it might have been injured or rendered worthless after conversion, or pay the costs on refusal to do so, even if the action had been brought to recover the specific property tendered, unless the offer had also included, with the proposed delivery of articles tendered in kind, a proposal also to pay an amount as damages for detention not less than that ultimately assessed by the jury. Wood's Mayne Dam. §§ 520, 521. But the defendant proposes to disclaim title, and surrender the engine and other machinery alleged to have been converted by him, or pay $1.80. We can treat the offer, therefore, in this case only as a tender of that amount of money, and, as the jury assessed plaintiff's damages

Digitized by Google

at $300, he did recover "a more favorable judgment" than a recovery of $1.80.

The defendant objected to so much of the judgment as allowed the plaintiff interest from the date of judgment. The jury had the right in this case to determine whether they would allow interest before the rendition of verdict on the amount assessed as plaintiff's damages, and in the exercise of that power gave the plaintiff "three hundred dollars, without interest." Patapsco v. Magee, 86 N. C. 350. After verdict, the statute (Code, § 530) provides that the "amount of any judgment or decree except the costs rendered or adjudged in any kind of action, though not on contract, shall bear interest till paid, and the judgment and decree of the court shall be rendered according to this section." McRae v. Malloy, 87 N. C. 196.

This is not an action for the specific property in the nature of detinue or replevin, but for the money or damages, and therefore there is no force in the objection that his honor should have rendered an alternative judgment for the property, and, if delivery could not be had, for the value, with damages for detention. The judgment is affirmed. No error.

(103 N. C. 179)

KOONCE *v.* RUSSELL *et al.*

(*Supreme Court of North Carolina.* March 19, 1889.)

COMPROMISE—OBLIGATION OF CONTRACTS.

Code N. C. § 574, providing that, where there is an agreement to accept an amount less than that claimed in satisfaction thereof, payment according to the agreement of the less amount shall operate as a full discharge of the whole, does not impair the obligation of any contract.

Appeal from superior court, Onslow county; SHEPHERD, Judge.

Motion by Koonce for payment of a claim due by David L. Russell, deceased. From an order denying the motion Koonce appeals. Code N. C. § 574, provides that, "where an agreement shall have been or shall be made and accepted for a less amount than that demanded or claimed to be due in satisfaction thereof, the payment of such less amount according to any such agreement in compromise of the whole shall be a full and complete discharge of the same."

S. W. Isler, for appellant.

AVERY, J. This was a motion in an original cause, being a special proceeding instituted by the creditors of David L. Russell, deceased, against the defendants Bellamy and Russell, his executors, formerly acting, and the defendant Olivia, now administratrix *cum testamento annexo* of said David L. Russell. The motion was heard before SHEPHERD, J., at the fall term, 1888, of the superior court of Onslow county. The plaintiff's intestate, Ann Koonce, died in the year 1877, but before her death she had recovered two judgments against the said executors of David L. Russell,—the first for the sum of $811.82, at the fall term, 1871, of Onslow superior court; and the second for the sum of $852.74, at the spring term, 1873, of said court. As one of the creditors of David L. Russell, deceased, the said Ann Koonce made herself a party to a special proceeding instituted by his creditors in the year 1879, and proved and filed said judgments rendered against the executors, and the special proceeding is still pending. In October, 1885, David L. Russell, the defendant, acting as the agent of the executor or administratrix of David L. Russell, deceased, offered the sum of $1,000 by way of compromise of the two judgments, then amounting in the aggregate to $1,492.29, and the said agent further offered to pay the costs that had accrued in said special proceeding, and also in the two actions wherein plaintiff's intestate had recovered said judgments against the executors of Russell. The plaintiff accepted the offer, and gave the personal representative of Russell, deceased, a receipt in full for the whole amount of the judgments. The costs in said suits and in the special proceeding have not been paid. The plaintiff's counsel presented and relied upon the single point, for which he had contended in the court below, that plaintiff was entitled to recover the sum of $492.20, being the difference between the aggregate amount due on the two judgments and the amount actually paid the administratrix, Olivia Russell, through her agent, in compromise for the whole. If the compromise had been made prior to the passage of the act of 1874–75, (Laws 1874–75, c. 178, § 1; Code, § 574,) the payment of $1,000 would not have discharged the debt, but would have been valid only *pro tanto*, leaving to the plaintiff the right to collect the difference between the sum paid and that actually due, as he seeks to do in this action, because the agreement to recover a part for the whole was held to be a *nudum pactum* as to all in excess of the sum actually paid. Currie v. Kennedy, 78 N. C. 91; Hayes v. Davidson, 70 N. C. 573; Mitchell v. Sawyer, 71 N. C. 70; Love v. Johnston, 72 N. C. 415. The contract to accept $1,000 as a payment in full of both judgments was made, however, in October, 1885, and when the statute (section 574) was and had been for many years the law of the land. But the plaintiff's counsel contends that the last-named act could not be construed to apply to a debt upon which the plaintiff's intestate recovered judgment before it was enacted, because it would be a violation of section 10, art. 1, Const. U. S., to give to the law a retroactive effect, and he relies upon the case of Edwards v. Kearzey, 96 U. S. 595, to sustain the position. The parties contracted with reference to the law in force when the contract was made, and, if such a receipt had been deemed a *nudum pactum* under the law then existing as to any part of the debt, a subsequent act could not have supplied the want of consideration. But the compromise must be considered just as though the statute (Code, § 574) had been incorporated into the

Digitized by Google

receipt given by the plaintiff. "The obligation of a contract consists in its binding force on the party who makes it. This depends upon the law in existence when it is made. These are necessarily referred to in all contracts, and form a part of them as the measure of the obligation to perform them by the one party, and the right acquired by the other." Cooley, Const. Lim. *285. A law providing that creditors may, in the exercise of their own judgments, voluntarily accept a part of a debt already in existence in discharge of the whole, cannot be held to impair the obligation of the contract. Grant v. Hughes, 96 N. C. 190, 2 S. E. Rep. 339; Fickey v. Merrimon, 79 N. C. 585. No error. Judgment affirmed.

(103 N. C. 207)

COMRON v. STANDLAND.

(*Supreme Court of North Carolina.* March 25, 1889.)

APPEAL—CHATTEL MORTGAGE.

1. Code N. C. §§ 883, 884, provide that on appeal from a justice's court the appellant may give an undertaking for the appeal before the justice, with one or more sufficient sureties, to the effect that if judgment be rendered against the appellant the sureties will pay the amount, with costs. Section 117, being part of the chapter relating to clerks of the superior court, provides that any person desiring to commence or defend any civil action or special proceeding may execute a mortgage on real estate of the value of the bond or undertaking required, and with similar conditions, in lieu thereof. *Held*, that this section has no application to justices' courts, but there is nothing to prevent a respondent from accepting a chattel mortgage in lieu of the undertaking, if he pleases.

2. An instrument containing the names of the parties to a suit in the caption, and reciting that whereas plaintiff has recovered judgment against defendant before a justice named, and defendant intends to appeal, and desires to stay proceedings on the judgment, now, therefore, to secure damages and costs that may be awarded against him, and so much of the judgment as may be affirmed, defendant "do give the following articles of personal property: Two mules, flesh marks pale yellow; worth $250; and said mule is free and clear of all incumbrances whatsoever, and that the said [defendant] has the right to convey the same,"—signed by defendant, and witnessed by the justice,—is a good chattel mortgage to stay execution, sufficiently showing the grantee and consideration.

Appeal from superior court, Brunswick county; CONNOR, Judge.

Action by R. R. Comron against D. B. Standland, to foreclose a certain written instrument and sell personal property. Judgment for plaintiff. Defendant appeals.

Thomas W. Strange, for appellant. *J. D. Bellamy*, for respondent.

MERRIMON, J. The plaintiff obtained a judgment in the court of a justice of the peace against the defendant for $110.84, and the defendant appealed therefrom to the superior court, but failed to give an undertaking on appeal to stay execution pending the appeal, as allowed by the statute. Code, §§ 883, 884. He, however, in lieu thereof, and for the purpose of such stay, executed, and the plaintiff accepted, a paper writing which was duly proven and registered, whereof the following is a copy: "STATE OF NORTH CAROLINA, BRUNSWICK COUNTY—*R. R. Comron* vs. *D. B. Standland*—Undertaking on Appeal from Justice's Judgment. Whereas, on the 23d day of February, 1885, the plaintiff recovered judgment against the defendant before S. J. Stanly, justice of the peace, for one hundred and ten 84-100 dollars; and whereas, the said defendant intends to appeal therefrom to the superior court of said county, and desires to stay all proceedings thereon: Now, therefore, for the purpose of securing the payment of all damages and costs which may be awarded against him, and so much of the judgment or any part thereof that may be affirmed, the said D. B. Standland to give the following articles of personal property: Two mules, flesh marks pale yellow; worth two hundred and fifty dollars; and said mule is free and clear of all incumbrances whatsoever, and that the said D. B. Standland has the right to convey the same. This 23d day of February, 1885. [Signed] D. B. STANDLAND. Witness: [Signed] S. J. STANLY." The purpose of this action is to enforce this paper writing as a chattel mortgage.

The defendant contends that it was not such mortgage, nor was it so intended; that it was intended to be an undertaking on appeal, but is not; that it is void, "because it did not conform to the statute, and because it is without consideration, and had no obligee named therein." The court submitted the following, among other issues, to the jury, and they responded to the same as follows: "(3) Did the defendant intend the paper writing as a mortgage, or did he intend it as an undertaking to secure the plaintiff's debt on appeal? *Answer.* Mortgage." There was a verdict and judgment for the plaintiff. The defendant assigned error as follows, and appealed to this court: "*Second.* The court erred in submitting issue No. 3 to the jury, because it was a paper writing whose terms were certain, and its construction was a matter for the court. *Third.* The court erred in refusing to give the following instruction: 'That, inasmuch as a justice of the peace had the right to accept an undertaking on appeal, but no right to accept a chattel mortgage in lieu of such an undertaking, they must presume that this instrument was given in accordance with law as an undertaking on appeal, and not as a mortgage.' *Fourth.* The court erred in sustaining the validity of this instrument: (1) Because, being void as an undertaking, it could operate as nothing else; (2) because it appeared upon its face that it was without consideration; (3) because there was no obligee specified or mentioned in the instrument itself."

The statute (Code, §§ 117, 120) has no application in courts of justices of the peace, as seems to have been supposed by the parties to this action. It prescribes the duties of clerks of the superior courts, and allows mortgages of real estate to be given by par-

Digitized by Google

ties to actions in the cases, and as and for the particular purposes, specified. The statute (Id. §§ 883, 884) applies particularly to appeals from judgments in courts of justices of the peace, and it is by it provided that the appellant shall in such cases be allowed to give an undertaking by one or more sureties, to be approved, "to the effect that if judgment be rendered against the appellant the sureties will pay the amount, together with all costs awarded against the appellant, and when judgment shall be rendered against the appellant, the appellate court shall give judgment against the said sureties." There is no statutory provision that allows a mortgage of real or personal property to be given in lieu of and for the purpose of an undertaking on appeal from such judgment. The defendant failed to give the undertaking on appeal from the judgment of the justice of the peace, but he gave the paper writing in question, a copy of which is set forth above. The justice of the peace could not require the plaintiff to accept it or a like instrument, nor did the defendant have any right to require him to accept it in the absence of statutory provision so prescribing; but there was no legal reason why the plaintiff, if he saw fit, for any consideration, might not accept it, and allow the stay of execution as a consideration for it. He had the right, in the absence of the usual undertaking on appeal, to issue execution, (Id. § 875,) and he might not stay it pending the appeal, and thus the defendant might have suffered harm or disadvantage. There was no legal obstacle in the way to prevent the arrangement made voluntarily by and between the parties for their common convenience.

The paper writing called "an undertaking on appeal" is very informal, but it is not wholly insensible; its nature and purpose are obvious. The defendant intended by it to mortgage the two mules described therein to the plaintiff for the purposes therein specified, in order to obtain the stay of execution, and the plaintiff accepted the mortgage, as he might do. The stay of execution was a valuable and sufficient consideration to support the contract of mortgage. The names of the parties to it were mentioned in the caption at the top of it, and plainly the stipulations and agreements embodied in the writing had reference to and were between them, and sufficiently pointed, and expressed their mutual agreement. They were respectively designated, certainly, as plaintiff and defendant. The expressed purpose was to obtain the stay of the execution referred to for the benefit of the defendant, and, to secure the payment of so much of the judgment mentioned therein as might be affirmed in the appellate court, the defendant "doth give the following articles of personal property, to-wit, two mules, flesh mark pale yellow;" that is, the mules were given—sold—to the plaintiff to secure the payment of the judgment he expected to obtain. This was the obvious implication from the words employed, and the nature of the transaction. The condition implied was that the mules should be sold, and the proceeds of sale applied to the judgment, if, when obtained, the defendant should fail to pay it; and if the judgment, or some part of it, should not be affirmed in the appellate court, then the mules were to revest in, and be the property of, the defendant. Holly v. Perry, 94 N. C. 30. No particular form is essential to the validity of a chattel mortgage, nor will mere informality defeat its purpose. It is not necessary that it shall be under seal, because the title to personal property will pass without deed. It is sufficient if the words employed express in terms or by just implication the purpose of the parties to transfer the property to the mortgagee, to be revested in the mortgagor upon the performance of the condition agreed upon, however informally expressed; and the mortgage may or may not have a power of sale annexed thereto. Rawlings v. Hunt, 90 N. C. 270; McCoy v. Lassiter, 95 N. C. 88; Frick v. Hilliard, Id. 117. The law determines the legal nature and effect of the instrument in question, and hence the court should have decided upon it without submitting to the jury the question whether or not it was intended to be a mortgage. But any objection on this account was obviated by the finding of the jury, which was in harmony with the law applicable. The submission of the issue did no harm, in view of the finding upon it.

A remaining assignment of error is so imperfect that we cannot pass upon its merits. A paper writing essential to it does not appear in the record. Hence we pass it without further notice. Judgment affirmed.

Digitized by Google

(103 N. C. 66)

WHITEHEAD *v.* SPIVY *et al.*

(*Supreme Court of North Carolina.* March 25, 1889.)

APPEAL—MOTION TO REMAND—HOMESTEAD.

1. In ejectment, the court held that a sheriff's deed under which plaintiff claimed was void because the homestead of the principal defendant had not been laid off to him in sufficient quantity as to value. Plaintiff appealed, and pending the appeal suggested to this court that since the appeal was taken the homestead has been revalued and relaid off to defendant; that the land in controversy has been resold at sheriff's sale, and plaintiff has repurchased it; and asked to be allowed to file the return of the homestead proceedings and have the benefit thereof on this appeal, or that the case be remanded, and he allowed the benefit thereof in the court below. *Held*, that neither request would be granted. Plaintiff must stand on his original case, and cannot in this manner introduce a new cause of action.

2. The report of appraisers allotting a homestead to a judgment debtor, who takes no exception thereto, and no appeal therefrom, estops him to claim any additional allotment in the tract levied on and sold, notwithstanding the value of the appraisers' allotment is less than the statutory allowance.

Appeal from superior court, Moore county; PHILIPS, Judge.

Ejectment by W. A. Whitehead against M. M. and Mack N. Spivy. Judgment for defendants, and plaintiff appeals.

McIver & Black, *W. E. Murchison*, and *Hinsdale & Adams*, for appellant. *R. P. Buxton*, for appellees.

ON MOTION OF APPELLANT TO REMAND.

MERRIMON, J. In this case the court below held that the sheriff's deed under which the plaintiff claims title to the land in controversy was void, and passed no title thereto, because the homestead of the principal defendant in the land had not been valued and laid off to him in sufficient quantity as to value. The appellant now suggests upon affidavit that since the appeal was taken the homestead has been revalued and relaid off to the defendant; that the land has been resold, and the plaintiff has repurchased it, taking the sheriff's deed therefor; and he asks to be allowed to file the return of the homestead proceedings, and have benefit thereof in and of his appeal, or, if that cannot be allowed, that the case be remanded, to the end he can have benefit of the same in the court below. The motion must be denied. The appellant seeks to help his cause of action and his case in this court by introducing here summarily substantially a new cause of action,—one that has arisen since this action began, and since this appeal was taken. The defendants have had no opportunity to contest its application or bearing in this action. Indeed, the effect of allowing the motion, as to this court, might probably be to recast the action in material respects, and allow the plaintiff to assign new grounds of error as to rulings never made in the court below. This could not be thought of for a moment. Nor will the court remand the case for the purpose mentioned. In the court below it would appear that the case had been tried upon its merits as presented by the pleadings, and the plaintiff could not avail himself of the new cause of action, and one, too, arising since the action began, and since the trial therein. The court would not allow a new and distinct cause of action to be introduced into the action, and especially one that has arisen since the action began. This would be subversive of settled methods of procedure, and tend to confusion. This application is very different from the case of Holley v. Holley, 96 N. C. 229, 1 S. E. Rep. 553. In that case it appeared that the very matter in question by the appeal had been settled and disposed of in another action, and the pendency of the latter action was pleaded. The purpose of remanding the case was to allow the adjudication of the very matter in controversy to be made to appear, and thus present the readjudication of the same matter. Motion denied.

ON THE MERITS.

AVERY, J. This was an action of ejectment, tried before PHILIPS, J., and a jury, at April term, 1888, of the superior court of Moore county. The plaintiff introduced evidence tending to show that one J. B. Cole was the owner of the *locus in quo* in 1874. He then introduced a deed from said Cole to M. M. Spivy, dated September 16, 1874, conveying the *locus in quo* to him in fee. He then introduced evidence of a judgment in favor of W. A. Whitehead and T. H. McKay, partners trading as W. A. Whitehead & Co., against said M. M. Spivy, for $600, rendered in this court on August 12, 1878, and docketed August 19, 1878, upon two notes for $300 each, dated January 13, 1876, and due on the 1st day of April, 1876, and also of a judgment in favor of same plaintiffs and against same defendants and one D. M. Lemons, for $105 damages, rendered in this court on August 4, 1879, and docketed on August 20, 1879. That on each of said judgments an execution returnable to the spring term, 1880, was issued to the sheriff of Moore county, and that under them he caused the homestead and personal property exemptions of M. M. Spivy to be allotted on 16th day of December, 1879, the homestead being appraised at $766. A copy of the homestead return is made a part hereof, together with the execution and return of the sheriff thereon. There was no evidence that said M. M. Spivy excepted to or appealed from the said allotment by the appraisers, or that he took any steps to have the allotment corrected or the deficiency made up. The plaintiff further showed that executions issued upon said judgment, they being alive, and not dormant, returnable to fall term, 1882, and that under those executions the sheriff sold the *locus in quo* without further allotment of homestead, and that said W. A. Whitehead became the purchaser, and the sheriff executed a deed to him, a copy of which is made a part of the complaint herein. This testimony was admitted by the court, after objection by defendants, for that it had already ap

Digitized by Google

peared in evidence of the plaintiff that only a partial homestead of $766 had been allotted under the former executions in the same cases, the court reserving the question as to whether it should not be ruled out at a later stage of the trial. The defendant then offered in evidence a deed from M. M. Spivy to Mack N. Spivy, for the same land, dated June 10, 1877, and registered in register's office of Moore county. The plaintiff attacked said deed for fraud, and offered evidence tending to show that the said deed was made between near relatives, at night, in secret; that it was not registered for three and one-half years; that there was no change of possession; that M. M. Spivy was insolvent; that the price was inadequate, and that in fact but a small portion of the price had been paid, and that the deed was dated and signed on Sunday; that said Mack N. Spivy had but little money with which to have purchased said land; and that there was no delivery of the deed by M. M. Spivy to Mack N. Spivy. The defendant offered evidence tending to show that the land brought a fair price, and the money was paid, and that the date of the deed was a mistake, and that it was executed on Monday, June 11, 1877, instead of Sunday, and that the defendant had always resided in Moore county. The court instructed the jury as follows: The sheriff's sale and deed under which the plaintiff claims are inoperative and void as against the defendants, because upon the proofs introduced by plaintiff it appears that no full homestead has ever been allotted to defendant in execution, but only a partial homestead valued by the appraisers at $766, both executions having been issued by the plaintiff in the same case, and the plaintiff being the purchaser under both; and directed the jury to find the first issue in favor of the defendants; to all of which the plaintiff excepted. Verdict for defendant. Motion for new trial on account of error in judge's charge, and error in his directing the jury to find in favor of the defendants. Motion denied. Judgment for defendants, from which plaintiff appealed.

We think that his honor erred when he told the jury that the sheriff's deed for the land in controversy was inoperative, and did not vest the title in the plaintiff, because the two other tracts allotted to the defendant as a homestead were valued by the appraisers in the aggregate at only $766. In the case of Spoon v. Reid, 78 N. C. 244, the facts were that the plaintiff owned a tract of land on which he lived, and two other tracts. He allowed his homestead to be allotted in the two tracts, and conveyed his home place to his daughter, to defraud creditors. The transcript in that case shows also (what does not appear in the reported case) that the two tracts allotted were valued in the aggregate at only $500. In delivering the opinion of the court, Justice READE says: "Without affecting the conclusion at which we have arrived, it may be conceded that he had never conveyed his home place in fraud, nor at all, but that he owned it, and lived upon it at the time of the levy and sale, and yet he could not recover, for when the allotment was made to him in the other two tracts by the sheriff's appraisers, and he took no exception thereto, and no appeal therefrom, and disclaimed title to the home place, and claimed no homestead therein, he assented to, and was bound by, the allotment, and the same is an estoppel of record against him." The principle is sustained, too, by Burton v. Spiers, 87 N. C. 87. It would be unreasonable, and productive of endless cheating, to concede to the debtor the power, after a fraudulent alienation of the most valuable portion of his land, and the selection of the two small tracts, worth less than $1,000, to be allotted by the appraisers, to change his plans when the fraud is exposed, and get, as against his creditors, all the advantage he would have had if he had, in the exercise of his right, selected his homestead in the tract he attempted to convey. The statement of the proposition shows that the law, if so construed, would encourage such efforts to defeat creditors, because the debtor would take the chance of success without incurring the least risk of paying any penalty in case of exposure. But the report of the appraisers, being admitted to be in regular form, operates to estop the defendant from claiming any additional allotment in this tract, whether the deed to his son was valid or void. If it was not a fraudulent conveyance, of course the plaintiff could not recover. As the defendant cannot by reason of the estoppel claim that any portion of the land in controversy shall be added to his homestead, we find it unnecessary to follow counsel in mere speculations as to whether land acquired after an allotment, like this, could be added to make up the full value of $1,000, and, if so, whether it would be done only on the petition of, or at the request of, the owner. We must meet the numerous questions presenting new phases of homestead litigation, and decide them, when they are properly raised. The judge ought to have allowed the jury to determine whether the deed executed by the defendant to his son was fraudulent and void, and should have instructed them, if they found it was executed to hinder, delay, and defeat creditors, to find the first issue for the plaintiff. There was error for which a new trial will be awarded.

Digitized by Google

(85 Va. 939)

NEW YORK, P. & N. R. CO. v. COOPER'S ADM'R *et al.*

(*Supreme Court of Appeals of Virginia.* April, 1889.)

NEGLIGENCE—CARRIERS—COLLISION.

1. Where a passenger is injured by the concurrent negligence of the carrier and a third person, the negligence of the carrier is not imputable to the passenger, so as to bar the right of the latter to recover of the third person.[1]

2. Hence, in an action by the passenger against the carrier and third person, it is not error, as against the latter, to charge that if the injuries were caused by the negligence of both defendants the jury should find against both, but if the injuries were caused by the negligence of one, they should find against him, and to refuse to charge that extraordinary diligence was required of the carrier, while ordinary care only was required of the third person. LEWIS, P., dissenting.

3. During a strong gale, and in a flood tide, and on a dark night, a tug having in tow a barge laden with freight-cars left its wharf when the lights of the respective slips of a ferry-boat, not far away, whose course crossed its own, and was known to the tug, disclosed the departure and destination of the ferry-boat. The lights of the tug, except the stern light and a lantern on the cars, where wholly obscured to the ferry-boat, while the lights of the latter were burning and a bright light was thrown from its windows, and its port light was shown to the tug. The ferry-boat and barge collided. *Held*, that those navigating the tug were guilty of negligence in attempting to cross the bows of the ferry-boat, whose speed was increased by both wind and tide, or in relying on the signal whistle, which the gale might prevent those on the ferry-boat from hearing.

Error to circuit court, Norfolk county.

Action by Cooper's administrator against the New York, Philadelphia & Norfolk Railroad Company and others. The railroad company brings error.

LACY, J. This is a writ of error to a judgment of the circuit court of Norfolk county, rendered on the 22d day of December, 1887. The case, so far as it is necessary to be stated, is as follows: The Portsmouth, a steam-tug, belonging to, and in the employment of, the plaintiff in error, with a railroad barge in tow, started from the Norfolk Southern Railroad wharf in Berkley, a suburb of Norfolk, about the hour of 8:45 P. M., to go to the wharf of the plaintiff in error at the foot of Water street, in Norfolk city. Just above Norfolk city the Elizabeth river is divided into two branches, and the village of Berkley is situated on the point between the two branches; while the cities of Norfolk and Portsmouth, lying on each side of Elizabeth river, stretch upwards along the said river opposite to Berkley, and the said river constitutes what is called the inner harbor of Norfolk. The village of Berkley, at the head of the Norfolk harbor, lies between the upper end of the cities of Norfolk and Portsmouth, separated from Norfolk by the eastern branch of Elizabeth river, and from Portsmouth by the southern branch, and it lies nearer to Portsmouth than to Norfolk. A ferry-boat called the "Manhasset," which is a small passenger steam-boat, plies regularly at short fixed intervals across the Elizabeth river between the ferry-slip in Norfolk and the ferry-slip in Portsmouth. These slips not being opposite, the course of the ferry-boat is diagonally across the Elizabeth river. The two courses of the said boats, as indicated, crossed; and in respectively moving along the said courses on the night in question, which was dark and stormy, a gale blowing from the north against the bow of the tug and her tow, which was loaded heavily with three rows of freight cars, on the port side of the ferry-boat, a collision occurred, by which the tow of the tug broke up the ferry-boat, carrying away the whole of the ladies' cabin and the wheel-house on the port side, and killing the wife of the defendant in error. When the tug left her wharf in Berkley, she was 233 yards from the Portsmouth ferry-slip diagonally across the southern branch, and in full view of it, as shown by its lights. The distance from Norfolk to Portsmouth is less than two-thirds of a mile, and it takes the ferry-boat between five and six minutes to make the whole distance, and when the collision occurred the ferry-boat was about three-fourths of the way across from Norfolk to Portsmouth. The action was brought by the defendant in error against both the plaintiff in error and the owners of the ferry-boat, and judgment recovered against each in the sum of $4,750. The plaintiff in error applied for and obtained a writ of error from this court.

The first error assigned here is the action of the circuit court in giving the instruction asked for by the plaintiff, as set forth in bill of exceptions "A," in effect, that if the jury should believe from the evidence that the navigators of both the ferry-boat and the tug and barge were guilty of carelessness and negligence in so doing, and that the death of Mrs. Fanny L. Cooper, the wife of the defendant in error, was caused by the negligence of both those navigating the ferry-boat and tug and barge, both contributing thereto, then the jury should find against all the said defendants; but if they should believe the injury was caused by the negligence of those only who navigated either the ferry-boat on the one hand, or the tug and barge on the other, then the verdict should be against the party so causing the injury. The objection to this instruction is that each boat is held to the same degree of diligence, whereas the defendant owner of the tug and tow claims that as the deceased, the said wife of the defendant in error here, was a passenger on the ferry-boat, that a contract relation existed on the part of the ferry-boat and the passenger, and called for extraordinary vigilance, aided by the highest skill, and rendered the ferry-boat liable for the slightest negligence, whereas the tug and tow had no contract relation with the deceased, and were liable to exercise only ordinary care and diligence, which is embodied

[1] On the general subject of negligence of a carrier or driver imputed to a passenger, see Railroad Co. v. Kutac, (Tex.) 11 S. W. Rep. 127, and note; Markham v. Navigation Co., Id. 131; Shaw v. Craft, 37 Fed. Rep. 317, and note; Nisbet v. Town of Garner, (Iowa,) 39 N. W. Rep. 516, and note.

Digitized by Google

in an instruction set forth in bill of exception "I," which was refused by the court. This contention of the plaintiff in error is based upon the idea that the negligence of the carrier is imputable to the passenger who has confided himself to its care; it being decided in the English case of Thorogood v. Bryan, 8 C. B. 115, where a passenger, in alighting from an omnibus, was thrown down and injured by the negligent management of another omnibus, that an action could not be maintained against the owner of the latter if the driver of the omnibus in which the passenger was riding, by the exercise of proper care and skill, might have avoided the accident which caused the injury; which was approved in the case of Armstrong v. Railway Co., L. R. 10 Exch. 47, decided in 1875, (12 Moak, Eng. R. 508;) Houfe v. Fulton, 29 Wis. 296; Prideaux v. Mineral Point, 43 Wis. 513; Lockhart v. Lichtenthaler, 46 Pa. St. 151; Payne v. Railroad Co., 39 Iowa, 523; Carlisle v. Sheldon, 38 Vt. 440,—and in some other cases.

CLARK, J., said in the case of Noyes v. Town of Boscawen, 10 Atl. Rep. 692: "The rule that the negligence of the driver or manager of a vehicle is to be treated as the negligence of a passenger, in an action by the passenger against a third party, is put upon the ground that the passenger, in selecting the conveyance, has placed himself in the care of the driver, and hence must be taken to be in the same position; and the driver, as to third persons, is to be so far regarded as the agent or servant of the passenger as to make the latter chargeable with the driver's negligence, and hence not entitled to recover, although he may have been free from fault himself." The learned judge, proceeding, said: "In the absence of any relation of master and servant, or principal and agent, when each is independent of control by the other, why should a passenger be chargeable with the driver's negligence, any more than the driver with the passenger's negligence." We think that the traveler should be held to the exercise of reasonable care only in the selection of a driver; and, being in no default in the choice of a conveyance, and having no control over the management of the team, he should not be held responsible for the negligence of the driver, which he could not reasonably anticipate or prevent. LOPES, J., is quoted in the same case as saying (Thorogood v. Bryan, and Armstrong v. Railway Co., having both been in the mean time overruled in the English court of appeals in the case of The Bernina, L. R. 12 Prob. Div. 58:) "A passenger in an omnibus, whose injury is caused by the joint negligence of that omnibus and another, may, in my opinion, maintain an action either against the owner of the omnibus in which he was carried, or the other omnibus, or both,"—and was clearly of opinion to overrule Thorogood v. Bryan, as had been many times held before that. Robinson v. Railroad Co., 66 N. Y. 11; Dyer v. Railway Co., 71 N. Y. 228; Bennett v. Railroad Co., 36 N. J. Law, 225; Railroad Co. v. Steinbrenner, 47 N. J. Law, 161; Transfer Co. v. Kelly, 36 Ohio St. 86, 91; Railway Co. v. Shacklet, 105 Ill. 364; Turnpike Co. v. Stewart, 2 Metc. (Ky.) 119; Railroad Co. v. Case's Adm'r, 9 Bush, 728; Thompkins v. Railroad Co., 4 Pac. Rep. 1165; Little v. Hackett, 116 U. S. 366, 6 Sup. Ct. Rep. 391. The doctrine of Thorogood v. Bryan, being declared to be unsound and in conflict with the principle that no one should be denied a remedy for injuries sustained without fault by him, or by a party under his control or direction; that the relation of master and servant and principal and agent does not exist in cases where the passenger has no control over the driver; that it is the right to control the conduct of the agent which is the foundation of the doctrine that the master is to be affected by the acts of his servant, and that no one is responsible for the negligence of another, unless the latter is his servant or agent. The doctrine of Thorogood v. Bryan, was much criticized by the English judges, and has been at last overruled there. It was never generally followed in this country, and may be now properly said to be altogether discarded, and rightly so. The passenger has no control over the driver of an omnibus, and certainly none over the conduct of a railway train or steam-boat, on which he has taken passage. He has no control over the movements of either, and is in fact powerless to prevent the negligence of either. As is pointed out in the case of The Bernina, supra, if the passenger is so identified with the driver as to be deemed to be guilty of his negligence, and therefore to be deprived of a right of action, it must necessarily follow that, in addition to his rights being curtailed, his liabilities are correspondingly enlarged, and the result is that the passenger in an omnibus or other public conveyance is necessarily liable to third parties for the negligence of the driver, which could be maintained upon no sound principle. See note in Amer. Law Rep. 27, 129.

In the case of Webster v. Railroad Co., 38 N. Y. 260, which was a case of a passenger by one railroad suing another railroad for the consequences of a collision, it was held that, the negligence of the defendant whereby plaintiff was injured being established by evidence, and there being no pretense that the plaintiff was guilty of any personal negligence, the negligence of a third party contributing to the injuries furnishes no excuse for the negligence of the defendant, and no reason why it should not respond in damages. Hence the refusal of the judge to charge that, if the jury should find that the injuries were in part caused by the negligence of a third party, the plaintiff could not recover from defendant, was not error.

And so in this case the refusal of the court to instruct the jury that one boat owed a greater degree of diligence to the passenger than the other was not error, because the

Digitized by Google

negligence of a third party could not be held to be the contributory negligence of the passenger, so as to bar his right to recover; the question being, not the degree of vigilance due by the third party, but whether the defendant was guilty of negligence which contributed to the injury; if the defendant was so negligent, then it was no defense for it that some other party was also guilty of negligence, unless that other party was such that its negligence could be imputed to the plaintiff by its being the servant or agent of the plaintiff, and under his control and direction, which was not this case.

But it is argued that in the case of Railroad Co. v. Burge, 4 S. E. Rep. 21, it was held that it was not error to refuse an instruction asked by the defendant because it failed to define the degree of care and caution required of the plaintiff to entitle him to recover. In that case the degree of care and caution or the contributing negligence of the plaintiff was of importance, because if he had contributed to the injury by his negligence he might be barred of recovery, and would be, unless the defendant, after discovering his negligence, had failed to use due diligence, notwithstanding, to prevent the injury. Dun v. Railroad Co., 78 Va. 645. But in this case it was not asked that the court should instruct the jury as to negligence of the plaintiff,—none being claimed against him; but the request was as to the negligence of the third party, the co-defendant steamboat, which was properly refused, for reasons stated already in what has gone before. The Washington v. The Gregory, 9 Wall. 513; The Alabama v. The Game-Cock, 92 U. S. 695; Colegrove v. Railroad Co., 20 N. Y. 492; Chapman v. Railroad Co., 19 N. Y. 341.

The next assignment of error is that the court gave the instruction set forth in the defendant's bill of exceptions "B," which was, in effect, that if the jury believed the stated circumstances as set forth above; that if the tug with its tow left the Berkley wharf when the ferry-boat was not in its Portsmouth slip, to go to the Norfolk wharf, and to cross the course of the ferry-boat, then shortly due at Portsmouth, with the tide at a strong flood, in a dark and stormy night, and none of the colored lights of the tug or tow visible to the Manhassett, but that the same were hid by the relative position of the tug and barge, and that they could not be seen by any person on the ferry-boat,—then those navigating the said tug and barge were in fault, and guilty of negligence. There can be no doubt of the propriety of this action of the court. The barge was an immense object, with all its colored lights hidden from view by its going backwards, and the tug, with its colored lights on the opposite side of the barge, very much lower than the barge, and the three rows of cars thereon, and altogether out of sight, while a gale of wind and a flood tide impressed their forces upon the ferry-boat. Under these circumstances the tug and barge bore down upon the ferry-boat, they were enveloped in total darkness except the stern light, a lantern upon the cars on the barge, which was at best misleading; and this not by an accident which resulted from the equal obscurity of the ferry-boat, so that its locality in like manner could not be discovered by the navigators of the tug and barge. But with all the lights of the ferry-boat brightly burning, both colored and white lights, and all her saloon windows throwing a bright light all around her, the lights of her Portsmouth slip close by, showing her destination, and the lights of her Norfolk slip not far off, showing her departure, and her course being well known (as well as their own obscurity) to the navigators of the tug and barge, it was in every sense an imprudence to attempt to cross her bow close upon her, or to rely upon the signal of a whistle to deflect her course, against the contingency of the gale, which was blowing against the tug, carrying back the sound of any whistle the tug might sound, so that it might not be heard in the ferry-boat. Whatever light the ferry-boat showed the tug when she left her Norfolk slip, she was not then either meeting or crossing, being too far off to do either, and her exact course was known and well defined, and the tug should have passed astern of her, especially when she was freighted with passengers; but before the collision the ferry-boat showed her port light, and the tug was bound to pass on her port side, and that this was now impossible was the fault of the tug. The rule of navigation requires the steam-vessel, such as the tug, to carry a red light on the starboard side, and a green light on the port side, in each case obscured astern, and showing only in front. The tug had these, but they were hidden completely by her tow. The barge had these, but, as it was moving stern foremost, its lights were obscured also. It was negligence thus to attempt to cross the course of the ferry-boat across her bow, when she was thus driven by wind and tide, at an unusual speed, in total ignorance of the proximity of her immense and invisible destroyer. There was no error in the action of the court in giving this instruction. Rev. St. U. S. § 4233, rules 4, 5, p. 816: The Pennsylvania, 19 Wall. 126, 135; The Eleanora, 17 Blatchf. 102; Samuel H. Crawford, 6 Fed. Rep. 906; The Frank P. Lee, 30 Fed. Rep. 277; The Titan, 23 Fed. Rep. 414; Briggs v. Day, 21 Fed. Rep. 727; Marshall v. Tug Conroy and Barge "E," 2 Fed. Rep. 785; The Howard, 30 Fed. Rep 281.

The next assignment of error which we will consider is the action of the court in refusing to set aside the verdict and grant a new trial to the defendant, as set forth in bill of exceptions "L." We think there was no error in that action of the court. The evidence has been sufficiently set forth already, and the jury were the proper triers of the facts; and the circuit court, under the circumstances of this case, rightly refused to set aside their verdict. In this court this

Digitized by Google

question is considered as upon a demurrer to the evidence by the plaintiff in error, and there is no principle upon which we can reverse the finding of the jury in this case.

As to negligence of the Manhassett, we have no concern with that. A judgment was rendered against its owners because, as stated in argument, there was no special official lookout. That boat has not appealed, and the verdict and judgment of the court below as to it are final; and for reasons already stated the question as to its negligence cannot affect the plaintiff in error in a suit by one of the passengers in the ferry-boat against it.

This disposes of all of the questions raised and relied on in the argument here and in the petition. The same questions are stated in different forms, and under different heads, but we have considered and substantially disposed of them all in what we have already said, and it would be of no benefit to prolong this discussion further. We think, after a careful consideration of the whole case as presented here, that there is no error in the judgment complained of, and the same must be affirmed.

LEWIS, P., (*dissenting.*) I dissent from the opinion of the court in this case. The record, in my opinion, discloses several errors for which the judgment should be reversed; but, as the order to be entered here will be final, and there will be no further trial of the case, I will call attention to only one or two of them.

It was palpable error, I think, to instruct the jury, as the circuit court did, against the objection of the appellant, that they must find for the plaintiff if they believed from the evidence that the collision and consequent death of the plaintiff's intestate was caused by the negligence of the defendant's agents, without accompanying the instruction with any explanation as to what negligence is. The authorities all agree that negligence, when the facts are disputed, is a mixed question of law and fact. It includes two questions: (1) Whether a particular act has been performed or omitted; and (2) whether the performance or omission of this act was the breach of a legal duty. The latter is a pure question of law for the court; the former a pure question of fact for the jury. Shear. & R. Neg. § 11. Therefore, to enable the jury in the present case to intelligently decide whether the defendants had been guilty of negligence, it was necessary for them to be told what legal duty the defendants, or either of them, owed to the plaintiff's intestate when the casualty occurred. A railroad company, like any other carrier who carries passengers by the agency of steam, is not only bound to exercise the highest degree of care in safely transporting its passengers, but it must repel by satisfactory proofs every imputation of negligence by a passenger. But it owes no such duty to a stranger, and in no case does it owe to a stranger the duty of exercising anything more than ordinary care. Railroad Co. v. Moose, 83 Va. 827, 3 S. E. Rep. 796. These are rules which the law prescribes, and in respect to which it is the duty of the court to instruct the jury in a case like the present, when instructions are asked upon the subject, in order that the jury may say whether, upon the facts of the particular case, negligence is established. The rule that to questions of law the court responds, and to questions of fact the jury respond, is as old as the common law itself, and the court can no more, with propriety, surrender its functions to the jury than it can invade the province of the jury by taking from them and upon itself the decision of disputed questions of fact. Greenleaf says that where the question to be decided is a mixed one of law and fact, it is submitted to the jury, who are first instructed by the judge in the principles and rules of law by which they are to be governed in finding a verdict, and these instructions they are bound to follow. 1 Greenl. Ev. § 49. And in a note to the text it is said, by way of illustration of the rule, that "the judge is to inform the jury as to the degree of diligence, or care, or skill, which the law demands of the party, and what duty it devolves on him, and the jury are to find whether that duty has been done." I had supposed this principle was too well settled to be questioned. It has been repeatedly recognized by this court, and is the universally accepted doctrine.

In Dun v. Railroad Co., 78 Va. 645, Judge LACY, speaking for the court, and citing numerous cases, used this language: "When the facts are disputed, the question of negligence is a mixed question of law and fact. The jury must ascertain the facts, and the judge must instruct them as to the rule of law which they are to apply to the facts as they may find them." The rule is well expressed by Beach in his work on Contributory Negligence, at section 161, who says that, as negligence is generally a mixed question of law and fact, "it devolves upon the court to say, as matter of law, what is negligence, and upon the jury to say, as matter of fact, in the light of the instructions from the bench, whether or not in the particular case at bar, the facts, as proven to their satisfaction, warrant the imputation of negligence. In other words, the court tells the jury what negligence is, and the jury tells the court what the facts of the case show upon the question of negligence. The judge defines negligence in the charge, and the jury apply the definition to the facts in their verdict." And he very justly adds the remark that an uncounted multitude of authorities might be cited in support of this elementary proposition. Nor has any authority been cited in support of the ruling of the circuit court, other than certain general expressions of some of the courts, in disapproving the doctrine of Thorogood v. Bryan, 8 C. B. 114, to the effect that a passenger in a public conveyance who, without fault on his part, is injured by the negligence of a third party, contributing to

Digitized by Google

the injury, may maintain an action against such person, notwithstanding the contributory negligence of those in charge of the conveyance in which he is being carried. I certainly do not controvert this proposition, but concede it to be sound. The case of Thorogood v. Bryan was based upon a groundless fiction, and has been—rightly, I think—overruled. The point there decided was that a passenger in a public omnibus, who is injured by the negligent management of another omnibus, cannot maintain an action against the owner of the latter, if the driver of the former, by the exercise of proper care and skill, might have avoided the accident; and the reason assigned was that the passenger in selecting a vehicle so identifies himself with the vehicle and its driver that the negligence of the latter is to be considered the negligence of the passenger himself. But this reasoning is fallacious, as we know from every-day experience that the passenger ordinarily exercises no control over the driver, and has no means of preventing his negligence. The doctrine has never been recognized in the admiralty courts, nor has it been generally followed in this country. On the contrary, it has been rejected by many courts of last resort, including the supreme court of the United States, in Little v. Hackett, 116 U. S. 366, 6 Sup. Ct. Rep. 391, and the case itself has been recently overruled in England. The Bernina, L. R. 12 Prob. Div. 58. I do not doubt, therefore, that the plaintiff in the present case may maintain an action against the appellant if the negligence of the latter contributed to the death of the deceased. But the question at last comes back, what is negligence? And that must be decided in the manner I have indicated. If the ruling of the circuit court be correct, then, indeed, not only must Thorogood v. Bryan be disregarded, but the law has been carried to the opposite extreme from what it was in England before that case was overruled; that is to say, the appellant may not only be sued with the owners of the ferry-boat, for the alleged negligent killing of the plaintiff's intestate, but it must stand upon the same footing with the co-defendant, notwithstanding the deceased, at the time of the accident, was a passenger on the ferry-boat, to whom, therefore, the owners of the ferry-boat owed the highest degree of care and skill, whereas the appellant owed her no higher duty than to exercise ordinary care in the management of its tug and barge. Railroad Co. v. Kellam's Adm'r., 83 Va. 851-857, 3 S. E. Rep. 703. But surely this is not the law. The same rule by which the liability of the appellant would have been determinable if the action had been brought against it alone must be the test of its liability in a joint action like the present. Why should it not be so. Upon what principle can it be otherwise?

It was suggested in the argument that there is no contribution between tort-feasors, but this argument assumes as established the very point in dispute; the question being not one of contribution, but of original liability; in other words, whether or not the appellant was negligent. But how were the jury to determine that question, without being first told what legal duty the appellant owed the deceased? They were not presumed to know, without an instruction upon the point, and they ought not therefore to have been left in the dark, as they were, to determine it for themselves. It was plainly the duty of the court to have instructed them as to the rule of law by which they were to be governed in finding a verdict.

The recent case of Railroad Co. v. Burge, 4 S. E. Rep. 21, is an authority in point. In that case the injuries complained of were caused by a collision of a freight train of the defendant company with the plaintiff's truck, as he was driving from a wharf into a public street, in the city of Norfolk, from which the colliding train was being backed. At the trial the defendant moved the court to instruct the jury that although they might believe from the evidence that its agents failed to give the customary signals of the approach of a train, yet that the plaintiff was not entitled to recover if he could have discovered the approach of the train in time to have avoided it. The plaintiff objected to this instruction, and moved the court to instruct the jury, in lieu thereof, that he was bound to use only such care and watchfulness as a man of ordinary prudence, under the circumstances, would have used, and that if he used such care he was not guilty of contributory negligence. The court granted the motion, and instructed the jury accordingly, and this court affirmed the ruling of the trial court on the ground that, as the instruction which was refused did not define the degree of care which the plaintiff was bound to use to entitle him to recover, it was calculated to mislead the jury, whereas the instruction given, by correctly telling the jury what negligence in the particular case was, enabled them to properly apply the law to the facts of the case, and thus to arrive at a right conclusion, *i. e.*, to decide whether or not the plaintiff had been guilty of contributory negligence. This ruling is in harmony with the principle laid down in Dun v. Railroad Co., 78 Va., supra, and is, in my opinion, decisive of the present case; for why should it not be as much the duty of the court to define negligence when imputed to a defendant as when imputed to a plaintiff? Are not its constituent elements in either case the same? Do not the jury need enlightenment on the question of law involved as well in the one case as in the other? Can a person who happens to be a defendant, any more than one who is the plaintiff in an action, be guilty of negligence, without the breach of a legal duty? And who but the court is to say what that legal duty is? I must confess I am unable to perceive any reason why the rule should not be so, nor am I aware of any authority which holds the contrary, where the question has been raised. Indeed, but for the decis-

Digitized by Google

ion of a majority of the court in this case, I would say the proposition was axiomatic.

It is therefore, to my mind, too clear for argument that, unless all legal rules as to the degree of negligence are to be abrogated altogether, the circuit court erred in giving the instruction above mentioned. And this error was intensified in its effects by the subsequent refusal of the court to give an instruction, on the motion of the appellant, to the effect that while the owners of the ferry-boat owed to the deceased the exercise of extraordinary vigilance, the appellant merely owed her the exercise of the ordinary care usually observed by prudent men in the business in which it was engaged. This instruction correctly propounded the law, and ought to have been given. It is true that, if the first part of it, namely, that part relating to the duty of those navigating the ferry-boat, had been offered separately, a refusal to give it might not have been error, to the prejudice of the appellant; but the refusal to give the latter part was calculated to mislead, and doubtless did mislead, the jury, and was therefore error for which, in my opinion, the judgment should be reversed. The case is stronger than many cases in which it has been held that, "though an instruction, as asked, is not wholly correct, yet, if the general refusal of it may mislead the jury, the court should either accompany the refusal with an explanation to the jury, or should give them an instruction stating the correct proposition." And the rule is certainly a very just one. Institution v. McVeigh, 8 S. E. Rep. 885, and cases cited.

There are, besides these, other errors, I think, in the record, but I will not enter into a discussion of them. I have only called attention to the questions to which I have referred because of their importance in the every-day practice of the courts of the commonwealth. Many of the questions relating to the rules of navigation and the federal statutes on the subject, which were argued before us, were considered by Judge HUGHES, of the United States district court, in the case of The Manhasset, 34 Fed. Rep. 408,—a case growing out of the same collision,—and were decided adversely to the views of the appellee here. The opinion in that case contains a very full and able discussion of the questions before the court, and I will do nothing more in this connection than simply refer to that opinion. I have already said more than I intended. I think the case was not properly submitted to the jury, and that the judgment ought therefore to be reversed, and the case remanded for a new trial.

AYRES v. WELLS' ADM'R.

(*Supreme Court of Appeals of Virginia.* April 11, 1889.)

APPEAL—REVIEW—SUFFICIENCY OF EVIDENCE.

Where upon the question of whether the assignment of a bond secured by a deed of trust to the trustee was intended by the payee to pass the ownership of the bond the evidence is conflicting, the decree of the circuit court will be affirmed.

Appeal from circuit court, Pittsylvania county; S. G. WHITTLE, Judge.

Bill by Alfred Anderson, administrator *c. t. a.* of Nancy Wells, deceased, against David Ayres and John T. Blankenship, to remove said Ayres from his position as trustee in a deed of trust executed by said Blankenship to secure a debt due said testatrix. Decree for complainant, and defendant Ayres appeals.

W. W. Henry, for appellant. *Peatross & Harris*, for appellee.

LACY, J. This is an appeal from a decree of the circuit court of Pittsylvania county, rendered on the 9th day of February, 1888. The case is as follows: The suit was instituted by the bill of the appellee seeking to enforce the payment of the bond of one Blankenship, of $700, secured by trust-deed, alleged to be due to the estate of his testatrix, Nancy Wells, and seeking to have the trustee, the appellant, David Ayres, removed as such. The trustee, David Ayres, answered, claiming to be the legal owner of the bond in question by an assignment by the testatrix shortly before her death. Depositions were taken in the cause, and by decree in the cause the appellant, David Ayres, was removed as trustee, the assignment ordered to be annulled, and the bond delivered to the appellee, Wells' administrator. From this decree the appellant, David Ayres, applied for and obtained an appeal to this court.

The question raised by this record is one of fact mainly, and, the evidence appearing to be contradictory, we have concluded—not without great reluctance—to solve the matter by deferring to the decree of the court below, and affirming the said decree. We are therefore of opinion that there is no error in the said decree of the circuit court, and the same will be affirmed.

(85 Va. 978)

SEDDON v. ROSENBAUM.

(*Supreme Court of Appeals of Virginia.* March 28, 1889.)

STATUTE OF FRAUDS—CONTRACTS.

1. A contract to sell certain stock at the end of three years, with an option to the purchaser to call it at any time, may be performed within a year, and is therefore not within Code Va. § 2840, subd. 7, prohibiting an action on an agreement "not to be performed within a year," unless it be in writing, etc.[1]

2. The contract is not invalid for want of mutuality, because one party has an option which the other has not.

Error to circuit court of city of Richmond.

Action by T. Seddon against S. M. Rosenbaum. Plaintiff brings error. By Code Va. 1887, § 2840, "no action shall be brought

[1] On the operation of the statute of frauds with reference to contracts not to be performed within a year, see Sarles v. Sharlow, (Dak.) 37 N. W. Rep. 749, and note; Osborne v. Kimball, (Kan.) 21 Pac. Rep. 163, and cases cited.

Digitized by Google

* * * upon any agreement that is not to be performed within a year, unless the promise," etc., be in writing.

W. W. Gordon, for plaintiff in error. *H. H. Marshall* and *H. G. Cannon*, for defendant in error.

LACY, J. This is a writ of error to a judgment of the circuit court of the city of Richmond on the 13th day of July, 1887. The action was *assumpsit* upon a contract by the defendant to sell the plaintiff 250 shares of the capital stock of the Richmond & Danville Railroad Company at the price of $96 per share. The contract was reduced to writing, but was not signed by the party sought to be charged, and is as follows: "S. M. R. [the defendant] to buy 250 shs. R. & D. at 80, and sell the same to T. Seddon at the end of 3 years at 96. Stock may be called at 96 at any time before expiration of 3 yrs." There was a demurrer by the defendant, which was overruled, and his plea setting up the statute of frauds rejected by the court, and issue was joined upon the plea of *non assumpsit*. Upon the trial the plaintiff asked for an instruction to the jury, which the court refused, and gave others, to which the plaintiff excepted. After hearing the evidence, and upon the instructions of the court, the jury rendered a verdict for the defendant, which the plaintiff moved to set aside for reasons already assigned in the other exception, which motion the court overruled, and the plaintiff again excepted. Whereupon the plaintiff applied for and obtained a writ of error to this court.

The first error assigned here is as to the action of the court in refusing to give to the jury the instruction asked by him, which was as follows: "If the jury believe from the evidence that on or about the 11th day of March, 1886, the plaintiff and defendant entered into an agreement by which the defendant agreed to buy 250 shares of Richmond & Danville railroad stock, and sell the same to the plaintiff at $96 per share, the plaintiff to take the same at the end of three years from the date of the agreement, but with the right to take it at any time prior to the expiration of the three years; and if they further believe that early in the month of July, 1886, the plaintiff, or his duly-authorized agent, demanded delivery of the stock from the defendant, and tendered him pay for the same, and that the defendant refused to deliver the said stock,—then the jury must find for the plaintiff an amount equal to the difference between the contract price and the market value of the stock at the time of the refusal to deliver the same,"—and in giving to the jury in lieu thereof an instruction that the said contract was void under the statute of frauds, unless the jury should believe from the evidence that it was in writing, and signed by the defendant or his duly-authorized agent, as being obnoxious to the seventh clause of the 2840th section of the Virginia Code, which provides that no action shall be brought upon any agreement that is not to be performed within a year, unless the agreement, or some memorandum or note thereof, be in writing, and signed by the party to be charged thereby, or his agent, etc.

Our statute of frauds and perjuries corresponds to the English statute of 29 Car. II. c. 3, which an eminent writer of that realm designates as the most important and most beneficial piece of judicial legislation of which England can boast. Lord Campbell, 3 Camp. Lives Ch. 330. Lord Nottingham, who is styled "the father of English equity," claims to have introduced the bill in the Lords' House, while its original conception has long been popularly imputed to Lord Hale and Sir Leoline Jenkins. Ash v. Abdy, 3 Swanst. 664; Windham v. Chetwynd, 1 Burrows, 418. And the proper construction of the law has been considered and debated in a vast number of cases, so that, as is said by an eminent author of our own times, Mr. Minor, (3 Minor, Inst. 151,) to ascertain the signification of its several clauses has cost an immense sum of money—a subsidy, it is customary to say—for every line. Wain v. Warlters, 5 East, 17. Our statute of parol agreements corresponds to the fourth section of 29 Car. II. c. 3. By the seventh clause the agreements contemplated by the statute are such as on their face have their performance postponed beyond one year, and not such as may or may not chance to be performed within that period. In the case of Peter v. Compton, 5 W. & M. King's Bench, 1 Smith's Lead. Cas. *351, the question upon the trial in an action upon the case, upon an agreement in which the defendant promised for one guinea to give the plaintiff so many upon the day of his marriage, was if such agreement ought to be in writing, for the marriage did not happen within a year. It was held that when the agreement is to be performed upon a contingent, and it does not appear within the agreement that it is to be performed after the year, then a note is not necessary, for the contingent might happen within the year; but, when it appears by the whole tenor of the agreement that it is to be performed after the year, then a note is necessary, otherwise not. Francam v. Foster, Skin. 326; Fenton v. Emblers, 3 Burrows, 1281, 1 Bl. W. 353; Wells v. Horton, 4 Bing. 40; Smith v. Neale, 2 C. B. (N. S.) 67.

But it is insisted in this case by the defendant in error that while the plaintiff could call the stock within the year, by the terms of the agreement the defendant could not, and that upon the option of the plaintiff the agreement might be performed within the year, but this the defendant could not do, and that the agreement, so far as it was mutual, was beyond the year, and came under the statute. The accepted doctrine in England upon the decided cases seems to be that the words in the statute "not to be performed" mean not to be performed "on either side,"—that is, that an agreement does not come within the statute, provided that all that is

Digitized by Google

to be done by one of the parties is to be done within a year; that is, that on that side the contract is executed. This was first hinted at in Bracegirdle v. Heald, 1 Barn. & Ald. 722, and then distinctly ruled in Donellan v. Read, 3 Barn. & Adol. 899; LITTLEDALE, J., saying as to the contract not being to be performed within a year: "We think that as the contract was entirely executed on one side within a year, and as it was the intention of the parties, founded on a reasonable expectation, that it should be so, the statute of frauds does not extend to such a case." In that case there was no time fixed for the performance by one party, but he performed within the year; the other party, by the terms of the agreement, was not to perform except at the expiration of several years; he to pay an additional annual rent for the remainder of the lease, of which several years were unexpired. This was established as the prevailing doctrine in England by the later case of Cherry v. Heming, 4 Exch. 631. In that case, which was decided at Michaelmas term, 1849, in the court of exchequer of pleas, the foregoing cases came under discussion. PARKE, B., said: "I am of opinion that this rule ought to be discharged. Upon the question whether this is an instrument within the statute of frauds, [an unsigned deed,] I think that Donellan v. Read is an answer; and in my opinion that case was rightly decided. The question there turned upon the words 'not to be performed.' The court held that they meant not to be performed on one side or the other, and did not include cases where the contract was entirely executed on one side. This was certainly in accord with the opinion of Lord TENTERDEN and Mr. Justice ABBOTT, in Bracegirdle v. Heald. If Donellan v. Read had been simply a decision on a doubtful point, I should have thought we ought to adhere to it, because we are bound by decided cases unless they are manifestly wrong. But I think the decision was right, and the observations made by Mr. Smith are not sufficient to make me think it was wrong. Peter v. Compton, which he relies on, does not support his conclusion. That case only shows that, there being two answers to the statute of frauds, Lord HOLT adopted one, when the other would also have been complete." The other members of the court concurring with PARKE, B.

This ruling has been approved and followed in many American cases, though not uniformly so. Holbrook v. Armstrong, 1 Fair. 31; Rake v. Pope, 7 Ala. 161; Johnson v. Watson, 1 Kelly, 348. This doctrine is thus stated by Mr. Smith, (Smith, Cont. 112:) "When, however, all that is to be done by one party, as the consideration for what is to be done by the other, actually is done by the one within the year, the statute does not prevent that party suing the other for the non-performance of his part of the contract. When one has had the full benefit of the contract the law will not permit the other to withhold the consideration,"—citing numerous cases, both English and American. If, by its terms, or by reasonable construction, a contract not in writing can be fully performed within a year, although it can be done only by the occurrence of some improbable event, as the death of a person referred to, it is not within the statute; so if it can be performed on one side within the year. Blanding v. Sargent, 33 N. H. 239; Wiggins v. Keizer, 6 Ind. 252; Soggins v. Heard, 31 Miss. 426; Suggertt v. Cason, 26 Mo. 221; Burney v. Ball, 24 Ga. 505; Sherman v. Champlain Co., 31 Vt. 162; Wilson v. Ray, 13 Ind. 1; Hill v. Jamieson, 16 Ind. 125. Mr. Bishop says, (Bish. Cont. § 537:) "The leading doctrine under this head is that a writing is essential or not, according as the completed doing of the thing must, by the terms of agreement, necessarily be postponed beyond the year, or may fall within it." As if the performance depends on the death of a person, or the coming in of a ship, or any other contingent event which may or not transpire within the year, no writing is required. Otherwise, if there is a fixed date forward more than a year. See, also, Paris v. Strong, 51 Ind. 339; Withers v. Richardson, 5 T. B. Mon. 94. In the supreme court of the United States, Mr. Justice MILLER said upon this subject, (Walker v. Johnson, 96 U. S. 424:) "In order to bring a parol contract within the statute, it must appear affirmatively that the contract was not to be performed within the year." In McPherson v. Cox, 96 U. S. 404, it was said in the same court that the statute applies only to contracts which, by their terms, are not to be performed with that time. To the same end are White v. Hanchett, 21 Wis. 415; Blakeney v. Goode, 30 Ohio St. 350; Thomas v. Hammond, 47 Tex. 42; Somerby v. Buntin, 118 Mass. 279, and Jordan v. Miller, 75 Va. 450; 1 Benj. Sales, 132. In the case of Packet Co. v. Sickles, 5 Wall. 580, relied on by the defendant in error, the court held that the contract, being by its terms extended beyond a year—to-wit, 12 years—that it was within the statute, notwithstanding the proviso, if the bond should last so long; that is, that the possibility of defeasance within the year does not make it the less a contract to be performed beyond the year. And to the same effect are many other cases cited. Birch v. Earl of Liverpool, 9 Barn. & C. 392; Dobson v. Esple, 2 Hurl. & N. 81. This has been often held, and the reason is that the contract, being one to be performed by its terms beyond the year, comes within the statute, although it may be defeated within the year; a possible defeasance not affecting the time when by its terms it may be performed. We are dealing with the statute that provides "any agreement that is not to be performed within a year," not any agreement that is not to be defeated within a year, and we think the distinction is clearly defined in reason as well as by the cases. If the agreement may be performed within a year, it cannot be said that by its terms it is

Digitized by Google

not to be performed within a year, because it may by its terms be performed within that time; but if, by its terms, it is to be performed beyond the year, it comes within the statute, and that it contains provision for a possible defeasance within the year does not make it thereby capable of being performed otherwise than as provided beyond the year. To defeat is not to perform. But it is further argued that there is an option granted to one side which is not granted to the other, and there is a want of mutuality. If this is so, then as to all cases where one side grants an option to the other, which is not unusual, the contract is not binding. But it is pressed further that without the option the contract is one to be performed beyond the year. Grant it, and the reply is (1) that such is not this contract; (2) that the provision which this consideration excludes is the provision which renders it capable of being performed within the year, and which takes it out of the statute. To consider the contract with that excluded is not this case.

We think the circuit court clearly erred in rejecting the plaintiff's instruction as asked, and the judgment will, for that cause, be reversed, and the case remanded to the circuit court, with directions to set aside the verdict and grant a new trial to the plaintiff, at which new trial, if evidence shall be the same, and the same instruction asked by the plaintiff, it must be given; and the instruction given by the court at the first trial is erroneous, and must not be again given. Reversed.

(85 Va. 955)

PAUL v. BAUGH *et al.*

(*Supreme Court of Appeals of Virginia.* April 4, 1889.)

FRAUDULENT CONVEYANCES—POSSESSION—REGISTRATION.

1. A provision in a deed conveying real estate and personalty to a trustee for the benefit of creditors, reserving possession of the property until the maturity of certain secured debts, 11 months later, the grantor taking the profits to his own use during that time, when, on default of payment of the debts, and at the request of any creditor, the trustee shall sell the property, is not of itself a proof of fraud; the length of the retention of possession not being unreasonable.

2. The fact that such a deed was made pending suits against the grantor by a creditor who soon afterwards recovered large judgments, and whose debts were placed in the least-favored class, does not indicate fraud.

3. Nor is it any evidence of fraud that certain bonds for debts due the grantor's sons, written on the day the deed was prepared, were antedated one month, when the latter were unaware of the fact, as is explained by the trustee in the deed, who wrote the bonds.

4. Failure to list such debts for taxation is not of itself sufficient evidence of fraud, where the other circumstances tend to establish their genuineness.

5. The omission to include in the deed an equity of redemption in land the incumbrances on which were much in excess of its value will not invalidate it, though it contain a provision requiring a creditor secured to release a part of his claim, as such an omission is no evidence of fraud, unless it is of such an amount of property as to indicate an intention of securing to the grantor a substantial benefit.

6. For a like reason the omission of a small amount of personalty exempt by law from forced sale is not fraudulent.

7. Such a deed may be admitted to record by a clerk who is the trustee therein, and acted as the counsel of the grantor in its preparation, as the act of admission is ministerial only.

Appeal from corporation court of Petersburg.

Bill by Peter Paul against W. W. Baugh and others, to cancel a deed of trust executed by said Baugh, conveying certain land and personal property to defendant A. S. Edwards, in trust to secure various debts to his co-defendants, on the ground that said deed was intended to hinder, delay, and defraud creditors. Decree dismissing the bill, and complainant appeals.

Alexander Hamilton and *Wm. H. Mann*, for appellant. *Charles F. Collier*, *W. Land*, *T. G. Watkins*, and *Cocke & Gilliam*, for appellees.

LEWIS, P. This was a suit in the hustings court of the city of Petersburg to set aside a certain deed of trust which was executed on the 1st of July, 1885, by the appellee W. W. Baugh, conveying certain real estate, and the personalty thereon, in Surry county, to A. S. Edwards, trustee, to secure the payment of certain debts due by the grantor, and enumerated in the deed. Among these debts was one due to W. W. Baugh, Jr., a son of the grantor, evidenced by bond dated June 1, 1885, payable one year after date, for $490, and a debt due to John C. Baugh, another son of the grantor, also evidenced by bond dated June 1, 1885, and payable one year after date, for $380. These debts, with others, were put in the second class. Among the creditors of the grantor, at the date of the deed, was the plaintiff in the court below, who is the appellant here. This indebtedness amounted in the aggregate to about the sum of $4,000, and for which judgments were obtained by the appellant at the July term, 1885, of the said court, which began the day after the deed was admitted to record in the clerk's office of the county court of Surry county. The trustee, Edwards, as the counsel of the grantor, drew the deed, and, as clerk of the court, admitted it to record. The appellant's debt was placed in the third class. The provision of the deed in respect to it is that, "after paying the expenses of this trust and the debts aforesaid, then, *thirdly*, to secure to Peter Paul, of Richmond, Virginia, the payment of the sum of two thousand dollars, which the said W. W. Baugh has agreed to pay him in full compromise of all differences between them, which sum shall bear interest from the date of this deed until paid." The bill seeks to avoid the deed on the ground of fraud, and it makes the trustee, and the creditors other than the appellant, secured in the deed parties defendant. It charges that the deed was made with intent to hinder, delay, and defraud the plaintiff, and that the debts secured to the two sons of the grantor above men-

Digitized by Google

tioned are fraudulent and void, and sundry alleged badges of fraud are set forth in the bill. The grantor, who was also made a defendant, answered the bill, denying the charges of fraud, as did the trustee and the rest of the defendants. The cause was in due time referred to a master commissioner to take (1) an account of all the property, real and personal, of the grantor at the date of the deed, and to ascertain and report its fee-simple and annual value; (2) an account of the liens thereon, with their dignities and priorities; and (3) to make inquiry and report as to all the facts connected with the alleged fraudulent character of the deed. The commissioner, in execution of this decree, examined a number of witnesses, and reported in favor of the validity of the deed and of the debts secured thereby. To this report the plaintiff excepted. The exceptions, however, were overruled, and the deed sustained *in toto* by the decree complained of.

One of the grounds upon which the deed of trust and the debts therein secured to the sons of the grantor were charged to be fraudulent was that, before the commencement of the actions in which judgments were obtained by the appellant against the grantor, and pending those actions, the grantor threatened that, if the actions were pressed, he would take steps to protect himself, and that about the same time, in conversations with the attorney of the appellant, he stated what he said was about the amount of his indebtedness, but made no mention of any indebtedness on his part to his sons, or to either of them, and great stress was laid in the argument upon this point. The mere fact, however, that the deed was made during the pendency of the actions, and under the circumstances just mentioned, does not affect the validity of the deed, in the absence of fraud, and we do not discover in the record any evidence to sustain the charge of fraud, which, to avail in such a case, must always be proved with clearness and certainty. Matthews v. Crockett, 82 Va. 394; Hickman v. Trout, 83 Va. 478, 3 S. E. Rep. 131. This court has repeatedly decided that the execution of a deed, pending a suit against the grantor by a creditor, and a short time before the time at which it was probable judgment would be rendered against him, does not of itself vitiate the deed, and that a debtor in failing circumstances may make a valid assignment for the benefit of his creditors, and may make preferences as between them. To make such preferences is neither illegal nor immoral, when not prohibited by statute. Brooks v. Marbury, 11 Wheat. 78; Skipwith v. Cunningham, 8 Leigh, 271; Sipe v. Earman, 26 Grat. 563; Gordon v. Cannon, 18 Grat. 387. Besides, even if there had been fraud on the part of the grantor, such fraud could not affect the rights of the trustee, and the creditors secured by the deed, without notice of the fraud, and no such notice is proved. 2 Lomax, Dig. 323; Rixey v. Detrick, 6 S. E. Rep. 615, and cases cited.

The evidence in the case not only fails to establish the charge that the debts to the sons of the grantor are fictitious and fraudulent, but it shows the contrary. Both deny the charge in their answers, and also in their depositions, which were taken. It seems that the bonds by which their debts are evidenced were written when the deed securing them was prepared, and were antedated one month. But this is explained by the trustee in his deposition, who also wrote the bonds for the debtor to sign, and it does not appear that either of the sons were aware of the fact that the bonds had been antedated. The debts were due more than a month before the date of the deed, and the fact, therefore, that the bonds were antedated is not a circumstance of any significance as tending to prove fraud.

It is also true the debts were not listed for taxation, but that does not prove that they were fraudulent. There is no explanation in the record as to why they were not listed, but the uncontradicted evidence shows that they are *bona fide*. The items and dates of the advances from time to time made by the sons, respectively, to their father, who were doing business on their own account, and not residing with their father, are given with particularity; and the statements of W. W. Baugh, Jr., as a witness, are in large measure corroborated by the witness Ramey. We lay out of view the declarations of the debtor upon which the appellant relies, because they were not made in the presence of, or assented to by, the sons, and are not evidence against them.

Nor can the objection to the deed be sustained on the ground that it reserves to the grantor a power incompatible with, and adequate to the defeat of, the avowed purposes of the deed. It provides that until the maturity of the aforesaid bonds to the sons of the grantor, namely, 11 months after the date of the deed, the grantor shall remain in possession of the property conveyed, and take the profits thereof to his own use, and then sale to be made by the trustee, if requested by any creditor, etc. Such a provision is a common one in deeds of trust to secure creditors, and does not of itself invalidate the deed. The question in such cases generally is whether the time to which the sale is postponed is reasonable or not, and, if unreasonable, that circumstance, in connection with others, may be taken as proof of fraud. In Brockenbrough v. Brockenbrough, 31 Grat. 580, it was said, in the course of the opinion delivered by Judge BURKS, that while there may be provisions in a mortgage or deed of trust of such a character as of themselves to be evidence of fraud,—such as a reservation of a power in the grantor over the property conveyed incompatible with the avowed purposes of the trust, (Lang v. Lee, 3 Rand., Va., 410,)—yet that no irresistible inference of a fraudulent intent is deducible, either from a provision postponing a sale of the property for a reasonable length of time, and reserving the use thereof to the grantor in the

Digitized by Google

mean time, or from the omission, as in the present case, to annex a schedule of the property, or from all these circumstances combined. And to the same effect are numerous cases. Lewis v. Caperton, 8 Grat. 148; Cochran v. Paris, 11 Grat. 348; Dance v. Seaman, Id. 778; Sipe v. Earman, 26 Grat. 563; Young v. Willis, 82 Va. 291; Keagy v. Trout, 7 S. E. Rep. 329.

Another objection made to the deed is that it does not convey all the property of the grantor, and yet requires of the appellant a release of one-half of the amount of his debt, which renders the deed, it is contended, void as to him. It is undoubtedly well settled that a provision in a deed securing creditors which provides for the payment of the debts on the terms of a release of the creditors is not valid, unless all the debtor's estate is conveyed by the deed. In other words, an embarrassed debtor cannot protect a part of his property by surrendering another part. But here all, or substantially all, of the grantor's property was, in fact, conveyed. It is true he has an equity of redemption in certain real estate, not conveyed, but the prior incumbrances on the property, as shown by the record, far exceed its value; so that, if it had been embraced in the deed, the security of the deed would not have been strengthened. And as to the small amount of personalty belonging to the grantor, and not embraced in the deed, the value of which does not exceed the sum of $15, as shown by the commissioner's report, that is secured to the grantor by the exemption laws of the state, and its omission, therefore, does not affect the validity of the deed. In Gordon v. Cannon, supra, it was said by the court that, in a case like the present, any omission of property for the purpose of securing a substantial benefit to the debtor (except such property as may be exempt by law from distress or levy) conclusively shows an intention to hinder and defraud creditors, but that the omission of a comparatively small amount, where all is substantially conveyed, does not avoid the deed, in the absence of a fraudulent intent. In such a case "the deed essentially complies with the requirements of the law." See, also, Skipwith v. Cunningham, 8 Leigh, 271; Phippen v. Durham, 8 Grat. 457.

But it is insisted that, inasmuch as Edwards, the trustee in the deed, was the clerk by whom the deed was admitted to record, and also acted as the counsel of the grantor in advising and preparing it, its alleged recordation is void, and therefore that the judgments of the appellant are paramount to the deed, whether it be valid or not. The ground of this contention is that the act of admitting a deed to record is of a judicial character, and hence cannot be performed by one who, as counsel, prepared the deed, or who is a party to, or has any interest in or under, it. And Davis v. Beazley, 75 Va. 491, is cited as an authority for this position. In that case it was decided that a clerk who is the grantor in a deed cannot take his own acknowledgment of it before himself in his official character, because, as the court said, these functions partake of a judicial character, and no man can be a judge in his own cause. But this principle is not applicable here, as it is well settled by the decisions of this court that admitting a deed to record is merely a ministerial act, which the clerk or court cannot lawfully refuse to perform, and which may be compelled by a *mandamus*. Dawson v. Thruston, 2 Hen. & M. 132; Manns v. Givens, 7 Leigh, 689; Randolph v. Stalnaker, 13 Grat. 523; Carter v. Robinett, 33 Grat. 429; 2 Minor, Inst. 867.

We find no error in the decree of the hustings court, and the same is affirmed.

(82 Ga. 559)

ANDERSON *et al.*, Commissioners, *v.* RYAN, Judge.

(*Supreme Court of Georgia.* March 28, 1889.)

JUDGE OF COUNTY COURT—TERM OF OFFICE—SALARY.

Code Ga. § 279 et seq., fixes the term of office of county judges at four years, and provides that their salaries shall be fixed by the grand juries at the spring term of each superior court. Act 1878-79, p. 51, provides that the salary, when once fixed, shall not be altered during the term of office. *Held*, that when a judge was appointed April 30, 1884, his term expired and a new term began April 30, 1888, and the grand jury of the spring term of the superior court, which commenced in May, 1888, had power to fix the salary for the new term, though the same judge was reappointed, and did not receive his new commission until after the grand jury had adjourned, and the law declares that the county judge shall hold until his successor is appointed and qualified.

Error from superior court, Pulaski county; KIBBEE, Judge.

Ryan, the petitioner, was appointed county judge April 30, 1884, and his salary was then fixed at $500. He was reappointed before the expiration of his term, and the grand jury, at the spring term of court, fixed the salary for the new term of office, but petitioner did not receive his new commission until after the grand jury had adjourned. He applied for *mandamus* against Anderson and others, commissioners, to compel the assessment of a tax to pay petitioner's salary at the former rate, for the year beginning April 30, 1888. Writ granted, and defendants bring error.

Jordan & Watson, for plaintiff in error. *L. C. Ryan* and *J. H. Lumpkin*, for defendants in error.

SIMMONS, J. Under the foregoing facts we think the court erred in making the *mandamus* absolute. The law as to county courts in the several counties of this state, as embodied in section 279 et seq. of the Code, fixed the terms of office of the judges thereof at four years. The original act provided that their salaries should be fixed by the grand juries at the spring term of each superior court. The act of 1878-79, p. 51, amended the original act, and provided that the salary, when once fixed, shall not be increased or diminished during the term of the county

Digitized by Google

judge. This amending act rendered it unnecessary for the grand jury at each separate term of the court to fix the salary of the county judge during his term of office, but at the expiration of that term of office it became the duty of the grand jury at the spring term to fix the salary for the succeeding term of four years. Ryan was appointed and commissioned on the 30th of April, 1884. According to this act, his term of office expired four years thereafter, to-wit, 30th April, 1888; his salary had been fixed by the grand jury of 1884, at the sum of $500. Under the act of 1878–79, supra, this salary could not be increased or diminished during that term of four years. At or before the expiration of that term it was made the duty of the governor, by and with the advice and consent of the senate, to appoint a successor to Ryan. The governor performed that duty before the expiration of the term, by reappointing Ryan, and his appointment was confirmed by the senate. The spring term of Pulaski superior court commences, under the law, in May of each year. When the grand jury met at the spring term of the year 1888 they knew that, under the law, the term of office of Ryan had expired, and the new term of office of the county judge had commenced, on the 30th of April, 1888, and that it was their duty, under the law, at that term of the court to fix the salary of the new appointee for the next four years. They proceeded to do this, and we think their action at that term of the court was legal and binding. But it is argued by counsel for the defendant in error that the new term of Ryan did not commence until he received his commission,—seven weeks after the expiration of his former term,—and that therefore, the spring term of Pulaski superior court having adjourned before he received his commission, the grand jury of that term had no right to fix the salary. We cannot agree with the learned counsel in this view of the case. As we have said before, the term for which Ryan had been appointed was four years from the 30th of April, 1884; and the new term commenced on the 30th of April, 1888. It is true that the law declares that the county judge shall hold until his successor is appointed and qualified, but it would not do to hold that where a man is appointed to office, and reappointed as his own successor, he could change the term of office prescribed by law by a failure to apply for the second commission, and to qualify thereunder. Under that view of the case, Judge Ryan could have refused to apply for and qualify under the new commission for three years and eleven months, and could then apply for and qualify under the new commission, and make his term four years more, and draw, for nearly the whole of the second term, the same salary originally fixed by the first grand jury; or he could have refused to apply for and qualify under the new commission at all, and been reappointed by the governor at the expiration of the second term, and still refused to apply for and qualify under the third commission, and have drawn his original salary. As said before, the law contemplates that the grand jury shall fix the salary once in every four years; and, when once fixed, it shall not be increased during that term of four years. If there should be any good reason to reduce the salary of the county judge, under the view taken by counsel for the defendant in error it could never be done as long as the same person should be reappointed to the office, because he could refuse to apply for and receive the new commission. We think, therefore, that the better rule is to hold that the term of office expires every four years from the reception of the original commission, and that it is the duty of the grand jury, at the spring term, when the four years have expired, or, when they will have expired, before the next spring term, to fix the salary for the succeeding term. We therefore hold that the judge erred in ordering the county commissioners to assess a tax for the payment to Ryan of the sum of $500 as his salary for the year beginning April 30, 1888, and that he erred in holding that the grand jury for the spring term, 1888, was not the proper jury to fix the salary of the county judge for the new term commencing April 30, 1888. Judgment reversed.

(82 Ga. 568)

REILLY v. STATE.

(*Supreme Court of Georgia.* March 25, 1889.)

APPEAL—EVIDENCE.

1. Though the fact that evidence was objected to be stated, yet, if it be not stated either in the motion for a new trial or in the bill of exceptions on what ground or grounds the objection was predicated in the court below, the supreme court will not adjudicate upon the alleged error in admitting the evidence over the objection.

2. The evidence, though conflicting, and in its letter very strong in behalf of the accused, warranted the verdict, the case turning on the credibility of the witnesses.

(*Syllabus by the Court.*)

Error from superior court, Chatham county; ADAMS, Judge.

W. P. La Roche, for plaintiff in error. *W. W. Fraser*, Sol. Gen., *pro tem.*, for the State.

BLECKLEY, C. J. Reilly, being convicted of the offense of shooting unlawfully at another, moved for a new trial on the general grounds, and on two other grounds, both complaining of the admission of evidence.

1. While it is alleged that certain evidence was admitted over objection, no ground of objection is specified as having been presented to the court below. This omission precludes us from making any adjudication upon the exclusion of evidence. The cases upon this subject are too numerous to require citation.

2. Was the verdict unauthorized by the evidence, or contrary to law? The evidence was conflicting, but the jury must have credited that adduced by the state, and, if so, it was ample to warrant the verdict. The evi-

Digitized by Google

dence in behalf of the accused, had it been credited, made out a most complete justification for the shooting, but it all involved the theory that the shooting occurred while Jenkins, the man who was shot, was advancing upon Reilly to cut him with a knife or stab him with a dirk, whereas Jenkins testified that he and Reilly were going in opposite directions; that the shot was fired after they had passed each other; and that the ball struck on the back of the jaw, and came out in front. He exhibited the wound to the jury, and that must have confirmed his testimony, for otherwise neither the finding of the jury nor the refusal of a new trial by the court can be accounted for. On the position of the wound, or the direction taken by the bullet, there was no conflicting evidence. Had the testimony of the witnesses for the accused been true, the ball should have passed from front to rear, and not from rear to front. This one circumstance may have swayed the opinion of the jury as to crediting and discrediting witnesses, and may have been the surest guide to truth which the case afforded. While there is in the letter of the evidence a strong current against the verdict, yet evidence is of no force unless it is true, and the jury have virtually pronounced it untrue. We cannot say they were mistaken, or that the court erred in not setting their verdict aside. Judgment affirmed.

(82 Ga. 613)

CLARK v. GORDON, Governor.

(*Supreme Court of Georgia.* March 25, 1889.)

BAIL—REQUISITES OF BOND.

1. In order to render a surety on a bail-bond, returnable to the city court of Savannah, liable for its breach, it is not necessary for the bond to recite whether the offense charged against the principal is a misdemeanor or a felony, under the law requiring bail-bonds for the former to be returnable to the city court, and for the latter to be returnable to the superior court, where the surety knew when he signed the bond that both the indictment and warrant charged a misdemeanor, as it will be presumed that the magistrate taking the bond knew the law, and made the bond returnable accordingly.

2. The surety cannot be relieved from liability on the bond by the fact that, on his applying to the solicitor general for instruction as to how he should proceed, the latter gave him erroneous advice, which he followed.

Error from city court of Savannah; HARDEN, Judge.

Jackson & Whatley and *A. C. Wright*, for plaintiff in error. *F. G. Du Bignon*, Sol. Gen., for defendant in error.

SIMMONS, J. It appears from the record in this case that one Pritchard sued out a criminal warrant before a justice of the peace against Broughton, charging him with larceny from the person, "in that he wrongfully and fraudulently did take, steal, and carry away from the person of the deponent $38, the deponent's property." Broughton was arrested under this charge, and carried before the magistrate, and gave a bond for $500 for his appearance at the city court of Savannah; Clark, the plaintiff in error, becoming his security on the bond. An indictment was found against Broughton, charging him with larceny from the person to the amount of four dollars. When the case was called for trial in the city court, Broughton failed to appear. A rule *nisi* was issued, calling on him and his surety to show cause why the bond should not be forfeited. Clark, the surety, demurred to the rule upon the following grounds: "(1) Because the said bond imposed no obligation upon said Broughton to appear as therein stipulated, nor did it impose any obligation upon said Clark to produce the body of said Broughton as therein stipulated. (2) Because the bond was conditioned for the appearance of said Broughton at said November term of said court to answer for the offense of larceny from the person, without stating that the subject-matter of the alleged larceny from the person was under the value of $50. (3) Because the bond disclosed no obligation upon said Broughton to answer or to appear for any offense within the jurisdiction of said court, nor any obligation upon said Clark, surety, to produce the body of said Broughton to answer for any offense within the jurisdiction of said court. (4) Because the bond was conditioned for the appearance of said Broughton to answer for an alleged offense of which, if committed, said court did not have jurisdiction, to-wit, the offense of larceny from the person, the subject-matter of which exceeded in value $50." This demurrer was overruled, and Clark excepted. Clark then filed his answer, in which he set up, in substance, that, being desirous of relief from further liability on the bond, he applied to the solicitor general *pro tem.* for instruction as to what was necessary to be done by him for that purpose. The solicitor instructed him to tell the sheriff to arrest Broughton, and, on being asked by Clark if it was his duty to arrest Broughton himself, the solicitor replied that it was not, but that it was the sheriff's duty. Clark applied to the sheriff to make the arrest, but the sheriff refused, saying it was Clark's duty. At that time Broughton was in Savannah, and could have been arrested. Clark then applied to a constable to make the arrest, but Broughton had fled. He claimed that he was released from the bond, because the solicitor general had misinformed him. This answer was stricken by the court, and judgment rendered against Clark for the amount of the bond. Clark excepted thereto, and brought the case here.

1. The demurrer filed by Clark to the rule *nisi* was properly overruled by the court. It is not necessary, in our opinion, when a magistrate takes a bail-bond of this kind, for the bond to recite whether the larceny from the person is a misdemeanor or a felony. If it is a misdemeanor, the law requires the magistrate to make it returnable to the city court of Savannah; if a felony, it is to be returned to the superior court. Code, § 4978. The

Digitized by Google

magistrate is presumed to know the law under which he acts, and to return the bonds accordingly. Besides, the fact that the bond was returned to the city court implied jurisdiction. Under the facts in this case, Clark, when he signed the bond, knew that the city court had jurisdiction of the offense; because the warrant under which his principal was arrested recited the amount stolen to be an amount under $50, to-wit, $38, and the indictment alleges that the amount was $4. The warrant and the indictment both charging the amount to be under $50, the city court had jurisdiction of the offense. The trial judge, therefore, did right in overruling the demurrer on this ground.

2. There was no error in striking the answer of Clark to the rule. If the solicitor general gave him wrong advice as to its being the duty of the sheriff to arrest his principal, the state is not bound by it. When he signed the bail-bond of his principal, the law placed the principal in his custody, and he could have arrested him and delivered him to the sheriff at any time, and it was his duty to do so if he wished to be relieved from liability upon the bond. Judgment affirmed.

(30 S. C. 291)

LYLES *v.* ROACH *et al.*

(*Supreme Court of South Carolina.* March 7, 1889.)

ADVERSE POSSESSION—AMENDMENT OF STATUTE.

1. Where, at the time adverse possession of land begins, the statute of limitations is 20 years, that statute governs the case, notwithstanding an act passed a year later provides (without using any retroactive words) that actions to recover land must be brought within 10 years.

2. The time when the adverse possession commenced being in dispute, the court erred in assuming that defendant was not in adverse possession before the enactment of the new statute of limitations, and in charging that, therefore, the new statute governed. The question was one of fact for the jury.

Appeal from common pleas circuit court, Richland county; KERSHAW, Judge.

Ejectment by Joseph Lyles against Alice Roach and her husband, J. M. Roach. Verdict and judgment for defendants, and plaintiff appeals.

Robert A. Lynch, for appellant. *Andrew Crawford*, for respondents.

SIMPSON, C. J. In 1872 the defendants took possession of the land in dispute, which at that time belonged to plaintiff's father, and they have held possession ever since. In 1872, at the time this possession was taken by the defendants, the limitation in reference to the recovery of real property was as follows: No action for such purpose could be maintained, unless it should appear that the plaintiff, his ancestor, predecessor, or grantor, was seised or possessed of the premises within 20 years before the commencement of such action. Section 101 of original Code. And in section 104, same Code, it was provided that in such action the person establishing a legal title to the premises should be presumed to have been in possession thereof within the time required by the law, and the occupation of such premises by any other person should be deemed to have been under and in subordination to the legal title, unless it appear that such premises have been held and possessed adversely to such legal title for 20 years before the commencement of such action. Construing these sections together, the meaning must have been that, to defeat the recovery of the plaintiff in such cases, the defendant was required to prove 20 years' adverse possession before the commencement of the action. And although the plaintiff could not recover unless it appeared that he or his ancestor, etc., had been in possession within that period, yet proof of title on his part presumed that; which was good until defendant, although he had been in possession for the 20 years, proved that said possession was adverse for said time. Only so much of the possession as was proved to be adverse could count as part of the 20 years required. In November, 1873, the act above was amended by reducing the time to 10 years, instead of 20, with the same provision, however, as to title in plaintiff presuming possession within the 10 years, and the necessity of the defendant proving adverse possession for 10 years before action brought in order to overthrow this presumption. So that, in brief, the law of force before 1873 required the defendant to prove, not simply 20 years' possession, but 20 years' adverse possession; and the law since 1873, and which is now of force, requires adverse possession of 10 years only before action brought. Now, as we have stated, the defendants went into possession in 1872, while the old act was of force, holding possession about a year, when the act of 1873 was passed; their possession continuing until up to this time. The plaintiff's father died in 1884, leaving the plaintiff, as one of his heirs, entitled to one-fourth of his estate; and the action below was brought under the above state of facts to recover said one-fourth of the land. His honor, the circuit judge, held that the act of 1873 applied to the case, and he charged that, if defendants had proved to the satisfaction of the jury adverse possession for 10 years before the action was brought, they were entitled to the verdict. The verdict was for the defendants. The question in the appeal is, was his honor correct in his ruling above? Or should he have held that the old act applied? Plaintiff's father died in 1884, and defendants having been in possession since 1873, and more than 10 years intervening between 1873 and 1884, if that possession was adverse, and the act of 1873 applied, defendants were certainly entitled to the verdict. But if the old act, to-wit, the act of 1870, applied, then defendants not having been in possession, either adverse or permissive, for 20 years, plaintiff was entitled to the verdict; so that the only question in the case, as we have already stated, is, should the act of 1870 or the act of

Digitized by Google

1873 be held to apply? There is no doubt but that the act of 1873 repealed the act of 1870, and that, in all cases arising since the act of 1873, only 10 years' adverse possession are required to defeat plaintiff's recovery; certainly, where the possession has been taken since the act and has been held adversely since, for the 10 years. But the act of 1873 was not retroactive. There is nothing in its terms which carries it back of its date, nor is there a necessary implication from the language used to that effect. It was clearly prospective, and had reference entirely to causes of action which might arise in the future, after its passage; as to which the old act of 1870 was, of course, thereby repealed. Now, such being the fact, the true point upon which the question turned, whether the act of 1870 or 1873 applied, was, when did the cause of action accrue? Or, rather, when did the defendants commence to hold adversely? because no action accrued until adverse holding began. It is conceded that defendants went into possession before 1873, to-wit, in 1872. But we do not understand that it is conceded that defendants' possession commenced adversely in 1872, and has so continued since. If so, his honor was in error in applying the act of 1873 to the case, because then the cause of action would have accrued before 1873, and while the act of 1870 was of force, in which event 20 years' possession before suit brought would have been required.

Now, at what time adverse possession commenced, and when thereby a cause of action accrued, was and should have been held a question of fact for the jury, with instructions from the court, as matter of law, that if they found that such adverse possession began before the act of 1873, supra, then the plaintiff was entitled to recover, unless the testimony satisfied them of 20 years' adverse possession in defendants before action brought; and, if such possession began after the act of 1873, then 10 years would be sufficient. We think, therefore, that the charge of his honor was erroneous in assuming that adverse possession had commenced since 1873, and therefore in charging that 10 years would entitle the defendants to the verdict. It may be stated generally, and with reference to all statutes of limitations, both as to actions arising on contracts, and also upon torts, trespasses, etc., that the currency of the statute commences when the cause of action accrues, or, as Judge EVANS said in Bugg v. Summer: "Whenever there is a plaintiff who can sue and a defendant who can be sued the statute begins to run. A right of action has accrued," (1 McMul. 333;) and the limitation in force at the accrual of the right is the limitation which must govern. This theory is sustained in our recent case of Nichols v. Briggs, 18 S. C. 478, where the limitation of force at the time the note fell due was applied, and not the one when the action was brought. And this was not because the subject-matter rested on contract, but because the accrual of a right of action set the statute in motion; and this was the case whether the cause of action was *assumpsit*, trespass, trover, debt, or whatever else it might be. Respondents' counsel contends, ingeniously, that title founded upon adverse possession is nothing but a right or title growing out of a continuous daily trespass submitted to for the statutory period, and, if the defendants can show such daily continuous trespass since the act of 1873, submitted to for 10 years by the plaintiff, then they are protected, their trespass having ripened into a right. But it will be observed that the action of the plaintiff is for the recovery of the possession of the land, and the right of action for such possession accrued, first, when he was illegally deprived of possession, and, if that deprivation has continued, there has not been a second cause created thereby, but the first has continued; and, the currency of the statute being set in motion by the accrual of the first, the time must be estimated from that period, and according to the provisions of the act of assembly then of force. We think it was error for the judge to hold, as matter of law in this case, that the act of 1873, limiting adverse possession to 10 years, applied and should govern. He should have ruled that whether said act, or the previous act of 20 years, applied, depended upon the question of fact whether the adverse possession set up began before or after the said act of 1873, and this question he should have left to the jury, with such instructions as the fact found might require.

It is the judgment of this court that the judgment of the circuit court be reversed.

McIVER and McGOWAN, JJ., concur.

(30 S. C. 422)

ELKIN v. GREGORY *et al.*

(*Supreme Court of South Carolina.* March 28, 1889.)

APPEAL—WHEN LIES—WHO MAY APPEAL.

1. A sheriff levied upon certain personalty of a debtor in obedience to a warrant obtained by the plaintiff for the enforcement of a lien, and the debtor, having given the required bond, regained possession of the property. Afterwards D., claiming to have a lien anterior in date to that of plaintiff, caused the sheriff to levy upon the same property, who delivered possession to D. On a rule issued against the sheriff to show cause why he should not be attached for not satisfying plaintiff's lien, it was adjudged that plaintiff was entitled to priority of payment from the proceeds of said property. *Held*, that the debtor, who was not a party to the rule to show cause, and who had not regained possession of the property after its delivery to D., could not appeal from an order, made without notice to him, that the sheriff should satisfy the lien of plaintiff out of the proceeds of the property.

2. Neither could D. appeal from such order on the ground that he had no notice of it, who, although he had intervened on the rule to show cause, and raised the question of the priority of the liens, had abandoned an appeal from the decree adjudicating such question.

Appeal from common pleas circuit court of Fairfield county; WALLACE, Judge.

Proceedings by Mattie L. Elkin against

Digitized by Google

Bolin Gregory and others, to enforce an agricultural lien. The defendants appeal from an order enforcing such lien.

Johnstone & Cromer and *H. A. Gaillard*, for appellants. *Obear & Rion*, for respondent.

MCIVER, J. The plaintiff, having leased certain lands to the defendant Gregory for the year 1884, obtained from the clerk of the court, on the 15th October, 1884, a warrant to enforce her lien on the crops grown on said lands during that year, directed to the sheriff of the county. In obedience to said warrant, the sheriff "levied upon and seized certain crops, in quantity, as the plaintiff alleges, fourteen thousand pounds of seed cotton, more or less, and about five thousand pounds of seed cotton not picked, made and grown by said Bolin Gregory on said land." On the 21st October, 1884, Gregory, having given bond as provided for by section 2404 of the General Statutes, regained possession of the property so levied upon. After this the defendants Dominick & Co., claiming to have a lien for supplies furnished Gregory anterior in date to that of plaintiff, obtained a warrant to enforce their lien, under which the crops were again levied upon by the sheriff. Thereupon the plaintiff made an affidavit, which appears in full in the "case," setting forth the grounds of her claim, and the issuing of her warrant, and the levy thereunder by the sheriff, and stating "that said sheriff, instead of applying the proceeds of said crop to the payment of the rent due this deponent, delivered said crop to Messrs. Dominick & Co., whereby the said sheriff has failed to obey the mandates of said warrant." Upon hearing this affidavit a rule was granted by Judge WALLACE requiring the sheriff to show cause why he should not be attached for failing to obey the mandate of said warrant. To this rule the sheriff made a return, which is likewise set out in the case, stating, in substance, that after the crops had been levied on under plaintiff's warrant, and the return of the same to Gregory upon his compliance with the provisions of section 2404 of the General Statutes, the said crops were also levied upon under a warrant issued at the instance of Dominick & Co., after the return of the same to Gregory. The sheriff does not state specifically in his return what crops were levied upon under either of the warrants, nor does he deny that he had levied on, under plaintiff's warrant, the specific property designated by her in her affidavit, but simply designates the property levied on as "the crops." Nor does it appear from the sheriff's return, or from anything else that we can discover in the case, what disposition was made of "the crops" after they were levied on under the warrant issued at the instance of Dominick & Co., as it is not stated that Gregory reclaimed them, under the provisions of section 2404 of the General Statutes, after that levy. In the absence, therefore, of any such statement, or any denial of the statement to that effect in the affidavit of the plaintiff, we must assume that the sheriff either turned over "the crops" levied on to Dominick & Co., or sold the same, and paid over the proceeds to those defendants. It seems that in this proceeding by rule on the sheriff the defendants Dominick & Co. intervened, and filed an affidavit, called a "return," setting up their claim to priority of lien; and this issue was heard by his honor, Judge WALLACE, who on the 13th of May, 1885, filed his decree, adjudging that the plaintiff was entitled to priority of payment from the proceeds of said crops, "and that she have leave to apply at the foot of this decree for all necessary orders to carry it into effect." Notice of appeal from this decree was duly given, but the appeal was subsequently abandoned. No further step seems to have been taken until the 15th of May, 1886, when the plaintiff, without notice to the defendants or their attorneys, applied for and obtained from Judge WALLACE, at chambers, in Columbia, an order, which, after setting out substantially the above-mentioned decree, required the sheriff to pay to the plaintiff or her attorneys, "from the proceeds of the crops levied upon by him under the warrant obtained by Mattie L. Elkin against Bolin Gregory, a sum sufficient to satisfy the rent due her by said Bolin Gregory, to-wit, six thousand pounds of lint cotton, and the grain and long food claimed; and also a sum sufficient to pay the costs and expenses of this proceeding, to be taxed by the clerk of said court; and, in the event of the failure or refusal of said sheriff so to do, that the said rule become absolute." The existence of this order remained unknown to the defendants until the 23d of February, 1888, when notice was given to their attorneys by the attorneys for plaintiff that such order was on file in the record of this case. But whether anything was done under said order, or whether its directions were complied with by the sheriff, does not appear.

Upon receipt of the notice of the filing of the order the defendants, Bolin Gregory and Dominick & Co., at once gave notice of appeal, upon the following grounds: (1) Because neither the defendants nor their attorneys had notice of the application for said order; (2) because said order was passed at chambers, and these appellants never consented that the application therefor should be heard at chambers, (3) because the order was not passed within the circuit where this cause was pending, by a judge having jurisdiction; (4) because the order was not passed out of the circuit where this cause was pending, by a judge having jurisdiction; (5) because the order does not correctly state the amount due on plaintiff's lien.

It is somewhat difficult to understand how the appellants have acquired any *status* in this court so as to enable them to make any of the questions raised by their grounds of appeal. This case originated in a rule on the

Digitized by Google

sheriff to show cause why he should not be attached for failing to execute a warrant placed in his hands to enforce plaintiff's lien, and to that proceeding Gregory never became a party in the court below, so far as we can perceive, and therefore we do not see how he can, in this court, question any order of the circuit court in such proceeding. He did not intervene in that proceeding, nor did he take any steps to contest the amount due on plaintiff's lien. It is said, however, that he could not do so, under the provisions of section 2398 of the General Statutes, as by that section it is provided that the lienor may, at any time within 30 days after the sale by the sheriff, give notice to that officer that the amount claimed is not justly due, accompanied with his affidavit to that effect, when an issue could be framed to try that fact. Whether the sheriff has ever sold the crops levied on or not does not appear. If he has not, then, certainly, he was amenable to this rule for not obeying the mandate of the warrant, and the lienor has no right to interfere. If the sale has been made by the sheriff, and no steps have been taken by Gregory, under the provisions of section 2398 of General Statutes, within the prescribed time, then it is equally clear that he is an unauthorized intruder, and cannot be heard. The fact that, when the crops were first levied on by the sheriff, Gregory reclaimed the property under the provisions of section 2404 of General Statutes, cannot make him a party to this proceeding, in view of what subsequently occurred; for the property was again levied on by the sheriff under the warrant procured by Dominick & Co., and there is not only no evidence that Gregory again reclaimed possession under the provisions of section 2404 of General Statutes, but, on the contrary, it is stated in the affidavit of plaintiff, and not denied either in the return of the sheriff or in the affidavit of Dominick & Co., that, after the last seizure, the sheriff, instead of applying the proceeds of the property levied upon to the payment of plaintiff's lien, "delivered said crops to Messrs. Dominick & Co." What would have been the relations of the parties, and the proper proceedings to be pursued, if Gregory had retained possession of the property levied on, or had regained possession after the seizure under the warrant issued to enforce the lien of Dominick & Co., we need not consider, as no such case is presented in the record. The case as presented is simply this: that the sheriff, instead of applying the proceeds of the property seized to the payment of plaintiff's lien, has applied the same to the lien of Dominick & Co., which has been adjudged to be the junior lien.

Next, as to the right of Dominick & Co. to be heard here. When they intervened in the court below, the only issue which they raised was as to the priority of the liens, and when that issue was adjudged against them, and the appeal from such adjudication was abandoned, it would seem that their claim was finally disposed of, and their connection with the case terminated. The consequence of that adjudication clearly was to establish the right of the plaintiff to be first paid out of the proceeds of the property levied upon by the sheriff under the two warrants; and, if that officer failed or refused to perform his duty as thus ascertained by the final judgment of a competent tribunal, he could, unquestionably, be required to do so under pain of attachment. If he applied, from the proceeds of the property levied upon by him, more than was sufficient to satisfy plaintiff's lien, together with the costs which she had incurred in enforcing her rights, the junior lien creditors, Dominick & Co., must look to the sheriff for redress, and certainly have no right to question an order requiring the sheriff to pay to plaintiff a sum sufficient to satisfy her lien and costs, which had been judicially ascertained to be entitled to priority.

It will be observed that the sheriff in his return raises no question as to whether the property levied upon was sufficient to satisfy the plaintiff's lien. He does not state, as he should have done, the amount of money which either was or ought to have been in his hands, arising from the sales of the property seized under the two warrants, and ask the instructions of the court as to how he should apply such amount, to which these conflicting claims were made. But he simply says, after stating the facts as to the seizure of "the crops" and the conflicting claims made thereto, that, "being unable to determine the conflicting claims of the parties aforesaid to the crops aforesaid, he has declined to enforce either of the warrants aforesaid until he shall have been further directed in the premises." What disposition was made of the property levied on under the warrant issued to enforce the lien to Dominick & Co., when it does not appear to have been reclaimed by Gregory, the sheriff does not state in his return. If he turned it over to Dominick & Co., as stated in the affidavit of plaintiff, instead of selling it, and holding the proceeds subject to the order of the court, as he should have done, he did so at his peril, and he must now abide the consequences.

The sheriff, who, it seems to us, was the only person entitled to notice of the application for the order appealed from, if any one was so entitled, does not appeal, nor does it appear whether he consented to the hearing of the application at the time and place, and by the judge when, where and by whom it was heard; and, even if such notice and consent were necessary, we would assume, in the absence of any evidence to the contrary, that it was given. But we are not to be understood as deciding anything as to the necessity for such notice and consent, inasmuch as the sheriff, the only person entitled to make the question, has not appealed, and is not before us. The judgment of this court is that the order appealed from be affirmed.

SIMPSON, C. J., and MCGOWAN, J., concur.

Digitized by Google

(30 S. C. 360)

UTSY v. HIOTT.

(*Supreme Court of South Carolina.* March 14, 1889.)

CONSTITUTIONAL LAW—SPECIAL LEGISLATION.

1. Act S. C. 1887, exempting from the operations of the general stock law (Gen. St. S. C. §§ 1184–1194) Colleton county, with a proviso that the act should not affect those citizens of the county who had conformed to the general stock law, is unconstitutional, the proviso being a special law, applying to certain persons of a class, and repugnant to Const. S. C. § 12, art. 1, which declares that no person shall be subjected in law to any restraint in regard to his personal rights not laid on others under like circumstances.

2. Both sections of the act, being closely connected and on the same subject, must fall together.

Appeal from common pleas circuit court of Colleton county; PRESSLEY, Judge.

Joseph Hiott, Sr., was sued by W. L. Utsy for expenses of seizure of estrays and damages under the general stock act. From judgment for plaintiff, defendant appeals.

W. B. Gruber, for appellant. *Murphy & Farrow*, for respondent.

MCGOWAN, J. From the "agreed case" it appears that both the plaintiff (respondent) and the defendant (appellant) reside within the territorial limits exempted from the operation of the general stock law by act of 1887, "to exempt certain portions of Colleton county from the operation of chapter 27, tit. 10, Gen. St., in relation to the general stock law." 19 St. 1002. That in April, 1888, one of the defendant's cattle wandered upon the cultivated lands of the plaintiff, and was seized by him while so trespassing, under the provisions of the general stock law, and claim made for seizure and damages. Thereupon the defendant went before a trial justice, and gave bond for the expenses of seizure and damage, should any be awarded, and retook his property. Suit was thereupon instituted by the plaintiff to recover the expenses of seizure and damages under the general stock law. One of the counts in the complaint also alleged $3 damage at common law, and prayed judgment thereon. It appeared that the plaintiff cultivated his crops without inclosure. During the summer months his cattle were placed in charge of persons residing in other neighborhoods, within the territorial limits exempt by act of 1887. While in charge of these persons, who were paid for their trouble, the cattle roamed at large, and were sometimes impounded by persons upon whose lands they trespassed, and the plaintiff paid the costs and damages. In the fall, plaintiff took his cattle home, and allowed them to graze in his fields. Later, when the crops of the neighborhood were harvested, the cattle were permitted to roam at large. One or two persons residing in the neighborhood objected to this, and impounded plaintiff's cattle, and he paid the costs and damages. Nearly all his neighbors allowed their stock to pasture at large during the winter months. The practice of the plaintiff here described embraced that period of time intervening between the general stock law (1882) and the act of 1887. Under these circumstances, the trial justice gave judgment in favor of the defendant, and dismissed the complaint, upon the ground that the plaintiff, not having "conformed to the general stock law," could not claim the benefit of the proviso to the exempting act, (1887,) which declares that "those owning real estate in Colleton county, who have conformed to the general stock law, shall not in any way be affected by the operations of this act." Appeal was taken to the court of common pleas, and Judge PRESSLEY, holding that the practice of the plaintiff as to the management of his cattle was "a substantial conformity to the general stock law," reversed the judgment of the trial justice, and gave the plaintiff judgment for $3, and costs. He also held that the act of 1887, "to exempt certain portions of Colleton county from the general stock law," (19 St. 1002,) operates "unequally upon the persons within its territorial limits and the same business, and is therefore unconstitutional and void." From this order and judgment the defendant appeals to this court upon the following exceptions: "(1) For that his honor erred in holding that the respondent [plaintiff] had proved a conformance to the general stock law. (2) For that his honor erred in holding that the act of 1887 ['To exempt certain portions of Colleton county from the operation of the general stock law'] was in violation of article 1, § 12, of the constitution of South Carolina, and therefore unconstitutional and void. (3) For that his honor erred in refusing to hold that if the proviso of said act of 1887 was unconstitutional, that the proviso alone was unconstitutional, and the body of the act valid."

The law commonly known as the general stock law, in order to secure parties in cultivating their crops without fences, makes it unlawful for the owners to allow cattle to roam at large. The plaintiff lives in a part of Colleton county which has been exempted by act of the legislature from the operations of the stock law, and yet the seizure of the defendant's cattle, and his action for the expenses of seizure and damages, are founded on the provisions of the general stock law. At first view this would seem inconsistent, but it arises in this way: Upon the passage of the general stock law, (1882,) which prohibited cattle from roaming at large, it seems that some persons in Colleton county conformed to it by removing their fences and inclosing their cattle, while others did not do so. Afterwards, (1887,) the legislature passed a law exempting a certain portion of Colleton county from the operation of the stock law, and, in order to protect those within that territory who had "conformed" to the general law of 1882, a proviso was inserted in the exempting act as follows: "Provided, those owning real estate in Colleton county, who have conformed to the general stock law, shall not in any way be affected by this act;" that is to say, the stock

Digitized by Google

law was not repealed, but still left in force as to such persons. The plaintiff rested his case, in the first instance, on this proviso, claiming that he was one of those within the exempted territory who had "conformed" to the stock law, and therefore was entitled to all the rights and benefits conferred by that law. It was, however, insisted on the other side that as matter of fact he was not one of those who had "conformed;" but, if he was, the proviso itself was and is unconstitutional and void, as being repugnant to section 12, art. 1, of our constitution, which declares that "no person * * * shall be subjected in law to any other restraints or disqualifications in regard to any personal rights than such as are laid upon others under like circumstances," and as also in conflict with the fourteenth amendment of the constitution of the United States, which, among other things, declares that "no state * * * shall deny to any person within its jurisdiction the equal protection of the laws." To this it was replied that, if the proviso is void, that must necessarily affect and avoid the whole exempting act, leaving the parties simply under the provisions of the general stock law.

Is the exempting act (1887) unconstitutional, either in whole or in part? We assume that the local character of the act does not make it necessarily unconstitutional. While there may be some just objections to local laws in general, it is well established that the authority that legislates for the state at large must determine whether particular rules shall extend to the whole state and all its citizens, or, on the other hand, to a subdivision of the state or a single class of its citizens only. The circumstances of a particular locality, or the prevailing sentiment in that section of the state, may require or make acceptable different police regulations from those demanded in another. The legislature may therefore prescribe different laws of police in each distinct municipality, provided the state constitution does not forbid. These discriminations are made constantly; and the fact that the laws are of local or special operation only is not supposed to render them obnoxious in principle. If the laws be otherwise unobjectionable, all that can be required in those cases is that they be general in their application to the class or locality to which they apply, and they are then public in character, and of their propriety and policy the legislature must judge. And, as Mr. Justice McIver said in the case of State v. Berlin, 21 S. C. 296: "The whole matter is well summed up in a note on the same page of Cooley, Const. Lim. 390, in the following words: 'To make a statute a public law of general obligation, it is not necessary that it should be equally applicable to all parts of the state. All that is required is that it shall apply equally to all persons within the territorial limits described in the act.'" See State v. Hayne, 4 S. C. 410; State v. Columbia, 6 S. C. 1; Kaminitsky v. Railroad Co., 25 S. C. 53. The legislature, then, having the right to pass laws which affect only certain localities and classes, the question arises here whether it was within its constitutional power not only to make an exemption from the operation of the general stock law in a particular locality, rather vaguely defined, in part, at least, by an "imaginary line;" but to go further, and make an exception of certain individuals within that exemption, simply on the ground that they had "conformed" to a previous general law upon the subject. So far as appears in the case, all the persons living within the exempted territory belonged to the class of farmers, cultivating the soil and raising stock as a business, and in their calling were in no way limited to any particular mode of conducting their operations, except that they should not violate the law. Some, however, did not conform to the law, and that course put their farms into condition in some respects different from that of those who did "conform" to it and removed their fences. Did such difference in the condition of the farms in the exempted territory divide the owners into two classes so separate and distinct as to authorize the legislature to make rules and regulations as to one class entirely different from those applicable to the other? We cannot think so. All the persons interested were not only living in the exempted territory, but were distinctively farmers, the difference in the condition of their respective farms claimed to exist being only that produced by the conduct of those who did not "conform" to the law, and which, we cannot think, was sufficient to place them in such distinct "classes" as to justify class legislation in favor either of those who "conformed" or of those who did not conform to the general stock law. As we understand it, previous conduct does not authorize partiality in the law. An act excepting from its operation all good men would surely be in conflict with the absolute equality required by the constitution. "A statute would not be constitutional which * * * should select particular individuals from a class or locality, and subject them to peculiar rules, or impose upon them special obligations or burdens, from which others in the same locality or class are exempt. * * * Every one has a right to demand that he be governed by general rules, and a special statute, which, without his consent, singles his case out as one to be regulated by a different law from that which is applied in all similar cases, would not be legitimate legislation, but would be such an arbitrary mandate as is not within the province of free governments. Those who make the laws 'are to govern by promulgated, established laws, not to be varied in particular cases, but to have one rule for rich and poor, for the favorite at court and the countryman at plow.' This is a maxim in constitutional law, and by it we may test the authority and binding force

Digitized by Google

of legislative enactments." Cooley, Const. Lim. §§ 483, 484, and notes.

The line seems to be drawn at "classes," and some of the cases, (Missouri,) with the force of antithesis, put it thus: "A statute which relates to persons or things as a class is a general law, while a statute which relates to particular persons or things of a class is special." Now, simply as an illustration, we suppose that there is no doubt that the first proviso of the act under consideration (1887) would fall under this prohibition as to persons "of a class," for it expressly and in terms excepts from the exemption enacted the lands of certain persons by name, viz., James L. Gantt, the estate of W. M. Brodsford, and of Theodore D. Jervey, and we think the same principle must apply to the second proviso, which excepts those owning real estate in Colleton county who have conformed to the general stock law.

We entirely understand and appreciate the object which was in contemplation when the legislature inserted the proviso in question. The intention manifestly was, while making the exemption, to protect those within the exempted territory, who, as law-abiding citizens, had "conformed" to the general law upon the subject. But, without regard to the laudable purpose, we do not think that the legislature could except from the exemption certain farmers, while declining to exempt others living in the same territory. According to our view, the proviso makes a distinction between citizens who were all farmers, living in the same territory, and under like circumstances, which is in conflict with the fundamental law, and we are therefore constrained to hold that it is unconstitutional and void. But we think that, as a necessary consequence, makes the whole act of 1887 void. It is true that a part of an act may be declared unconstitutional, and the other portions remain unaffected; but that must always depend upon the nature of the connection between the bad part and the other parts of the act. "Where, therefore, a part of a statute is unconstitutional, that fact does not authorize the courts to declare the remainder void also, unless all the provisions are connected in subject-matter, depending on each other, operating together for the same purpose, or otherwise so connected together in meaning that it cannot be presumed the legislature would have passed the one without the other; * * * and if they are so mutually connected with, and dependent on, each other as conditions, considerations, or compensations for each other as to warrant the belief that the legislature intended them as a whole, and, if all could not be carried into effect, the legislature would not pass the residue independently, then, if some parts are unconstitutional, all the provisions which are thus dependent, conditional, or connected, must fall with them. It has accordingly been held * * * where a statute annexed to the city of Racion certain lands, * * * but contained an express provision that the lands so annexed should be taxed at a different and less rate than other lands in the city, the latter provision being held unconstitutional, it was also held that the whole statute must fail, inasmuch as such provision was clearly intended as a compensation for the annexation." Cooley, Const. Lim. 212, 215, 217, and notes. In this case the two sections of the act are upon the same subject, and essentially connected. Indeed, the proviso was only made necessary by the exempting provision. The legislature evidently intended that the act should take effect as a whole, and we are not authorized to presume that they would have passed the one without the other,—the exemption without the exception. We think it would defeat the intention of the law-makers to erase the proviso and leave the exempting clause, "within the particular territory," without exception or qualification. It is not the proviso alone that is objectionable, for, in itself, it is but the reaffirmation of the stock law as to certain persons; but the difficulty springs from its connection with the exempting clause. It is the two together which make the inequality under the law. Besides, the inequality is intensified here because of the peculiar character of the stock law, which confers rights and imposes obligations so reciprocal in their nature that the benefits supposed to be afforded by it cannot be enjoyed or practically enforced, unless its operations are made general in the same community. One man may nominally have the right to cultivate his crops without fences, but assuredly that right would be worse than useless to him unless his neighbors were required to keep their stock from trespassing. This seems to be one of those cases where there cannot be a perfect individual right, but, in order to be beneficial, it must be general. The circuit judge well expressed it when he said that "under such circumstances I cannot perceive that the act can possibly be made to operate equally on persons in the same business within the exempt territory. It is worse than shadow without substance. The supposed exemption to persons within the territory along the boundary lines actually double their burdens. The effect is to compel them to pay the penalty if their stock shall wander across the boundary line, and also to fence their cultivated fields as a protection against stock within the exempt territory, but further inward from said boundary. And this same result follows all over the exempt territory, wherever there be any one who, under said proviso, has the benefit of the general stock law," etc.

With a strong consciousness of the fallibility of human judgment, we hesitate to declare an act of the legislature—a co-ordinate department of the government—unconstitutional and void, and never do so, except in the conscientious discharge of what is deemed to be official duty. The view we have taken of the case renders it unnecessary to consider the other questions raised. The act of 1887, being unconstitutional, the parties

Digitized by Google

stand upon their rights under the general stock law of 1882. The judgment of this court is that the judgment of the circuit court be affirmed.

SIMPSON, C. J., and MCIVER, J., concur.

(30 S. C. 419)

COPELAND v. TODD.

(*Supreme Court of South Carolina.* March 23, 1889.)

EXECUTORS AND ADMINISTRATORS—COMPLAINT.

1. Whether, in 1877, the probate court had jurisdiction to render judgment in favor of a creditor for his *pro rata* part of a claim filed against the estate of a decedent, which is allowed, is immaterial to the sufficiency of a complaint based upon such a judgment, when it is alleged that the amount of the judgment was ascertained to be in the executor's hands in a settlement of his accounts, made before said court, and that he has recognized, by subsequent payments thereon, the validity of the judgment; as, by the admission of assets in his settlement, he became liable personally to the creditor, and by the payments, and his acquiescence in the judgment, his personal representative is estopped to deny his liability as against the creditor's executor.

2. After the lapse of time within which an execution could issue upon the judgment mentioned, without any being issued, an action of debt can be maintained thereon.

Appeal from common pleas circuit court of Laurens county; W. H. WALLACE, Judge.

Action by George P. Copeland, executor, etc., of W. R. Young, deceased, against Mary C. Todd, executrix, etc., of R. P. Todd, deceased, to recover the amount of a judgment rendered by the probate court in favor of plaintiff's testator against said R. P. Todd, as executor, etc., of Hastings Dial, Jr., deceased. Judgment for plaintiff, and defendant appeals.

W. H. Martin, for appellant. *Holmes & Simpson* and *M. L. Copeland*, for respondent.

MCIVER, J. The only question raised by this appeal being whether Judge WALLACE erred in overruling a demurrer based on the ground that the complaint did not state facts sufficient to constitute a cause of action, it will be necessary to state substantially the allegations of the complaint. These allegations are as follows: That the plaintiff is the duly-qualified executor of the will of W. R. Young; that the defendant is the duly-qualified executrix of R. P. Todd, who died on the 15th of August, 1886; that the said R. P. Todd was the duly-qualified executor of Hastings Dial, Jr.; that upon the settlement of the estate of said Dial, made by his executor, Todd, in the court of probate, it was ascertained that the assets of that estate in the hands of the executor were insufficient to pay the debts in full; that among the claims established on that settlement was the claim of the plaintiff; that the judge of probate, on the 1st of August, 1877, rendered his decree, adjudging that said R. P. Todd, as executor as aforesaid, pay to the plaintiff the *pro rata* of his claim, then amounting to $1,221.25; that under said decree R. P. Todd made to plaintiff two payments on his claim, the amounts and dates thereof being stated, the last of which was made on the 14th of June, 1882; and the plaintiff demanded judgment against the defendant for the said sum of $1,221.25, with interest thereon from the 1st of August, 1877, after deducting the payments stated in the complaint. The appellant, in his argument to support his demurrer, takes two alternative positions: (1) That the court of probate had no jurisdiction to render a judgment on the unpaid note of a creditor, and hence, as the action is based upon the alleged judgment of the court of probate, the facts stated constitute no cause of action; (2) that, if the court of probate had the power to render such a judgment, the plaintiff's remedy was to enforce such judgment by execution, and hence no action could be maintained on the judgment.

Whether the court of probate had the power, prior to the passage of the act of December 20, 1878, (16 St. 710,) substantially incorporated in the Code as sections 67 and 69, to render a judgment which could be enforced by execution, may admit of some doubt. The act of 1872, (15 St. 23,) which was passed for the avowed purpose of removing the doubts then admitted to exist, does not seem to have been couched in language calculated to make the matter clear; for it is there declared that the judge of probate may issue executions "when that is the necessary and proper process to carry into effect any order, sentence, or decree of such court,"—the extent and meaning of which is far from plain. The act of 1878, above referred to, could not be applied to this case, where the alleged judgment was rendered on 1st of August, 1877, without giving it a retroactive effect, for which there is no warrant in the language of the act. Indeed, this act is not only subsequent to the transaction now under consideration, but it would have been impossible for the plaintiff to have availed himself of its provisions, as the time limited therefor (one year) had expired before the passage of that act, and the judge of probate is expressly prohibited from issuing an execution, unless the provisions respecting enrollment of the decree have been complied with. But under the view which we shall take of this case we do not deem it necessary to determine the question just considered. It seems to us that the more correct view to take of the case is that it is an action to enforce an admitted liability by defendant's testator to the plaintiff, and in that view the allegations of the complaint are clearly sufficient to constitute a cause of action. By the settlement made by Mr. Todd of the estate of his testator, Dial, he admitted that he had in his hands the sum stated, applicable to the plaintiff's claim, and this made him personally liable to pay the same to the plaintiff. But he not only admitted such liability by acquiescing in the decree of the judge of probate, but he renewed such admissions by his subsequent

Digitized by Google

payments thereon, and neither he nor his executrix can now dispute such liability. Buchanan v. Buchanan, 4 Strob. 63.

As to the second proposition upon which the appeal is based, we do not think it can be sustained when applied to this case. Assuming, for the present, that the judge of probate had the power to enforce the decree rendered by him on the 1st August, 1877, by execution, yet, as no execution appears ever to have been issued, and more than 10 years had elapsed after the rendition of the decree before this action was commenced, (21st December, 1887,) it is quite clear that before the plaintiff could obtain any execution, even within the three years allowed by the act of 1873, (the law then in force,) he would have had to institute some proceeding to revive the judgment, which, it would seem from the terms of the latter part of section 14 of the act of 1873, (15 St. 499,) could only be instituted in the court of common pleas. But, be that as it may, whatever doubts may have been entertained as to the right of a judgment creditor to bring an action of debt on his judgment as long as he had an enforceable execution, there was no doubt that he could bring such an action when he had no such execution. Norwood v. Manning, 2 Nott & McC. 395; Pinckney v. Singleton, 2 Hill, (S. C.) 343; Lee v. Giles, 1 Bailey, 449; Vandiver v. Hammet, 4 Rich. Law, 509; Shooter v. McDuffie, 5 Rich. Law, 61. The judgment of this court is that the judgment of the circuit court be affirmed.

SIMPSON, C. J., and MCGOWAN, J., concur.

(30 S. C. 391)

HARDIN v. TRIMMIER.

(Supreme Court of South Carolina. March 19, 1889.)

USURY—JURISDICTION.

1. Under act S. C. 1882, (18 St. 36,) which provides that any person "who shall receive as interest any greater amount than is herein provided for shall, in addition to the forfeiture herein provided for, forfeit also double the sum so received, to be collected by a separate action," the amount the borrower is entitled to recover is double the amount of the excess only, and not double the whole amount of interest paid.

2. The case on appeal stated that by act S. C. 1886, (19 St. 654,) the court of common pleas for the county in which the case was heard was required to be held on a certain day, "but, the business of the court of general sessions not having been finished by that day, the court of common pleas, as appears by its journal, was not opened, unless by operation of law," until two days later, when this cause was heard. *Held*, that an objection to the court's jurisdiction could not be sustained. It appearing by the case that the judge, attended by the court officers, was at the appointed place at the appointed time, it would be assumed that the court was properly opened; and the failure of the records to so show does not negative the fact, as there is no statute requiring an entry to be made, and, besides, the failure of the clerk to make the entry would not oust the court of jurisdiction.

Appeal from common pleas circuit court of Spartanburg county; WALLACE, Judge.

Action by William Hardin against F. M. Trimmier, to recover double the amount of interest paid because of usury. From an order granting a nonsuit plaintiff appealed, and on appeal the order was reversed. 3 S. E. Rep. 46. From a verdict and judgment for plaintiff for double the whole amount of interest paid defendant appeals.

Carlysle & Hydrick, for appellant. *Thomson, Nicholls & Moore*, for respondent.

MCIVER, J. Two questions are raised by this appeal,—one of jurisdiction, the other as to the proper construction of the second section of the act of 1882, (18 St. 35.) The facts out of which the question of jurisdiction arises are as follows: By the act of 1886 (19 St. 654) the court of common pleas for the county of Spartanburg, in which this case arose and was tried, is required to be held on the Wednesday following the third Monday in March, which in the year 1888 fell on the 21st day of that month; "but, the business of the court of general sessions not having been finished by that day, the court of common pleas, as appears by its journals, was not opened, unless by operation of law, until the 23d day of March," on which day the trial of this case commenced, and was concluded on the 24th day of March, 1888. It is stated in the case that "the defendant made no objection at the trial to the legality or jurisdiction of the court, nor was the matter in any way brought to the attention of the circuit judge." He therefore made no ruling on the question of jurisdiction, now made for the first time. If, therefore, this were a question other than that of jurisdiction, we could not, under the well-settled rule, consider it. But, as it is a question of jurisdiction, we are bound to consider it, as a question of that character may be raised at any time. State v. Penny, 19 S. C. 218; Bell v. Fludd, 28 S. C. 313, 5 S. E. Rep. 810. The case of Varney v. Vosch, 3 Hill, (S. C.) 237, cited by respondent's counsel to sustain the position that this question cannot be considered because not raised in the court below, was a case in reference to the jurisdiction of a magistrate, an inferior court, and is not, therefore, applicable. The position taken by appellant in reference to this question rests upon the assumption that the court of common pleas was not opened at the time prescribed by law, and therefore it could not take jurisdiction of any cause pending in that court; and counsel cites, in support of his position, the cases of Ex parte De Hay, 3 S. C. 567, and Ex parte Lilly, 7 S. C. 372. These cases do support the view that "if the individuals, who happen to be officers of the court, meet at a time when the court is not required or allowed to sit, and organize themselves as the court, with the usual machinery and ceremony attending it, their acts would be without legal force." If, therefore, it had been made to appear that the court which undertook to try this case had assembled "at a time when the court is not required or allowed to sit," and had proceeded to render the judgment appealed from, then the cases

Digitized by Google

cited would sustain the position that such judgment should be set aside for lack of jurisdiction. But it does not seem to us that this has been made to appear. It does appear from the quotation made from the case above that, on the day fixed by law for the opening of the court of common pleas for Spartanburg county, the judge of that circuit was at the place appointed for that purpose, attended by the proper officers, and it must be assumed that the judge did his duty, and opened the court at the time prescribed by law. The fact, which also appears from the quotation just referred to, that the judge did not immediately proceed to the dispatch of the business of the court of common pleas, but proceeded first to complete the business of the court of sessions, just as the law, presently to be cited, provides that he should do, does not negative the idea that the court of common pleas was opened at the proper time. Nor is it negatived by the fact that there is nothing on the journals to show that the court of common pleas was opened at the time appointed for that purpose; for certainly the failure of the clerk to perform his duty would not oust the jurisdiction of the court. Besides, we are not aware of any statute which prescribes any particular formula for opening a court, or any special entry thereof. It it true that in Miller's Compilation (page 237) a form to be used by the crier in opening the court is laid down, but that is a mere matter of custom and convenience, and surely the failure to observe the form there laid down would not invalidate the jurisdiction of the court. The statute having prescribed a particular day for holding the court of common pleas, and there being no law, so far as we are informed, requiring any particular ceremony to be observed in opening the court, whenever it appears, as it does in this case, that on the day appointed the judge, attended by the proper officials, was present at the place designated, the court must then be regarded as opened by operation of law, even though the judge may not then, owing to the unfinished business of the court of sessions, be able to proceed immediately with the business of the court of common pleas. It seems to us, also, that the legislature, by sections 27 and 27*a* of the Code, have provided for the contingency which arose in this case, and that Judge WALLACE, in pursuing the course which he did, was following the law as there laid down.

It is contended, however, that, if the legislation just referred to be so construed as to allow the presiding judge to open the court of common pleas either before or after the day appointed by the statute for that purpose, it conflicts with section 16, art. 4, of the constitution, which provides that "the court of common pleas shall sit at such stated times and places as may be appointed by law." In the first place, we do not rest our conclusion only on the provisions of those sections of the Code above cited, but we rest it mainly on the ground that, under the circumstances as stated in this case, the court of common pleas must be regarded as having been opened by operation of law on the day appointed by law, even though the presiding judge did not then immediately proceed with the business of that court. It was upon that view that this court proceeded in the case of McKeller v. Parker, 7 S. E. Rep. 295. We may add, however, with a view to avoid misconception, that we do not think the sections of the Code above referred to conflict with the constitution. The requirement that the court of common pleas shall sit at stated times does not necessarily imply that the specific or precise day shall be named in the act; for, if that were so, it would be difficult to vindicate legislation providing for the ordering of extra courts by the chief justice or by a circuit judge. The word "stated" should not be given such a limited signification as that contended for. When the legislature delegates to the chief justice or to a circuit judge the power to order a court to be holden, the day designated for that purpose in such order is just as much a "stated" time as if it had been designated by statute. It seems to us, therefore, that there was no lack of jurisdiction in the court which rendered the judgment appealed from.

The only other question raised is as to the proper construction of the second section of the act of 1882, (18 St. 36,) which reads as follows: "That any person or corporation, who shall receive as interest any greater amount than is herein provided for, shall, in addition to the forfeiture herein provided for, forfeit also double the sum so received, to be collected by a separate action, or allowed as a counter-claim to any action brought to recover the principal sum." The question is whether the amount which the borrower is authorized to recover from the lender, under the provisions of this section, is double the whole amount of interest paid, or only double the amount of the excess thereof over the amount allowed by law. We think that it is the latter. In the absence of any written agreement providing for a greater rate, not exceeding 10 per cent., the legal rate of interest, as prescribed by the first section of the act above referred to, is 7 per cent. As there is no such written agreement in the contract now under consideration, the legal rate of interest on the note could only be 7 per cent., and any interest charged for or received in excess of that amount would be usurious. And when, in the second section, the act declared that any person, "who shall receive as interest any greater amount than is herein provided for, [which, as we have seen, is 7 per cent.,] shall" forfeit double the amount "so received," it seems to us clear that the meaning is that if the lender, on such a contract as this, receives an amount greater than 7 per cent. he shall forfeit double the sum received in excess of 7 per cent. The thing forbidden is to receive interest in excess of 7 per cent., and, when the act declares a forfeiture of double the amount so received,

Digitized by Google

it must mean double the amount of such excess, and not double the whole amount of interest received. The act does not make it unlawful to receive interest upon such a contract up to 7 per cent., but the illegality consists in receiving a greater amount than the 7 per cent., for that is the plain meaning of the language, "any greater amount than is herein provided for;" and when it proceeds to fix the penalty for such illegal act, by saying that he shall forfeit double the sum so received, the manifest meaning is "double the sum illegally received." It will be observed that while in the first section of the act it is made unlawful to charge a greater rate of interest than 7 per cent., unless by an express agreement in writing a greater rate, not exceeding 10 per cent., is provided for, under the penalty of forfeiting all interest and costs, the second section of the act deals only with the receipt of a greater rate of interest than is provided for by the act, and provides, in addition to the forfeiture mentioned in the first section, an additional forfeiture of double the sum illegally received. We do not find anything in the second section of the act which imposes any penalty upon the lender for receiving interest at the rate of 7 per cent. upon such a contract as this is, but the penalty is for receiving a greater amount than such a rate would yield, and the penalty is double the amount in excess of that which he might receive without incurring the penalty imposed by the second section of the act. For example, if the lender here had only received interest at the rate of 7 per cent., we do not see how this action could have been maintained; for no penalty is imposed for such an act, even though, under the circumstances attending this transaction, the lender would not have been allowed, under the provisions of the first section of the act, any interest at all in an action on the note. Our view is supported by the recent decision in the case of Bank v. Parrott, 8 S. E. Rep. 199

It is argued, however, that the view here taken is in conflict with what was said in the former decision in this case, (27 S. C. 110, 3 S. E. Rep. 46.) It will be observed that when this case was before this court on a former occasion the question was as to the right of the plaintiff to recover at all, and not as to the amount which the plaintiff might be entitled to recover. Hence that question was not then either considered or determined. This is frankly conceded by counsel for respondent, but certain language used in the former opinion is relied upon as indicating a contrary view to that herein announced. This impression arises from a failure to observe the distinction, plainly kept up throughout the former opinion, between usurious interest proper—that is, interest in excess of the legal rate—and interest that could not be legally collected, not because it was beyond the legal rate,—usurious,—but because the statute expressly forbids its collection. Hence when it was said in the former opinion: "What was the original contract? Under the law, as it then stood, it was simply a contract for the repayment of the sum of nine hundred dollars, the sum actually lent. All beyond that was illegal and void,"—the plain meaning was that the contract could only be regarded as a contract to pay back the $900, without interest even at the rate of 7 per cent., not because such interest would be usurious, but because the statute made it illegal, and hence the contract for the payment of anything beyond the sum of $900 "was illegal and void." Again, the following language is cited to show that in the former opinion it was indicated that double the whole amount of the interest paid, and not merely double the excess over the legal rate, was recoverable under the second section of the act, to-wit: "The act complained of here is the receiving of usurious interest, which occurred after the act of 1882, and which is the subject of the penalty sued for." This quotation, though not precisely accurate, certainly does not, even as quoted, warrant the inference drawn from it by counsel for respondent. The court there spoke only of "usurious" interest, without undertaking to define, or even indicate, whether that term was intended to embrace the entire amount of the sum paid as interest, or only so much thereof as exceeded the legal rate, inasmuch as the amount which plaintiff was entitled to recover was not then before the court. The same remark is applicable to the remaining quotation relied upon, viz.: "But if the borrower had paid usurious interest on the note, and, after such payment, the lender had brought his action to recover the amount of the note, it is clear that the borrower might set up as a counter-claim to such action double the sum of the usurious interest so paid, because the statute so expressly provides. * * * We see no reason why the plaintiff here (*i. e.*, if there had been an action brought by Trimmier on the note) could not have set up as a counter-claim a demand for double the sum of the usurious interest paid by him." It is very obvious that the court, in using the language found in these quotations, employed the term "usurious interest" to indicate the measure of the recovery, without the slightest indication as to whether that term should be understood as embracing the entire amount of the interest paid, or only so much thereof as was in excess of the lawful rate. Indeed, if the language used in these quotations can be regarded as indicating anything as to the point now under consideration, the employment of the adjective "usurious" to qualify the word "interest" would rather seem to indicate that the court did not mean the entire interest, but only so much thereof as was usurious,—so much thereof as exceeded the legal rate.

The judgment of this court is that the judgment of the circuit court be reversed, and the case remanded for a new trial, unless the plaintiff, within 20 days after the service of written notice of the filing of this opinion, shall enter upon the record a *remittitur* for

Digitized by Google

so much of said judgment as it exceeds double the amount of the interest received by defendant, in excess of interest on $900, at the rate of 7 per cent. per annum from the date of the note to the time of its payment, to-wit, for the sum of $150.14; and upon the entry of a *remittitur* for that amount, within the prescribed time, the judgment of this court is that the judgment of the circuit court, as thus reduced, be affirmed.

SIMPSON, C. J., and MCGOWAN, J., concur.

(30 S. C. 370)

STARK v. HOPSON.

(*Supreme Court of South Carolina.* March 18, 1889.)

APPEAL—DOWER—SEISIN.

1. A decree of the probate court dismissing a petition demanding dower, on the ground that demandant failed to show seisin in her husband during coverture, was reversed by the circuit court, it holding that demandant had made out a *prima facie* case. *Held*, that the judgment of the circuit court was appealable.
2. On a petition for dower, the evidence showed that one T. devised the land "to the children of my niece, Sarah Stark," but that no niece of testator except one named Grace married a Stark. There was also evidence that the person called "Sarah Stark" in the will was the mother of demandant's husband. Demandant testified that her husband owned the land; that he was in possession of it, claiming it as his; and that he sold it to one B. On cross-examination she stated that her husband had never lived on the land, or cultivated it, or built any house or fences on it. The land in question was woodland. *Held*, sufficient evidence to make such a *prima facie* case of seisin in demandant's husband as would entitle her to dower.

Appeal from common pleas circuit court of Richland county; KERSHAW, Judge.

The testimony of the demandant, referred to in the opinion, is as follows:

Direct Examination. "*Question.* What is your name and place of residence? *Answer.* My name is Eliza C. Stark, and reside at Waco, Tex. *Q.* Are you the petitioner in this proceeding? *A.* I am. *Q.* Please state whether you are married, and, if so, give the date of your marriage and your husband's name? *A.* I was married to Theodore Stark on the 14th day of April, 1835. *Q.* Is your husband still living, and, if not, when did he die? *A.* He is not living. He died in Columbia, S. C., on the 2d day of August, 1882. *Q.* Where did you reside at the time of your marriage, and until your husband's death? *A.* I resided in Columbia, S. C., from marriage until my husband's death. *Q.* What was the name of your husband's father? *A.* Robert Stark. *Q.* Was your husband's father married more than once? *A.* He was married three times. *Q.* What was the name of your husband's mother? *A.* Mary S. Hay. *Q.* Did your husband's mother have any other children besides your husband? and, if so, give their names. *A.* Yes; she had Martha, Mary, Emma, Sally, Harriet, and Thomas. If there were any others, I never knew them. *Q.* Did any of your husband's mother's other children ever marry? and, if so, state whether they left children. *A.* Yes; Sallie Stark married John H. Means. Both she and her husband are dead. They left one child, Stark Means, who is also dead. Harriet Stark married Alexander Glennie. They are both dead, and left no children. Thomas Stark married Caroline Raoul. They are dead. At the time of his death there were three children, — Robert, Caroline, and Louis, — of whom Louis alone is living, the others dead. The other children of Robert Stark and Mary S. Stark died without issue; were never married. *Q.* Did your husband outlive all of the other children of his mother, or any of them, and, if so, which ones? *A.* He outlived them all. *Q.* Do you know the lot of land in the city of Columbia, S. C., bounded by Taylor, Hardin, Blanding, and Laurens streets, and containing four acres, more or less? *A.* Yes, I know the lot of land referred to. *Q.* Did your husband own the said lot during the time you were married to him? *A.* He did. *Q.* Was your husband in possession of said lot during the time you were married to him? *A.* He was. *Q.* Did your husband claim to be the owner of said lot while you were married to him? *A.* He did. *Q.* If you answer the thirteenth, fourteenth, and fifteenth interrogatories, or either of them, in the affirmative, please state at what period of your married life you refer to. *A.* I refer to the period shortly after my marriage, at which time my husband bought the interest of the other heirs in the lot up to the time he sold it. I do not remember the exact time of his purchase from the other heirs, but it was not long after our marriage, nor can I now state the date when he sold it. *Q.* Did your husband sell the said lot, and, if so, when, and to whom did he sell it? *A.* He sold it to Mr. Black. I presume the records will show the exact date. *Q.* Who was commonly reputed to be the owner of said lot at the time you were married, and for several years thereafter? *A.* The reputed owners of the lot at the time of my marriage were my husband, Theodore Stark and his three maiden sisters, Emma, Mary, and Martha Stark. *Q.* Did you ever hear your husband's title to said lot disputed by any one? *A.* I never heard the title of my husband disputed by any one. *Q.* Was his title to said lot admitted in his family? *A.* It was admitted in the family, and there was never any question or dispute about it. *Q.* Was his title to said lot admitted by the other children of his mother? *A.* My answer to preceding interrogatories answers this question. *Q.* If you said your husband was the owner of said lot, please state how he became the owner. *A.* I only know by common repute that this lot was willed to my husband and others by their relative, Mr. Taylor; I know of my own knowledge that he bought the interests of the other parties. *Q.* How did you get your information as to the ownership of said lot, and what was the information you thus received? *A.* I got my information as to the ownership from

Digitized by Google

common and undisputed statements in the family and in the community at large, and from the statements of Emma, Mary, and Martha Stark, that they had sold their interests to my husband; and these statements and his claim to the land were never disputed by any one. *Q.* Do you know anything concerning the matter in question that may tend to the benefit and advantage of the petitioner? If yea, declare the same fully and at large, as if you had been particularly interrogated concerning the same. *A.* I know of nothing further to state about the matter."

Answers to Cross-Interrogatories. The respondent, L. F. Hopson, objects to the granting of a commission herein by this court for the examination of said witness, because, as this respondent respectfully submits, this court has not power to grant such commission. But should his objection be overruled, and the commission be granted, then this respondent, while insisting upon his said objection, and while further reserving the right to except at the trial of this case to any or all of the interrogatories in chief to be propounded under said commission, propounds certain cross-interrogatories as hereinafter stated. This respondent, specially objecting to the fourteenth direct interrogatory, propounds in response thereto the following cross-interrogatories, which said cross-interrogatory and the answer thereto are to be read at the trial of this case only in the event that this respondent's objection to said direct interrogatories shall be overruled, and the said direct interrogatory and the answer thereto be read.

First Cross-Interrogatory. "*Question.* If you answer the fourteenth direct interrogatory in the affirmative, please state whether your husband ever lived on said lot during the time you were married to him. *Answer.* No. There was no house on the lot at that time. *Q.* If you answer the fourteenth direct interrogatory in the affirmative, please state whether your husband ever had a tenant on said lot during the time you were married to him. *A.* He did not. *Q.* If you answer the fourteenth interrogatory in the affirmative, please state whether your husband ever cultivated said lot during the time you were married to him. *A.* He did not. *Q.* If you answer the fourteenth direct interrogatory in the affirmative, please state whether your husband ever inclosed said lot with a fence during the time you were married to him. *A.* He did not. *Q.* If you answer the direct interrogatory in the affirmative, please state how much of each of your answers to the foregoing cross-interrogatories is upon your own knowledge, and how much upon information derived from others. *A.* All of my own knowledge."

Testimony of Alexander R. Taylor, taken by consent out of court to be used at the trial; all objections and exceptions reserved. (Sworn.) "*Question.* Did you know the family of Col. Robt. Stark,—himself, his wife, and all his children? *Answer.* I knew them well. His wife was my father's first cousin. *Q.* What was her name? *A.* She was called Mary, and her maiden name was Hay, or Hays. I do not remember her middle name. *Q.* Did you know all her children? *A.* Yes, intimately,—Martha, Theodore, Mary, James, who died young; Thomas, Emma, Harriet, who married in the low country; and Sally, who married Gov. Means,—all are now dead. This is the only cousin of my father that married a Stark, except Grace, another cousin, who married Mr. Stark late in life and died without children. *Q.* Do you know the land in dispute, upon which the Hopson house stands, on East Boundary street, bounded by Taylor, Hardin, Blanding, and Laurens streets? *A.* I do. *Q.* Who did it belong to when you were a boy? *A.* To my grandfather, Thomas Taylor, who died about 1835; he may have died previous. *Q.* Do you remember about what time this land in question passed out of the possession of Col. Thomas Taylor? *A.* I cannot remember. *Q.* Do you remember any special fondness or affection existing between Col. Thomas Taylor and his wife for Mrs. Stark and her children? *A.* Yes; they were specially fond of her and her family; they were constantly in their house. *Q.* You do not remember who owned the land after the Taylors? *A.* I do not. *Q.* Did your grandfather own this land in question up to about the time of his death? *A.* Yes, I am pretty sure of that; I am almost certain of it. My father, John Taylor, was a son of Col. Thomas Taylor."

Extract from the will of Col. Thomas Taylor, filed 14th December, 1833: "I devise and bequeath to the children of my niece, Sarah Stark, deceased, a square of land in Columbia, bounded north by Walnut street, east by Hardin street, west by Taylor street, and south by Laurens street."

Clark & Muller, for appellant. *A. C. Moore* and *John T. Rhett*, for respondent.

MCIVER, J. The demandant filed her petition in the court of probate for the county of Richland, claiming dower in a certain lot of land in the city of Columbia, of which the defendant is in possession. After hearing the evidence adduced by the demandant, the judge of probate rendered his decree dismissing the petition, upon the ground that the demandant had failed to show seisin in her deceased husband during the coverture. From this decree demandant appealed to the circuit court, upon the grounds set out in the "case," and that appeal was heard by his honor Judge KERSHAW, who, after stating that all the exceptions were waived except those "which raise the question whether there was sufficient evidence before the probate court to make out a *prima facie* case of seisin in demandant's husband during coverture, so as to require respondent to introduce his evidence in defense, if he has any," held that the testimony was sufficient to establish such a *prima facie* case as would, unless rebutted,

Digitized by Google

entitle the demandant to dower. He therefore rendered judgment reversing the decree of the judge of probate, and remanding the case to the court of probate, "in order that respondent may introduce his evidence in defense, if he have any, and for such other proceedings as may be proper." From that judgment the defendant appeals to this court, upon the grounds set out in the record, which, however, make the single question whether the circuit judge erred in holding that the testimony adduced by the demandant was sufficient to make out such a *prima facie* case of seisin in the husband during coverture as would, if not rebutted, entitle the demandant to dower.

During the argument here an inquiry was suggested by one of the members of the court as to whether the judgment of Judge KERSHAW was appealable, inasmuch as it remanded the case for a further hearing by the court of probate, and this was argued by counsel. The decree of the judge of probate practically amounted to a nonsuit for want of any evidence to establish one of the material issues in the case, so that the appeal from the judgment of Judge KERSHAW reversing the decree of the judge of probate, in effect, presents the question whether the judge of probate erred in granting the nonsuit, if that expression can be applied to a proceeding in the court of probate. In this view we cannot say that the judgment of Judge KERSHAW is not appealable, though we are inclined to think that, with a view to avoid multiplicity of appeals and consequent delay and expense, the better practice would have been simply to have noted an exception to the judgment of Judge KERSHAW, which could have been heard on an appeal after a final judgment had been reached, if such judgment had been adverse to appellant. That practice seems to have been adopted in the case of Stark v. Watson, 24 S. C. 215, though this court was not called upon then to make any ruling upon the subject. That practice is recommended by the fact that if upon the rehearing of the case by the court of probate, as directed by Judge KERSHAW, the judgment should still be favorable to the present appellant, then this appeal would be unnecessary; but if, on the other hand, it should be unfavorable, the question presented by this appeal could still be considered, as was done in Stark v. Watson. But holding, as we do, that the judgment of Judge KERSHAW is appealable, as it, in effect, presents the question whether the appellant was entitled to retain a judgment of nonsuit practically, we will proceed to consider the question presented by this appeal.

There being no dispute as to the law applicable to the case, the only question presented is whether the circuit judge erred in holding that the testimony adduced by the demandant was sufficient to make such a *prima facie* case of seisin in demandant's husband during the coverture as would, unless rebutted, entitle her to dower. The testimony is all set out in the case, and is too long to be incorporated here, though it should accompany the report of the case. The demandant was examined by commission, and, in answer to the direct interrogatories, she testifies distinctly that her husband owned the lot of land out of which dower is claimed during the coverture; that he was in possession of the lot during coverture, claiming it as his own, and that he sold it to Mr. Black. It also appears from the testimony that the lot of land was devised by Col. Thomas Taylor "to the children of my niece, Sarah Stark," and, although it is stated in the testimony that the maiden name of the mother of demandant's husband was Mary S. Hay, yet we cannot doubt, from the testimony, especially that of Mr. Alexander R. Taylor, who says that none of the other nieces of testator married a Stark except one named Grace, that the person mentioned in the will as Sarah Stark was the mother of demandant's husband. It is true that this testimony would not be sufficient to establish a legal title in demandant's husband, even to an undivided portion of the lot, inasmuch as there is no evidence that the testator had title, yet it is a circumstance throwing some light on the question of possession, for the demandant also testified that her husband bought out the interests of the other children of his mother. If this testimony stood alone, we do not think there could be a doubt that the evidence was sufficient to establish a *prima facie* case of seisin in the husband, inferred from his possession, which was distinctly testified to without any qualification. It is contended, however, that this testimony of demandant as to her husband's possession is deprived of all force and effect by her answers to the cross-interrogatories. On her cross-examination she does say that her husband never lived on the lot, as it had no house on it; that he never had a tenant on the lot; that he never cultivated it; and that he never inclosed said lot with a fence. This contention can only be sustained by the assumption that the only way in which a person can have such a possession of a lot of land as would imply seisin is either by living on it, having tenants on the lot, cultivating it, or inclosing it with a fence; for the witness was not asked whether her husband had ever exercised any other act of ownership over the lot. We do not think that such an assumption is well founded. It is possible that possession may be evidenced by other acts of ownership than those above specified. It seems that the lot was woodland, not in a condition for cultivation or for a residence, and, though a fence might have been erected around the lot, yet that was not the only way in which a party could take possession. Even in a case of trespass to try titles, where the evidence of possession is of a much stricter character than in a case of dower, it has been held that marking off a tract of land with a line of stakes might be sufficient, (Allen v. Johnson, 2 McMul. 495;)

Digitized by Google

or using it for pasture, (Porter v. Kennedy, 1 McMul. 354;) or there may be other modes of evidencing possession. At all events, the positive testimony that the husband had possession of the lot during the coverture, which he retained until he sold it to Black, is not destroyed by the further testimony that such possession was not evidenced by either of the modes above specified. The judgment of this court is that the judgment of the circuit court be affirmed, and the case remanded to the court of probate for such further proceedings as may be necessary.

SIMPSON, C. J., and MCGOWAN, J., concur.

(39 S. C. 616)

INGRAM v. LUKENS *et al.*

(*Supreme Court of South Carolina.* March 28, 1889.)

ASSUMPSIT—DAMAGES—ACCOUNT STATED.

1. Where plaintiff made a contract with a firm who operated a saw-mill for the sale of certain timber standing on her land, but afterwards the firm was dissolved, and their assets assigned to the defendants, including the interest in the said contract, the plaintiff could recover on an *indebitatus assumpsit* for timber taken by the defendants; she not having assented to the assignment of the contract to defendants, and the latter not having made any objection in the pleading to the form of the action.

2. Where the case did not show that the defendants were in the habit of making regular monthly payments for timber cut, the fact that plaintiff signed a receipt for money "in full for timber cut" from her land during a certain month did not afford such evidence of an account stated as estopped the plaintiff from alleging that defendants had not settled all their indebtedness to her for timber, accruing prior to the giving of such receipt.

3. The contract provided that in case plaintiff became dissatisfied with the rule of "mill or board measurement" laid down, the regular "lumberman's" rule should be resorted to for the purpose of ascertaining the quantity of timber removed. Plaintiff became dissatisfied, and had experts survey the ground on which timber had been cut, and, the lumber not being there, they applied the "lumberman's" rule, calculating from the "stumps and tops" left the quantity of timber removed. *Held*, that evidence of the results obtained by such measurement was admissible in behalf of plaintiff as to timber sawed before notice of dissatisfaction, the action being on a *quantum meruit*, and the judge leaving it to the jury to say what weight such testimony should have.

4. Evidence as to the quantity of lumber which other timbered tracts produced, and its value, was proper.

Appeal from common pleas circuit court of Clarendon county; FRASER, Judge.

Action by Annie D. Ingram against Lukens & Reifsnyder. Judgment was given for plaintiff, and defendants appeal.

Mr. Rhame and *T. G. Barker*, for appellants. *E. W. Moore* and *John S. Wilson*, for respondent.

MCGOWAN, J. In order to make the points in this case intelligible it will be necessary to make a short statement. On February 18, 1885, the plaintiff, a married woman, entered into a written agreement with the business firm of Trainer, Wise & Co., who were operating a steam saw-mill, to sell them "all the marketable heart yellow pine timber or trees, growing or standing upon a certain tract of land containing about 800 acres, with the right of way over and across it for seven years, if so long should be necessary to get off the timber," etc., at the price and in consideration of "one dollar for every thousand feet" of the lumber, which the trees to be cut and sawed would make, "by mill or board measurement;" payments to be made "monthly," as the lumber was turned out from the saw-mill. "It was further agreed that if the plaintiff should become dissatisfied with the measurement of the lumber that we shall resort to the regular 'lumberman's' rule to ascertain quantities; that is to say, take the butt and top diameter of the log, divide by two, and deduct one-third, the remaining two-thirds to be the contents," etc. The purchasers, Trainer, Wise & Co., paid in advance $1,000, but it does not appear how much, if any, in value they sawed of the timber. Their partnership, however, was dissolved by its own limitation on June 12, 1885; and their assets in Clarendon county, (with an exception named,) including their interest in the above agreement, were assigned to another firm, viz., Lukens & Reifsnyder, who continued the business of cutting and sawing the plaintiff's timber. She was not notified of this transfer, and was in no way concerned in it. It seems that while the sawing went on the monthly payments were not regularly made; only three payments being made in the year from June, 1885, to July, 1886, amounting in the aggregate to $232.21. The plaintiff gave notice that she was "dissatisfied," and upon their refusal to appoint "two responsible men" to make the count, she selected two experts in the business, who surveyed the ground from which the trees were cut, and, neither the trees nor the lumber being there, they applied the "lumberman's rule," butt and top, ("stump and blossom,") and reported that, after allowing credits for all amounts paid, including the cash payment of $1,000, there was still due the sum of $1,433.05. The defendants refused to pay the account rendered, and the plaintiff brought this action against the defendants upon an implied *assumpsit*, for the value of her timber taken and used by them, on January 11, 1887. The defendants answered separately, but substantially as follows, after putting in a general denial: For a first defense, that the defendants have not cut and removed any trees from the lands of the plaintiff, "except such trees, lumber, and timber as were cut and removed by virtue of the contract hereinbefore alleged, (Trainer, Wise & Co.,) and full payment has been made therefor. For a second defense, that the defendants have fully accounted to and with the plaintiff, through her agent, for all timber and lumber cut and removed from her land, which had not been previously paid for by Trainer, Wise & Co.; and that the last payment made by defendants to plaintiff was "in full payment for lumber and trees re-

Digitized by Google

moved from plaintiff's land up to July 1, 1886." That up to the last payment the defendants did not receive any notice that the plaintiff was "dissatisfied" with the measurement of the timber cut by defendants from her land, and that by reason of the facts aforesaid the defendants claim that she is "estopped" from prosecuting her action, etc. There was much testimony, which, although a law case, is all printed in the brief. Under the charge of the judge the jury found for the plaintiff $1,000, and the defendants appeal to this court.

There is some confusion arising from the circumstance that there are two sets of exceptions, but the attorney for the defendants states that all reference made must be considered as applying to that set which commences at folio 454, and extends to that of 463, of the brief. They are long, and 17 in number, and need not be inserted here. The thirteenth exception complains that his honor erred in holding that the parties had a right to recover under an implied contract, an express contract having been proved. We do not understand that the action is on the written agreement with Trainer, Wise & Co. That firm was dissolved, and they had given written notice of the dissolution to the plaintiff. But she received no notice, and did not assent to the sale and assignment, of the agreement to Lukens & Reifsnyder, who were a new firm, with which the plaintiff had no written contract. Her contract was not with them as a firm, and if she had sued them on the contract with Trainer, Wise & Co. they would probably have denied her right to do so; so that she brought her action against the defendants upon an *indebitatus assumpsit* for the value of the timber trees which they had taken from her land. The defendants made no objection in the pleadings to the form of the action. They did not demur orally or otherwise, nor move to dismiss the complaint, but answered to the merits that they had removed no timber trees from the plaintiff's land, except under the agreement with Trainer, Wise & Co., and that the account for these so taken had been stated and paid in full; but in any view the plaintiff was estopped from prosecuting her action by an "account settled," as shown by the last receipt given by her (through her agent) for $77.36. We think that the real issue in the case was whether, after allowing credit for all payments, (including the $1,000 advanced by Trainer, Wise & Co.,) the defendants were or were not indebted to the plaintiff for timber taken by them from her land, and, if so indebted, how much? This was a question of fact which the jury solved in favor of the plaintiff, and, as this is a law case, that finding cannot be disturbed by us, unless the trial judge committed error of law.

The fourth and fifth exceptions allege that lumber accounts were rendered by the defendants "monthly," without objection, until the last payment by them, July 24, 1886, when the plaintiff, through her agent, gave notice that the plaintiff was "dissatisfied with the measurement," but at the same time signed a receipt for $77, "in full for timber cut from the land of Mrs. Annie D. Ingram during the month of June, 1886, as per statement rendered," which, as alleged, afforded the evidence of an account stated and settled, and the plaintiff was estopped from going behind it. We do not see that the lumber returns were regularly made "monthly." The "case" does not show that there were more than three small payments made during the year ending in July, 1886, aggregating $232.21. Besides, the receipt was only for the month of June, then just passed, and had inserted in the margin the letters "E. & O. E.," probably for the very purpose of excluding the conclusion now sought to be drawn from it. We think the transaction did not amount to an "estoppel."

Many of the exceptions, in different forms, complain that it was error to admit testimony as to the quantity of lumber taken from the premises by a mode of ascertainment not provided by the express contract which governed the parties. This being an action on the *quantum meruit*, it was incumbent on the plaintiff to show as best she could the amount and value of the lumber removed from her land by the defendants. This was difficult to do, after the lumber had been removed, so that it could not be measured. We can conceive of no other method of even approximating the quantity, except by resort to what seems to be called the "lumberman's rule;" that is to say, to inspect the ground from which the trees were cut, and, from the "stumps and tops" left, to calculate by a given rule the quantity of lumber which the stocks taken off should produce. Such rule, as stated in the argument, may be wanting in certainty, and may possibly be mixed up with something very like opinion, but it seems to have been established, and, from the nature of the subject, in certain cases may be the best—indeed the only—evidence obtainable. It is argued, however, that the admission of the evidence was not in accordance with the stipulations in the written contract with Trainer, Wise & Co., which only allowed resort to that mode of measurement after the plaintiff had given notice of her "dissatisfaction," and was limited to the sawing done thereafter. Upon this subject it might be enough to repeat that the action was not brought on the special contract. But if it had been it is by no means clear that the contract, properly construed, limited the application of the lumberman's rule of measurement to sawing done after notice of "dissatisfaction." If that be the proper interpretation of the provision, it was certainly useless, for in that case the lumber itself could be measured. From the character of the rule itself, it would seem that it was intended especially for cases where the lumber itself had been removed, or was not accessible; and, as we rather suppose, resort to it was provided for in the contract as a sort of check

Digitized by Google

upon the mill-men, who, as to the "mill or board" measure, necessarily had it all their own way. But be that as it may, the question as to the proper construction of the contract with Trainer, Wise & Co. was not in this case against the defendants. The judge left it to the jury to say what weight the testimony was entitled to, and we cannot say that it was error to admit it for what it was worth.

The sixth exception charges error in "allowing in proof of quantity and value of lumber cut by defendants from the Ingram tract evidence of what defendants had paid for the timber on the Vernon place," etc. The judge said: "The complaint says nothing about any special contract, but brings the action on an implied contract, arising from the fact that the defendants used the plaintiff's timber. It is necessary for you to ascertain now how much timber was taken, and what was the value of that timber. Now, in order to do that it is proper to let the jury know what other timbered tracts turned out, and by that means to help the jury to ascertain the amount of timber that was taken off the land in question, and what was the market value of that timber. In doing this the parties here referred to the Vernon tract of land, and to other tracts, showing what the timber on other places brought, and by this means to enable the jury to find out how much timber was cut off this place, and what was the market value of it," etc. This is objected to as "irrelevant." It is not always easy to fix the dividing line between what is and what is not "relevant" testimony. The best authorities say that "the meaning of the word 'relevant,' as applied to testimony, is that it directly touches upon the issue which the parties have made by the pleadings, so as to assist in getting at the truth." 1 Greenl. Ev. (14th Ed.) § 51; Tarrant v. Gittelson, 16 S. C. 231. See 7 Amer. & Eng. Cyclop. Law, tit. "Evidence," and notes. "The value of any property may generally be proved by the value of similar property under similar conditions, the relevancy of the evidence for such purpose being always a question for the court," etc. The judgment of this court is that the judgment of the circuit court be affirmed.

SIMPSON, C. J., and MCIVER, J., concur.

(30 S. C. 617)

MILLS *v.* CARRIER *et al.*

(*Supreme Court of South Carolina.* March 23, 1889.)

SET-OFF—PARTNERSHIP—PLEADING—LIMITATION OF ACTIONS.

1. An indebtedness growing out of an unsettled partnership is admissible as a set-off in mortgage foreclosure.

2. An answer alleging unsettled transactions, and asking an accounting, and stating that on such accounting a balance will be found due to defendant, for which judgment is prayed, sufficiently pleads such counter-claim, plaintiff not having demurred, though a partnership is not alleged in words.

3. Plaintiff's intestate and defendant had mutual dealings for several years, awaiting final settlement, which both parties expected, as a means of determining the balance, and during that time intestate sold to defendant his interest in a partnership in consideration of a building to be erected by defendant at the cost of a certain sum, with the condition that, if the cost of the building should exceed that sum, intestate should pay the excess, as the parties might afterwards determine. The cost did exceed such sum, but the excess was not agreed on before intestate's death, seven years afterwards. *Held*, that such excess should be considered as an item of the mutual account.

4. Where intestate received the amount of notes due to him and defendant jointly, on account of a partnership transaction, and there was no evidence of a dissolution of the partnership as to that transaction during intestate's life-time, the statute of limitations is no bar to defendant's claim for his half of the fund.

Appeal from common pleas circuit court of Spartanburg county; I. D. WITHERSPOON, Judge.

Action to foreclose two mortgages, brought by O. P. Mills, administrator of L. A. Mills, deceased, against G. D. Carrier and others.

The opinion of the court below, so far as material, is as follows:

"Ladson A. Mills, Jr., plaintiff's intestate, died in November, 1885, and the complaint herein was filed in the clerk's office, 19th January, 1887. Plaintiff, as administrator, seeks to secure judgment of foreclosure against the defendant G. D. Carrier upon two mortgages of the same lot in Spartanburg, executed by said defendant on the 3d December, 1875, and the 27th September, 1875, to Franklin Cox and Ladson A. Mills, Sr., respectively, to secure the payment of said defendant's promissory notes of even dates with said mortgages. The plaintiff alleges that the defendant Carrier's notes and mortgages aforesaid were duly assigned and transferred to his intestate, Ladson A. Mills, Jr., who was the legal owner and holder of the same at the time of his death, and that no part thereof has been paid. The other parties named as defendants are junior incumbrancers. In his answer the defendant G. D. Carrier, in substance, alleges: (1) That, by mutual agreement between himself and the intestate, their respective accounts were to be set off, the one against the other, on settlement; that said defendant has been anxious to settle, and that it will be found on a settlement that the intestate is largely indebted to said defendant. (2) That, for a valuable consideration, the intestate, on the 12th April, 1876, assured the payment of one-half of the principal sum of the notes sued upon, and one-half of the interest that should accrue thereon after March 17, 1876. (3) For a further defense, payment, and counter-claim, that plaintiff's intestate is indebted to said defendant in the sum of $2,644, for material furnished and work performed in erecting a brick store-room; and also in the further sum of $518.50, for one-half of a certain amount of money collected by intestate upon notes due said intestate and said defendant jointly. (4) This defendant further pleads the statute of limitations, and prays for an accounting

Digitized by Google

between himself and the intestate, and for judgment for any balance ascertained to be due said defendant. Plaintiff in reply denies the allegations of the answer of Carrier, and also pleads the statute of limitations. After charging defendant Carrier with one-half of the notes sued upon, and giving him credit for $1,869.36 for erecting the brick store, the referee reports a balance of $94.67 to be due by the defendant Carrier, with interest from November 15, 1878, and recommends that the mortgage premises be sold to pay said balance and interest. The referee concludes, as matter of law: '(1) That the defendant Carrier cannot set up copartnership matters in this action, the copartnership not having been shown to be settled and balance struck in favor of the copartners. (2) That the statute of limitations is a complete bar to all other items attempted to be set up on either side as counter-claims or set-off." The referee submits Exhibits A and B with his report. Exhibit A shows how the referee ascertained and reported the balance due by defendant Carrier. Exhibit B is made up regardless of the referee's views as to the copartnership matters and the statute of limitations, showing a balance of $445.94 in favor of the defendant Carrier.'

"I concur in the first, second, and third findings by the referee as matters of fact, and plaintiff's eighteenth exception is overruled. In the fourth finding as matter of fact the referee states that the sum of $769.36 is the amount of balance due Carrier for building the brick store under the contract between said Carrier and the intestate, L. A. Mills, Jr., after deducting all credits according to the terms of said contract. The referee states that he is satisfied that said balance under said contract was intended by both parties to be a payment on the indebtedness of Carrier to the intestate, L. A. Mills, Jr. The plaintiff's nineteenth and twentieth exceptions allege that the referee erred in said findings. On the 15th day of December, 1877, Carrier gave plaintiff's intestate a note for $1,100, and upon the same day said parties entered into a written agreement, in which Carrier undertook to erect a brick store for intestate: provided, that said building shall amount to $1,100, and no more, (the amount of Carrier's note to intestate of that date,) and, if said building shall exceed in value said sum of $1,100, the intestate agreed to pay for such excess according to any contract the parties may thereafter make in reference thereto. There is no evidence of any contract between the parties as to the payment of any excess in value over $1,100. I fail to find anything in the building contract, or in the evidence, to sustain the referee's conclusion that the parties intended the excess in value of the building over the $1,100 as a payment of Carrier's indebtedness to the intestate. The referee, ascertaining the value of the building at $1,869.36, and after deducting therefrom Carrier's note of $1,100 to plaintiff's intestate, allows Carrier credit on the notes sued upon for the excess or balance of $769.36. In his thirtieth exception plaintiff alleges that the referee erred in not finding that the balance of $769.36 in excess of the $1,100 note is barred by the statute of limitations. The building was completed by Carrier in 1878, and I see nothing in the building contract or in the evidence to prevent the application of the bar of the statute of limitations to the $769.36 in excess of the $1,100 note allowed as a credit to Carrier by the referee. I conclude that the referee erred in allowing Carrier credit for the balance of $769.36, and the plaintiff's nineteenth, twentieth, and thirtieth exceptions must be sustained. To this extent the referee's report is modified. The plaintiff's twenty-first and twenty-second exceptions are overruled. The defendant Carrier's fourteenth, fifteenth, sixteenth, and seventeenth exceptions will not be considered, as they do not definitely indicate wherein the referee has erred. The defendant's ninth exception alleges that the referee erred in not allowing said defendant credit for $38.44 paid on the Walker judgment. This exception refers to the one-third of the amount paid by said defendant in 1883 upon a judgment against Carrier, Mills & Carson. Carson, of said firm, is not before the court, and I do not think the referee erred in refusing to allow said defendant credit for said amount in this action. This exception is overruled. The defendant Carrier's eleventh exception alleges that the referee erred in not allowing said defendant credit for one-half of the money collected by Farish. It appears that in 1876 and 1877 plaintiff's intestate received $1,017.00 upon notes due jointly to said intestate and the defendant Carrier for the sale of Texas ponies on joint account. The referee finds, as matter of fact, that intestate received said sum from said source, and has never accounted to Carrier for $508.50, his one-half interest in said fund. Regarding this, however, as a partnership transaction, the referee held that the defendant Carrier was not entitled to said credit in this action. The referee further held that this item of $508.50 was barred by the statute of limitations. While I agree with the referee that the $508.50 related to a partnership transaction, I cannot concur in the view that it cannot be considered in this action. In Pomeroy on Remedies, § 799, it is stated that a demand growing out of unsettled partnership transactions, between plaintiff and defendant, may be pleaded as a counter-claim. See, also, subdivision 2, § 171, Code. In receiving said fund belonging to both jointly, the intestate acted as the agent or trustee for Carrier, and the statute of limitations would not commence to run against Carrier until the intestate had thrown off the relation by a dissolution of the partnership or some other equivalent act. There is no evidence of a dissolution of the partnership as to this transaction prior to intestate's death. I agree with the referee in his finding as matter of fact with reference to the $508.50, but consider

Digitized by Google

that he erred as matter of law in refusing to allow the defendant Carrier credit for the $508.50. The defendant Carrier's eleventh exception is sustained, and to that extent the referee's report is further modified. There is no evidence of any payments by the defendant Carrier upon the mortgage debt sued upon. The allegation of Carrier of a mutual agreement with plaintiff's intestate to set off their respective demands is not sustained by the evidence. All of the exceptions of the plaintiff and the defendant Carrier that have not been considered are hereby overruled. * * *"

Plaintiff and defendant Carrier appeal, the latter assigning error "(1) in overruling so much of the referee's report as allowed the defendant credit for the sum of $769.36, and in finding that said sum was not a payment on plaintiff's intestate's claims against defendant; (2) in finding that defendant's claim for said sum, if it was not a payment, was barred by the statute of limitations, and hence defendant could not get credit for it in this settlement; * * * (8) in holding that the allegation by Carrier of a mutual agreement with plaintiff's intestate to set off their respective demands was not sustained by the testimony; (9) in holding the statute of limitations to be a bar to all or any of above items of account."

Plaintiff's assignments are—"*First.* In not sustaining the exceptions that the referee erred (1) in allowing any testimony as to the alleged indebtedness of L. A. Mills to G. D. Carrier on account of isolated transactions of their copartnership; (2) in finding that, in any event, Carrier's claim in the Farish matter could be sustained, instead of finding that same was settled, or at least more than balanced by the amount paid out by plaintiff's intestate in paying off the Kay note. (3) in not, in any event, giving plaintiff judgment for the full due on the note transferred to intestate by L. A. Mills, Sr., except the amount thereon agreed in writing by intestate to be paid by himself. * * * *Third.* In holding that the defendant Carrier could bring in as a counter-claim in this action even an alleged claim of unsettled copartnership business of copartnership between Carrier and plaintiff's intestate. *Fourth.* In holding more especially, as in this case, that the defendant Carrier could bring in as a counter-claim alleged isolated transactions of an unsettled business copartnership between Carrier and plaintiff's intestate. *Fifth.* In holding that there was no evidence of a dissolution of the said copartnership. *Sixth.* In not holding that the alleged Farish claim was barred by the statute of limitations."

Thomson, Nicholls & Moore, for appellant. *Bomar & Simpson*, for defendant Carrier.

SIMPSON, C. J. The plaintiff, as administrator of L. A. Mills, deceased, brought the action below to foreclose two mortgages executed by the defendant Carrier covering certain real estate of his situate in Spartanburg, —one of them to Frank Cox, and the other to L. A. Mills, Sr., by whom they were transferred to L. A. Mills, Jr., in his life-time. The defendant Carrier set up payment, and also a defense in the nature of counter-claims growing out of alleged mutual running accounts and unsettled business transactions between the deceased and himself, as the result of which he claimed a balance in his favor, praying that an accounting be had, and judgment be granted for whatever sum might be found due him. The other defendants were made parties on account of some supposed lien. From the decree of his honor, the circuit judge, both parties appealed.

Without stating *seriatim* the numerous exceptions of the appellants, we may say that they involve the questions (1) whether an alleged indebtedness growing out of an unsettled copartnership could be set up in a case like this; (2) whether certain items, claimed by the parties, respectively, should have been allowed; (3) whether the statute of limitations applied to certain items; (4) whether certain testimony should have been admitted; and (5) whether his honor was correct in certain findings of fact.

As to the first question above, in reference to setting up an alleged indebtedness growing out of a partnership. The rule seems to be that, if the plaintiff's cause of action arises on contract, any counter-claim, legal or equitable, or set-off, also arising on contract, is admissible, (Code, § 171,) provided the general rule applicable in such cases is complied with, to-wit: "That the relief granted to the defendant shall in some manner interfere with, lessen, or modify, if not destroy, that otherwise obtained by the plaintiff," (Pom. Rem. § 796.) Mr. Pomeroy says, further, in section 799, that "it is now established in opposition to some of the earlier decisions which have been expressly overruled that a demand growing out of the unsettled partnership transactions between the plaintiff and defendant may be pleaded as a counter-claim." It was not error, then, for the circuit judge to admit the testimony as to the alleged counter-claim, growing out of the unsettled partnership accounts, in so far as the objection rested upon the fact of the partnership being unsettled. Whether the pleadings were of a character sufficient to let it come in is another question, to be noticed hereafter.

Next, as to the items of the account between the parties. The referee allowed to the defendant Carrier a credit of $769.36, balance due for building a house for the plaintiff's intestate. This was overruled by the circuit judge, who held that said claim was barred by the statute of limitations. In the matter of mutual accounts, it is well settled that the currency of the statute does not begin until the date of the last item. Sumter v. Morse, 2 Hill, Eq. 92. Now, it is apparent from the bill of particulars of both plaintiff and defendant, appended to the complaint and the answer, as well as from the testimony taken by the referee, that there

Digitized by Google

were mutual dealings between the plaintiff's intestate and the defendant Carrier running through several years, awaiting a final settlement, which it seems both parties expected and looked forward to as a means of ultimately determining a balance from the one in favor of the other. During this time, to-wit, on the 15th of December, 1877, the plaintiff's intestate sold to Carrier all of his right, title, and interest, being one-third, in the horses, buggies, carriages, wagons, harnesses, hogs, and every other personal thing belonging at that time to the firm of Carrier, Mills & Carrier, in consideration of a brick store-house to be built by the said Carrier in the city of Spartanburg, at a cost of $1,100, with the condition, if the house should exceed that sum, the said Mills should pay for the excess as the parties might afterwards by contract determine. It turned out that this house cost in its erection considerably more than the $1,100, but the excess had not been determined or agreed upon in the life-time of Mills, and this was one of the items claimed by Carrier that should be ascertained, and allowed him as a credit on plaintiff's demands, and which the referee found to be $769.36, as above stated, and which he also allowed as a credit, November 15, 1878; finding, as a matter of fact, that it was the understanding of the parties that such excess, whatever it might be, was to be a payment on the indebtedness of Carrier to Mills. His honor overruled this finding of fact, and held that the claim was barred by the statute of limitations. Upon an examination of the testimony, especially that of Goodlett and R. K. Carrier, we think the finding of the referee should have been sustained. The house certainly cost considerably more than the $1,100 mentioned in the agreement. It does not appear that the excess was ever paid, nor is it claimed to have been paid in any other way than as a credit upon Mills' demands; and, besides, it is difficult to explain the fact that neither party attempted to enforce their respective claims, during the life-time of Mills, except that it must have been understood between them that, having these mutual demands, they were to be set-off the one against the other, as far as might be necessary. The Cox mortgage was assigned to Mills in 1878, and we suppose the Mills mortgage about the same time. The store-house was built in 1878, and Mills died in November, 1885. During all this time, from 1878 to 1885, seven years or more, these parties held these respective claims against each other, without any steps taken on either side to collect them. The only reasonable explanation for this, as it seems to us, is that they were mutual demands, awaiting final settlement; and the doctrine of Sumter v. Morse, supra, should be applied, as to this and all other transactions between them, to-wit, that the currency of the statute should not begin until the date of the last item of the accounts. The referee in his alternative statement made in the event that the statute of limitations should not be applied, and which is hereto appended,[1] we think, is a correct statement, and should be adopted. We concur with the circuit judge as to the item of $508.50, called the "Farish debt." This seems to have been one-half of $1,017, partnership assets received by Mills, and never accounted for by him.

Appellant, plaintiff, objects to these unsettled matters coming in as counter-claims, and relies upon Mr. Pomeroy, § 799, where, after stating that unsettled partnership transactions between the plaintiff and the defendant may be pleaded as a counter-claim, he says: "It is necessary, however, that the defendant should not only aver the existence of such unsettled transactions, and ask an accounting, but allege that upon such accounting a balance will be found due him from the plaintiff, and he must demand judgment therefor. Without the averment of such a balance, the counter-claim will be bad on demurrer." Upon an examination of the answer, it will be found that this requirement was substantially complied with. True, a partnership is not alleged in words, but there is an allegation of unsettled transactions, and an accounting is asked, alleging that upon such accounting a balance will be found due the defendant, for which judgment is prayed; and the plaintiff did not demur.

We have not taken up in detail the exceptions filed, but we have nevertheless considered them, both those of the plaintiff and the defendant, and we see nothing in them to affect the conclusion we have reached above. We think the decree below should be modified so as to conform to Exhibit B of the referee's report. This result follows after an elimination of the statute of limitations from the case. And it is the judgment of this court that the judgment of the circuit court be modified so as to conform to Exhibit B hereto appended,[1] and to this end that the case be remanded for such orders as may be necessary.

McIver and McGowan, JJ., concur.

(30 S. C. 377)

KNOX v. KNOX *et al.*

(*Supreme Court of South Carolina.* March 18, 1889.)

INSANITY—EVIDENCE.

Plaintiff, in an action on a note, alleged that one of the defendants was adjudged a lunatic after the execution of the note. The lunatic's committee answered that the adjudication declared her a lunatic for a period covering the date of the note, and introduced the record of the inquisition. *Held*, that plaintiff did not admit that the lunatic was such when she executed the note, and that it was competent to introduce evidence of her sanity at that time.

Appeal from common pleas circuit court of Chester county; WITHERSPOON, Judge.

Action by Sarah R. Knox against Samuel Knox, Elizabeth Knox, a lunatic, and James

[1] This was simply a statement of the account, regardless of the statute of limitations and copartnership matters.

Digitized by Google

S. Drennan, as her committee, on a promissory note. There was a judgment for plaintiff, and defendants Elizabeth Knox and James S. Drennan appeal.

Hemphills & Brice, for appellants. *W. A. Sanders*, for appellee.

MCIVER, J. This was an action on a note under seal executed by the defendants Samuel Knox and Elizabeth Knox on the 5th of March, 1884, and payable to the plaintiff. Among other allegations in the complaint it was alleged that, after the making of said note, to-wit, on the 7th of October, 1885, the said Elizabeth was adjudged "a lunatic, and incompetent to transact her own business," and the defendant Drennan was then duly appointed committee of the person and estate of said Elizabeth Knox. The defendant Samuel Knox put in no answer, but in the answers of the other two defendants it was, among other things, alleged that by the inquisition of lunacy referred to in the complaint the said Elizabeth was "on or about the 7th day of October, 1885, adjudged to be *non compos mentis*, and to have been so for thirty years prior to said finding." At the trial the plaintiff, besides other testimony not pertinent to the questions raised by this appeal, offered evidence tending to show that the note was executed by the defendants Samuel and Elizabeth, and that it was given for borrowed money; and closed her case. The appellants then offered in evidence the record of the proceedings in the court of probate, to which, however, the plaintiff was not a party, under which the inquisition of lunacy above referred to was taken, whereby it appeared that said Elizabeth Knox was, on the 7th of October, 1885, found to be a person of unsound mind, and that she had been in that condition for the preceding 30 years. In reply the plaintiff offered evidence for the purpose of showing that at the time of the execution of the note sued on the said Elizabeth Knox was competent to make the contract evidenced by said note. To this testimony appellants objected upon the ground that such testimony was irrelevant and was not in reply, there being no such allegation in the complaint. The circuit judge overruled the objection, and exception to such ruling was duly noted. The jury were charged, among other things, that while the law presumes all persons to be of sound mind until the contrary appears, yet the effect of the record of the inquisition of lunacy was to shift the burden of proof onto the plaintiff, who must satisfy the jury by the preponderance of the evidence that Elizabeth Knox, at the time the note was executed, had such mental capacity as enabled her to understand the nature of the contract, and, if so, she was bound by it. The jury having found a verdict for the plaintiff, upon which judgment was entered, the defendants Elizabeth Knox and Drennan, as her committee, appealed upon the three grounds set out in the record.

The first ground imputes error in overruling appellants' objection to the testimony offered by plaintiff in reply, tending to show that the said Elizabeth Knox was competent to contract at the time of the execution of the note. It is contended that, in the absence of any allegation in the complaint to that effect, no issue was raised as to the correctness of the findings under the inquisition of lunacy, and therefore it was not competent to offer any evidence to impeach such findings. It appears from the record of the court of probate, which was introduced in evidence by the appellants, that the proceedings in lunacy were commenced on the 20th of September, 1884,—several months after the date of the note; and there is no evidence tending to show that the plaintiff, at the time she took the note, had any knowledge of the lunacy of Elizabeth Knox, or even any notice that she was claimed to be a lunatic. The allegation in the complaint that Elizabeth Knox had been adjudged a lunatic on the 7th of October, 1885, more than a year after the execution of the note, cannot be regarded as even an implied admission that she was a lunatic when the note was signed. But when the appellants, in their answer, did allege that the said Elizabeth Knox was not only adjudged to be a lunatic on the 7th of October, 1885, but that she had also been adjudged to have been in that condition for 30 years next preceding the taking of the inquisition, which of course covered the date of the note, an issue was raised as to the capacity of Elizabeth at the time the note was signed. To maintain the issue thus presented by the answers of appellants, the record in the court of probate was offered in evidence by them; for we can conceive of no other purpose for which it could have been offered. The fact alleged in the complaint, that the appellant Elizabeth had been adjudged a lunatic on the 7th of October, 1885, afforded no evidence—not even a presumption—that she was incompetent to make a contract at the time of the date of the note; but the allegation in the answers, that the finding of the inquisition also was that the said Elizabeth had been of unsound mind for a period extending over the date of the note, supported by the introduction of the record, would raise a presumption to that effect, though only a presumption which was susceptible of being rebutted. It seems to us that the evidence objected to was clearly in reply, and, if credited by the jury, was sufficient to rebut the presumption arising from the record, introduced in evidence by the appellants. Until that record was offered in evidence, there was no occasion for the testimony in question, and it might then have been considered irrelevant. But, after the record was offered in evidence, and a presumption was thereby raised that the appellant Elizabeth was incompetent to contract at the time the note was executed, it was clearly competent for the plaintiff to offer evidence to rebut such presumption. If the complaint had contained

Digitized by Google

an allegation that the appellant Elizabeth had been adjudged to have been a lunatic for a period of time covering the date of the note, then there might be some force in the contention of appellants' counsel that, in the absence of any allegation in the complaint controverting the presumption raised by such adjudication, it would not be competent for the plaintiff to offer evidence rebutting such presumption. But there is no such allegation in the complaint. We only find it in the answers of these appellants and in the evidence offered by them, to which the plaintiff clearly had the right to reply.

The second ground of appeal, based upon the alleged refusal to charge a request there set out, cannot, under the well-settled rule of this court, be considered, for the reason that it does not appear in the "case" that any such request was submitted to the circuit judge. But we may add that, even if this ground was properly before us, it is apparent, from the views herein expressed, that it could not be sustained. It also follows from what we have said above that the third ground of appeal cannot be sustained. The judgment of this court is that the judgment of the circuit court be affirmed.

SIMPSON, C. J., and MCGOWAN, J., concur.

(30 S. C. 399)

STATE v. YOUNG.

(Supreme Court of South Carolina. March 20, 1889.)

STATUTES—REPEAL—CRIMINAL LAW—MOTION TO QUASH—APPEAL.

1. The schedule of acts repealed in Gen. St. S. C. 1872, did not include the act of 1807, regulating wharfage charges in Charleston, but the General Statutes declared all navigable water-courses, etc., to be common highways, free, without tax or import, unless expressly provided for by statute, and that any person obstructing the same was guilty of a nuisance, etc. *Held*, that the General Statutes did not impliedly repeal the act of 1807.

2. Section 1, act S. C. 1768, provided for regulating rates of wharfage in Charleston, but the other sections of the act were distinct and separable. Act 1778 was entitled "An act for amending an act [giving the title of the act of 1768,] and for repealing the first section of the act," and covered the subject-matter of section 1. Act 1807 was entitled "An act to amend an act entitled 'An act for amending an act entitled [giving the title of the act of 1768,]'" and provided that immediately from and after its passage certain rates should be paid, etc., and repealed all repugnant provisions of the act of 1778 and any other acts, and was to go into effect from and after its passage. It was the first act to provide a rate for cotton. *Held* that, notwithstanding its title, the act of 1807 was affirmative and original, and was not repealed by the repeal of the acts of 1768 and 1778, in the schedule in the General Statutes of 1872.

3. Under 19 St. S. C. 1887, p. 829, declaring that every objection to any indictment for any defect apparent on its face shall be taken by demurrer or motion to quash, a defendant may move to quash on grounds which previously would have been proper for demurrer.

4. The indictment having been quashed on such grounds, the state may appeal.

Appeal from general sessions circuit court of Charleston county; B. C. PRESSLEY, Judge.

The indictment charged "that Thomas Young, late of county aforesaid, on," etc., "with force and arms, at Charleston, in the county and state aforesaid, did willfully, unlawfully, and injuriously impose, demand, and receive, in his character as wharf-owner and wharfinger, on, of, and from persons, owners of certain merchandise and commodities known as 'bales of cotton,' and doing business as merchants in and about the said city of Charleston, a charge of eight cents wharfage for each bale of cotton shipped at certain wharves, known, respectively, as 'Vanderhost's Wharf,' 'Commercial Wharves,' and 'Southern Wharf,' for the use of said wharves, which are erected on the shores of the harbor and port of Charleston, and doth still continue so to impose, demand, and receive the said sum of eight cents wharfage for each bale of cotton so shipped at the said wharves, and either of them, to the common nuisance of the good citizens of the said state, to the injury of the said port, and to the evil example of all others in like manner offending against the form of the statute in such case made and provided, and against the peace and dignity of the same state aforesaid. And the jurors aforesaid, upon their oath aforesaid, do further present that the said Thomas Young, on," etc., "with force and arms, at Charleston, in the county and state aforesaid, did willfully, unlawfully, and injuriously impose, demand, and receive, in his character as wharf-owner and wharfinger, on, of, and from persons, owners of certain merchandise and commodities known as 'bales of cotton,' and doing business as merchants in and about the said city of Charleston, a charge of eight cents layage for each bale of cotton shipped at certain wharves known, respectively, as 'Vanderhost's Wharf,' 'Commercial Wharves,' and 'Southern Wharf,' for the use of said wharves erected on the shores of the harbor and port of Charleston, and still doth continue so to impose, demand, and receive the said sum of eight cents layage for each bale of cotton so shipped at the said wharves, and either of them, to the common nuisance of the good citizens of the said state, to the injury of the said port, and to the evil example of all others in like manner offending against the form of the statute in such case made and provided, and against the peace and dignity of the same state aforesaid." Motion to quash was granted, and the state appeals.

W. St. Julien Jervey, for the State. *Mitchell & Smith*, for defendant.

MCGOWAN, J. This was an indictment for a nuisance against Thomas Young, as wharfinger of certain wharves in the port and harbor of Charleston, for charging, demanding, and receiving larger rates and sums than the law allows, viz., a charge of eight cents wharfage for each bale of cotton shipped at said wharves; and also for demanding and receiving a charge of eight cents layage on every

Digitized by Google

bale of cotton passed over said wharves,—"to the common nuisance of the good citizens of the said state, to the injury of the said port, and to the evil example of all others in like manner offending against the form of the statute in such case made and provided, and against the peace and dignity of the same state aforesaid." On reading the indictment to the defendant, and before the jury were sworn, the defendant's attorney moved to quash the indictment, on the ground that on its face there is no common or public nuisance charged, for the following reasons: "(1) That the act of 1807 had been repealed, and consequently there was no act in force regulating charges; (2) that the limitation of charges at common law was that they must be reasonable; (3) that, as to the prohibition of the constitution, the long usage and recognition by the legislature warranted a presumption of a legislative grant." After argument the circuit judge quashed the indictment, holding that, although the right to charge wharfage was a franchise, and one exercising it without proper authority, or exceeding the authority given, would be guilty of a common nuisance, nevertheless this indictment was not good at common law, because it did not allege that the charges were "unreasonable and improper," nor under the statute, for the reason that there was no statute in existence regulating charges; the statute of 1807, under which the indictment was framed, having been, as he thought, repealed indirectly by Gen. St. 1872, c. 147, p. 737. The solicitor for the state appealed from the order quashing the indictment, on the following grounds: "(1) That his honor erred in granting a motion to quash the indictment on the grounds proposed, which were a proper subject of demurrer; (2) that his honor erred in ruling that the indictment was defective as an indictment at common law, because the charges for wharfage and layage were not therein characterized as "unreasonable," and therefore quashing the indictment; (3) that the indictment in this case, in addition to allegations as to time and place as required by law, charges the crime substantially in the language of the common law, and so plainly that the nature of the offense charged may be easily understood, and his honor, therefore, erred in quashing the same; (4) that his honor erred in holding that the offense charged does not lie for violation of the constitution and statutes of the state in such case made and provided, and therefore quashing the indictment; (5) that his honor erred in holding that the requirements of section 40, art. 1, of the constitution, forbidding the imposition of any wharfage, 'unless the same be authorized by the general assembly,' can be fulfilled by implication; (6) that his honor erred in holding that the said clause of the constitution does not call for any express act; (7) that his honor erred in holding that the act of assembly of 1807, regulating the rate and charge for wharfage on the shores of the harbor of Charleston, had been repealed, and therefore quashing the indictment; (8) that his honor erred in refusing to allow the plaintiff to amend the indictment by adding the words 'unreasonable and improper,' which he ruled were necessary to an indictment at common law." The respondent served the solicitor with notice that if the supreme court should decide that the order quashing the indictment is appealable, and find itself unable to sustain the judgment of the circuit court on the grounds upon which it was rested, then that he would insist upon its being sustained on the following grounds, viz.: "(1) That, from the facts charged on the face of the indictment, it does not appear that the defendant was guilty of any common or general nuisance, so as to subject him to a criminal indictment. (2) That the wharves having been constructed by individuals at their own proper costs and charges, under the sanction of the general assembly, for the purposes of charging for the use of the same, the same were vested contract rights in the hands of the owners, subject to legislative regulation, but not to abrogation; and that the constitution of 1868 could not by any provision abrogate or sequestrate those vested contract rights for the benefit of the public, without first making proper compensation to the owners," etc.

Was the order quashing the indictment appealable by the state? The defendant was not "acquitted by a jury." Indeed, his case was never given in charge to the jury, but, upon being read, was summarily quashed, which was certainly a final order, as it put an end to the case. As we understand it, under the former practice, motions to quash were granted for some fault in the form of the indictment itself; but when the indictment was regular in form, and the objection was to the facts or the law, the parties were put to plead the same. The old books say that "by the common law the court may quash any indictment for such insufficiency as will make the judgment thereon erroneous. * * * Judges are not bound *ex debito justitiæ* to quash an indictment, but may oblige the defendant either to plead or demur to it. * * * The court doth not usually quash indictments for forgery, perjury, and nuisances, notwithstanding the indictments are faulty, and it is against the course of the court to quash an indictment for extortion," etc. See Toml. Law Dict. tit. "Indictment," and authorities cited. The objection made here, in one aspect certainly, was not to the faulty form of the indictment; for it was conceded to be entirely regular and formal as an indictment under the statute, but to the law involved, and might have been presented by demurrer. But the act of 1887 (19 St. 829) declares "that every objection to any indictment for any defect apparent on the face thereof shall be taken by demurrer or a motion to quash such indictment before the jury shall be sworn," etc. We suppose that under this provision,

Digitized by Google

intended to simplify and regulate the criminal practice, a defendant may now move to quash upon grounds which, before the act, would have been proper for a demurrer; and, with a view to the right of appeal, we will consider it as if a demurrer had been filed and sustained. In such a case we do not see any satisfactory reason why the state's attorney, in the discharge of his official duty, may not appeal in behalf of the state. See State v. Gathers, 15 S. C. 372; State v. Shuler, 19 S. C. 140; State v. Shirer, 20 S. C. 392; 1 Bish. Crim. Proc. (3d Ed.) § 76.

The seventh exception alleges error on the part of the circuit judge "in holding that the act of assembly of 1807, regulating the rates and charges for wharfage on the shores of the harbor of Charleston, had been repealed, and therefore quashing the indictment." It was properly conceded that the right to erect a wharf and charge for its use, below high-water mark in the harbor of Charleston, is a franchise, which can only be obtained from the state, and any one undertaking to do so without such authority is guilty of a nuisance; yet the defendant, while exercising that right, claims that there is now no act of the legislature of force upon the subject, and that he holds the right from the state by prescription, long usage, and many legislative recognitions, especially by the acts of 1768, 1778, and 1807, while at the same time he is not bound by the limitations and restrictions in these acts, for the reason that they are now repealed,—leaving to him the general undefined right, without any legislative control over it; that the repeal was effected by the "Revision and Consolidation" of the General Statutes, the first two acts indicated above by direct repeal, and the last, that of 1807, by indirect repeal,—that is to say, upon the principle claimed as applicable, that the repeal of an act necessarily works a repeal of all acts entitled as "amendments" to it. In order to make the point clear, it will be necessary to give a condensed statement of the facts.

In 1768 the colonial legislature passed "An act for ascertaining and regulating the rates of wharfage of ships and merchandise, etc., in Charleston." It contained 12 sections, but the first was exclusively devoted to the subject of wharfage and storage, (and had a long schedule of rates and commodities attached.) 4 St. 286. In 1778 was passed "An act for amending an act, [giving title of the above act, 1768,] and for repealing the first section of said act." It covered the whole field of wharfage, and had attached another and different schedule of articles and rates, and then, in regular form, repealed the first section of the act of 1768. 4 St. 435. In 1807 was passed another "Act to amend an act entitled 'An act for amending an act entitled "An act for [title of act 1768.]" '" This act provided "that, immediately from and after the passing of this act, the following rates and sums, respectively, shall be paid, and no greater shall be demanded or exacted by owners of wharves, or any other persons, for wharfage of ships or vessels, or for landing," etc., to-wit: "For shipping every bale or case of cotton, four cents per bale or case," etc. 7 St. 123. It expressly repeals so much of said act of 1778 and any other acts as are repugnant to the provisions of the act of 1807. It was to go into effect "from and after its passage," and its provisions took the place of an original enactment, certainly as to the important item of cotton, which appears in this act for the first time; showing, probably, that previously that article had not attained the importance of being a staple commodity of the state. This is the act which has been on the statute book as a subsisting law for nearly a century, and was not mentioned in the schedule of the General Statutes. In 1872 the "Revision and Consolidation" of the General Statutes were adopted, which arranged many acts by their titles in a schedule, under the heading: "The following entitled acts, ordinances, and resolves, passed in the several years hereinafter enumerated, have expired, or have been, or are hereby, expressly repealed," etc. The title of the acts of 1768 and 1778 are found in this "schedule," and are therefore claimed to have been thereby directly repealed. The act of 1807, however, does not appear in the "schedule," but it is claimed that that also was indirectly repealed; that its title declared that it was an "amendment" of the mother act of 1768, and, when the last-named act was repealed, that of 1807, one of its "amendments," and therefore "ingrafted" into it, fell with it. It seems to us at least doubtful whether it can be affirmed of any particular act, which appears by its title on the schedule of the General Statutes, that it was thereby certainly repealed. The sweeping declaration is made as to the whole list, without discrimination, but in the alternative, "expired," "before repealed," or "now repealed." Into which category could it be placed with any degree of certainty? This would seem to be a very summary and wholesale manner of sweeping off old statutes in order to clear the way for the new; but passing this, and assuming that the General Statutes (1872) declared the acts of 1768 and 1778 thereby repealed, how does the matter stand as to the act of 1807? That was not included in the schedule of 1872, and has certainly never been expressly repealed by the General Statutes or any other.

Was the act of 1807 repealed by implication? It is quite certain that it was not. Such repeals sometimes take place. When a subsequent act covers exhaustively the whole ground of one prior in time, but does not expressly repeal it, the law may and does imply from this substitution a repeal of the former act. Such repeals, however, are not favored in the law. Mr. Dwarris (p. 154) says: "Every affirmative statute is a repeal of a precedent affirmative statute, where its matter necessarily implies a negative; but only

Digitized by Google

so far as it is clearly and indisputably contradictory and contrary to the former act 'in the very matter,' and the repugnancy such that the two acts cannot be reconciled, for then *leges posteriores, priores contrarias abrogant.* The leaning of the courts is so strong against repealing the positive provisions of a former statute by construction as almost to establish the doctrine of 'no repeal by implication.'" There could be no repeal by implication here, from the subject-matter of the repealing act; for there was in the said "schedule" no act at all, but simply the bald statement of the title of the acts repealed, of which, as we have said, the act in question was not one. And we may say that there is not in the General Statutes anything which intimates an intention on the part of those who framed them to repeal the act of 1807, the only act remaining on the subject of wharfage, and charges for it, in the harbor of Charleston. But, on the contrary, these very General Statutes contain a chapter on the subject of "highways," in which it is declared that "all navigable water-courses and cuts are hereby declared navigable streams, and such streams shall be common highways, and forever free, as well to the inhabitants of this state, as to the citizens of the United States, without any tax or impost therefor, unless the same be expressly provided for by the general assembly; and if any person shall obstruct the same, otherwise than as hereinafter provided, such person shall be deemed guilty of a nuisance, and such obstruction may be abated as other public nuisances are by the laws of this state," etc. Section 1062.

But it is earnestly insisted that, if there was no implied repeal here, there was an indirect repeal, based on the doctrine that the repeal of an act necessarily carries with it all "amendments" made to said act, and that therefore the act of 1807, being, as stated in its title, an "amendment" of the act of 1768, fell with the latter act when it was repealed. We know of no inexorable rule of law which peremptorily requires that every act which is entitled as "an amendment" to a former act must therefore be carried back, and "ingrafted" upon that act, so as to become part and parcel of it, for all purposes. It is well settled that the title is no part of the act. "There is nothing in a name." It seems to have been the practice formerly to incumber the titles of acts by repeating fully the formal titles of former acts upon the same subject. The question must always be one of intention, to be reached by considering the character and objects of the acts. As stated by Mr. Endlish, (section 294:) "But even where the amendment merges portions of the original act in the new provisions, so that, from the time of the amendment, the whole force of the enactment, as to transactions subsequent to it, rests upon it, the old act retaining no vitality distinct from the new one, it may be referred to as controlling past transactions, and even an amendment of an act 'so as to read' in a prescribed way has no retroactive force, but is to be understood as enacted when the amendment takes effect."

We incline to think that some of the seeming confusion in the case has arisen from looking alone to the titles of the acts, instead of considering the character of the enactments themselves. The act of 1768 had many sections, (12,) but the first section dealt exclusively with the subject of charging for wharfage and storage in the harbor of Charleston. It was so distinct from the other sections that, like a separate act, it was susceptible of being separately repealed, without interfering with the matter of the other sections. Upon careful consideration of the whole case, we think that the act of 1778 covered precisely the same subject-matter as the first section of the act of 1768, and repealed the same; absolutely abrogating that section once and forever, both by an implied repeal, and also by expressly repealing it. The other sections of the act of 1768 were left unaffected, and on that account it may be that the repealing act was entitled "an amendment." Then, as to the act of 1807. The object of that act manifestly was to make some changes in the charges upon other articles, and to settle charges for the new article of cotton, just rising into notice as a staple commodity. In its provisions the act is positive and affirmative, and expressly repealed so much of the act of 1778 and of other acts as were repugnant thereto. It certainly was not the intention of the lawmakers that the act should be pushed back, and be incorporated either in the act of 1778 or 1768, so as to become part and parcel thereof, and have retroactive operation accordingly. Such construction would certainly involve the absurdity of making provision for the wharfage on cotton 40 years before it came to be a considerable article of commerce, and be in direct violation of the terms of the act itself, which directed that it should go into effect "immediately from and after its passage." We think that the act of 1807, although entitled as "an amendment to an amendment," was in its provisions affirmative and original. It was upon an important subject, which the legislature, in accordance with its duty, always claimed the right to control. It has stood upon the statute book as the existing law, unchallenged for nearly a century, and we do not see anything in the law which requires the court to declare that it has been repealed, either intentionally or by implication, or indirectly by the operation of a fixed Procrustean rule, as to the effect of amendments, leaving the whole subject absolutely "derelict," as to any legislative regulation or control. We think the act is of force, and that makes it unnecessary to consider the other exceptions.

The judgment of this court is that the judgment of the circuit court be reversed, and that the case be remanded to the circuit for such further proceedings as may be

Digitized by Google

thought necessary to carry out the conclusions herein announced.

SIMPSON, C. J., and MCIVER, J., concur.

(30 S. C. 381)

KING v. BELCHER *et al.*

(*Supreme Court of South Carolina.* March 18, 1889.)

JUDGMENT—CONSTITUTIONAL LAW.

1. Act S. C. 1873, provided that a final judgment should be a lien for 10 years, and that the creditor might have an additional three years within which to revive it. Act of 1885 repealed the proviso allowing the additional three years. *Held*, that the latter act was unconstitutional as interfering with vested rights when applied to a judgment the lien of which had expired before its passage, but the additional three years for reviving which had not then expired.

2. The fact that a judgment was enrolled and tested by one as "deputy-clerk," who had never been regularly appointed deputy, but who sometimes acted as deputy, in the absence of the clerk and the duly-appointed deputy, does not make the judgment void.

Appeal from common pleas circuit court of Abbeville county.

Benet & Cason and *Parker & McGowan*, for appellants. *Boyd & Brown* and *E. B. Gary*, for respondent.

MCGOWAN, J. On February 6, 1888, the plaintiff issued a summons to revive a judgment for $11,277.85, which was entered on February 15, 1875, and had been recovered on a note under seal bearing date in 1859. The defendants objected to the revival on two grounds: (1) Because no judgment was ever entered according to law, for the reason that it was not signed by the clerk of the court, (Bowie,) but by A. W. Jones, who styled himself "deputy-clerk," but who was never regularly appointed as such, or his appointment approved by the court, etc.; (2) that the time within which the judgment could be revived had expired. The case was referred to W. A. Lee, Esq., as special referee, who made a clear and full report:

First. As to the answer, in which the judgment in the principal case was entered, as to which he found as a fact that the judgment was enrolled and tested by A. W. Jones as "deputy-clerk," who had never been regularly appointed to that office, but, in the absence of the clerk, (Bowie,) and of the regular "deputy," he had sometimes acted in that capacity. Under these circumstances, he held that the objection was not fatal, but was met by the decision in Clark v. Melton, 19 S. C. 498, that the signature of the clerk is not necessary to give validity to a judgment.

Second. As to the point whether the proceeding to revive had been commenced in time, he indicated as matter of law that the plaintiff was not within time, (10 years from the original entry of the judgment,) if the act of 1885, repealing the proviso to the act of 1873, allowing three years within which to revive a judgment after the expiration of its lien, was constitutional and valid. But he held that the act of 1885, so far as it purported to repeal the proviso of the act of 1873, giving a supplemental three years within which a judgment might be revived, was unconstitutional and void as to all judgments (including this one) entered between 1873 and 1885. Among other things he said: "The act of 1885 deprives the plaintiff of a vested and subsisting right by depriving her of all power of renewal, since the period (10 years) subsequent to the recovery of the judgment (in 1875) had already expired at the passage of the act, (1885.) But it is contended that the right of action is still preserved on the judgment after the lapse of 20 years. If the owner of a judgment has any right under it, it is the right of immediate enforcement, when he may reach, perhaps, the property of the debtor; but to delay its enforcement in nine cases out of ten would be depriving him of all remedy. Taking this view of the matter, I regard the act of 1885 as unconstitutional and inoperative as to this judgment, and that the proceeding to revive it was duly instituted within the enlarged time (three years) given by the act of 1873," etc. Upon exceptions this report was confirmed by Judge WITHERSPOON, who ordered the judgment revived. From this order the defendants appeal to this court upon the following grounds: "(1) Because it was error to hold that the proceedings in this case were instituted under the act of 1873, (section 10 of the Code,) and that the summons was lodged within proper time. (2) Because it was error to hold that the act of 1885, (19 St. 223,) is unconstitutional and inoperative as to this proceeding and judgment. (3) Because it was error to hold that the judgment herein is a valid and subsisting judgment, and could be revived by summons after the lapse of 10 years from its entry. (4) Because the presiding judge should have decided that the time for reviving by summons had expired, and that the court had no jurisdiction in the premises. (5) Because it was error to allow the said judgment to be revived." We agree with the referee and circuit judge that we cannot, especially at this late day, and in this manner, declare that the judgment in the principal case was rendered absolutely void by the irregularity as to the manner in which it was entered. We do not see why the signature as deputy-clerk by one who was never regularly appointed to that office should be more fatal than an entire absence of signature by or for and in behalf of the clerk. See Clark v. Melton, supra; 4 Wait, Pr. 671. As was said by the chief justice in the case of Clark v. Melton: "To hold that the failure of the clerk in the matter suggested here destroyed the judgment, would, in our opinion, be sacrificing substance to a shadow, and would overthrow established and adjudicated rights upon the merest technicality."

Then, in reference to the time within which it was necessary to commence the proceeding to revive the judgment. The judg-

Digitized by Google

ment was entered on February 15, 1875, and the summons to revive it was filed on February 6, 1888, within 10 days of 13 years thereafter, and the question is whether that was within the time allowed by law. At the time the proceeding to revive was instituted (1888) the latest law upon the subject was the act of 1885, (19 St. 229,) which provided as follows: "That section 310 of the Code of Procedure (act of 1873) be, and the same is hereby, amended by the substitution therefor of a new section to be known as section 310, which shall read as follows: 'Section 310, (1) A final judgment recovered in any court of record in this state, subsequent to the 25th day of November, 1873, shall constitute a lien upon the real estate of the judgment debtor in the county where the same is entered for a period of ten years from the date of entry thereof. * * * (2) A final judgment may be revived at any time within the period of ten years from the date of the original entry thereof;' " etc. According to this law it is perfectly clear that, the 10 years from the entry of the judgment having expired, the plaintiff's proceeding to revive was not in time. But the plaintiff insists that her judgment was entered in 1875, before the above act was passed, and when the act of 1873 was of force, which had a provision as follows: "Provided, however, that the plaintiff in such judgment may, at any time within three years after its active energy has expired, revive the judgment, with like liens as in the original, for a like period," etc.; and that under this proviso she acquired the privilege or right to revive for three years after the expiration of the lien of her judgment, which right so inhered in and attached to her judgment as that it could not be divested retrospectively by the act of 1885, afterwards passed, but still existed for the three years. There is no question in the case as to whether it was the purpose of the act of 1885 to repeal the proviso of that of 1873, allowing the three years in addition to revive. It is certainly a general rule that a statute must not be construed retrospectively, unless it shall appear that it was so intended by the legislature. The act of 1885 simply re-enacts that of 1873, omitting the proviso which allowed the extra three years, and substituting for it the provision "that a final judgment may be revived at any time within the period of ten years from the date of the original entry thereof," etc. The intention to repeal the proviso is plain. Indeed, it was properly admitted in the argument that the act of 1885 was intended to be retrospective in its character. But we do not understand that for that reason alone the act must be unconstitutional. All repeals must necessarily refer back to the act repealed. Whenever the intention is clear that the act should have a retrospective operation, it must unquestionably be so construed, however unjust and hard the consequences may appear. Retrospective laws do not fall within the prohibition against such laws contained in the constitution of the United States, unless they are *ex post facto*, or impair the obligation of contracts, or possibly divest vested rights of a certain character. See End. Interp. St. §§ 283–285; McLure v. Melton, 24 S. C. 559, and authorities cited. Of course there is nothing *ex post facto* here, as that relates only to criminal proceedings. Did the act of 1885, which purported to repeal the three-years proviso in that of 1873, impair the obligation of any contract, or materially affect the legal remedy for its enforcement? The contract between the parties was made in 1859, when the note was executed, and was to the effect that the creditor might sue the debtor to judgment, which, under the law then of force, would have a lien for 20 years. The lien of the judgment which might be recovered was not, however, the contract itself, but only a legal incident of the judgment. As was said in the case of Moore v Holland, 16 S. C. 22: "A well-recognized distinction is drawn between the contract itself and its obligation. The contract is the agreement of the parties; the obligation is the remedy which the law affords for its enforcement. * * * Where, then, an act is passed which materially interferes with and impairs the legal remedy which the courts afforded before the passage of the act for the enforcement of contracts, such act is unconstitutional," etc. And the same case held that the lien for 20 years on real estate, which the previous law allowed to decrees and judgments, was no part of the remedy of enforcement, and consequently decided "that the act of 1870, declaring that final judgments thereafter rendered should not of themselves constitute a lien upon real or personal property, but that such lien might be obtained by levy, etc., did not impair the obligation of contracts entered into prior to its passage," etc. If the point should arise, we suppose, of course, that the same would be ruled as to the act of 1873, which restored the lien of a judgment, reduced, however, to 10 years, with the supplemental provision as to the power to revive it within three years; and it follows as a matter of course that, if the plaintiff had recovered her judgment after the act of 1885, she would, according to the same principle, have been bound by that act as to the time within which she could revive it, without the least reference to the date of her note or the doctrines as to the impairment of its obligation. So that it seems clear upon authority that the allegation of unconstitutionality in the act of 1885, so far as it affected the proviso of the act of 1873, cannot be sustained on the ground that it impaired the obligation of the original contract, entered into before its passage, when the remedies for enforcing it were, in some respects, different.

Conceding this, however, the plaintiff invokes the doctrine of "vested rights." She insists that the act of 1873 declared the right to revive a judgment within the three years of grace, and that when she came in and recovered her judgment under the act, that right *eo instanti* vested in her, not by reason

Digitized by Google

of the obligation of the original contract, but by virtue of her judgment, and that such right could not be destroyed by the subsequent repeal of the act that gave it. This view is not without force. Undoubtedly there are rights of property vested under statutes, which are properly held sacred, protected from destruction by subsequent repeal of the statute; but this cannot be affirmed of all rights created by statute. "It is very true that the repeal of an act will not divest rights vested under it." Ex parte Graham, 13 Rich. Law, 277 But, the general rule being that the legislature which enacts may also repeal, the inquiry is always legitimate, whether a right claimed under a statute repealed was or was not so "vested." It is often difficult to determine whether a right was so vested as to be beyond the reach of repeal. It seems to be one of the matters which cannot be safely reduced to fixed rules. After some effort to find such a rule, I must say that I agree with what my Brother McIver said in McLure v. Melton, 24 S. C. 571: "It is very difficult, if not impossible, to define precisely the rights (under statute) which are so vested as to be protected from legislative interference, as is shown in the discussion of the subject by that eminent author, Judge Cooley," etc. The right to revive a judgment for three years after the expiration of its active energy can hardly be called a "vested right," according to the ordinary meaning of the term. We can understand that it would have been in the nature of a vested right if the lien itself had been expressly extended over the three years; but the proviso gave only a right to acquire a new lien within a certain time, and by proper proceedings. This right was in one particular somewhat analogous to that of the statute of limitations. It is true that the latter statute (limitations) does not, like the proviso, create the right affected, as well as limit the time for its exercise, but merely fixes a period beyond which an existing right may not be enforced. The rights may differ in this respect, but nevertheless we cannot doubt that the right given by the proviso appertained to the remedy afforded for the enforcement of the judgment. It is settled as a general rule that the right to a particular "remedy" is not a vested right, unless it is a part of the right itself. It is also settled that the remedy may be "modified," as the wisdom of the state may direct, without impairing the obligation of a contract; but it is equally well settled that any legislation which "materially diminishes" the remedy given by law to the creditor, at the time his contract is made, just so far impairs the obligation of the contract. It is said that "the obligation would be nugatory if all remedy to enforce it were taken away, and it would be impaired if the remedy were obstructed and rendered imperfect." See State v. Carew, 13 Rich. Law, 498, and the authorities.

Now, considering the proviso of 1873 as a part of the remedy afforded by law at the time the judgment was rendered, was that remedy merely "modified," or "materially diminished,"—"obstructed or rendered imperfect,"—as the result of its repeal by the act of 1885? The time allowed by the proviso of the act of 1873 for proceedings to revive had not expired at the passage of the act of 1885, which cut off entirely all that remained of the three years. It may be that the repealing act did not disturb the right to sue on the judgment as it then existed; and, even if it extended that right beyond "twenty years," yet we cannot consider that as an adequate substitute in place of the summary remedy given by the proviso. We cannot say that the referee and circuit judge erred in holding that the act of 1885 "deprived the plaintiff of all power of renewal," and in that went beyond the conceded power to "modify the remedy," and is inoperative as to plaintiff's judgment. The judgment of this court is that the judgment of the circuit court be affirmed.

Simpson, C. J., concurs in the result, and in the separate opinion of Mr. Justice McIver.

McIver, J. I concur in the result upon two grounds, which I will proceed to state briefly.

1. It does not seem to me that, under the well-settled rule respecting retrospective legislation, the act of 1885 can be given a retroactive effect. It is quite clear that there are no words in the act expressly declaring an intent that it shall be retrospective, so far, at least, as the renewal of judgments is concerned, and I think it is equally clear that there is nothing in the act which necessarily implies such an intention. It will be observed that section 2 of the act, which is the only portion of it relating to section 310 of the Code of Procedure, is divided into five subdivisions, each relating to distinct and different subjects; and while subdivision 1 does, in terms, refer to judgments recovered after 25th of November, 1873, there is no such reference in subdivision 2, which is the only subdivision relating to the renewal of judgments. On the contrary, the language there used is: "A final judgment," which, under the well-settled rule as to retrospective legislation, must be read as: "A final judgment hereafter entered." It will also be observed that the introductory language of section 2 of the act of 1885, referring to section 310 of the Code, (the act of 1873,) is not, as we often find, that such section be stricken out or repealed, but the language is that the section be amended. So, too, the repealing clause of the act of 1885 does not, in terms, repeal so much of the act of 1873 as had been inserted in the Code as section 310, but it only repeals such acts and parts of acts as are inconsistent with the act of 1885. If, therefore, a prospective, and not a retrospective, operation be given to subdivision 2 of section

Digitized by Google

2 of the act of 1885, there is nothing in the provisions of that subdivision inconsistent with so much of the provisions of section 310 of the Code as prescribe the time within which a judgment recovered after the 25th of November, 1873, may be renewed, but they may both stand together,—the one applying to judgments recovered after the 25th of November, 1873, and before the passage of the act of 1885; while the other applies to judgments recovered after the passage of that act.

2. But, even if I should be in error in the view just presented, there is another ground, alluded to in the opinion of Mr. Justice McGOWAN, upon which the judgment below should be affirmed. Conceding, for the purpose of this inquiry, that the legislature could, without infringing the constitution, reduce the time previously allowed for the renewal of judgments previously recovered, in analogy to the doctrine by which legislation altering the time within which an action may be brought, has been sustained, even when applied to existing causes of action, yet the rule in such cases is that such legislation must afford a reasonable time within which existing rights of action may be enforced. As is said in Cooley, Const. Lim. (2d Ed.) 366: "It is essential that such statutes shall allow a reasonable time after they take effect for the commencement of suits upon existing causes of action." This rule would be clearly violated if the act of 1885 is applied to this case, for no time whatever has been allowed the plaintiff to renew her judgment after the passage of the act. Under the law as it stood up to the time of the passage of the act of 1885, the plaintiff had a right to renew her judgment at any time within the period prescribed by the act of 1873, or section 310 of the Code, to-wit, 13 years; and under the rule above stated the legislature could not deprive her of such right without affording her a reasonable time for the exercise of such right after the passage of the act reducing the time originally allowed; and this the act of 1885 fails to do. The time, as prescribed by the act of 1885, (10 years from the date of the original entry of the judgment,) had expired before the passage of that act; and the plaintiff, relying on the law in force at the expiration of the 10 years from the original entry of her judgment, was fully justified in forbearing to exercise her right of renewal within that period, because the law then informed her that she would be allowed an additional period of 3 years within which she might exercise such right; and she could not be deprived of such additional time, under the rule above stated, unless the depriving act had allowed her a reasonable time after its passage to exercise her existing right of renewal. But the act of 1885, so far from making any such provision, would, if applied to this case, absolutely destroy the plaintiff's right to renew her judgment, guarantied to her by the law in force at the time she recovered her judgment, and which continued in force up to the time of the passage of the act of 1885, which it is claimed destroyed her then existing right. If the legislature should pass an act in such terms as made it clearly retrospective, reducing the period prescribed for the limitation of a right of action on a promissory note from six to four years, such act could not, under the rule, be applied to an action on a note which had been past due for five years at the time of the passage of such act. Upon the same principle I do not think the act of 1885 can be applied to this case.

(32 W. Va. 66)

CHILDS *v.* HURD *et al.*

(*Supreme Court of Appeals of West Virginia.* Feb. 11, 1889.)

MORTGAGES — FORECLOSURE — DEED — CORPORATIONS.

1. A mortgagor left in possession of the mortgaged premises is entitled to the rents, issues, and profits of them, without rendering an account of them to the mortgagee, who can never recover them from him. The mortgagor is regarded in equity as the real owner of the property, a court of equity regarding a mortgage as a mere security, and the mortgagee, though the legal title be in him, as having a chattel interest.

2. If, therefore, a suit to foreclose a mortgage, whether of real or personal property, be brought by the mortgagee, the mortgagor will continue, pending the suit, to take the rents and profits or use of the mortgaged property, unless the court by its order appoint a receiver, and he takes possession of it. Till the receiver takes actual possession of the mortgaged property the mortgagor in possession takes the rents, issues, and profits, or has the use of the property as owner without rendering an account thereof.

3. But after forfeiture the mortgagee has a right to take possession of the mortgaged property, and hold the same without rendering an account of the rents, issues, and profits, other than applying them to the payment of the debt secured by the mortgage.

4. If the suit brought by the mortgagee be not a simple suit to foreclose the mortgage, but it be brought also to require an agent of the mortgagor in possession and use of the mortgaged property to render an account, and to have the rents and profits taken possession of and paid over to the parties entitled to them, or having a lien or claim on them, such agent, and all having any lien or claim to such rents, will be regarded as though he had been a receiver appointed by the court, and the rents, issues, and profits of the mortgaged premises will be ordered to be paid into the court by him, and the court will dispose of the same according to the rights of the parties; and in such case the mortgagee will have a superior right to such rents, issues, and profits to any creditor acquiring a lien on them subsequent to the institution of the suit.

5. If in such suit the mortgaged premises is a lease of lands to the mortgagor for the purpose of mining coal or iron on the same during a continuance of the lease, and the lessor retains a certain amount on every ton of coal or iron mined, as royalty, with or without a provision in the lease that no coal or iron shall be moved off the premises till such royalty be paid, such landlord has a right to be paid before the mortgagee, out of any funds in the hands of the agent of the mortgagor arising out of the sale of coal or iron mined on the premises, and paid into court.

6. A railroad is built on such leased premises in order to facilitate the mining of such coal and iron ore. Such railroad passes to the mortgagee in a mortgage made by the lessor of such land; and, if the proceeds of the sale of such iron of said railroad track come into the hands of the court in

Digitized by Google

such suit, they will be directed to be paid to the mortgagee, in preference to any lienor subsequent to the recording of such mortgages.

7. In such a suit, none of the defendants, creditors of the mortgagor, can gain any priority over other defendants by levying an attachment pending such suit, on rents and profits in the hands of an agent of the mortgagor having such leased premises in his possession.

8. The recitals in a deed that the consideration was valuable and paid is no evidence of such payment, as against creditors of the grantor assailing such deed as voluntary, and therefore fraudulent as to them.

9. Where the statute law of a state requires that, before a corporation can do any business, it shall record in a certain county the certificate of its incorporation, this is a condition precedent, and the corporation has no power to transact any business till such condition is complied with, and such corporation has really no existence till such certificate of incorporation is so recorded.

10. A tenant may remove fixtures which he has put on leased premises at any time during his lease, or while he continues tenant, but after the expiration of the lease, and the surrender of the premises to the landlord, he cannot enter on the premises, and remove any fixtures, for when he quits the premises, leaving his fixtures behind him, it will be presumed he intended to abandon them.

11. If a commissioner fails entirely to make any report with reference to a matter referred to him, the court should refer this matter to him again, to be reported upon, and this should be done though no one except to such report. No one's right can be regarded as abandoned or prejudiced by his failure to except to such report because of such failure.

12. When the iron on a railroad is sold under an execution as personal property, but the proceeds are brought into a court of equity to be disposed of to the proper parties, such proceeds should be paid by the order of the court to the owner of the lease, and not to the execution creditor.

(*Syllabus by the Court.*)

Appeal from circuit court, Taylor county.

The record in this case is very large, containing upwards of 400 printed pages. I will endeavor to give a concise statement of the material facts.

On January 2, 1878, Samuel Colgate, of New Jersey, leased to Charles S. Hurd, of Taylor county, about 2,000 acres of coal land in Preston county, W. Va. The lease was for five years, commencing May 1, 1878, and said Hurd agreed to pay 10 cents per ton for all coal mined by him during this time on said land. This property was located on the Baltimore & Ohio Railroad, at Austen, and was known as the "Austen Mines." These mines had already been worked, and included in the lease all the works and property on the ground then used for mining coal, and the timber on said land necessary to keep the mines in proper condition, to be selected, with the assent of M. L. Shaffer, when practicable. The royalty of 10 cents per ton on all coal mined was to be paid quarterly, and 30 days after the end of each quarter the lessee, Hurd, was also to pay $250 rent per annum for a store-room. If any part of said rents and royalties were in arrears for 30 days after the rent was due and demanded, the lessor, Colgate, was authorized to enter into and distrain upon said mines and premises, or dispose of same, in due course of law, as landlord.

Hurd entered into the possession of this land under this lease at once, and began to operate these mines extensively, converting much of the coal mined into coke, which was consumed at Hurd's iron furnaces, at Ironton, Taylor county, W. Va.

Hurd became indebted to Edward F. Browning, and, on May 15, 1879, he executed to Browning a mortgage on a claim which he had against the Lancaster Furnace & Mining Company, secured by a deed of trust from said company to Krauss, trustee, dated December 22, 1874, and recorded in said Taylor county, W. Va., and on said deed of trust, and on all his real estate and property, real, personal, or mixed, in Taylor county, which is described as all the property conveyed to said Hurd by Jacob Krauss by deed dated February 7, 1878, and duly recorded in said county of Taylor. This mortgage was in form an absolute deed, and was duly recorded. This debt to Browning was by the court in this cause ascertained to be $4,773.29.

About three months afterwards, on August 13, 1879, Hurd executed to Joseph S. Brown and A. A. Childs a mortgage on the Austen mines; and also a lease to certain property, made to said Hurd, by one Ulman, at Ironton furnace, in Taylor county, and all the personal property of every nature and kind connected with said furnace, or said coal mines, as security for the compliance by said Hurd with, and fulfillment of, a contract made by him with said Childs and Brown; whereby they agreed to advance to said Hurd, on account of iron delivered by him to them, moneys, not exceeding $12,000, in the manner following: During the month of August, $3,000; During September, $5,000; and during October, (if the delivery of the iron should not have been completed,) so much as C. S. Hurd may want; and by this contract said Hurd sold to Brown and Childs 1,000 tons of pig-iron, to be made as soon as possible at said furnace, at $15 per ton, to be delivered at Pittsburgh. The amount due on this mortgage for advances made by Childs and Brown, with interest to November 4, 1885, afterwards turned out, as ascertained by the court, to be $2,353.67.

Some 10 months afterwards, on June 10, 1880, Hurd executed a second mortgage on the Austen mines, and also on the Waldorf furnace property, and also certain leases of iron land in Taylor county, W. Va., made to said Hurd by one F. Leon Clerc. This mortgage was made to secure a note for $15,000, payable to said Childs, 10 days after the date of said mortgage. The amount of this debt, secured by this mortgage, as afterwards ascertained by the court, was, on November 4, 1885, $4,696.10, with interest from June 1, 1881, $1,246.81, or a total as of November 4, 1885, of $8,296.58. On the 5th of February, 1881, a creditor of said Hurd, Thomas N. Jeffreys, issued an attachment in an action of *assumpsit* against him in the circuit court of Taylor county to satisfy a debt of $5,000,

Digitized by Google

which attachment was levied on that day on the estate of said Hurd in the said Waldorf furnace property, a list of which is given, including a locomotive engine. It was also levied on the Baltimore & Ohio Railroad Company, as garnishees, on the same day. Between the 5th and 10th of February, 1881, this attachment was levied on additional personal property of said Hurd; and on August 19, 1881, it was served on Martin L. Shaffer, as garnishee. Martin L. Shaffer was said Hurd's agent, in control and possession of said Austen mines, from about January 15, 1881, till May 1, 1883, when the Colgate lease of said mines to said Hurd expired. A judgment was rendered against Hurd in said action on August 11, 1881, for $7,001.15, with interest from that date, and $34.47 costs. This judgment became, by assignment, the property of Eugene G. Jeffreys; and on November 16, 1887, amounted to $9,666.88. On January 1, 1881, said Hurd assigned to the Austen Coke Company, a New York corporation, said Colgate's lease of the Austen mines. This assignment was claimed to be fraudulent and void as to creditors of said Hurd, and was so held by the court below.

While Martin L. Shaffer was in the possession of the Austen mines there came into his hands, from the sale of its products, $6,743.11, which, with $300 derived from the sale of certain mules by Hurd, was paid into court on November 20, 1885. Albert H. Childs, at June rules, 1881, filed his bill in the circuit court of Taylor county, to foreclose his said mortgage of June 10, 1880, on the Waldorf furnace property, the Austen mines property, and said Clerc lease to Hurd. This bill also made the judgment creditors of said Hurd defendants. These were set out in the bill,—1 justice's judgment rendered March 7, 1881, and some 50 justice's judgments rendered March 12, 1881. On all these executions were promptly issued. There were also 14 other judgments, rendered by another justice of Taylor county, during the months of February, March, and April, 1881. On these judgments executions were also issued promptly. All of these judgment creditors, as well as Thomas N. Jeffreys, who had issued his attachment aforesaid, on February 5, 1881, and also those creditors who had obtained judgments at the March term, 1881, of the circuit court of Taylor county, were made defendants to this bill. Executions issued on the three last judgments on April 14, 1881. This bill concludes thus: "Plaintiff thereupon charges and alleges that his said mortgage is a lien upon said Ulman lease and personal property at and upon said furnace premises, third in priority, the said Browning's mortgage being first, and said Brown and plaintiff's mortgage being second; that his said mortgage as to said Colgate lease is a lien second in priority, said Brown's and plaintiff's mortgage being first. Plaintiff, therefore, asks that said Ulman and Colgate leases, and said personal property hereinbefore described, be sold, and that his said claim be paid out of the proceeds arising therefrom; and he asks such further and general relief as the court may see fit to grant."

All the defendants appeared to the bill, and filed a general demurrer thereto, which by its decree of August 11, 1881, the court overruled; "and by consent of all parties the cause was referred to a commissioner, to ascertain and report all the property, real and personal, belonging to said Hurd in West Virginia, together with the liens thereon, and their respective priorities." October 20, 1881, the commissioner reported that Charles S. Hurd owned no real estate in West Virginia; that he owned the following personal property, in Preston county, W. Va.: First, a certain leasehold interest on about 2,000 acres of land, being the leasehold interest granted to said Hurd by Samuel Colgate, of New Jersey, dated January 2, 1878. This has been hereinbefore fully described. The following the commissioner reports as the liens on said property, according to their priorities: First in priority, mortgage to Allen H. Childs and Joseph S. Brown, hereinbefore described, amount due, with interest to November 4, 1881, $13,349.85; second in priority, mortgage to Albert H. Childs, date June 16, 1880, duly recorded therein, heretofore particularly described, amount due, with interest to November 4, 1881, $19,622.21. The commissioner reported that, in addition to this mortgage, Albert H. Childs held, as collateral security for this debt, 750 tons of pig-iron, estimated at $19 or $20 per ton; and that after the execution of the two foregoing mortgages, on the 15th day of January, 1881, the defendant Charles S. Hurd assigned said lease to the Austen Coke Company, subject to this mortgage. The commissioner then reports in detail the personal property situated in Taylor county owned by said Hurd. It is properly connected with Waldorf furnace property, belonging to said Hurd. He states that he ascertained what belonged to Hurd by taking all the furnace property, which had been levied on by an officer, and deducting from it all the personal property at this furnace at the time said Charles S. Hurd took possession of it under his lease from Ulman, as shown by the deposition of Reuben Watte and Thomas N. Jeffreys, returned with the report. A portion of this personal property had been sold by a constable under a distress warrant for rent, bringing $844, which had all been paid out for taxes or rent and costs excepting $27.97, still in the constable's hands. This constable also sold under execution a bay horse, the property of the Lancaster Furnace & Mining Company, subject to a certain lien, for $32.78. He paid for keeping the horse $7.60, and the balance, $25.15, he still has in his hands; and he has also $82, the proceeds of the sale of a horse belonging to said Hurd, sold under execution; the total amount in his hands being $130.12.

The following is reported in reference to

Digitized by Google

the property of the Lancaster Furnace & Mining Company: They are the owners of certain property at the Waldorf furnace, at Ironton, Taylor county, W. Va. The report gives a list of this personal property, two items of which are the railroad iron on two and a half miles of railroad track, two steam-engines, besides various other items of personal property specified. Of this personal property the sheriff of Taylor county, under execution of George Heller against the Lancaster Furnace & Mining Company, sold this railroad iron, one locomotive engine, three carts, one wagon, and one steam-engine, for a saw-mill. These sales amounted to $1,707.14. These articles were all purchased by Mason, attorney for Heller, and by John S. Herr, except certain articles purchased by others, amounting to $132.14; and this sum, as well as all balances of said purchase money, amounting to $1,707.14 in all, was settled by the sheriff with Mason, as attorney for Heller in said execution. There was a deed of trust on this property which was the first lien on all the property of the Lancaster Furnace & Mining Company. It was a deed of trust to Krauss, trustee, to secure a debt of $15,000, which, with interest to November 4, 1881, amounted to $20,417.50. This debt had been assigned to Charles S. Hurd on February 7, 1878, and it was mortgaged by said Hurd to secure a debt to Edward F. Browning by mortgage dated and duly recorded May 1, 1879. The commissioner expresses the opinion that said Hurd should be substituted to the trust lien of Krauss on this property, and that Edward F. Browning, another lien creditor of said Hurd, should be substituted in place of said Hurd to the extent of the debt against said Hurd, as follows:

Amount of Browning's debt	$1,421 37	
Interest 14th February, 1880, to November 4, 1881	146 87	
	1,786 34	
Interest 8th November, 1879, to November 4, 1881	213 15	
		$3,567 73

Then followed 46 judgments against said Hurd, aggregating in amount $20,417.50, in 13 classes. After all these judgments, and as the fourteenth in priority, is the judgment in favor of George Heller, amounting, with interest to November 4, 1881, and costs, to $5,077.71. There is but one lien subsequent to this, and that is a judgment in favor of Samuel Carrothers, amounting, debts, interest, and costs, to November 4, 1881, $319.17. This part of the report concludes thus: "The following liens on said Lancaster Furnace & Mining Company's property are also liens upon the said Charles S. Hurd's personal property situated at Waldorf furnace, in Taylor county, as heretofore reported, except that said Edward F. Browning's lien reported first in priority is not a lien upon said Hurd's personal property; said Hurd having mortgaged to said Browning only that property acquired by him [Hurd] through the Krauss deed of trust. This will make Thomas N. Jeffreys' attachment first in priority, and the other execution liens following in priority as they were heretofore reported, on the furnace property, except the liens of George Heller and Samuel Carrothers, reported fourteenth and fifteenth in priority, are not liens upon the personal property hereinbefore reported as belonging to C. S. Hurd." The report then proceeds as follows:

"The Lancaster Furnace & Mining Company are the owners of a certain strip of land thirty feet wide, running through a tract of land on Three Forks, known as the 'Nichols Tract.' The following liens exist upon said land:

First in priority, George Heller, judgment debt, interest, and cost	$5,077 71
Second in priority, Samuel Carrothers, judgment debt, interest, and cost	319 17
	$5,396 88

"*Waldorf Furnace Case.* The said Charles S. Hurd having failed to comply with his agreement with Alfred J. Ulman in regard to the lease of the said furnace property, said lease was forfeited, and said Alfred J. Ulman has taken possession of said property."

This report was excepted to by Edward F. Browning and Thomas N. Jeffreys. This cause was on November 22, 1881, heard upon this report, and by consent of parties the court, without acting on said exceptions, recommitted said report to the commissioner, for the purpose of restating the plaintiff's claim, and amending the report in such other particulars as may be deemed proper by him, or required by any of the parties hereto. There were some directions given in this decree in reference to the mode of settling the accounts of Hurd and plaintiff which I do not deem necessary to set out; and by the same decree, by consent of parties, it was decreed that John W. Mason and Samuel McCormick, special commissioners, do sell the said lease of the Austen mines, made by Samuel Colgate to Charles S. Hurd, which is dated January 2, 1878,—the sale to be made for one-fourth in cash, and the residue on a credit of 4, 8, and 12 months, with interest from the day of sale; the purchasers executing bonds therefor, with good personal security. And other usual and proper directions are given with reference to said sale, in said decree. John W. Mason, one of these special commissioners of sale, sold this lease of land known as the "Austen Mines" in the manner stated in his report; Edward Austen being the purchaser, for $500. This sale report was excepted to by the Austen Coke Company. For reasons set forth in a petition filed at the next term of the court, it asked the court to set aside this sale. But the motion was overruled, and the Austen Coke Company then offered for said property an upset bid of $5,500, in case the sale should be set aside and biddings reopened, securing the same by bond, with approved security; and

Digitized by Google

thereupon the court set aside the sale made to Edward Austen. From this decree the purchaser, Edward Austen, obtained an appeal and *supersedeas*, which was dismissed by this court as improvidently allowed before such resale had been made and confirmed. See Childs v. Hurd, 25 W. Va. 530. This decision was rendered April 4, 1885. In the mean time the said lease of the Austen mines by Colgate to Hurd expired, to-wit, in May, 1883, so that there remained nothing for the special commissioners of the court to sell. On November 18, 1887, Eugene G. Jeffreys filed his cross-bill in this cause, in which he states that on February 5, 1881, in said circuit court, Thomas N. Jeffreys, a defendant in the original suit, commenced an action of *assumpsit* against said Hurd, accompanying it with an attachment for $5,000, and the costs of the suit; which attachment was issued and served on that day on Hurd's estate in said Austen mines.

The evidence of these levies was filed with the cross-bill, which stated that in said action of *assumpsit*, on August 11, 1881, Thomas N. Jeffreys recovered against said Hurd $7,001.15, with interest from that day, and $34.47, which judgment was transferred and assigned by him to the plaintiff in the cross-bill, Eugene G. Jeffreys. The cross-bill further alleges as follows: That on May 1, 1878, the defendant Hurd, under said Colgate's lease, took possession of the Austen mines and at once began to mine large amounts of coal therein, and to convert much of it into coke. That he employed the defendant Martin L. Shaffer as his agent to carry on these mining and coking operations, and put him in possession and control of said Austen mines property. That he continued as such agent to carry on these mining and coking operations till May 1, 1883, when said lease by Colgate of said property expired. That the royalty due said Colgate under said lease for the coal mines was regularly paid to him. That when said Hurd put said Shaffer in possession of said Austen mines, as superintendent, the said Hurd at once removed from this state, and has ever since been a non-resident of this state. That, as such agent and superintendent, Shaffer received from said Austen mines property many thousand tons of coal, out of which this cross-bill alleges he manufactured and sold at least 35,393 tons of coke, and made a net profit of at least $11,915.17, after retaining all sums due from said Hurd as salary, and as his debtor; of which net profit Shaffer expended, without consent or authority of said Hurd, $4,062.78 in building on the premises, with the knowledge and consent of the landlord Colgate, 20 new ovens, which increased the value of said Austen mines property to the full extent of the costs of these ovens; and that Shaffer is indebted to said Hurd to the full extent of said net profits of the said mines, $11,915.17, with interest thereon from May 1, 1883, less the sum of $4,062.78, unlawfully and wrongfully expended in building said 20 coke-ovens. This cross-bill further alleges that in said original suit of Childs v. Hurd, under a decree dated April 8, 1882, directing a resale of said lease of the Austen mines property, it was offered for sale on July 27, 1885. But McCormick & Armstrong, who had offered the upset bid of $5,500, wholly failed to bid on said property, or pay for the same, or take said property at any price, as it was then of no value; the said lease having then expired. This cross-bill claims that the defendants McCormick and Armstrong were liable to pay into the court their said upset bid of $5,500, with interest thereon from July 27, 1885, and that this money is liable to be first applied to the plaintiff's claim; he having a lien thereon by virtue of the said attachment.

This cross-bill also alleges that in the original cause of Childs v. Hurd an order was made directing Shaffer to pay to the general receiver of this court $7,043.11, which was the amount due from him to said Hurd as his agent and superintendent, excluding, however, the interest from May 1, 1883; that said Shaffer paid said sum to said receiver, but still owes the interest on said sum from May 1, 1883. In this cross-bill the plaintiff, Jeffreys, claims that under the aforesaid two mortgages on Austen mines property no rights passed to the mortgagees, either Childs or Brown, to change any part of their claims secured by the same mortgages on the rents and profits of the said Austen mines; that in the original suit they did not make this claim, but sought only to subject the lease property itself to sale; and that, as to the rents and profits of said lease property in the hands of Shaffer, the said Childs and Brown by said mortgages had no lien upon the same, and that he (Shaffer) was simply indebted to Hurd individually therefor, and the plaintiff, Jeffreys, in this cross-bill acquired a lien on the same by his attachment served on Shaffer on August 15, 1881.

It is further alleged in this cross-bill that said Hurd, when he put said Shaffer in charge of these Austen mines as superintendent, and as the agent of said Hurd, in January, 1881, he, the said Hurd, was utterly insolvent and worthless, and that, this being his pecuniary condition, he changed his residence from West Virginia to New York, where he promptly associated himself with two other persons under the statute law of that state, and formed two distinct joint-stock corporations; these three persons being the only incorporators and trustees of both corporations, one called the "Alleghany Iron & Coke Company," and the other the "Austen Coke Company," both having their principal offices in the city of New York; these companies were thus got up simply that all the property owned by the said Hurd, including the Austen mines, might be assigned to them, said assignment being made with intent to hinder, delay, and defraud the plaintiff in this cross-bill, and other creditors of the said Hurd;

Digitized by Google

that the certificates of the formation of both of these companies were made on the same day, January 14, 1881; that this acknowledgment of the agreement, the basis of each of these corporations, was made by these parties on the same day, and before the same notary public, and on the next day they were both filed in the office of the clerk of the county of New York, in the state of New York; but that no duplicate of either certificate was ever filed, as required by law, in the office of the comptroller of the treasury of New York; nor has either of these corporations ever filed in the office of the clerk of the county of New York any annual report, as required by law; nor has either of said corporations made any report to the comptroller of the treasury of New York, though both of these reports are required to be made under the laws; nor has either of these corporations ever transacted any business whatever; nor did either of them ever have any principal office or place of business in New York city; nor did either of them ever keep any stock-book, as required by law; nor did either of said corporations file with the secretary of state of West Virginia, on or before January 15, 1881, a copy of said articles of association, or of the law or authority under which they were incorporated; nor was a certificate issued to either of said corporations by the secretary of state of West Virginia, or recorded by either of said corporations in any county of West Virginia; nor did either of said corporations place or file in the county court's clerk's office of the clerk of the county court of any county a copy of its articles of association; nor do any of the acts required by the laws of West Virginia to be done by such foreign corporations.

The plaintiff in this cross-bill still further alleges that at the same time, January 15, 1888, and before either of said certificates of incorporation were filed in the office of the clerk of New York county, the defendant, said Hurd, executed, with intent to delay, hinder, and defraud the plaintiff in this cross-bill, and his other creditors, three assignments in writing, that is to say: One to Alleghany Iron & Coke Company, of all of his property of every kind situated in Taylor county, including the lease premises in Taylor county, W. Va., conveyed to him (Hurd) by said Clerc, consisting of iron ore mines of the value of many thousand dollars; also another assignment to the said Alleghany Iron & Coke Company of all his (said Hurd's) property of every kind, on certain other premises in Taylor county, W. Va., leased to him (Hurd) by Alfred J. Ulman, where there was a blast iron furnace, for making pig-iron, together with said furnace and lease premises, of the value of many thousand dollars; and the third of said assignments was to the Austen Coke Company of all his (said Hurd's) property of every kind in the Austen mines property, in Preston county, W. Va., including the lease of the Austen mines property made by Samuel Colgate, of New Jersey, to said Hurd, dated January 2, 1878; that each of these several assignments was promptly recorded in the office of the clerk of the county where the property therein assigned was located; that all these assignments were made at the same time, attested by the same witnesses, and acknowledged by said Hurd before the same notary public; and that they and the said two certificates of incorporation constitute one and the same transaction; that both of these corporations were created by said Hurd with intent to delay, hinder, and defraud the plaintiff and his other creditors, and for the sole purpose of taking these assignments, and do constitute a part of the fraudulent scheme carried out by said Hurd to hinder, delay, and defraud his creditors; that the said Austen Coke Company was not in existence when said assignment of it was made; that neither of said corporators ever did, or pretended to do, any business, or owned or pretended to own any property whatever, except that the Austen Coke Company pretended to own said Austen mines, which continues to be really the property of said Hurd since said assignment, as it was before; that the Austen Coke Company is but another name of said Hurd, and the pretended assignment to it was without consideration, and fraudulent as to the plaintiff's claim, and was known and so intended both by the said Hurd and by the other two corporators and trustees composing what was called the "Austen Coke Company;" that, the said Hurd being the president of each of these corporations, they knew all that Hurd knew with reference to these assignments, and were, of course, aware that they were voluntary and fraudulent as to the creditors of said Hurd, though stated on their face to have been for a consideration of $100 and other valuable consideration; that one of these corporations, the Alleghany Iron & Coke Company, has never claimed, or pretended to claim, the valuable properties so assigned to it as aforesaid; but that the said Austen Coke Company in this original suit claimed the whole of the net issues and benefits of the Austen mines which so came into the hands of said Shaffer, including the money so paid by him into the hands of the receiver of this court in this suit.

The prayer of the cross-bill is as follows: "To the end that plaintiff may be relieved in the premises, he prays that an attachment may be issued herein against the defendant Hurd for said $7,001.15, with interest thereon from 11th August, 1881, and $34.47, the costs of said judgment, and the costs of this suit; that, as to said money paid into the hands of the general receiver of court, plaintiff may have the benefit of the lien of the attachment issued herein, and the benefit of his said attachment issued in his action at law on the 5th day of February, 1881; that the defendant Shaffer may be required to pay out of said $11,915.17, and its accrued interest

Digitized by Google

since it came into his hands, the claim of plaintiff and the costs of this suit; that plaintiff's claim may be paid out of the said $7,043.11, now under the control of this court, in the hands of its general receiver; that the said assignment executed by the defendant Hurd to the Austen Coke Company of the Austen mines may be set aside and overruled as to plaintiff's claim; that the defendants McCormick and Armstrong be required to pay into court said sum of $5,500, with interest thereon from July 2, 1885, hereinbefore mentioned; that the cost of building said twenty new ovens may be charged to the defendant Colgate in payment of his claim for royalties on coal mined by Shaffer after January 15, 1881; and that plaintiff may have in the premises such other, further, and general relief as the nature of his case may require, and to equity appertains."

At the March rules, 1886, the Austen Coke Company filed its answer to this cross-bill. It claimed that it was a corporation, duly incorporated under the laws of New York, and duly entered and registered under the laws of West Virginia, and as such entitled to hold property and transact business in these states, and to be fully protected in its corporate rights. The answer avers that in the exercise of its corporate rights, on the 15th of January, 1881, it became the purchaser, for a good and valuable consideration, of the interest of Charles S. Hurd in certain leasehold property at Austen, in Preston county, W. Va., known as the "Austen Mine & Coke Works," conveyed to said Hurd by Colgate by lease dated January 2, 1878, for the purpose of mining coal, and coking and marketing the same; that it at once took possession of said property by its agent, Martin L. Shaffer, who had been the agent of said Colgate and said Hurd, but who was directed to account to the respondent, said Austen Coke Company; and the respondent, said company, from the time of said purchase, January 15, 1881, became the owner of said Austen mines, rents, issues, and profits, and is not subject to the attachment issued by the plaintiff in the cross-bill, some three weeks afterwards, on February 5, 1881, against said Hurd, who had no sort of interest or ownership in any of said property levied on as his under this attachment. In said answer the company denies that it was created to hinder, delay, and defraud the plaintiff and other creditors of said Hurd, or that it was in collusion with him for any such purpose. It denies that it has no principal office or place of business in New York city, and that it has not transacted business and has not kept stock and other company books, and says the contrary is the truth. It claims that all such allegations are impertinent, averring that while all certificates and reports required have been made and filed, it would not at all affect its rights in this suit were these allegations true; as it claims that, did all the negligence stated in the cross-bill exist, yet the plaintiff in this cross-bill could take no advantage thereof. This answer asserts that the Austen Coke Company is a corporation legally created, and competent to take and hold the property assigned to it; that it transacted business, and did purchase and take possession of said property, and is the legal owner thereof; that the assignment to it of said property was for a valuable consideration, and was in no wise fraudulent, and therefore the defendant Hurd had no ownership of any of said property, and did not control the same, nor the stock of said corporation; and that the said corporation, after said assignment, owned said Austen mines property, and the rents, issues, and profits thereof. The said company makes a part of its answer the record of a suit in chancery brought by it in the United States district court of West Virginia against said Martin L. Shaffer and others. This suit was brought in April, 1882. It set out the facts alleged in this answer, and asked that Martin L. Shaffer, as the agent and superintendent of the Austen Coke Company, be required to account for the rents, issues, and profits thereof since May 15, 1881. Martin L. Shaffer, Samuel Colgate, and Charles S. Hurd were defendants in this suit, and it prays that said Shaffer may render an account of his agency as such superintendent of said Austen mines since January 15, 1881, and deliver to the Austen Coke Company full possession of said leasehold property, machines, machinery, and all other property on said leasehold premises, as fully as it was granted by said Hurd to the Austen Coke Company. So far as the record before us shows, it does not appear what has been done, if anything, in this suit in the United States district court of West Virginia, other than the filing of the bill, or that anything else has been done. Mary E. Clerc, devisee of F. Leon Clerc, filed an answer to the original bill, in which she claims that her testator devised to her certain land, which has been leased to the Lancaster Furnace & Mining Company for 25 years from June 3, 1874; that about two years thereafter the said company abandoned said lease; that by the terms of said lease they had no right to remove a certain railroad track which they had laid down; and, so far as it is on the land devised to her, it is claimed by her as part of the realty. She also claims a portion of the said land as the heir of one of her brothers, who was a lessor of said land and said company, alleging that her testator, F. Leon Clerc, became, after the surrender of said lease, the owner in fee of said land; and that on November 19, 1877, said Clerc leased said land to said Hurd for 15 years, for the purpose of mining iron ore; that he did this, removing the iron ore to his furnace at Ironton; that on his lease, when he quit owning said land, he owed a considerable royalty to her testator, which she claims. She claims that the railroad iron, if regarded as personalty, should be applied to the payment of the royalty due from said Hurd. Albert H. Childs filed an

Digitized by Google

answer to this cross-bill, April, 1880. He says the mortgage executed for his benefit by said Hurd, June 10, 1880, was forfeited in July, 1880; that in April or May, 1881, he, desiring to possess himself of said Austen mines under this Colgate lease, and to have the same sold to pay the amount due him from said Hurd secured by said mortgage, found Martin L. Shaffer in possession of said property, claiming that he had been put in possession of it by said Hurd in January, 1881, under a contract by which Shaffer was to pay himself a debt Hurd owed him, and pay certain moneys due miners who had labored in mining on said land; that he learned in April or May, 1881, that the so-called Austen Coke Company was claiming the possession of said mines of Shaffer; and that in May, 1881, he instituted this suit, and Shaffer refused to give him, or any one else, possession of said moneys or leasehold, but said he would continue to operate them until they were sold, or he was legally dispossessed, or until the expiration of the lease, and pay the proceeds into the court, to be disposed of as it might direct. He did so operate said mines till said lease expired, in May, 1883, and brought into court $7,043.11, derived from the use of said mines. Childs, in this answer, claims that he has the same liens upon the funds so brought into court by Shaffer as he had upon said mines and leasehold property under his mortgage; that in fact said funds represent said lease; and that said lease has been thus in fact converted into money. He alleges that in said original suit the court ascertained that said Hurd was indebted to him $4,696.10, with interest from March, 1882, secured by this mortgage; that no part of this has ever been paid. He claims that with the money paid into the court by Shaffer there is now on hand sufficient to pay the entire amount due him, and claims that it should be so applied; and he denies that Jeffreys has any lien on this fund or upon said leasehold property or moneys till he (Childs) has been fully paid. He claims the rents, issues, and profits of the Austen mines under the mortgage to him to satisfy his debt secured thereby, amounting to $4,696.10, with interest from March 20, 1882.

Samuel Colgate filed in July, 1886, his answer to said cross-bill. He admits his lease of January 2, 1878, to Charles S. Hurd, for five years. He admits the receipt of all the royalty of 10 cents per ton on all coal mined on said leasehold property up to January 1, 1881, but alleges that all accruing since then is still due and unpaid; and he asks that it be decreed to be paid to him, and he states the amount of coal, which has been mined, on which this royalty is due; and he claims that the royalty due him ought to be paid to nim out of the rents and profits of said coal mines paid into the court by Martin L. Shaffer. He denies that said Shaffer was his agent to collect said royalty. He avers that no coke-ovens were erected on said leasehold property by said Hurd by his direction, and that he is not responsible for any which said Hurd may have erected, and cannot be charged with them under his lease to Hurd. All other allegations in the cross-bill are denied.

February, 1881, Charles S. Hurd answered this cross-bill. He denies that the attachment sued out by Thomas N. Jeffreys was sued out on just grounds, or that the property levied on by the officers under these attachments was his (Hurd's) property, or that said attachments were levied on the rents, issues, and profits of said Austen mines leasehold property in the hands of Martin L. Shaffer. He denies that he became in January, 1881, a non-resident of West Virginia. He avers that he was then only temporarily absent in New York, where said companies were organized in perfect good faith, openly, and legitimately, for the purpose of operating said coal and iron mines. The assignment to said companies was made in perfect good faith by respondent with no intent to delay, hinder, or defraud his creditors. He alleges that he claims no interest in said Austen mines, as he says he transferred and assigned all his interest therein to the Austen Coke Company, which was formed with no fraudulent purpose, but solely for the purpose of enabling the respondent Hurd to pay his debts, which he would have been able to do by the sale of his stock in said company, had not his agent, Shaffer, and the plaintiff, Jeffreys, prevented him from selling said stock or from realizing dividends from the earnings of the said mines and works. He further alleges that the said company, immediately after its organization in January, 1881, established its principal office in the city of New York, and had and kept the stock-book required by law, and transacted its business.

S. P. McCormick, *Caleb Boggess*, and *John Bassel*, for appellants. *J. W. Mason*, for Childs and Brown. *Frank Woods*, for E. G. Jeffreys.

GREEN, J. The most important question presented by this record is, to whom does the $7,043.11 paid by Martin L. Shaffer to the receiver of the court under its order entered November 20, 1885, properly belong? It was the proceeds of the mining of the Austen mines by Charles S. Hurd, who was insolvent, and unable to work them; and it was understood that out of the net proceeds of these mining operations Shaffer would pay the debt said Hurd owed to him and the debts he owed to sundry miners and laborers. Hurd's interest in said Austen mines, so placed under the management and control of Shaffer, was a lease of certain coal lands, about 2,000 acres, known as the "Austen Mines," for five years, by Samuel Colgate to Charles S. Hurd, which lease was created by a contract dated January 2, 1878, and expired May, 1883. After said Hurd had so leased this Austen mines property on August

Digitized by Google

13, 1879, he executed to John S. Brown and A. H. Childs a mortgage on the said Austen mines and certain other property. The amount of this debt so secured was ascertained to be $1,838.09, with interest from March 1, 1881. On June 10, 1880, said Hurd executed a second mortgage on these Austen mines and other property to the plaintiff, A. H. Childs, to secure a debt of $15,000, payable in 10 days after date. The amount due on this debt so secured, as afterwards ascertained, was $4,696.10, with interest from June 1, 1881, till paid. Of this sum paid in by Shaffer, Childs and Brown claim enough to pay the balance due on their mortgage, of $1,838.09, with interest from March 1, 1881. A. H. Childs then claims that the residue of the said fund should be paid or the debt secured by the mortgage to him. The balance due on it is $4,696.10, with interest from January 1, 1881. In opposition to both these claims, E. G. Jeffreys claims the whole of this fund under his attachment served on said Hurd's interest in the Austen mines property on February 15, 1881, and the court below based its action on this as the correct view.

It is insisted in argument by the counsel of Jeffreys that the claims of Childs and Brown, as mortgagees to this fund, are invalid, because their mortgages, while prior liens on the lease of Austen mines by Colgate to Hurd, created no lien on the rents, issues, and profits of the Austen mines. They had liens on the *corpus* of this lease, but as long as the mortgagor, Hurd, remained in possession, he, and not his mortgagees, were entitled to the issues and profits of the lease. The only way in which the mortgagors could be entitled to the rents and profits was to take possession of the property, which they had a right to do at any time after forfeiture, or non-payment, when due, of the debts secured by the mortgages. This they never did, but Hurd, the mortgagor, or his agent, Shaffer, remained in possession of the mines, taking the rents and profits till the expiration of the lease of Colgate to Hurd. The law is well settled that a mortgagee is not entitled to demand of the mortgagor or owner of the equity of redemption the rents and profits of the mortgaged premises until he has actual possession. The rule on this subject is thus stated in Bacon's Abridgment, tit. "Mortgage," C: "Although the mortgagee may assume possession of ejectment at his pleasure, and according to the case of Moss v. Gallimore, 1 Doug. 279, may give notice to the tenants to pay him the rent at the time of the notice, yet, if he suffers the mortgagor to remain in possession or in receipt of the rents, it is a privilege belonging to his estate that he cannot be called upon to account for the rents and profits to the mortgagee, even although the security be insufficient." In Higgins v. Buildings Co., 2 Atk. 107, Lord HARDWICKE thus states the law: "In the case of a mortgagee, where a mortgagor is left in possession upon a bill brought by the mortgagee for an account in this court, he can never have a decree for an account of rents and profits from the mortgagor for any of the years back during the possession of the mortgagor." And again, in Mead v. Lord Orrery, 3 Atk. 244, he says: "As to the mortgagor, I do not know any instance where he keeps in possession, that he is liable to account for the rents and profits to the mortgagee, for the mortgagee ought to take the legal remedies to get into the possession." The American decisions sustain this rule. So long as the mortgagor is allowed to remain in possession, he is entitled to receive and apply to his own use the increase and profits of the mortgaged estate; and, although the mortgagee may have the right to take possession upon condition broken, if he does not exercise the right he cannot claim the rents; if he wishes to receive the rents, he must take means to obtain the possession. See Wilder v. Houghton, 1 Pick. 87; Bank v. Reed, 8 Pick. 459; Noyes v. Rich, 52 Me. 115; Clarke v. Curtis, 1 Grat. 289; Beverley v. Brooke and Same v. Scott, 4 Grat. 208, 209, et seq.; Allen v. Gibson, 4 Rand. (Va.) 468; Gilman v. Telegraph Co., 91 U. S. 603, 617; Teal v. Walker, 111 U. S. 248, 4 Sup. Ct. Rep. 420.

While it is not disputed that this is the law, yet it is insisted that it has no application, when the mortgaged estate is a leasehold and not a fee-simple. The interest of the mortgagor, Hurd, in the Austen mines was a lease of five years; and it is argued by the counsel for the mortgagee that this was but a right to use these Austen mines for five years. These funds derived from the use of the mines by Shaffer were not, strictly speaking, rents and profits. They represent the lease itself. It is all that is left of the thing mortgaged. The mortgaged premises being so converted into money, the mortgagors are entitled to the fund as the equivalent of the lease. When a tenant mortgages his crop, it cannot be said that this crop is rent, although it issues out of the land. But certainly a court of equity would preserve for the benefit of the mortgagee the fund into which the crop has been converted. The error in this reasoning is the assumption that under Colgate's lease Hurd had simply the right to take the rents and profits of the Austen mines for five years; and that it was really these rents and profits for five years which he afterwards mortgaged. On the contrary, what Hurd owned and mortgaged was a leasehold estate in the land known as the "Austen Mines," and whether it was a leasehold estate or a fee-simple estate mortgaged, till the mortgagee takes actual possession of the estate, which he has a right to do, the rents belong to the mortgagor. It was so decided in Mayo v. Fletcher, 14 Pick. 525.

But there is another ground on which the mortgagees in this cause insist that they were entitled to the fund in court arising out of the issues and profits of the mortgaged estate.

Digitized by Google

They admit that the law is correctly stated by Judge BALDWIN in Beverley v. Brooke and Same v. Scott, 4 Grat. 212. He says: "It is true that a mortgagee's right to receive the profits is an incident of his possession, and, if he permits the mortgagor or subsequent incumbrancers to retain the possession and enjoy the profits, he cannot recover them by action at law or suit in equity. But the appointment of a receiver is in the nature of an injunction, which defeats the mortgagee's power of election. He cannot take possession if he would. The court takes and preserves it for him until his right of priority is established. If he be a party to this suit, he has nothing to do but wait the decision of the controversy, and receive the rents from the hands of the court." It is certainly the general rule, in a suit to foreclose a mortgage or to sell the mortgaged estate to pay the debt secured by a mortgage, that the mortgagee has no claim to the rents and profits of the mortgaged estate till it is taken possession of by a receiver appointed by the court; but it is insisted that if, in addition to seeking to foreclose the mortgage, or to sell the mortgaged estate to pay the debt secured by it, the bill seeks to subject the future rents and profits of the mortgaged estate to the payment of the debt secured by the mortgage, the court will apply such future rents and profits after the institution of such suit to the payment of the mortgage debt, if it be necessary in order to satisfy the same; and such rents and profits, after the institution of such suit, do not belong to the mortgagee, nor are they subject to his control, nor to that of any person claiming by, through, or under him. And the case of Dow v. Railroad Co., 20 Fed. Rep. 768, is relied upon as sustaining this principle. It was there held that the mortgagor of a railroad, though the mortgage covers income, cannot be required to pay the mortgagee for earnings, while the property remains in his possession, until a demand has been made on him therefor, or for a surrender of the possession under the provisions of the mortgage. This was also in effect decided in Railroad Co. v. Cowdrey, 11 Wall. 459. If, however, the suit is not simply for the foreclosure of the mortgage or sale of the railroad to pay the mortgage debt, but also that the mortgagor may be required to surrender the possession of the railroad, the mortgagee would be entitled to the earnings. The mortgagee, it was held in this case, was entitled to the income and profits of the railroad from the institution of the suit, and not from the time the receiver of the railroad was appointed, some time afterwards. The ground of this decision was that, after the institution of such a suit, the company or mortgagor wrongfully withheld the possession, and under such circumstances equity forbids that it should retain, as against the mortgagee, the fruits of its refusal to do what it ought to have done. If they had done so, when the suit was brought, a receiver would have been unnecessary. Upon the principles laid down in these decisions of the supreme court of the United States, which seem to be sustained by good reason, it would appear to follow that, if a suit was brought by a mortgagee, not only to foreclose a mortgage debt, but also asking the court in the mean time to put the mortgagee in possession of the estate, or to appoint a receiver, and appropriate the rents and profits of the estate to the payment of the mortgage debt, the mortgagee ought to have a right to have the rents and profits so applied from the institution of such suit, and not from the time only when a receiver was appointed, and took possession of the mortgaged estate; for then the improper retention of the possession of the mortgaged estate by the mortgagor, after the institution of such suit, would be permitted to inure to the benefit of the wrong-doer, and equity forbids that the mortgagor should retain against the mortgagee the fruits of his refusal to do what he ought to have done.

But it is claimed by the counsel of the mortgagor that the cause before us was simply a suit to foreclose a mortgage or to sell the mortgaged premises to pay the mortgage debt, and not either to obtain possession of the mortgaged estate, or to have it put into the hands of a receiver, and the rents and profits applied to the payment of the mortgage debt. It is true the bill was very imperfect, and its prayer was simply "that the mortgaged estate might be sold, and the plaintiff's mortgage debt be paid out of the proceeds of such sale, and for further and general relief." But Martin L. Shaffer was made a defendant to the bill. If the obtaining of this specific relief was the whole object of this suit, it was obviously improper to make him a defendant; for he was, so far as the bill showed, a mere agent or person claiming and holding possession under and for the mortgagor, Hurd, and he had, as shown by the bill, no interest in this suit, and could only properly have been made a party defendant to it with the view of holding him responsible for the future rents and profits of the Austen mines, or part of the mortgaged estate, or of requiring him to surrender the possession of them, that they might be paid to the party entitled to them; and the counsel for the mortgagee claims that, if this be so, the general prayer for relief ought to be regarded as including in it a prayer that Shaffer should surrender the possession of the Austen mines to the mortgagees or to a receiver of the court, or that he be regarded and treated as a receiver of the court. The only allegation in the bill in reference to Shaffer is this: "The plaintiff further says that Martin L. Shaffer is now in possession of and operating the Austen mine lease by contract with said Hurd;" and the prayer of the bill is for the sale of the mortgaged property, and that out of its proceeds the plaintiff's debt as mortgagee be paid, and for such further and general relief as the court may

Digitized by Google

see fit to grant. Upon this state of facts, the only relief which could be granted against the defendant Martin L. Shaffer would be a decree directing him to surrender this Austen mine leasehold to a receiver of the court, or to a mortgagee, or a decree treating him as a receiver of the court from the time the bill was filed, (June rules, 1881,) and requiring him to account for the rents and profits received pending the suit, and to such rents and profits, upon the principles laid down above, the mortgagees would be entitled. But they could not be entitled to the rents and profits received by Hurd or by Martin L. Shaffer, his agent, prior to the institution of this suit.

I do not think that we do unreasonable violence to the meaning of the bill when we regard the general prayer for relief against Shaffer as the equivalent of a demand for the Austen mines lease, so that the mortgagees may have the rents and profits of the same thereafter. There is another and insurmountable objection to the validity of the claim of Jeffreys to this fund. He claims it by virtue of an attachment of these rents and profits of the property of Hurd, the mortgagor, in the hands of his agent, Shaffer. But when this attachment was served on Shaffer, August 11, 1881, these funds were under the control of the court in this chancery cause, it having been instituted May 19, 1881, and therefore not liable to be attached. After the institution of this suit no attachment could be levied upon the goods and effects which were sought to be subjected in the suit, though they had not been taken actual possession of by the officer of the court. See Hagedon v. Bank, 1 Pin. 61. The principle underlying this law is that after one court has taken charge of property with a view of disposing of it according to the rights of all parties, no other court can interfere with it by seizing and disposing of the property under an order of attachment or any other order. See Taylor v. Carryl, 24 Pa. St. 259. From the moment the chancery court obtained jurisdiction over the property or funds, the power of another court to dispose of the property under an order of attachment, or in any other manner, is necessarily excluded. Now, when a chancery court can legitimately appoint the receiver of property or of a fund, it has the exclusive jurisdiction from the moment it is asked to appoint a receiver, or to dispose of the property or fund, provided it subsequently appoints such receiver or disposes of the property. If the plaintiff in a chancery suit claims certain property or fund, and asks legitimately the appointment of a receiver of the fund, and makes defendants all persons having any claim to the fund, all persons, who set up any claim to the fund, must do so in such suit, and no subsequent suit can change the rights of any of the parties.

The suit before us was instituted May 10, 1881, by Childs, the mortgagee of the lease by Colgate to Hurd of the Austen coke lands in Preston. The defendant in the suit was not simply the mortgagor, Hurd, but very many other creditors of Hurd,—all of his creditors, according to the allegations of the bill, who had any lien on said mortgaged property, or any other property of said Hurd, by judgment, or in any other manner. By the decree of August 11, 1881, with the consent of all parties it was decreed that this cause be referred to a commissioner of this court to ascertain and report all the property, both real and personal, of said Hurd, in the state of West Virginia, together with the liens thereon, and their respective priorities. In view of the character of the bill in this cause, and especially in view of those who are the defendants in said suit, and in view of the character of this consent decree, and of the fact that its entry was consented to by said Jeffreys, it does seem to me that we ought not to regard this as simply a bill to foreclose a mortgage and sell the Austen coke lands, but as having a far wider scope, including in the objects of the suit the ascertainment of all the claims or liens on the rents, issues, and profits of said Austen coke lands in the hands of Martin L. Shaffer, as alleged in the bill; and the ascertainment by the court of the rights of all parties to their rents, issues, and profits. So regarding this bill, from the moment this suit was instituted, May 19, 1881, the determination of the person or persons who were entitled to these rents, issues, and profits was submitted to the court, and none of the defendants could thereafter acquire any new or additional claim to the same by issuing attachments for their claims, or in any other manner. For any other claimant would be a *lis pendens* purchaser, and by such purchase *pendente lite* could acquire no right against the original parties to the suit; for property or a fund so situated cannot be attached, being really in the custody of the law. This we regard as substantially the case before us. It is true there was no direct claim in the bill of the funds in the hands or which might come into the hands of Shaffer by the mortgagee of the property out of which the fund arose or would arise. But the plaintiff stated in the bill that this mortgaged property was in the possession of Shaffer, an agent of the mortgagor, and the suit, as we have seen, sought the decision of the court as to who were the lienors on all the property of the mortgagor, real or personal, including of course those rents and profits in the hands of Shaffer, and their priorities.

When this suit was instituted the chancery court of Taylor county acquired jurisdiction in the cause to pay out the funds in Shaffer's hands, or which might come into his hands from the Austen coke mines, the mortgaged property, to the parties entitled thereto; and neither Jeffreys nor any party to this suit could acquire precedence of right to this fund by subsequently suing out an attachment

Digitized by Google

against the mortgagor, Hurd. I am therefore of opinion that Jeffreys' attachment gave him no additional right to the fund, which came into the hands of Shaffer.

The Austen Coke Company's claim to this fund is based on an assignment of the Austen mines lease by the mortgagor, Hurd, on January 15, 1881, which preceded the institution of this suit, and was also some 20 days prior to the issuing of the attachment of Jeffreys against said Hurd. Its claim would be apparently better than that of Jeffreys to said fund, arising from the products of said Austen mines lease, provided this assignment of the Austen mines lease to the Austen Mine Company was for a valuable consideration and *bona fide;* but in the said cross-bill of Jeffreys this assignment is charged to be fraudulent, voluntary, and void as against the creditors of said Hurd. The allegations in this cross-bill on this point are as follows: The plaintiff is informed, and he accordingly alleges, that on January 15, 1881, about 10 days after he had put his agent, Shaffer, in charge of the Austen mines, the defendant Hurd, who was then utterly insolvent and worthless, appointed with himself two other persons, under chapter 40 of the Laws of New York state passed in the year 1848, and the several laws of the state of New York subsequently made by way of amendment thereof, and formed two distinct joint-stock corporations,—the same three persons being the only incorporators and trustees of both corporations, one being called the "Alleghany Iron & Coke Company;" the other being called the "Austen Coke Company;" both having their principal office in the city of New York, —for the purpose of conveying and assigning to these two corporations all the property owned by him, including the Austen mines, with intent to hinder, delay, and defraud the plaintiff and his other creditors in the collection of their claims against him. That the certificates of the formation of both these corporations were signed, made, and acknowledged on the same day, January 14, 1881, before the same notary public; and at the same time, on the next day, they were both filed in the office of the clerk of New York county, in the state of New York. That no duplicates of either certificates were ever filed, as required by law, in the office of the comptroller of the treasury of the state of New York; nor has either corporation ever filed in the office of the clerk of the county of New York any annual report; nor has either corporation ever made any report to the comptroller of the treasury of the state of New York,—both of which last-named two reports are by law required to be made annually, under oath; nor has either corporation ever had, or pretended to have had, any principal office or place of business whatever; nor has either corporation ever had, or pretended to have, any principal office or place of business in New York city, or kept, or pretended to keep, any stock-book, as required by section 25 of chapter 40 of the Laws of New York for the year 1848; nor did either of said companies file with the secretary of state of West Virginia on or before January 15, 1881, a copy of the articles of association, or of the law or authority under which they were incorporated; nor was a certificate issued to either of said corporations by the secretary of state, or recorded by either of said corporations in any county in West Virginia; nor did either corporation place or file in the county clerk's office a copy of its articles of association, nor do any of the things required by the laws of West Virginia to be done by foreign corporations. On January 15, 1881, and at the same time, said Hurd executed, with intent to hinder, delay, and defraud the plaintiff and his other creditors, the following three assignments in writing; that is to say: One to the Alleghany Iron & Coke Company of all his property of every kind, situated on and including certain leasehold premises in Taylor county, W. Va., conveyed to him by F. Leon Clerc, consisting of iron ore mines of the value of many thousand dollars; one to the same corporation of all his property of every kind, situated in and including certain leasehold premises in said county of Taylor, conveyed to him by Alfred J. Ulman, whereon for two years he had carried on a large blast iron furnace for making pig-iron, of the value of many thousand dollars; and one to the Austen Coke Company of his property of every kind situated on and including said Austen mines property, in Preston county, W. Va., of the value of many thousand dollars. These three assignments were made at the same time, and attested by the same witnesses; were acknowledged by said Hurd, at the same time, before the same notary public; and they, with the two certificates of incorporation, constitute one and the same transaction, and constitute together part of the fraudulent scheme carried out by said Hurd to hinder and delay his creditors. That the said two companies were neither of them in existence when said assignments were executed by said Hurd.

The following is a copy of this assignment to the Austen Coke Company: "Know all men by these presents, that I, Charles S. Hurd, of Ironton, West Virginia, party of the first ———, for and in consideration of the sum of one dollar and other good and valuable consideration, lawful money of the United States, to me duly paid by the Austen Coke Co., have sold, and by these presents do grant, convey, assign, and transfer and set over, unto the said Austen Coke Co., the indenture of lease bearing date the second day of January in the year one thousand eight hundred and seventy-eight, made by Samuel Colgate, of Orange, county of Essex, state of New Jersey, of the first part, and said Charles S. Hurd, of Ironton, county of Taylor, state of West Virginia, of the second part; the same being witnessed by Au-

Digitized by Google

gustus P. McGraw. Said lease covers about two thousand acres of coal lands in Austen, county of Preston, state of West Virginia, and other property, with all and singular the premises therein mentioned and described, and the buildings thereon, together with the appurtenances,—to have and to hold the same unto the said Austen Coke Co., or its assigns, from the fifteenth day of January, 1881, for and during all the rest, residue, and remainder yet to come of and in the term of seven and one-half years mentioned in said indenture of lease; and I hereby sell, assign, and transfer to said Austen Coke Co. all the tools, machinery, mules, and personal property of any and all kinds belonging to me now on said premises, or used in working said mines; subject, nevertheless, to the rents, covenants, conditions, and provisions therein also mentioned; and I do hereby covenant, grant, promise, and agree to and with said Austen Coke Co. that the said assigned premises now are free and clear of and from all former and other gifts, grants, bargains, sales, leases, judgments, executions, back rents, taxes, assessments, and incumbrances whatsoever, except one mortgage, made by the party of the first part to J. S. Brown and A. H. Childs, to secure twelve thousand dollars, and one to A. H. Childs, to secure any balance due to him on account. In witness whereof I have hereunto set my hand and seal this 15th day of January, one thousand eight hundred and eighty-one. CHARLES S. HURD. [Seal.]"

Charles S. Hurd in his answer says: "The Austen Coke Company was duly and fully organized under the laws of the state of New York, and has been duly authorized to transact and carry on business under the laws of West Virginia, having fully complied with the statute relating to foreign corporations; that this respondent does not constitute said company, and is not authorized to act for it; that the assignment of the lease of Samuel Colgate to respondent, dated January, 1878, and by respondent to said Austen Coke Company, was made in perfect good faith, and for a valuable consideration, and this respondent has no further interest therein. Respondent further says that it is not true that said Martin L. Shaffer holds possession of such leasehold premises under this respondent. Said Shaffer holds under and by an arrangement with said Austen Coke Company, and is accountable to and should account to it alone."

In the answer of the Austen Coke Company the allegation that there is no such company as the Austen Coke Company, but that it is an assumed name for said Hurd, is flatly declared untrue. Said answer avers that, on the contrary, the Austen Coke Company is a corporation duly organized and chartered under the laws of the state of New York, and fully authorized to do business within the state of West Virginia, as will appear by the certificate of Randolph Stalnaker, secretary of state, a copy of which is filed. This certificate is dated August 25, 1881, and was recorded in Preston county, August 25, 1881. The certificate is that on August 25, 1881, said company filed in the office of the secretary of state a copy of the law under which they are incorporated. The evidence showed that there were stockholders in said company who became *bona fide* stockholders in the spring and summer of 1881, and who proved in a general way the truth of these general allegations in these answers. But there was no proof as to the consideration of the assignment by Hurd of this Colgate lease of the Austen mines to the Austen Coke Company. But from the evidence in the cause the inference to be drawn is that no money was paid to Hurd to obtain this transfer, and that he organized said Austen Coke Company and transferred to it the Colgate lease and the Austen mines property under the expectation that after the organization of the company enough stock of the company could be sold to furnish the corporation with funds sufficient to pay off the debts due from said Hurd on account of said Austen mines property, and successfully carry on the coking business at said mines. But, while Hurd hoped to do this by the organization of these companies, he was disappointed in this expectation. These corporations, after their organization, disposed of but a few shares of their stock to *bona fide* purchasers. The assignment of Colgate's lease by Hurd to the Austen Coke Company is dated January 15, 1881, and professes to be "in consideration of the sum of one dollar, and other good and valuable considerations, duly paid to the said Hurd by the said Austen Coke Company."

The cross-bill charges that this Austen Coke Company never had any existence. But, though there are many acts required by the laws of New York as well as the laws of West Virginia, to be done by every corporation, which this company is not shown to have done, and though by its failure to perform these required acts it may have forfeited its charter, yet these causes of forfeiture cannot be taken advantage of in this suit, nor enforced against the Austen Coke Company, a private corporation, collaterally or incidentally, or in fact in any other manner than by a direct proceeding for that purpose against it, which it would have the opportunity to answer. The state alone can institute such a proceeding, and, as the charter of the corporation is a compact with the state, it may, like an individual, waive a broken condition of the compact, and not enforce the forfeiture. Lumber Co. v. Ward, 30 W. Va. 48, 49, et. seq., 3 S. E. Rep. 227. While, then, the court was bound to regard in this suit the Austen Coke Company as an existing corporation, yet it was then in this case required to do more, and to ascertain when it came into existence; for it is claimed by the appellant that it came into existence subsequently to the assignment to it by Hurd

Digitized by Google

of this Colgate lease of the Austen Coke Company mines property, on January 15, 1881, and that therefore this assignment was a nullity; and this position is apparently sustained by the evidence. Laws N. Y. 1848, §§ 1, 22, required the certificate of every company to be filed with the clerk of the county in which the business shall be carried on, and that a duplicate thereof shall be filed in the office of the comptroller of the treasury of New York. Whenever this is required by statute, as it is in many states, it is properly held that the filing of this original certificate with the clerk is an indispensable prerequisite to the creation of the corporation, and that, until this has been done, it has no existence; and that may be shown incidentally, and taken advantage of collaterally, whenever the fact of incorporation is in any form called into question. See Mining Co. v. Woodbury, 14 Cal. 425. By the wording of the New York statute, as well as that of other states, the filing of this certificate in the proper offices must occur before any of the rights and privileges of a corporation are conferred. See, also, Abbott v. Smelting Co., 4 Neb. 416; McIntire v. Association, 40 Ind. 104; Mining Co. v. Herkimer, 46 Ind. 142; Doyle v. Mizner, 42 Mich. 332, 3 N. W. Rep. 968; Field v. Cooks, 16 La. Ann. 153. I have found no decision of the New York court of appeals on this point, but the court of common pleas of New York city has decided that, under the New York law, the filing of the certificate of incorporation in the office of the clerk of the county, though not the filing of the duplicate in the office of the comptroller of the treasury, is an essential prerequisite to the existence of the corporation; and this we must hold to be the law of New York both on reason and authority. See Raisbeck v. Oesterricher, 4 Abb. N. C. 444.

The cross-bill of Jeffreys expressly charges that the certificate of incorporation of the Austen Coke Company was signed, made, and acknowledged before a notary public on January 14, 1881, and on the next day it was filed in the office of the clerk of the county of New York, in the state of New York, and that no duplicate of this certificate of incorporation was filed in the office of the clerk of New York county. On January 15, 1881, Hurd executed this assignment of all property of every kind comprising the Austen mines property in Preston, including said lease of the Austen mines. It is denied that this assignment was made without valuable consideration, to hinder, delay, and defraud the creditors of said Hurd; but there is no denial of the express charge in the cross-bill that this assignment was made before the certificate of incorporation of said company was filed in the clerk's office of the county court of New York. This charge therefore must be regarded and treated as admitted to be true. There is not a particle of evidence on this point, and nothing to show when this assignment was executed by Hurd, except simply the date of it, January 15, 1881; and, as the certificate of the incorporation of the Austen Coke Company was filed in the office of the clerk of the county of New York on that day, of course this is entirely consistent with the admission that this assignment was executed first, and before the filing of this certificate in said clerk's office, and therefore before the assignee in the assignment, the Austen Coke Company, had any existence; for, under the laws of New York, we have seen it had no existence until this certificate of its incorporation was filed with the clerk in his said office in the county of New York.

This, of course, rendered the assignment null and void, if it had not been made to hinder, delay, and defraud the creditors of the assignor. But it was so made. The plaintiff in this cross-bill alleges that, before this assignment was made, this corporation owned no property whatever, and could not and did not pay to said Hurd any consideration whatever for the property so assigned to it; that by these assignments said Hurd utterly divested himself of all property owned by him, and became thereby utterly insolvent, and has continued so ever since. There is a denial of the truth of this allegation in the answer of the Austen Coke Company; but there is no statement of what was the consideration paid by the Austen Coke Company for said assignment by Hurd to it, and nothing to prove any consideration except the recital in the assignment that it was for one dollar in hand paid, and other valuable considerations. All that the answer says on this subject is that on the 15th day of January, 1881, it became the purchaser, for a good and valuable consideration, of the interest of Charles S. Hurd, its co-defendant, in certain leasehold property at Austen, in Preston county, W. Va., known as the "Austen Mines & Coke Company," "conveyed to said Hurd by said Colgate under written lease of January 2, 1878." The cross-bill having charged that this assignment was voluntary, and for that reason void as against the plaintiff, and other then existing creditors of the said assignor, under the settled law of this state the recital in this assignment of the payment of the consideration for the property is not evidence of such payment or consideration, as against the existing creditors of the assignor, who are assailing such assignment as voluntary, and therefore fraudulent as to existing creditors. See Cohn v. Ward, ante, 41, (decided at the present term of this court.) See, also, Rogers v. Verlander, 30 W. Va. 619, 5 S. E. Rep. 847, and Knight v. Capito, 23 W. Va. 689. In such a case, the burden of proving that the deed or assignment was made for a valuable consideration rests upon the grantee or assignee; and this burden the Austen Coke Company has failed to meet, and the court below, therefore, did not for these reasons err in regarding as null and void this assignment in the decrees of which the appellant complains. The Austen Coke Company's claim to this

Digitized by Google

fund paid into court by Shaffer was worthless. This fund being the proceeds of the Austen coke mines, which was by this void assignment attempted to be assigned to the said Austen Coke Company, Samuel Colgate, by his counsel, claims that he is entitled to $5,420.50 of this fund; that being the amount due from said Hurd, under his lease to said Colgate of said Austen mines property, as royalty for coke taken from said property by the lessee, Hurd, and not paid by said Hurd to the lessor, Colgate. This lease was for 2,000 acres of land, with the privilege of working coal-mines on said land, and run for five years from May 1, 1878, the coal mines then already opened, with the buildings erected, levels, drifts, road-works, engines fixed, machinery, fixtures, and all other things on said premises used for getting coal from under said land, and coking the same; "yielding and paying, during said term of five years, the royalty of 10 cents for every ton of coal which shall in any year be gotten out of the said premises, to be paid quarterly, within 30 days next after the close of the quarter year;" and by said lease it was agreed that, "whenever any part of said rent and royalties shall be in arrear for the period of thirty days after the same shall have been duly demanded, the party of the first part, Samuel Colgate, may enter into and distrain upon said mines and premises and coal, and dispose of the same in due course of law, as landlord."

This lease gave to the landlord, Samuel Colgate, a lien on all the coal mined on said land, to pay his royalty when due and demanded. The fund paid by Shaffer into the court in this suit was the product of the coal mined on said land during the continuance of this lease. The claim set up by Samuel Colgate in this suit, to be paid his unpaid royalties, was such a demand as gave him a complete and first lien, on the proceeds of the coal in the hands of the court, to be paid the entire amount due to him for royalties which remained unpaid. This amount was ascertained in the suit, and the court below ought to have had it first paid out of the moneys in the hands of the receiver in the cause, and paid into court by said Shaffer as the first lien upon the same.

But it is claimed by counsel in this court that Samuel Colgate is entitled to nothing on account of unpaid royalty under this lease, because said Hurd, the lessee, had constructed some 20 new coke-ovens on the leased premises, at a cost of more than $4,000, which at the expiration of the lease would add largely to the value of the leased premises, which would inure to the benefit of Colgate, and therefore the value of these new coke-ovens should be deducted or set off against the amount due Colgate for royalty. This position cannot be maintained. In the lease of Colgate to Hurd is the following provision: "The party of the second part, said Hurd, may remove for his own benefit all engines, machinery, and fixtures he shall have erected and set up on the said premises, or any part thereof; first giving the party of the first part, said Colgate, the option of purchasing the same, or any part thereof, at a fair valuation." The law regards with peculiar favor the right of tenants to remove articles annexed by them to the freehold, and extends much greater indulgence to them in this respect than it concedes to some other classes of people. See Thomas v. Crout, 5 Bush, 37; Wall v. Hinds, 4 Gray, 256; Elwes v. Maw, 3 East, 38, 2 Smith, Lead. Cas. (7th Amer. Ed.) 212, 228, notes. Under the provision in the lease above cited there can be no question but that the lessee, Hurd, could have removed the new coke-ovens, which he put on this land and premises during the continuance of the lease, and it might have been extended to such further period as the tenant continued to hold possession as tenant. See Weeton v. Woodcock, 7 Mees. & W. 14. But there was no such possession here by Hurd, or his assignee as tenant, after the expiration of his five years' lease, and as tenant he would have had no right to enter on the premises after the expiration of his time for the purpose of removing these coke-ovens, which he had put there, or any other fixtures. See Leader v. Homewood, 5 C. B. (N. S.) 546. When the tenant quits the premises leaving his fixtures behind him, it will be presumed that he intended to abandon them. See Penton v. Robart, 2 East, 88; Dubois v. Kelly, 10 Barb. 496; Conner v. Coffin, 22 N. H. 541.

It is, however, insisted by the counsel for the appellee Jeffreys that this claim of Colgate for unpaid royalty was not proven and was therefore properly rejected. It was proven by Jessup that Shaffer, said Hurd's agent, mined on these leased premises after January 1, 1881, in all 54,205 tons of coal, the royalty on which at 10 cents a ton would be $5,420.50. Jessup kept for Shaffer an account of mining of coal and manufacturing of coke, so that his statement of the quantity of coal mined at these Austen mines, which were in the possession and under the control of Shaffer as agent for Hurd, the lessee, is important; and he states that no royalty for any of this coal so mined after January 1, 1881, was ever paid to Colgate. This evidence satisfactorily establishes Colgate's claim.

Another ground for rejecting this claim is urged by counsel that none of the commissioner's reports allowed this claim, and that Colgate did not except to any of these reports, but abandoned his claim, if he has ever had any. He must be held to have acquiesced in these reports, which ignored his claim by failing to report it. See Thompson v. Catlett, 24 W. Va. 525; Chapman v. McMillan, 27 W. Va. 220. The first of these reports was made under an order of reference which directed the commissioner to ascertain and report all the property, real and personal, belonging to said Charles S. Hurd in the state of West Virginia, together with the liens thereon and their respective priori-

Digitized by Google

ties. Though the bill had stated that the coal mines had been worked since January 1, 1881, by Shaffer for the lessee, Charles S. Hurd, yet neither the commissioner nor any of the parties or their counsel understood this order of reference as directing the commissioner to ascertain what moneys were in the hands of Shaffer belonging to said Hurd, and he accordingly made no report on this subject. It is by no means clear that the commissioner did not properly interpret the order of reference, but, whether he did or did not, his failure to make any report on the subject of this fund in the hands of Shaffer certainly would not forfeit the claim of Colgate to this fund or some part of it, because he did not insist upon his claim being reported. He had nothing to except to but the failure of the commissioner to report on this subject, and if it was an abandonment of his claim to any part of this fund, as no exception was filed by any party to the commissioner's report because of this omission, all of the parties to this suit, including Jeffreys, must be for the same reason regarded as abandoning all claim to this fund. This is an absurdity; and in truth none of the parties, in order to preserve their claim to this fund, were under any obligations to except to the commissioner's report because of its failure simply to make any report on this subject.

This report was recommitted to the commissioner, with express directions to make settlement of the accounts between the defendant Albert H. Childs and said Charles S. Hurd, but with no directions to settle the accounts of Martin L. Shaffer as agent of Charles S. Hurd, nor with any directions to ascertain the amount of the fund in the hands of said Shaffer, and to whom it should be paid. There was in this report of the commissioner under this order of reference no allusion to this fund in the hands of Shaffer, and no exception to the report on this account by Colgate or any one else, and no necessity for such exception in order to prevent the forfeiture of their claim to this fund or any part thereof. But on November 20, 1885, on the motion of Samuel Colgate, "this cause was recommitted to the commissioner to ascertain and report to the court what sums, if any, remained unaccounted for to said Colgate of the royalty of 10 cents per ton of coal mined and reserved to him in his lease to the defendant Hurd, dated January 2, 1878, and what sums of money have been expended by M. L. Shaffer on said leasehold by permanent improvements in addition to ordinary repairs and necessary repairs, and at what time; and said commissioner shall certify all the evidence and facts upon which this report and also the report of November 4, 1885, is based, and also from what source the funds in said Shaffer's hands were derived." His report was made October 15, 1882, and was that Martin L. Shaffer filed a statement of his accounts showing that on the 1st day of May, 1883, there was in his hands as follows:

Total amounts of receipts from coke and coal	$74,908 84
Total disbursement	68,165 73
	$ 6,743 11

Then follows in the report a minute statement of the personal property which was on hand the 15th of January, 1883, the time said Shaffer took possession of the Austen coke and coal mines, and then a list of uncollected claims for coke and coal, amounting to $2,695.92; and he reports that no rent had been paid on the store-room occupied by Shaffer since December 13, 1879. This was the whole of this report. There was no ascertainment of the liens or claims on this fund in the hands of Shaffer, and no exception to the report because of this. The commissioner and the parties not having regarded it as required to be stated by the decree of reference, clearly neither Colgate, nor any one else, can be regarded as having forfeited or abandoned any claim to this fund because the commissioner failed to report on the claims of any of the parties to this fund. This report was recommitted to the commissioner at the November term, 1885, with directions to "ascertain and report what sums, if any, remained unaccounted for to the said defendant Samuel Colgate of the royalty of 10 cents per ton of coal reserved to him in his lease to the defendant Hurd, dated January 2, 1878, and what sum or sums of money have been expended by M. L. Shaffer on said leasehold premises by way of permanent improvement in addition to ordinary and necessary repairs, and at what time, and also to certify all the evidence and facts on which his previous report was based, and also from what source the funds in Shaffer's hands were derived." In this report the commissioner restated the balance in the hands of Shaffer, corresponding with his former report, and he stated that there was in his hands the proceeds of the sale of three mules, $300; and that he was responsible for the rent of store-house on leased premises from January 13, 1881, to May 1, 1883; but there was no evidence in the cause showing the amount of said rent. He submits to the court the question whether Shaffer should pay any interest on the funds in his hands. The following is the report in reference to the claims to this fund:

Statement of the liens upon the funds in the hands of Martin L. Shaffer:

First in priority:		
Childs and Brown, monthly balance, March 1, 1881		$1,838 09
Interest March 1, 1881, to November 4, 1885		515 58
		$2,353 67
Second in priority:		
Albert H. Childs	$4,696 10	
Interest 1st June, 1881, to November 4, 1885	1,246 81	
		$5,942 91
		$8,296 58

For evidence of the two foregoing claims see deposition of Albert H. Childs, and com-

Digitized by Google

missioner's report No. 2, filed in this cause the 11th day of February, 1882. After the payment of the above two claims the Austen Company is entitled to any balance remaining in the hands of said Shaffer.

Special matter reported at the instance of the Austen Coke Company:

(1) The amount paid out by Shaffer for permanent improvements or building new ovens	$6,215 61
(2) Amount applied of the profits of the mines and sale of coke to the payment of Martin L. Shaffer's debt	$1,047 50
(3) Amount paid to miners, laborers, etc., assigned to Martin L. Shaffer, and paid by him out of the mines and coke	$2,814 48

There was no exception filed to this report by Samuel Colgate, but the court, in acting upon it, ordered that this cause be recommitted to the commissioner, who shall ascertain and report certain specified things; also the amount in the hands of the said Martin L. Shaffer as agent and manager of the Austen Coke Company; that he also report any property of said Hurd besides said leasehold estate, upon which the various judgments and attachments against said Hurd are liens, and the priorities thereof, and any other matter deemed pertinent or required by any of the parties. The commissioner on March 9, 1886, made his report, in which he said: "No evidence was produced before your commissioner in reference to Samuel Colgate's royalty, upon which to base a report." He reports all the evidence on which his former report was based to the court, and states: "No oral testimony was taken before me;" and he sends up and refers to all the written testimony on which his last report was based. The depositions of Jessup and Shaffer, before referred to, were sent up with this report. Samuel Colgate did not except, on account of the failure to report the amount of royalty due him under his lease of the Austen mines property to said Hurd, as specially required by the order of reference. I cannot conclude that this failure to except can be regarded as an abandonment by Samuel Colgate of his claim to royalty. This simple failure to report the amount due on this royalty reserved, cannot be regarded as the equivalent of a report that nothing was due thereon. If this had been the report on this order, and it had not been excepted to by Samuel Colgate, it would have been properly held as acquiesced in by him, and his claim of royalty would have been regarded as abandoned. But as there is no such report against this claim set up in Colgate's answer and proved satisfactorily to exist, the court ought to have recommitted the cause to the commissioner, and required him to report the amount of this claim; or it should, from the evidence in the cause, have ascertained, as it easily could, the amount of this claim, and decreed it to be paid first out of the funds which had been paid into the court by Shaffer. If Jeffreys has not a claim to this fund by reason of his attachment, his claim by reason of his having filed a cross-bill in the nature of a foreign attachment, it cannot be sustained. This fund was paid into the court on November 20, 1885, and the attachment on this cross-bill filed by Jeffreys did not issue for some time thereafter,—that is, on the 30th of June, 1886,—so that these funds, being unquestionably in the hands of the court, were not subject to an attachment by Jeffreys. This suit cannot justly be regarded simply as a suit to foreclose a mortgage. The parties, as well as the court below, always evidently regarded it as embracing much more than a simple foreclosure of a mortgage. This is shown by the fact that Shaffer, the mortgagee, was an agent of the mortgagor, and was made a party to the cause, which ought not to have been done, had the suit been simply to foreclose a mortgage. He was obviously made a party defendant in order to make him account for the funds of the mortgagor which he had received as the manager of the mortgaged premises. All the lien creditors of every description were made defendants. This would obviously have been improper if it had been a suit simply to foreclose a mortgage. See Mooreland v. Metz, 24 W. Va. 119. The court, by a consent decree, referred the cause to a commissioner to ascertain all the property of the mortgagor, real and personal, and all the liens on it, and their respective priorities, and this was accordingly done. This shows that no one in the court below regarded this as a suit simply to foreclose a mortgage, and yet this is insisted on as the character of this suit. That the court below should have ascertained the true amount of royalty due to Colgate under his lease, and directed its payment out of the fund in the hands of the receiver, which was paid into court by Shaffer, and was derived from the mining of coal on said leased premises, was a sequence from the course it did pursue. It set aside the sale of the mortgaged premises at $5,000 on an upset bid of $5,500, and ordered a resale. These premises were a lease for five years, which was, of course, diminishing in value rapidly every year, as the purchaser could only obtain by his purchase the premises till the termination of the lease. But the court and its officers were so dilatory in the making of this resale that the lease expired before it was made. Of course, the mortgage then was obviously of no value, and the parties who had offered the $5,500 as an upset bid to the court refused to make this or any other bid; and the court, instead of holding them to their bid by its final decree of November 16, 1881, discharged them from any liability thereon. This would seem to be but just to them; and if, as we hold, the net rents, issues, and profits of the leasehold premises paid into court by Shaffer were to be distributed as the proceeds of the lease, if sold, would have been, then no one will sustain any loss from this failure of the court to have this leasehold property sold; for, though it was worth $5,500, yet those entitled to the money it would have sold for,

Digitized by Google

according to our views, will get, in lieu of its salable value, the net profits from the use of said leasehold premises up to the termination of the lease. If, however, they are entitled, as the appellants insist, to no part of these net profits in the hands of the court, then they have suffered a loss of $5,500 by reason of the court's failure to resell the property promptly, and the release of those who offered the upset bid from all liability therefor.

The counsel for the mortgagees insists that the parties who offered this upset bid of $5,500 ought, though the lease had expired before the resale, to be required to pay this sum. If this had been simply a bill to foreclose this mortgage, there might have been much reason in this view. If this $5,500 was to be a clear loss, it would seem more just that it should fall on those who had produced it by making the upset bid, rather than on the mortgagors; but if, as we think, the net rents and profits of this lease can be substituted in effect in this case for the lease, then there would be no such clear loss of $5,500, and no necessity to impose it on the parties, who had offered this upset bid.

One of the appellees, Ulman, by his counsel complains of errors against him in the court below. To understand his complaint it is necessary to state briefly his connection with the matters in controversy in this suit, as shown by the record. Commissioner Dent in one of his reports makes an accurate statement of a portion of these facts, thus: "For the assistance of the court your commissioner gives the following history of certain matters connected with the case: Some time in the year of 1874, Sinsheimer, Joseph Rittenberg, and S. L. Alder were the owners of the furnace property known as the 'Lancaster Furnace Property,' and were running said furnace, and, being in need of funds, they borrowed of Joseph Ruck fifty thousand dollars, and executed a deed of trust on said land to Isador Raynor, trustee, to secure said sum of money. After the execution of said trust-deed the Lancaster Furnace & Mining Company was incorporated, and said land conveyed by said Sinsheimer, Adler, and Rittenberg to said company, subject to said trust-deed; and afterwards, on December 21, 1874, said Lancaster Furnace & Mining Company executed a second deed of trust on said real estate, and all their personal property situated on said premises, to Jacob Krauss, to secure certain notes executed by said furnace company for the sum of $44,800. Said Krauss, the trustee, became the owner of said notes, and took possession of said furnace, and ran the same for ninety days. Said indebtedness of said furnace company to said Krauss seems to have been reduced to $15,000. Said company was largely indebted to the men employed about said works, and it executed another deed of trust to Samuel Fernheim to secure said employes. Said employes assigned their claim to George Heller, who instituted a suit in chancery, and levied an attachment on all of said property. Said Heller obtained judgment against said company in the circuit court of Taylor county in said chancery suit, but the court failed to ascertain and settle the priorities on said property, and reserved its decision upon all questions in relation to said property, but gave Heller leave to sue out execution, which he did, and levied upon all the personal property. Jacob Krauss filed his answer in said suit, praying an injunction to said execution, which was granted. Said injunction was never perpetuated, and said chancery suit was continued from time to time, and in 1879 was dismissed, (all parties being tired.) In the mean time Isador Raynor, trustee in the first trust-deed, sold said real estate to Alfred J. Ulman, and Ulman took possession, the personal property still being on said premises; and Raynor's trust-deed did not cover the land upon which the railroad was situated, hereinbefore reported as the Lancaster Furnace & Mining Company, because said property was acquired by said company after the making of said deed. Neither is the said strip of land included in the Krauss deed of trust. Said Krauss deed of trust was never executed, and Krauss took possession of said property, and treated it as his own. He subsequently left said premises, and removed out of the state. He afterwards sold his interest in said property to Charles S. Hurd, who leased the land of Ulman, and took possession of the personal property, and ran the furnace until the fall of 1880, when he suspended operations. In the mean time he had charged said property with the liens hereinbefore reported, except the execution liens, which were acquired by after-recovered judgments. On July 1, 1878, Ulman leased this Lancaster furnace tract so purchased of the trustee Raynor, and the Holland tract adjoining it, to C. S. Hurd for one year. This lease was afterwards extended to January 1, 1884, and Hurd gave mortgages on this furnace property sought to be foreclosed in this suit."

This statement will suffice to enable us to understand the counter-assignment of error made by the counsel for Alfred L. Ulman, one of the appellees. It is as follows: "Alfred L. Ulman, one of the appellees, by way of counter-assignment of error against him in said decree, suggests and relies upon the following: He is the owner of the tract of land upon which said furnace was built, having bought it at the trustee's sale. About one-third of said tram railway is located on appellee's land. Of the other two-thirds, one is upon the Armstrong land, and the other upon the Rosset land. Said tram railway was built for the use of the furnace, and is as much a part of the furnace as any other machinery, and is therefore real estate, —a fixture,—and was bought by appellee with the furnace at the trustee's sale. *Second.* The property at the furnace sold by Constable Blue, under the distress in favor of this appellee, was the property of Hurd, and subject to the warrant. It was error to

Digitized by Google

require the proceeds of this sale to be paid to Browning."

It is true that Krauss had a lien upon this property before Ulman leased it to Hurd; but Hurd bought Krauss's lien, and afterwards sold or assigned it to Browning. Now, if the property were still in the hands of Hurd, it is plain that Ulman would have a lien for his rent, and Hurd could not defeat this lien by selling the property then on the lessor's premises without providing for at least one year's rent. Code W. Va. c. 93, § 12. The facts stated in these assignments of error are supported by the evidence in the record. The deposition of Charles E. Hooper, a deputy-sheriff of Taylor county, also proves that he had in his hands an execution in favor of George Heller against the Lancaster Furnace & Mining Company, dated January 4, 1881, for $3,684.36, with interest from 1875, and $45.55 costs; that he levied this execution on two and a half or three miles of railroad iron and some other personal property belonging to the Waldorf furnace, which C. S. Hurd had been running in part, on said land leased by said Ulman to said Hurd. On June 20, 1881, this deputy-sheriff, under this execution, sold this railroad iron to John W. Mason and John S. Herr for $1,850. This railroad iron was levied on as the personal property of the Lancaster Furnace & Mining Company under the order of said Mason, its attorney, to whom the net proceeds of the sale was paid. The court below was of opinion, and decided, that the railroad, so far as it was on said lease land, was included in the mortgage executed by said Hurd to E. S. Browning, and the proceeds of it should have been paid to him as the party having the first lien thereon, and that it had been erroneously regarded by the deputy-sheriff as the property of the Lancaster Furnace & Mining Company; and it was accordingly decreed that said Heller do pay to E. S. Browning the net proceeds of the sale of the railroad iron which had been so paid to him by said deputy-sheriff in extinguishment to that extent of said Browning's claim on said Hurd, secured by said mortgage. The propriety of this decision by the court below is called into question by these counter-assignments of errors. Browning claims under an assignment to him by Hurd of a mortgage which had been assigned to Hurd by one Krauss. This mortgage was dated December 22, 1874, and was executed by the Lancaster Furnace & Mining Company to Krauss, to secure a loan, and it was upon the land on which said company had built in part said railroad; and on the 15th of May, 1879, said Hurd had conveyed certain personal property, and the railroad iron on said railroad running from said furnace to Ironton, by a mortgage to secure a debt. If this iron on this railroad be regarded, as the counsel for Ulman in this counter-assignment of error insists it should be regarded, as real estate, then Ulman became the owner of it when the trustee, Raynor, conveyed this furnace tract of land, on March 11, 1876. But he leased this land and railroad to said Hurd till January 15, 1884, and Hurd gave a mortgage on said railroad to said Browning, and in addition thereto said Hurd assigned another mortgage on said furnace tract, which would include the railroad iron given by the Lancaster Mining Company to said Browning. It would seem, therefore, that if this said railroad track be regarded as real estate, as Ulman's counsel claims, he has no claim to the proceeds of the sale of this railroad track on this furnace tract, as it had by mortgages passed to said Browning; and the circuit court properly held that he (Browning) was entitled to these proceeds, so far as they were on this furnace tract, but no further, and ordered their payment to him. There is therefore no foundation for the first counter-assignment of error by said Ulman. Nor is the second assignment of error well founded.

The constable, Blue, sold under execution in November, 1881, various articles of personal property used in connection with this furnace property, which were fixtures, which had, with this property, been mortgaged by Hurd to secure a debt to said Browning. This personal property included in said mortgage fixtures which were sold for $678.15, and the money was brought into court by said Blue, to be disposed of by the court in this suit by directing its payment to the party entitled to it. The proceeds of said sale were directed by the court to be paid to said Browning. It was clear that the claim of Browning by reason of his mortgage was prior and superior to that of the execution creditors. But said Ulman gave the constable notice that he had a claim for $750 for rents due from said Hurd on August 15, 1881, and the record shows that there was that much more due from Hurd to Ulman for three months' rent of this furnace property. This rent was due under a lease dated February 1, 1878. The oldest mortgage held by said Browning on Lancaster furnace property and fixtures was the one to Jacob Krauss, dated December 23, 1874, afterwards assigned to said Hurd, and then assigned to said Browning. This mortgage was on the fixtures sold by the constable, and, if it had been a lien created after the commencement of Ulman's lease, then by section 12, c. 93, Code W. Va. 1887, p. 691, Ulman would be entitled to claim, as against such lienor, as much as one year's rent; but, as the lien existed when the tenantry of said Hurd to Ulman commenced, this statute has no operation in this case, and the mortgage in favor of Krauss, now belonging to said Browning, has the first claim to the proceeds of the sale made by Blue, constable, and the court below did not err in directing the proceeds to be paid to said Browning.

George Heller, another appellee, as a counter-assignment of error complains that the court below erred in this portion of its decree of November 16, 1887: "And it appears to the court that the defendant George Heller, on the 20th day of June, 1881, re-

Digitized by Google

ceived from George E. Hooper, deputy-sheriff, upon an execution issued by the said Heller, and levied upon certain railroad iron, and a certain locomotive engine, tender, carts, wagon, and saw-mill engine, which was sold by said sheriff, under said execution, as the property of the Lancaster Furnace & Mining Company, the net sum of $1,707.14; and it appearing to the court that none of said property was the property of said company, or liable to said execution, but that the same was included in the same mortgage executed by Charles S. Hurd to Edward S. Browning, and that the said claim hereinbefore decreed to said Browning constituted a lien upon all of said property first in order of priority,—it is therefore adjudged, ordered, and decreed that said George Heller do pay to said Edward S. Browning said sum of $1,707.14, with interest thereon from said June 20, 1881, to this day, now amounting to $2,363.25, with interest of this sum of $2,363.25 from this day, in extinguishment to that extent of said Browning's claim against said Hurd; but this decree is made without prejudice as to any other remedy of said Browning, at law or in equity, to collect said $2,363.25 in any other way, or from any other person, if any such remedy he has." the following are the views of the counsel for said Hurd on this point: "*First.* Said railroad is real estate, and therefore not subject to Browning's claim. Wright v. Ore Co., 45 Pa. St. 475. Appellee has the oldest judgment against said mining company, and his judgment is a lien upon said strip of ground belonging to said company, bought by it from Samuel Armstrong, and upon which about one-third of said railroad track lies. The Armstrong land was not included in any of the mortgages made by the company. *Second.* If said railroad shall be held to be personal estate, then Heller's execution was a lien upon it." This lien was sold under said execution, and the circuit court decreed that Browning was entitled to proceeds. It will be observed that on the 22d day of December, 1874, the company executed a mortgage on all its personal property to secure a debt to Jacob Krauss; that Krauss assigned his claim to Hurd, and Hurd assigned his to Browning. There was never a foreclosure of this mortgage. Heller obtained a judgment against the company, and took out execution. This execution was levied on the railroad, among other things, and the iron was sold as the property of the company. The execution, it is true, was issued long after the mortgage was made and assigned. But it is maintained that the mortgage was never properly admitted to record, and therefore was void as to Heller, who is a *bona fide* creditor of the company. It is suggested that the mortgage was not properly acknowledged, and could not be legally admitted to record. The mortgage is signed by L. Sinsheimer, and acknowledged by Frank P. Clark. It is submitted that it could only be legally acknowledged by the person who executed it. The said railroad track is, properly speaking, to be regarded as real estate, and, so far as this record shows, George Heller has the oldest unsatisfied judgment against the Lancaster Furnace & Mining Company. A portion of the land on which the railroad was built, was not included in any of the mortgages on this furnace tract of land, and the proceeds of as much of this iron as was on this Armstrong land ought not to have been ordered by the court to be paid to Edward S. Browning, but this much of the fund, which had been paid by the deputy-sheriff, Hooper, to said Heller on his execution against the Lancaster Furnace & Mining Company, ought to have been allowed to remain there as property on his land and belonging to him; but, as we have said before, as the residue of this railroad track was included in the mortgages of Edward S. Browning, the proceeds of this portion of the track in the hands of said Heller ought to be decreed to be paid by him to said Browning. The record does not at present enable us to determine what portion of said railroad track was on Armstrong's land,—whether it was one-third, as was claimed, or more or less than that portion. This must be ascertained before it can be decided what disposition should be made of the proceeds of the sale of this railroad iron.

It is claimed, however, that one of these mortgages on this Lancaster furnace property and fixtures now owned by Edward S. Browning (the one of December 22, 1874) is not a valid lien, because not properly recorded. The defect in its recordation is that, while it was signed by Sinsheimer, president of the Lancaster Furnace & Mining Company, the mortgagor, and the corporation seal affixed by him, yet it was acknowledged by Frank P. Clark. It is claimed that, the corporation seal being attached to the deed of mortgage by the president, he was the proper and only person who could acknowledge this mortgage for recordation; whereas, in this state, no statutory provision exists as to the execution or acknowledgment of a deed by a corporation. The officer, who affixes the corporation seal, is the party executing the deed, within the meaning of the statute requiring its acknowledgment by the grantor. See Kelly v. Calhoun, 95 U. S. 710. But though not acknowledged by the president, who signed the deed, it seems to me that it was properly acknowledged, because on its face was this provision: "And this deed further witnesseth that the said Lancaster Furnace & Mining Company doth hereby appoint Frank P. Clark its attorney in fact to acknowledge these presents to be the act and deed of said company, to the end that the same may be properly recorded." Frank P. Clark, in the certificate of a commissioner for West Virginia in Maryland, acknowledged the said writing to be the act and deed of said company. This, it seems to me, was an acknowledgment by the grantor, who, if a corporation, must act by some agent appointed to acknowledge the deed for recordation, had the corporation not

Digitized by Google

expressly appointed some one else to acknowledge the deed for recordation. See Talbert v. Stewart, 39 Cal. 602; Bigelow v. Livingston, 28 Minn. 57, 9 N. W. Rep. 31.

Martin L. Shaffer, another one of the appellees, makes a counter-assignment of error: "Appellee had no interest in the case of Childs v. Hurd and others, when the same was brought, and was only made a party because he then had the possession and custody of the property leased by Colgate to Hurd; and but for this suit the appellee Shaffer would have returned the property to Hurd or his assignee as soon as the object for which he took it had been accomplished, but was advised that he was by the said bill made the receiver, or was treated as such for the time being, and as such should let the property remain *in statu quo*, working as he had done. The leased premises remained in his custody until the expiration of said lease. *First.* It was error to charge appellee Shaffer with interest on the amount in his hands from the 1st day of May, 1883, because the amount was not a debt due from him, nor was it damages for a wrong committed by him. It was the proceeds of the leased premises which had accumulated in his hands during the progress of the suit, which was at all times subject to the order of the court in the cause." This counter-assignment of error cannot be sustained. It might, perhaps, in some other state, but in Virginia and West Virginia the law seems to be settled that in such a case interest should be paid, because the money is worth the interest, and the creditor is entitled to the interest, and it is presumed that the money was used by the party holding it. If he was unwilling to pay interest on it, he could at any time avoid and stop the payment of interest by paying the fund into court, when it would be ordered to be loaned, if the court could not determine to whom it was properly payable. See Tazewell's Ex'r v. Barrett, 4 Hen. & M. 263; Templeman v. Fauntleroy, 3 Rand. (Va.) 446.

The appellee Mary E. Clerc also files a counter-assignment of error. It is as follows: "The appellee Mary E. Clerc, wife of F. Leon Clerc, by way of counter-assignment of error in the decree made in this cause on the 16th day of November, 1887, says she is prejudiced by said decree, and that she is informed that the same is erroneous, for the following reasons, to-wit: In decreeing that portion of the iron tram railway lying on the Rosset land to be subject to the mortgage executed by the Lancaster Furnace & Mining Company in favor of Edward Browning. On the 3d day of July, 1874, John D. Rosset leased a large tract of land to said company for the purpose of mining and removing iron ore. Said lease provided, among other things, that said company 'shall have the right and privilege of removing from said lands all railroad machinery and fixtures placed thereon by it, provided all the rent and royalty due under the contract be paid. But it shall at no time remove anything so placed thereon when there remains due any royalty.' This property, as will be seen by the record, afterwards became the property of F. Leon Clerc. The said company put down the railroad track, and used it a year or so, and then failed; being at the time of the failure largely indebted to Rosset. There would seem no reasons why the conditions of this should not be observed. The railroad iron is not worth anything like the sum the company owed Rosset when it abandoned the lease." The facts stated by the counsel of the appellee above are true, as appears from an examination of the record. The proof is that the Lancaster Furnace & Mining Company, when they failed, owed for royalty on this Rosset land more than $1,000. The Rossets, and those claiming under them, took possession of this land when said company broke up and abandoned it. On November 19, 1887, F. Leon Clerc, who then owned this Rosset land, leased it to said C. S. Hurd for the purpose of working the iron ore on said land for a certain royalty. If, as the lease of 1874 provides, the lessee, the Lancaster Furnace & Mining Company, had no right to remove the iron ore, till all royalty due on the land was first paid, it would seem clear that they could not confer such right on others, either by sale or mortgage; and the right of every assignee, or person claiming under the Lancaster Furnace & Mining Company, to the iron on the railroad must yield to the claim for the satisfaction out of it first of the unpaid royalty on the leased land. The counter-assignment of error in this respect, by the executrix of F. Leon Clerc, must be sustained as well founded.

SNYDER, P., and ENGLISH and BRANNON, JJ., concurred.

(108 N. C. 165)

JAFFRAY *et al. v.* BEAR *et al.*

(*Supreme Court of North Carolina.* March 25, 1889.)

LIMITATIONS—APPLICATION OF STATUTE.

Code N. C. § 155, provides that where relief is sought on the ground of fraud or mistake, in cases which heretofore were solely cognizable by courts of equity, the cause of action shall not be deemed to have accrued until the discovery by the aggrieved party of the facts constituting such fraud or mistake. *Held*, where plaintiff alleged that the defendant owed him a sum of money, and that he had been induced by the false and fraudulent representations of the defendant as to his solvency to accept in full satisfaction of the claim a much less amount than the face thereof, that, as such facts did not show a cause of action solely cognizable in equity, the above statute was not applicable to an action by plaintiff to set aside the compromise.

Appeal from superior court, New Hanover county; SHEPHERD, Judge.

Thos. W. Strange, E. S. Martin, and *M. Bellamy*, for appellants. *Geo. Davis, Junius Davis, J. I. Macks*, and *Russell & Ricond*, for appellees.

MERRIMON, J. The questions to be decided are sufficiently presented by the case stated

Digitized by Google

on appeal, and the following is a copy of so much thereof as need be reported here: In the month of October, 1881, the defendants became indebted to the plaintiffs in the sum of $3,206.53, for goods sold and delivered. On the 19th of November, 1881, the defendants made a deed of assignment of all their real and personal estate to one Fernberger, in trust for the payment of their creditors, with certain preferred classes, the plaintiffs not being among the preferred creditors. On the 5th July, 1882, after some negotiations, the plaintiffs, through their attorney, agreed with defendants to compromise and settle their claim at 25 cents on the dollar; and on that day the money was paid to said attorney, and he signed a simple receipt in full for the debt of the plaintiffs on the face of the account for the goods, which they had rendered to defendants. This action was commenced on the 13th December, 1886. There was evidence tending to show that some of the preferred debts in the deed of assignment were fictitious, and that plaintiffs were induced to assent to the compromise by the false and fraudulent representations of defendant that all of the preferred debts were honest and *bona fide;* and that plaintiffs did not discover that those representations were false, and that some of the preferred debts were fictitious, until within three years before the commencement of this action. His honor intimated his opinion that this case was not heretofore solely cognizable by the courts of equity, but there was a concurrent jurisdiction at law, and therefore the case was not within the saving of the Code, § 155, subd. 9, and the action was barred by the statute of limitations. In deference to this intimation the plaintiffs took a nonsuit and appealed.

The cause of action alleged in the complaint is clearly barred by the statute of limitations, (Code, § 155, par. 1,) if the latter, as contended by the defendants, is applicable in this case. The plaintiffs contend, however, that it is not pertinent; that the ninth paragraph of the same section is that it embraces and applies to the present and all like causes of action, and therefore their present cause of action is not barred, the action having been brought within two years next after the discovery of the alleged fraud. The bar of three years applies to the class of cases specified in the ninth paragraph mentioned. It prescribes that "an action for relief on the ground of fraud or mistake, in cases which heretofore were solely cognizable by courts of equity, the cause of action in such cases not to be deemed to have accrued until the discovery by the aggrieved party of the facts constituting such fraud or mistake." It will be observed that this paragraph applies only to causes of action founded on the ground of fraud or mistake solely cognizable by courts of equity prior to its enactment. Whatever may have been the legislative motive for such restricted application, it plainly exists, and the court must give it effect. Prior to the enactment of the present method of code procedure in this state, including the statutory provision just cited, there prevailed a settled and well-understood distinction between causes of litigation of which courts of equity had sole and exclusive jurisdiction, and also such as they had jurisdiction of concurrently with the superior courts, as distinguished from them. Of the former class there were such as were founded on fraud and mistake, and to these the paragraph of the statute above recited clearly applies. It does not, however, apply to cases as to which such courts had concurrent jurisdiction. This is the plain implication from the statute. And, moreover, this court has so decided in repeated cases. In Blount v. Parker it is said that "the act, however, may be regarded as a legislative declaration that the effect of the statute cannot be defeated, even in case of undiscovered fraud, unless the fraud is such that the jurisdiction of a court of equity was alone competent to afford relief." 78 N. C. 132. It was also said in Egerton v. Logan, 81 N. C. 178, that if the express trust alleged to arise out of the vague and indefinite words used by the defendant at the time of the transfer was not determined by the first demand, and the antagonistic relations thereby produced, it is nevertheless manifest that there are concurrent remedies at law and in equity, and hence the case does not come within the saving of the statute. Spruill v. Sanderson, 79 N. C. 466, is to the like effect. Granting that in some aspects of the plaintiff's alleged cause of action it was formerly cognizable in a court of equity, it certainly was not exclusively so; a court of law had concurrent jurisdiction. Accepting the evidence produced on the trial as true in connection with the pleadings, as we must, for the present purpose, the defendants owed the plaintiffs simply a sum of money specified, for goods, and the former fraudulently and by false and fraudulent representations and inducements led the latter to receive 25 per centum of the debt so due them in discharge of the whole thereof, and to execute a receipt, proper as to form, for the whole. But this did not conclude the plaintiffs at law. They might, notwithstanding such payments and receipt, have maintained an action at law to recover their debt less the payment, because the transaction, including the receipt adverse to them, was fraudulent, and the plaintiffs might have treated it as void, and, such fraud appearing on the trial, the court would have allowed them to recover judgment for their debt. Fraud vitiates and renders void and nugatory such and like receipts and acquittances, so that they cannot, when properly objected to, be successfully interposed, and stand in the way of a recovery at law. It has such effect in cases like this, both at law and in equity. Story, Cont. § 495; Chit. Cont. 590; Broom, Phil. Law, 42 et seq.; 1 Chit. Pl. 581, 584; 1 Saund. Pl. Ev. 823; Elliott v. Logan, Phil. Eq. 163; Wilson v. White, 80 N. C. 280; Egerton v. Logan, 81

Digitized by Google

N. C. 178; Hefter v. Cahn, 73 Ill. 303. As, therefore, the plaintiffs' cause of action was cognizable both in courts of law and equity, it is barred by the statute of limitations first above recited.

The learned counsel for the plaintiffs contended on the argument that, accepting the evidence as true, the defendants had perpetrated a gross fraud upon them which they had not been able to discover until the statutory bar had become effectual against them, and that the court ought, in the exercise of its equitable authority, to prevent the defendants from taking advantage of the bar at law, upon the ground that it would be manifestly inequitable and unjust to allow them to take and have advantage of their own fraud to the grievous prejudice of the plaintiffs, and they cited and relied upon the rule of equity invoked as stated in 2 Story, Eq. Jur. §§ 1521, 1521*a*, and Kirby v. Railroad Co., 120 U. S. 130, 7 Sup. Ct. Rep. 430. This contention would have great force but for the statutory provision already cited and applied. In this state the principles both of law and of equity are applied now in and by the same court in the same action and the same cause of action, when need be; and it seems to us clear that the purpose, in part, of the statute was to prevent the exercise of the power invoked in cases like the present one. It prescribes in plain terms the classes of cases in which the cause of action shall not be deemed to have accrued until the fraud shall be discovered. Why is the restriction made to apply to one class of cases and not to others? It was intended to serve some purpose,—that indicated in the paragraph recited. If it had been contemplated that the court should exercise the power as formerly, then this paragraph was unnecessary, and could serve no useful purpose, because the courts could interpose their power as justice and occasion might require, just as before the present statute of limitations and method of procedure began to prevail. In the case last cited the learned judge adverts to the similar restrictions upon the courts of the state of New York, whose statute is substantially—almost literally—like that of this state, to which we refer above. The courts of equity of the United States are not trammeled by such restrictions, nor, it seems, are they generally affected, if at all, by the practice of the courts of the several states in administering the principles of equity. Their jurisdiction is the same as that of the high court of chancery in England, subject neither to limitation nor restraint by state legislation, and it is the same and uniform throughout the states of the Union. Hence the United States court could in the case cited exercise the authority, and grant relief like that we are constrained to deny. The counsel of the plaintiffs bring to our attention an act passed by the general assembly at its late session, which simply strikes out of the paragraph above recited of the section of the statute cited the words, "in cases which heretofore were solely cognizable by courts of equity." This act has no application by its terms or effect to this appeal. No question is raised in the record by it, nor has the action, in any aspect of it, been directed or tried with a view to it or its effect upon the subject-matter of the action. Judgment affirmed.

(102 N. C. 413)

BATTLE *v.* MAYO *et al.*

(*Supreme Court of North Carolina.* March 19, 1889.)

HUSBAND AND WIFE—FRAUDULENT CONVEYANCES—REFERENCE.

1. Code N. C. § 1837, provides that "no husband who, during coverture, has received, without objection from his wife, the income of her separate estate, shall be liable to account for such income for any greater time than the year next preceding" an action against him for such sum, or next preceding her death. *Held*, that this section does not apply where the husband occupies the land and receives the rents upon an express agreement to account therefor, which is afterwards embodied in notes for the amount, as the express agreement precludes the possibility of assent, and implies objection to the receipt, except upon the promise.

2. A mortgage deed executed to secure a valid pre-existing debt, and with no fraudulent intent on the part of the mortgagee, is valid, though the mortgagor executed it for the purpose of defrauding creditors.[1]

3. Under the North Carolina practice, the court may, on exceptions to a referee's report, set aside, modify, or confirm the report in whole or in part, and, on appeal from his decision, his findings of fact are conclusive, and his conclusions of law alone reviewable.

4. In supplementary proceedings to reach property conveyed by a husband to his wife, as alleged, in fraud of creditors, but which he alleged was in consideration of money given him by her, an exception to a referee's report, because the referee failed to direct the wife to refund to the husband so much of the money received by him from her as is necessary to satisfy the claims of creditors, is too general.

5. A statement that "the plaintiff does not assent to any part of this judgment, unless where it distinctly appears in the same," and especially "to the judge's finding additional facts to those found by the referee" cannot be treated as a specific exception to the whole judgment.

6. An objection that there is no evidence to sustain a finding of fact stated by the court in revising the referee's report should be made during the term when the cause was heard, in order to enable the judge to modify it, if any error is pointed out.

Bunn & Battle, for appellant. *Strong, Gray & Stamps* and *Gilliam & Son*, for respondents.

AVERY, J. This was a civil action heard at the fall term, 1888, of the superior court of Nash county, before GRAVES, J. The plaintiff, Battle, under an order in a supplementary proceeding against the defendant James M. Mayo, instituted by T. P. Braswell & Co., judgment creditors of said Mayo, was

---

[1] That it is necessary, in order to set aside a conveyance as fraudulent, that the grantee should have known of, and in some way participated in, the grantor's fraudulent intent, see Burtis v. Bank, (Iowa,) 41 N. W. Rep. 585, and note; Stewart v. Bank, Id. 318, and note; Verner v. Verner, (Miss.) 1 South. Rep. 52, and note; Scott v. Davis, (Ind.) 20 N. E. Rep. 189, and note.

Digitized by Google

appointed receiver on the 7th of January, 1887. Other judgment creditors of Mayo have been made parties to that proceeding.

The plaintiff alleges in the complaint: (1) That on the 14th of January, 1886, the defendants A. H. Ricks and A. L. Taylor executed three sealed notes to Carr Bros. & Co., each for the sum of $500, with interest from date at 8 per cent., payable, respectively, September 1, 1886, November 1, 1886, and January 1, 1887 (2) That on each of said notes are the following indorsements:

"For value received, we hereby transfer all our interest in the within note to J. M. Mayo or order.

"January 14, 1886.

[Signed] "M. J. CARR,
"J. B. CARR."

"Pay to the order of W. T. Mayo, trustee, for F. L. Mayo.

[Signed] "JAMES M. MAYO."

—(3) That on the note maturing November 1, 1886, there is a credit indorsed as follows:

"Received December 20, 1886, one hundred and fifty-eight and 57-100 dollars ($158.57.)

[Signed] "W. T. MAYO, Trustee."

After alleging his own appointment as receiver at the date mentioned, and naming other judgment creditors who have intervened in the supplementary proceedings, the plaintiff alleges that the notes mentioned are now in his hands, and are, as far as creditors are concerned, the property of James M. Mayo; that he transferred them to his brother, the defendant W. T. Mayo, in trust for his wife, the defendant F. L. Mayo, with intent to hinder, delay, and defraud creditors, without consideration, and as a mere gift. The plaintiff demands judgment against the obligors on the notes, the defendants A. H. Ricks and A. L. Taylor, for the sum alleged to be due on the notes, and that the judgment be applied, after deducting costs and charges, to the payment of the judgments of the plaintiff creditors. Subsequently, and after vacating a judgment by default at the November term, 1887, in reference to the action above-named and three other actions brought by the plaintiff, Battle, and pending in the same court, the following order was made: "It is now, on motion of the plaintiff and with consent of the defendants, ordered by the court that the four actions be consolidated, and that J. M. Mullen be, and he is hereby, appointed a referee, under Code Civil Proc., to find all issues of law and of fact therein involved, and the defendants are to be allowed sixty days in which to file answers."

In an amended complaint consolidating the four actions, the receiver subsequently alleged that with the same fraudulent intent the defendant James M. Mayo had transferred to his said wife: (1) His equitable interest in the Williford tract of land, he having contracted to pay about $1,250 for the land, and having paid over half the price; (2) the Baker land, explained below; (3) the Ricks and Taylor notes; (4) oxen, stock, and farming utensils; (5) a piece of land of about 300 acres in Edgecombe, with stock on it; (6) the Charles Knight place, of about 40 acres. The other facts that will throw light upon the exceptions appear in the report of the referee, the exceptions, and the judgment.

REPORT OF REFEREE.

The undersigned, referee herein, begs leave to report that, from the admissions in the pleadings and the evidence deduced before him, which evidence is herewith sent, he finds:

(1) That the following judgments, obtained and docketed, as hereinafter appears, against the defendant James M. Mayo, are unpaid; that executions have been duly issued thereon, and the same returned wholly unsatisfied, to-wit: (*a*) Three judgments in favor of John G. Spotts and George Gibson, copartners, trading as Spotts & Gibson,—one for $346.17, with interest from March 26, 1886, and costs, confessed in Nash superior court, and docketed therein April 23, 1886, and docketed in Edgecombe superior court about the same time; one for $101.48, with interest from April 10, 1886, and costs, docketed in Edgecombe superior court April 13, 1886, and in Nash superior court April 23, 1886; and one for $41.17, with interest from April 15, 1886, docketed in Edgecombe superior court April 17, 1886, and in Nash superior court April 23, 1886. (*b*) Judgment in favor of T. P. Braswell and M. C. Braswell, copartners, trading as T. P. Braswell & Son, obtained at spring term, 1886, of Nash superior court, for $360, with interest from November 1, 1885, and costs, docketed April 26, 1886, in said court, and docketed also in Edgecombe superior court. (*c*) Judgments (2) in favor of the Brown Cotton Gin Company, —one for $129.15, with interest on $1.15 from November 17, 1884, and on $128 from September 16, 1885, and costs, obtained February 1, 1887, and docketed same day in Nash superior court; and one for $144, with interest from September 16, 1885, and costs, obtained and docketed February 1, 1887, as above. (*d*) Judgment in favor of H. Cohen and her husband, William Cohen, for $170, with interest from March 1, 1884, and costs, obtained and docketed as above, February 1, 1887. (*e*) Judgment in favor of Rountree, Barnes & Co., for $520.80, with 8 per cent. interest from November 1, 1885, and costs, obtained in Nash superior court, and docketed there November, 1886.

(2) That subsequent to the issuing and return as aforesaid of executions upon said judgments, to-wit, on the 18th day of December, 1886, proceedings supplementary to execution were duly instituted before the superior court clerk of Nash county by said T. P. Braswell & Son on their said judgment, the defendants herein (James M. Mayo and F. L. Mayo, his wife; Mary H. Lyon, who has since intermarried with the

Digitized by Google

defendant Dr. J. C. Braswell; W. T. Mayo, V. W. Land, A. H. Ricks, and A. L. Taylor) were also duly served with the clerk's order therein. After an examinination before said clerk, an order was duly made in said proceedings, January 10, 1887, appointing Jacob Battle receiver of the debts, etc., of said James M. Mayo. Said receiver duly qualified. Afterwards the other judgment creditors intervened. The orders had and made in said proceedings were duly recorded in Nash and Edgecombe superior courts. For fuller particulars, reference is had to the third section of the complaint, the allegations of which are adopted by the referee.

(3) That the defendant James M. Mayo is insolvent, and has been insolvent for more than two years prior to January 1, 1886, but before that time he was in the possession of a large real and personal estate, and was considered to be worth from fifty to seventy-five thousand dollars. He, however, early in 1885, sold most of his real and personal property to different parties, on long time, payable in annual installments, evidenced by their bonds, executed and delivered to them absolute deeds and conveyances therefor, and taking from them contemporaneous mortgages, securing their bonds for the purchase price. These bonds, amounting to about $70,000, said Mayo deposited with Rountree & Co., merchants, doing business in Norfolk, Va., to secure his indebtedness to them, then amounting to about $40,000. The property sold as above was worth about $27,000, and was sold to parties pecuniarily insolvent. Subsequently, on the 18th of March, 1886, the aforesaid purchasers having failed to comply, and having, by mutual agreement, surrendered their purchases, said Mayo and wife conveyed said property to said Rountree & Co. for the sum of $27,000, the purchase price to go as a credit upon said Mayo's aforesaid indebtedness, leaving still due thereon a balance of between sixteen and eighteen thousand dollars, which is still unpaid. A certified copy of said deed, part of the evidence herein, is made a part of this report.

(4) That said Mayo, in settlement or part payment of other creditors, conveyed and assigned to them during the early part of 1886 the balance of his property other than that in litigation in this action. He still owes upon said indebtedness two or three thousand dollars.

(5) That prior to the 2d day of February, 1886, the defendant V. W. Land was bound as surety for the defendant James M. Mayo to the Pamlico Banking & Insurance Company of Tarboro, N. C., in the sum of $3,000, for money borrowed by said Mayo, originally, some time in the spring of 1885. On said 2d day of February, said Mayo deeded to said Land certain real property situate in Edgecombe county, for $2,500. A certified copy of said deed in evidence is made a part of this report. Said deed was twice recorded,—first, February 22, 1886; and, second, March 10, 1886. See certified copies. About same time said Mayo deeded to said Land a tract of land in Bertie county, worth $1,500; but at the time the same was in litigation, and Land was to pay and has paid the expenses attending that litigation. Land was to pay for the above property by assuming and paying the bank debt, and paying the wife (the defendant F. L. Mayo) of said Mayo $1,000, Mayo claiming that he was indebted to her. Shortly after said conveyances, said Land and said Mayo confessed judgment to the bank, the bank refusing to release Mayo. Land has paid the bank debt down to about $900. He gave Mrs. Mayo his due-bill for $1,000, and has paid her $120 thereon,—paid the $120 in January, 1888. Land is, and was at the time of said conveyances, a brother-in-law of the defendant James M. Mayo, and was then, and is now, perfectly solvent. At the instance of Land, who became uneasy by reason of rumors of the *bona fides* of his aforesaid transactions with the defendant James M. Mayo, the bank, a defendant herein, caused execution to issue upon its aforesaid judgment, and, after due advertisement, sold thereunder on April 18, 1887, the interest of said Mayo and of said Land in the property in Edgecombe, conveyed as aforesaid to said Land by said Mayo, said Land becoming the purchaser at $2,910, and received the sheriff's deed therefor. Said property was worth $2,910 on February 2, 1886. Land paid the bank no part of this bid, except that he has been paying off the aforesaid debt from time to time.

(6) That said conveyances to the defendant V. W. Land were not made with intent to hinder, delay, or defeat creditors.

(7) That none of the conveyances and transfers of property referred to in sections 3 and 4 of this report were made with intent to hinder, delay, or defeat creditors.

(8) That the defendant Mary H. Lyon (now Braswell) is a niece of both the defendants James M. Mayo and F. L. Mayo, his wife. On the 29th day of October, 1885, said James M. Mayo was indebted to said Mary H. on account of her distributive share of her grandfather's estate, upon which said Mayo was administrator. She also held a claim of $200, with interest, upon the land of the defendant F. L. Mayo for equality in division. Said Mayo gave her his note on said October 29, 1885, for $1,500, to cover both these amounts, which he believed was as much as $1,500. On the 2d day of February he executed to the said Mary H. a mortgage to secure said note, which was payable six months after date, whereby he conveyed to her his equitable estate in the Herbert land in Nash county, and certain personal property thereon, consisting of a steam-engine, two mules, one farm cart, half interest in a wagon, lot corn, fodder, tobacco, cotton-seed, and other personal property upon said farm. Said Mayo, also, on same day, executed to said Mary H. another mortgage securing said note, conveying certain lands in Edgecombe county; but

Digitized by Google

there is no controversy as to that mortgage. Said Mayo remained in the possession of said Herbert tract, and the personal property aforesaid thereon, and continued in possession until the Herbert tract was sold, about the first of this year, under a prior mortgage, using and enjoying the same, and consuming the property, to-wit: the corn, fodder, and cotton-seed. On the ——— day of February, 1888, the personal property remaining, consisting of one mule, half interest in the wagon, and one cart, were sold, bringing $118, and the proceeds by agreement deposited with one A. Braswell, to abide the determination of this suit. The engine was also sold, but it was claimed as a fixture by the owners of the land, and brought only $5. At the time of the execution of said mortgage it was the purpose and intention of said Mayo to remain in the possession of said Herbert place and the personal property thereon, and use, enjoy, and consume the same, such as would be consumed by the use, until the same was sold under said mortgage.

(9) That the Herbert place, when sold, did not bring enough to pay the first mortgage debt.

(10) That prior to the 1st day of January, 1885, and since her marriage, the defendant F. L. Mayo owned in her own name and right the tract of land known as the "Lyon" tract, situate in Edgecombe county, and containing about 227 acres. On said date, said F. L. Mayo joined with her husband, James M. Mayo, in the conveyance of said land to one W. B. Harper. The purchase bonds therefor were taken, payable to said J. M. Mayo. At the time of said sale to said Harper, and as a consideration therefor to said F. L. Mayo, it was agreed between said J. M. Mayo and his wife that he would convey to her property in exchange of equal value to her property sold Harper. In pursuance of that agreement, the deeds referred to in the pleadings were executed and delivered by J. M. Mayo and wife to W. T. Mayo, trustee, conveying the Lowe tract, containing 360 acres, and the personal property thereon, the Charlie Knight tract, containing about 45 acres, all situate in Edgecombe county, bearing date January 1, 1885, and were recorded in said county February 27, 1886. A certified copy thereof is in evidence, and is made a part of this report. The property thereby conveyed is about of equal value to the Lyon tract.

(11) That said deed to W. T. Mayo, trustee, was not made with intent to hinder, delay, or defeat creditors.

(12) That the trust-deed from the defendant J. M. Mayo to the defendant W. T. Mayo, conveying the Williford tract, situate in Nash county, bearing date December 2, 1886, and recorded same day, was not recorded until after the docketing of the judgments set out in section 1 of this report, in favor of Spotts & Gibson, T. P. Braswell & Son, and Rountree, Barnes & Co.; besides, it was made to hinder, delay, and defeat creditors.

(13) That at the time of his failure, on or about January 1, 1886, the defendant J. M. Mayo was justly indebted to his wife, the defendant F. L. Mayo, in the following sums: (*a*) One thousand dollars given her by her father in 1873; (*b*) fourteen hundred and thirty-nine dollars, her distributive share of her father's estate, settled in 1882, and upon which said Mayo administered; (*c*) one hundred and forty dollars and thirty-seven cents, amount collected for her from J. L. Lyon in 1883. These amounts were received by J. M. Mayo with the knowledge of his wife, and with her tacit consent for him to use the same. No express understanding or agreement was entered into between them as to payment. The defendant J. M. Mayo treated and used the same as his own property, with no expectation of accounting to his wife therefor. But his said wife was not a party to any agreement that he should so use said money This is true as to her land also. No express agreement was entered into between them as to the rents and profits. Her said husband took possession of said lands, and used and enjoyed the same, and received the rents and profits, as he did the aforesaid sums of money, as a matter of course, and with no expectation of accounting to her therefor. These rents and these sums of money were received by him long prior to 1886, and with the exception of rents accruing thereafter, and the small amount received from J. L. Lyon prior to 1882, when he admits he believed himself perfectly solvent, and he gives none in his wife's name for taxes. He has been her agent to list her taxes, and swore to her property.

(14) That the defendant F. L. Mayo has received in payment of her aforesaid demands $1,000, February 2, 1886, from V. W. Land; $1,158.59, from A. L. Taylor and A. H. Ricks, during the year 1886, and $810, August 2, 1886, as appears from credits on the alleged $1,439 note,—more than enough to discharge her demands.

The referee therefore concludes:

(1) That the mortgage to Mary H. Lyon (now Braswell) conveying the Herbert tract, and the personal property thereon, is fraudulent as to creditors, and void, and that the plaintiff is entitled to the proceeds of the personal property, to-wit: $118 to be applied to the judgment creditors aforesaid, in the order of their priority.

(2) That the deed of trust to W. T. Mayo of the Williford tract is fraudulent and void as to creditors, Said land has been sold by order of Nash superior court to pay the balance due on the purchase money and costs. The plaintiff is entitled to the surplus, to be applied by him as aforesaid.

(3) That the plaintiff is entitled to collect and apply the proceeds of the three notes for $500 each,—one subject to credits of $158.69, December 26, 1886, executed by A. L. Taylor and A. H. Ricks, upon which he has obtained judgment in the manner above stated. For the facts as to these notes, see section 11 of

Digitized by Google

the complaint, which is adopted to the extent it is admitted by the answer.

(4) That the defendant F. L. Mayo is only entitled to interest on the principal ($2,759.37) of her debt against James M. Mayo from January 14, 1886, date of assignment to her of the A. L. Taylor and A. H. Ricks bonds.

Respectfully submitted,

J. M. MULLEN, Referee.

DEFENDANTS' EXCEPTIONS TO REFEREE'S REPORT.

The defendants except to the report of J. M. Mullen, referee, filed herein at the present term of this court, and for grounds of exceptions respectfully show:

(1) That the referee committed error in his eighth finding, wherein he finds that, at the time of the execution of said mortgage to Miss M. H. Lyon, it was the purpose and intention of the said Mayo to remain in the possession of said Herbert place and personal property thereon, and use, enjoy, and consume the same, until the same was sold under said mortgage. The only evidence on the subject is found in the testimony of James M. Mayo, on page 22, wherein he testifies as follows: "Miss Lyon got all the tobacco, so far as I know. The corn, fodder, and cotton-seed embraced in her mortgage were kept upon the land subject to her order. I think I notified Miss Lyon that the corn, fodder, etc., were there at her disposal, but she got none. I think I stated to the clerk that these articles were not measured. If I did so state, I did not then know they had been measured by the tenants."

(2) That said referee committed error in his finding No. 12, to-wit, that the deed from the defendant James M. Mayo, to defendant W. T. Mayo, trustee, conveying the equitable interest of said James M. Mayo in the Williford tract of land, situated in the county of Nash, was made to hinder, delay, and defeat creditors. The interest of the defendant J. M. Mayo in the tract of land referred to was covered by the deed referred to in paragraph 2 of the referee's report, where it is found as a fact that said deed was not made to hinder, delay, and defeat creditors. The only testimony upon this subject is found in the testimony of James M. Mayo, on pages 13 and 14 of the evidence, wherein said Mayo testified that, by an agreement with his wife, he conveyed her the Lowe place, the Charlie Knight place, and his interest in the Williford place, in exchange for the Lyon tract, the property of his wife, and which she had joined with him to convey to W. B. Harper. The referee adopts the testimony of said Mayo in his tenth and eleventh findings, and sustains this transaction as *bona fide*. The defendants submit that at the time of docketing the judgment in favor of Spotts & Gibson, T. P. Braswell & Son, and Rountree, Barnes & Co., in the superior court of Nash county, the defendant J. M. Mayo had no interest in the said Williford land liable to sale under execution, or upon which a lien could be created by force of docketing said judgment. That there is no evidence to support the referee's finding.

(3) The referee committed error in his thirteenth finding, wherein he finds the various sums in which James M. Mayo is indebted to his wife, F. L. Mayo. He should have found that James M. Mayo was justly indebted to his wife F. L. Mayo: *First*. In the sum of $1,396.27, with interest from 4th November, 1879, at the rate of 8 per cent., evidenced by note of that date. *Second*. In the sum of $1,439, with interest from 31st March, 1882, at the rate of 8 per cent., as evidenced by note of that date. *Third*. In the sum of $140.37, with interest from 17th March, 1883, at the rate of 8 per cent., as evidenced by note of that date. *Fourth*. In the sum of $700, with interest from 1st January, 1878, at 8 per cent., as evidenced by note of that date. *Fifth*. In the sum of $700, with interest from 1st January, 1879, at 8 per cent., as evidenced by note of that date. *Sixth*. In the sum of $700, with interest from 1st January, 1881, at 8 per cent., as evidenced by note of that date. *Seventh*. In the sum of $700, with interest from 2d January, 1882, at 8 per cent., as evidenced by note of that date. *Eighth*. In the sum of $700, with interest from 1st January, 1883, at 8 per cent., as evidenced by note of that date. *Ninth*. In the sum of $700, with interest from 1st January, 1884, at 8 per cent., as evidenced by note of that date. *Tenth*. In the sum of $700, with interest from 31st December, 1885, at 8 per cent. interest, as evidenced by note of that date. *Eleventh*. In the sum of $700, with interest from 1st January, 1886, at 8 per cent. interest, as evidenced by note of that date. *Twelfth*. In the sum of $700, with interest from 1st January, 1880, at 8 per cent., as evidenced by note of that date. The finding of the referee that the amounts represented by the first, second, and third notes above mentioned were received by the said James M. Mayo with the tacit consent of his wife, and with no express understanding or agreement to pay the same, is altogether unwarranted by the evidence. The referee assumes arbitrarily to accept or reject the testimony of James M. Mayo, the only witness upon the subject. Reference is made to pages 17, 18, 19, and 20 of the testimony of James M. Mayo. The referee committed further error in finding no express agreement was entered into between James M. Mayo and his wife, F. L. Mayo, in respect to the rents of his wife's land, and wherein he found the said Mayo took possession of the said lands, and used and enjoyed the same, and received the rents as a matter of course and right, and with no expectation of accounting to his said wife therefor. The defendants submit that said finding is arbitrary, and unwarranted by the evidence. The testimony of James M. Mayo, on page 17, is as follows: "The nine notes, each for $700, were executed at the time they were dated, and were for the

Digitized by Google

rent of my wife's land heretofore mentioned by me, that being my agreement with my wife. I thought $700 was a fair rental value, and it was the price agreed upon between us." That there is no evidence to support the referee's finding.

(4) That the referee has committed error in his fourteenth finding, wherein he finds that F. L. Mayo has received from James M. Mayo in payment more than enough to discharge her just demands against said James M. Mayo. He has committed error in not charging James M. Mayo with the amount of the nine rent notes, and the further error of not allowing F. L. Mayo interest upon the first, second, and third notes mentioned in paragraph 3.

The defendants except to the conclusions of law of the referee: (1) The first conclusion of law is unwarranted either upon the facts contended for in first exception hereof or upon the facts as found by the referee. (2) The second conclusion of law is unwarranted either upon the facts contended for in the second exception hereof or upon the facts as found by the referee. (3) The defendants except to the correctness of the conclusion of law No. 3, for the reasons set forth in exception 3 hereof. (4) The defendants except to the referee's fourth conclusion of law.

JUDGMENT.

This cause coming on to be heard upon the report of J. M. Mullen, referee, (filed at spring term, 1888,) and upon the exceptions to the same, filed both by the plaintiff and the defendants, and all the exceptions of the defendants being sustained, except only that in regard to the Williford land, which exception is withdrawn by the defendants, and all the exceptions of the plaintiff being overruled, except his third exception in regard to the Edgecombe real estate, mortgaged by James M. Mayo to Mary H. Lyon, now Mrs. Braswell, which exception is withdrawn, it is now, on motion of the defendants, ordered, adjudged, and decreed by the court that said report shall be reformed in accordance with the said defendants' exceptions, and, as thus reformed, shall be confirmed and sanctioned by the court, the particulars wherein said report is reformed being as follows; (*a*) Referee's eighth finding is to be changed so as to show that if, at the time of the execution of the mortgage by J. M. Mayo to Miss M. H. Lyon, it was the purpose and intention of said Mayo to remain in the possession of said Herbert place and personal property described in said mortgage, and use, enjoy, and consume the same, until the same was sold under said mortgage, she did not accept said mortgage with any knowledge of or concurrence in any unlawful intent on his part, but accepted the mortgage in good faith to secure a just debt. (*b*) Referee's thirteenth finding is to be changed so as to show that James M. Mayo was justly indebted to his wife, F. L. Mayo, (1) in the sum of $1,396.27, with 8 per cent. interest from November 4, 1879, evidenced by note of that date; (2) in the sum of $1,439, with 8 per cent. interest from March 31, 1882, as evidenced by note of that date, for distributive share in her father's estate; (3) in the sum of $140.37, with 8 per cent. interest from March 17, 1883, as evidenced by note of that date, given for money collected on note F. L. Mayo held on J. T. Lyon; (4) in nine sealed notes, each for $700, given for the rent of the wife's land, inherited from her father, and bearing date January 1, 1878, 1879, 1880, and 1881, January 2, 1882, January 1, 1883, 1884, December 31, 1885, and January 1, 1886, bearing 8 per cent. interest from their respective dates. The amounts represented by the first, second, and third notes above mentioned were received by the said James M. Mayo, (sums of money belonging to his wife,) with the express agreement that he would repay the same. That the defendant J. M. Mayo occupied the lands of his wife, and with her knowledge received the rent therefrom, during the nine years for which said $700 notes were executed. There was an express agreement between them, as shown by the said notes, that he would repay her said rents. That at the time of the assignment of the Ricks and Taylor notes by said Mayo to his wife he was indebted to her upon three notes,—one $1,396, one $1,439, one $140, with interest,—in the sum of $4,132.25. That the defendant F. L. Mayo, is entitled to interest on the three notes mentioned in the first exception, and numbered 1, 2 and 3, from the dates thereof, upon which there was due August 2, 1886, after allowing all credits thereon, and also the payments on the Ricks and Taylor notes, in the sum of $308.26. That in addition he owes her the nine $700 notes, with interest, as aforesaid.

It is further adjudged by the court as conclusions of law: (1) That the mortgage executed by James M. Mayo to Mrs. Braswell, conveying the Herbert place, in Nash county, and certain personal property mentioned in the eighth finding of the referee, was not executed with any intention on the part of Mrs. Braswell that J. M. Mayo should remain in the possession thereof, and use, enjoy, and consume the same, and therefore was not fraudulent. (2) That the assignment of the Ricks and Taylor notes by J. M. Mayo to his wife, F. L. Mayo, was not voluntary, but upon fair and full consideration. (3) That the defendant F. L. Mayo is entitled to interest upon all her said notes against her husband. Now, upon motion of the defendants, it is adjudged that Mrs. J. C. Braswell is entitled to the fund of $118 deposited with A. Braswell to await the determination of this suit; and, further, that W. T. Mayo, trustee for F. L. Mayo, is entitled to recover of the plaintiff whatever collections, if any, made by him on the Ricks and Taylor notes, and of A. H. Ricks and A. L. Taylor whatever may still be due on the judgment against them. The surplus in Williford vs. Willi-

Digitized by Google

ford is $28.90, with 8 per cent. interest from August 1, 1887, and it is adjudged that the same shall be collected and held by the plaintiff as receiver. The costs of this action, and of all the actions consolidated into this one, to be taxed by the clerk, and to include a fee of $75 hereby allowed the referee, shall be paid by the plaintiff, as receiver, and as far as he has the funds, but he is not responsible personally for the same; and whatever sum may still remain due on such bill of costs shall be reported by the said receiver in the several actions brought by creditors of J. M. Mayo, as appears in the complaint. The plaintiff does not assent to any part of this judgment, unless where it so distinctly appears in the same, and he especially objects to the judge's finding additional facts to those found by the referee. The plaintiff is allowed 30 days in which to file exceptions to this judgment, under rule 7 of the supreme court. The plaintiff appeals from this judgment to the supreme court.

J. F. GRAVES, Judge Presiding.

Plaintiff's exceptions to the judgment, filed under rule 7 of the supreme court, and copied from the manuscript record, are as follows:

"(1) That his honor erred in stating on the face of said judgment that the value of J. M. Mayo's interest in the Williford land was nothing at the time of the assignment to W. T. Mayo, and that it was agreed that that matter should be eliminated from the controversy. The record in Williford vs. Williford, a memorandum of which is filed by the referee as an exhibit, shows that there was a surplus after paying the debt for purchase money against J. M. Mayo.

"(2) That his honor, while sustaining the finding of fact set forth in paragraph 8 of the referee's report, erred in not declaring that such fact rendered null and void the mortgage from J. M. Mayo to Mary H. Lyon, dated February 2, 1886, made to secure the pre-existing debt, even though there was no actual intent on the part of the mortgagee to defraud mortgagor's creditors.

"(3) That while it is admitted that said mortgagee had no actual intent to defraud said creditors, it is manifest from the evidence, and his honor erred in not finding the fact, that she had notice that the mortgagor was greatly in debt, and that his object was to take care of himself at the expense of his creditors, and that said mortgage was therefore null and void as to such creditors; or the report should have been recommitted, that this fact might be ascertained.

"(4) That if the above fact appeared to his honor not to have been distinctly found by the referee, and if participation in the fraud on the part of the said mortgagee were necessary, then his honor erred in not recommitting the report to the referee, that he might distinctly pass on that fact.

"(5) That his honor erred in sustaining the defendants' third exception, and declaring that there was no evidence to support the findings of fact set forth in the thirteenth paragraph of the referee's report, (see last part of said exception, supra.)

"(6) That his honor erred in not declaring, as the referee in effect declared, that J. M. Mayo did not execute the notes described in the defendant's third exception, at the times when they purport to have been executed. The preponderance of evidence was against the finding of his honor.

"(7) That if it appeared to his honor that there was a discrepancy between the referee's findings in paragraph 13 of his report, that J. M. Mayo was justly indebted to his wife on January 1, 1886, in the sums of $1,000, $1,439, and $140.37, and that he received these sums from her long before he became insolvent, and without any agreement between them, or expectation on his part, of accounting to her for the same, then his honor erred in not recommitting the report to the referee to pass clearly on the facts.

"(8) That if it appeared to his honor that the referee had not definitely passed on the fact alleged in the latter part of the eleventh paragraph of the consolidated complaint, to-wit, that the transfer of the Ricks and Taylor notes were made with intent to hinder, delay, and defraud creditors, then the report ought to have been recommitted, that said fact might be passed upon.

"(9) That his honor erred in not declaring that the referee's findings of fact stamped the transfer made by J. M. Mayo to his wife, in payment of alleged indebtedness, with fraud, and that, as that made the transfer void *in toto*, his (the referee's) allowing her to retain to the extent of collections which she had made and appropriated before the plaintiff effected a lien, was not an error of which she could complain.

"(10) That his honor erred in overruling the plaintiff's fourth exception, and it is insisted that he ought to have declared that not even the principal money received by J. M. Mayo for his wife constituted valid, enforceable indebtedness in her favor as against the claims of his creditors, and that it ought to have been found as a fact that she was a party to an agreement that he should use her money as his own, with no expectation on the part of either, at the time he received it, that it should be accounted for.

"(11) That his honor erred in overruling the plaintiff's fifth exception. Mrs. Mayo should have been directed to refund so much of the money received by her from him as necessary to satisfy the claims of creditors.

"(12) That his honor erred also in not declaring that the nine notes which J. M. Mayo claims to have executed to his wife, each for $700 and interest, for the rent of her land, were fraudulent, fictitious, and void.

"(13) That his honor erred in not declaring that in any event J. M. Mayo, under the circumstances which exist in this case, was not liable to account for the income of his wife's separate estate, under Code, § 1837,

Digitized by Google

and that such income did not constitute valid, enforceable indebtedness in her favor against him, to the prejudice of creditors.

"(14) That his honor erred in finding that there was an express promise by J. M. Mayo to repay to his wife the money received from her, and also to pay her each year $700 for the rent of her land.

"(15) That in any event he ought to have found that $700 was greatly more than the annual value of said land.

"(16) That his honor erred in finding that, at the time of the transfer of the Ricks and Taylor notes by J. M. Mayo to his wife, he was indebted to her in the sum of $4,132.25.

"(17) That his honor erred in sustaining the defendant's fourth exception, and in overruling the referee's fourteenth finding of fact.

"(18) That his honor erred in declaring that the assignment of the Ricks and Taylor notes to F. L. Mayo by J. M. Mayo was not voluntary, but upon full and fair consideration.

"(19) That his honor erred in adjudging that F. L. Mayo was entitled to collect interest upon the three notes specified in the defendants' third exception.

"(20) That his honor erred in his adjudication touching the fund of $118 deposited with A. Braswell to await the determination of this suit. It should have been ordered that this fund be paid over to the receiver.

"(21) That his honor erred in his adjudication in regard to the judgment obtained by the receiver against Ricks and Taylor. The receiver, who has collected nothing on said judgments, should have been authorized to collect the same and apply the proceeds to the payment of judgment creditors.

"(22) That his honor erred in directing costs to be taxed against the receiver personally, under Code, § 535, (1.) Such costs should have been chargeable on the fund of $118 and the judgment against Ricks and Taylor.

"(23) That his honor erred in overruling the plaintiff's first exception.

"(24) That his honor erred in overruling the plaintiff's second exception. He should have reversed the referee's finding, and declared that the conveyances to V. W. Land were made with intent to hinder, delay, and defeat creditors.

"(25) That his honor erred in this: He had no right to find additional facts,—facts that the referee had not passed on at all. For instance, it is alleged in the complaint that the Ricks and Taylor notes were transferred by J. M. Mayo to his wife, with intent to defraud creditors, and the defendants J. M. Mayo and wife contend that he executed to her notes described in the defendants' third exception. It may be that these facts are not passed upon by the referee at all. If so, the report should have been recommitted to him."

On the argument, counsel revived the discussion as to the right of this court to review findings of fact made by a referee or judge, and also questioned the power of the judge below to modify the report of the referee upon the facts. It is necessary therefore to collect, rearrange, and reiterate some of the settled rules that define the duties and powers respectively of referees, the trial judge, and the appellate court in disposing of references by consent. This is a mode of trial selected by the parties, who, in agreeing to it, are deemed to have waived their constitutional right of trial by jury. Const. art. 4, § 13. Sections 422 and 423 of the Code are, so far as is material to the decision of the questions before us, the same as sections 246 and 247 of the Code of Civil Procedure, including the provision that the report "shall have the effect of a special verdict," and therefore the line of our decisions, running through 20 years, have been constructions of the same language.

The referee must state in his report his findings of fact and law separately, and when the judge who hears exceptions to the report makes no special finding of fact, it is presumed that he adopts those of the referee, which are considered *prima facie* correct. Barcroft v. Roberts, 92 N. C. 249; Green v. Jones, 78 N. C. 268. But, in the exercise of his revisory power, the judge may set aside, modify, or confirm, in whole or in part, the report of the referee, and the appellate jurisdiction attaches to his rulings in matters of law only. Vaughan v. Lewellyn, 94 N. C. 472. His findings of fact upon appeal to this court are conclusive, and his conclusions of law upon them are alone reviewable. Barcroft v. Roberts, supra; Green v. Castlebury, 70 N. C. 20; Klutts v. McKenzie, 65 N. C. 103; Armfield v. Brown, 70 N. C. 27; Patterson v. Wadsworth, 89 N. C. 407.

One valid exception may be raised to the findings of the referee, adopted by the judge either directly or by failing to modify them, or to those of the judge substituted for the referee's, but it raises in reality only the question of law whether there is any evidence to support the conclusions of fact. Where no such objection is made, and in apt time, the findings of the judge, whether made or adopted, are final, and cannot be reviewed in this court; and if, upon hearing such exception when taken, it appears in the appellate court that there is any evidence to sustain the finding, it will be deemed conclusive. Usry v. Suit, 91 N. C. 406; Reaves v. Davis, 99 N. C. 425, 6 S. E. Rep. 715. The supreme court, under the constitution of 1868, (article 4, § 10,) had no jurisdiction to try any issue of fact, as distinguished from a question of fact. Issues of fact were defined by the court to mean such matters of fact as are put in issue by the pleadings, and a decision of which would be final, and conclude the parties upon the matters in controversy in the issue. Heilig v. Stokes, 63 N. C. 612. This cause, constituted as it is in this court, is certainly not one in which the supreme court could have decided the issues of fact before the constitution of 1868 was

Digitized by Google

ratified, according to the practice as it then existed. Though this is a cause that would have been cognizable in a court of equity then, it presents issues of fact which the parties have elected to try by a referee in place of a jury trial, and the evidence does not come to this court in such shape as to require us to review it, or even to determine whether, with or without the aid of legislation, the case might have been so presented on appeal as to require us, in the exercise of the jurisdiction conferred by the amendment of 1877, to decide the issues of fact involved. Jones v. Boyd, 80 N. C. 258; Coates v. Wilkes, 92 N. C. 376.

Having stated the foregoing general principles applicable to the consideration of trials by referee, we will find that some of the exceptions which appear in the record will fall within the rules laid down, and be disposed of without directly discussing them at any length. The following were all the exceptions filed by the plaintiff in the court below: (1) The plaintiff objects to the referee's finding of fact No. 4, as to the amount of indebtedness still due from Mayo after transferring, or attempting to transfer, all his property. (2) The plaintiff objects to the referee's sixth finding of fact, as being contrary to the evidence. (4) The plaintiff objects to the referee's finding of fact, and insists that not even the principal money there mentioned constitutes valid, enforceable indebtedness in favor of Mrs. Mayo, as against the claims of creditors. Our objection being mainly this: that he ought to have found that Mrs. Mayo was a party to the agreement which he mentions. (5) The plaintiff objects to the report because the referee did not direct Mrs. Mayo to refund to her husband so much of the money received by him from her as is necessary to satisfy the claims of creditors.

Without considering whether his honor ultimately modified the findings of the referee covered by the first, second, and third exceptions, we will see at a glance that they were all based on the objection that the facts were found against the weight of evidence, and could serve no purpose unless they could have induced his honor to set aside that portion of the report, and find the facts on the points mentioned for himself; and, whether he did or did not make any alteration, his decision is not reviewable.

The fifth exception is in form subject to an objection that has frequently been held to be fatal. It is not sufficiently specific,—does not point out any conclusion of law stated by the referee in his report, at which the exception is aimed, nor the precise error in the referee's ruling. Suit v. Suit, 78 N. C. 272. The exception in that case was that the referee ought to have found as a conclusion of law that the plaintiff recover nothing. Here the ground is because "the referee did not direct Mrs. Mayo to refund to her husband so much of the money received by him from her as is necessary to satisfy the claims of creditors." The only difference is that in this case the exception raises objection in general terms to the final disposition of one of several funds in controversy, and there it was to the final conclusion as to the only matter involved in the action. We concur with the judge in overruling this with the three other exceptions. Currie v. McNeill, 83 N. C. 176; Whitford v. Foy, 71 N. C. 527.

Embodied in the judgment of the court we find but one exception, which is as follows: "The plaintiff does not assent to any part of this judgment, unless where it distinctly appears in the same, and he especially objects to the judge's finding additional facts to those found by the referee." The withholding of assent cannot be treated as a specific exception to the whole judgment, just as an exception to a whole charge has been held not sufficient, even where the counsel after the term filed their assignments of error pointing out the particular objection. Bost v. Bost, 87 N. C. 476. In Green v. Castlebury, supra, Mr. Justice READE, avowing for the court the purpose to give sections 246 and 247, Code Civil Proc., such a construction as would best subserve the convenient administration of justice, and to settle the practice, formulated 10 rules governing trials by referee that clearly "blaze the way" and constitute the substratum of the principles already stated; but, probably because of the fact that the judges usually adopted the findings of referees, he did not indicate when or how an appellant should note the exception that there was no evidence to support a finding of fact made by a judge in revising a referee's report. Counsel are required to present such objections to the judge's rulings as constitute ground of motion for new trial during the term at which the verdict is rendered, in order to give the judge an opportunity to set aside the verdict, if convinced that there is error, because he has no power to do so after the end of the term, and exceptions made after the term are not considered. The objection that there is no evidence to sustain one of the conclusions of fact stated by a judge on revising a referee's report should be likewise made during the term when the cause is heard, in order to enable the judge to modify his findings, if any error is pointed out; and we will not consider exceptions, based upon such alleged error, filed for the first time within 10 days, under rule 7 of this court.

The plaintiff, it seems, filed, under rule 7, 25 exceptions, which we find in the record, and which ought to have been printed instead of the assignment of errors remodeled and rearranged that appear in the printed record. As the argument was addressed to the printed exceptions, or what purported to be exceptions, we find greater difficulty in reviewing the points properly presented for our consideration.

Disregarding the order observed by the plaintiff, we address ourselves first to the twelfth exception: His honor, after finding

Digitized by Google

that although Mayo occupied his wife's lands for nine years, and with her knowledge received the rent therefrom, and that there was an express agreement on his part to account to her for the rents, which was afterwards set forth in the nine notes for $700 each, declares and adjudges, in effect, that the notes constitute valid indebtedness on the part of the husband to his wife. It was insisted that the wife's power to contract with her husband in reference to the rent of her separate estate was restricted by the provision of section 1837 of the Code; that "no husband who, during coverture, (the wife not being a free trader under this chapter,) has received, without objection from his wife, the income of her separate estate, shall be liable to account for such receipt for any greater time than the year next preceding the date of a summons issued against him in an action for such income, or next preceding her death." It is settled that none of the other sections of chapter 42 of the Code are to be construed as limiting the wife's power to acquire property by contracting with her husband or any other person, but only to restrain her from, or protect her in, disposing of property already acquired by her. Kirkman v. Bank, 77 N. C. 394; George v. High, 85 N. C. 99; Dula v. Young, 70 N. C. 450. But section 1837 does contain the restriction that the liability of the husband for rents received without objection on the part of the wife shall be limited. The wife must have "knowledge" in order to enter into any contract, and the fact that there was an express agreement, that ultimately assumed the form of notes, precludes the possibility of assent, and implies objection on her part to the receipt of the rents, unless upon a promise to account for them.

The defendant J. M. Mayo, on the 29th of October, 1885, being indebted to his niece, Mary H., now the wife of J. C. Braswell, for her distributive share in the estate of her grandfather, as he supposed, in the sum of about $1,500, executed to her on that day a mortgage conveying a tract of land known as the "Herbert Tract," and also certain personal property on said place, to secure the payment of a note for $1,500, executed contemporaneously as evidence of his indebtedness to her. He continued to live on said place, and to use the personal property conveyed in the mortgage, some of which was consumed in the use, until about the first of the year 1887, when the Herbert place was sold under a prior mortgage, and the proceeds were insufficient to satisfy the debts secured by it. The $118 is the fund realized by a sale of the said personal property in February, 1888, and deposited with A. Braswell to await the decision in this case. His honor finds that the said mortgage deed was not executed with any intent on the part of said Mary H. (now Mrs. Braswell) that Mayo should remain in possession thereof, and use, enjoy, and consume the same, and therefore was not fraudulent. The plaintiff's exception No. 2 is based on the ground that there was error in the holding that the mortgage deed made to secure a pre-existing debt was not void, because the mortgagee did not participate in the fraud. The deed was executed to secure a valid, pre-existing debt of $1,500, which is held to be a valuable consideration. A mortgage deed executed in this way, for a valuable consideration, and with no fraudulent intent on the part of the mortgagee, is valid, though the mortgagor did execute it for the purpose of defrauding his creditors. Savage v. Knight, 92 N. C. 493; Lassiter v. Davis, 64 N. C. 498; Beasley v. Bray, 98 N. C. 266, 3 S. E. Rep. 497. This principle is sustained by the reasoning in those cases, and disposes of the twentieth exception, relating to the same subject.

The referee found that J. M. Mayo justly owed his wife the three notes mentioned in his report. His honor adopted his finding, and allowed her interest on the unpaid notes. We can discover no error in this, and the exception points out none. Exception 19 is overruled. The judge finds that when the Ricks and Taylor notes were assigned by J. M. Mayo to his wife he was indebted to her in a large amount upon these notes, as set forth in the judgment, and subsequently he holds that said assignment was not voluntary. His finding of fact was conclusive. His legal deduction naturally follows from the finding. Therefore we cannot sustain either exception 18 or 21, because the assignment was not voluntary, if the consideration was a large debt, as found; and, if made upon consideration, it is valid, and the money collected on the judgment against Ricks and Taylor should be paid over to W. T. Mayo, trustee, for the benefit of F. L. Mayo. All of the other exceptions filed by counsel under rule 7 we think are amenable to the objection that they ask us to review findings of fact which, under the rules already stated, are conclusive, and we cannot therefore sustain any of them. The judgment of the court below must be affirmed.

(103 N. C. 203)

FRY v. CURRIE.

(*Supreme Court of North Carolina.* March 25, 1889.)

APPEAL—REHEARING.

A case will not be reversed upon petition to rehear unless it was decided hastily, and some material point was overlooked, or some direct authority was not called to the attention of the court.

Petition to rehear. For former decision see 91 N. C. 436.

McIver & Black, for plaintiff. *J. W. Hinsdale*, for defendant.

SMITH, C. J. This cause, the ruling in which we are now asked to rehear and reverse, was decided, and the appellant's exceptions adversely disposed of, at fall term, 1884, of the court. 91 N. C. 436. It was based upon an adjudication made in Mason

Digitized by Google

v. McCormick, 85 N. C. 226, three years previous, which during this interval seems not to have been questioned, to the effect that boundary lines may be proved by declarations of old and deceased persons, made *ante litem motam*, and having personal knowledge of the locality, even when coming from an adjoining proprietor. The ruling has since been approved in Smith v. Headrick, 93 N. C. 210; Halstead v. Mullen, Id. 252, decided a year later; and in the more recent case of Bethea v. Byrd, 95 N. C. 309. The language of MERRIMON, J., in the last-named case is distinct and emphatic, when speaking of the witness who testifies: "The mere fact that he was the owner of an adjoining tract of land did not necessarily make him interested. He was not seeking to point out his own corner, but that of the 'Clevins grant,' not to promote his interests and advantage, to enlarge or change his boundary, or those of any other person. So far as we can see, he was content with his own lines and boundary. It seems that he was entirely disinterested, and his declarations come exactly within the exception above pointed out." The other ruling contested, to-wit, that exceptions to the charge of the court in general, and pointing out no particulars in which error is assigned, cannot be entertained upon an appeal, has been so frequently and uniformly asserted that it cannot be necessary to refer to specific cases in which it has been so ruled. The question of possession under and by virtue of color of title to ripen and perfect that title, pressed with some earnestness now, was not the ground upon which the vesting of the estate was claimed, but it was derived from a regular chain of conveyances, originating in a grant from the state in November, 1820, issued to Thomas Bryant, for 100 acres, and terminating in the sheriff's deed made in 1841 to the plaintiff, pursuant to a sale under execution issued to him; and the controversy was concerning the location of the lines of the grant so as to cover the land claimed in the action. In re-examination of the case on appeal, while the answer denies the wrongful possession of the land, and thus imposes upon the plaintiff the burden of proving the defendant to be in possession, and wrongfully so, the sufficiency of the evidence, if there be any, to warrant the finding, was for the consideration of the jury, and therefore the only point that could arise for reviewal on appeal is presented as to there being any evidence reasonably sustaining the verdict in response to the second issue. Upon this the court ruled that there was some evidence, and it is set out in the case on appeal. Moreover, no direction was asked to be given to the jury, and none seems to have been given beyond the summary statement of acts of ownership exercised over some of the land by one of the preceding parties through whom the plaintiff claims in resistance to an asserted authority over the same by the grantee, the father of the defendant, and under whom he claims, and the cause seems to have proceeded and to have been determined upon the sole inquiry as to the position of boundaries. We recur to these matters in connection with the former trial, not to uphold the rulings then made, preferring to let their vindication rest upon the reasoning and supporting authorities contained in the opinion, but rather to show that the exceptions now urged were fully and carefully considered and decided then; and, according to the practice, notwithstanding the certificate of counsel that we committed errors, the case is not presented in which we should be called on to unsettle the law as declared. The rule on the subject in the clear and forcible language of the late chief justice is thus stated in Watson v. Dodd, 72 N. C. 240: "The weightiest considerations make it the duty of the courts to adhere to their decisions. No case ought to be reversed upon petition to rehear unless it was decided hastily, and some material point was overlooked, or some direct authority was not called to the attention of the court." This is reiterated in Hicks v. Skinner, Id. 1, and again by the present court in Haywood v. Davis, 81 N. C. 8; Devereux v. Devereux, Id. 12; Lewis v Rountree, Id. 20; and recently in Hannon v. Grizzard, 99 N. C. 161, 6 S. E. Rep. 93. It is not suggested that any of these conditions underlie and sustain the present application, and we have but a repetition of the argument urged with equal earnestness, and as much, but not more, legal learning at this rehearing.

We must adhere to the rule announced, and it is not sufficient merely that other members of the bar, who perhaps have not heard the argument, and may not have given the same careful consideration to the questions raised and decided, are of opinion, and so certify, that the court has committed error in its exposition of the law, though this is an indispensable prerequisite to the filing the petition. The practice does not admit of a simple repetition of an argument already heard, weighed, and passed upon after full deliberation; and the law must be considered settled after an adjudication, and not open to renewed discussion, except under the conditions mentioned, and, when shown, the court will be always ready to correct its own errors and oversights. But the security of titles and other considerations of the gravest moment demand the maintenance of such principles of law as are declared in cases involving their determination, unless the error is clearly made to appear. The application must be denied, and the petition dismissed.

(102 N. C. 264)

FAULCON *et al.* *v.* JOHNSTON.

(*Supreme Court of North Carolina.* March 25, 1889.)

ADVERSE POSSESSION — RENT — EVIDENCE — TRIAL.

1. The owner of land held adversely is not the owner of the crops, and cannot recover them or their value from one who has received and converted them, and cannot recover rent moneys paid

Digitized by Google

to a third person by direction of the adverse holder.

2. In an action to recover rent moneys received by defendant, defendant alleged that the land during the time when he received the rents was in the adverse possession of one who leased it, and directed the payment of the rents to defendant. *Held*, that the lessee could testify that he paid the rent to defendant because he was told to do so by such adverse holder, and that the latter claimed the land.

3. The record of a suit by plaintiffs against the adverse holder, in which they recovered possession, is admissible to show adverse occupancy.

4. Evidence of the circumstances under which defendant received the rents was properly admitted.

5. Defendant was properly permitted to testify to the contents of written statements given to him by the adverse holder, authorizing him to collect the rents. The question arising collaterally, production of the originals is not necessary.

6. Testimony that the adverse holder listed the land for taxation *ante litem motam* is admissible.

7. The admission of evidence of an execution sale of the land as the property of plaintiffs' devisor, and the deed made thereon, and of a deed by the purchaser to such devisor, the latter deed being admitted to show the time of its registration, is not error.

8. The admission of defendant's testimony that he could find no evidence of title in plaintiff's devisor is not prejudicial, plaintiffs' title having been established.

9. It is in the discretion of the court whether or not to allow the withdrawal of testimony on the application of the party who elicited it on cross-examination.

Appeal from superior court, Halifax county; GRAVES, Judge.

Action by Walter B. Faulcon and others against Johnston. Plaintiffs appeal.

Batchelor & Devereux, for appellants. *W. H Day* and *R. O. Burton, Jr.*, for appellee.

SMITH, C. J. This action, begun on December 29, 1886, in the superior court of Halifax county, is prosecuted by the surviving devisee, and administrators of two devisees, claiming under the will of Isaac N. Faulcon, to recover moneys received by the defendant during several years, as rent alleged to be due the plaintiffs for the use and occupation of the devised land, paid by tenants thereon to him. The defendant, not denying his receiving said moneys, in answer to the charge of his being responsible to account with the plaintiffs therefor, says that the said land, during this interval of time when rents were paid, was in the adverse possession of one James A. Faulcon, who, claiming to be the owner, leased parts of the premises to the different occupying tenants, to whom the defendant furnished agricultural supplies in carrying on farm operations, and that rent-notes taken by the lessor were handed over to defendant to secure the advances; which notes he collected, and so applied the proceeds. He further says that the said James A. Faulcon remained in possession and control of the said lands till the 1st of September, 1885, undisturbed, when suit was instituted by those deriving title under the will to recover possession, which, at November term of the superior court following, terminated in a judgment in their favor, and under it possession was acquired. The only issue extracted from the pleadings, and passed on by the jury, is in these words: "Did the defendant receive money or rents belonging to the plaintiffs; and, if so, how much?" and was answered in the negative;—whereupon judgment was rendered for the defendant, and the plaintiffs appealed. The plaintiffs introduced two contracts of letting, made by the testator, Isaac N., on January 1, 1878, one to John Young and the other to John Faulcon, of parts of the land in contest for four years, each writing declaring it to be the same land the lessees had rented for the two preceding years, and both testified to having cultivated the land during the time, and paid the rent ($70 a year) to the defendant. The lessee, John Young, having testified to his having paid the rents due from him to the defendant, was asked, on cross-examination, why he did so, and answered, because he was told by James Faulcon to pay the rent to defendant. Again he was asked by defendant if James Faulcon claimed the land, and in reply witness said he did claim it. These inquiries, and the responses, were admitted after objection of plaintiffs.

In our opinion the testimony was competent as explanatory of his act in making that payment of the rent, and under a demand as an assertion and exercise of a claim of ownership in James Faulcon, recognized by the witness. A similar inquiry, made of the lessee John Faulcon, met with a similar objection, and was disposed of by a similar ruling. The defendant offered, in order to prove an adverse occupancy of the land by James A. Faulcon, the record of an action brought against him by Walter B. Faulcon and Alice B. and Thomas C. Williams, who, except said Alice B., whose administrator is a party in her stead, prosecute the present suit to recover possession of the land in the alleged wrongful possession of said James A., and for damages for the detention, a judgment rendered by default, and also an award of a writ of possession at fall term, 1885, of Halifax superior court. This documentary evidence, after objection to its admission made and overruled, was allowed to go to the jury. The defense arises out of the want of any privity between the plaintiffs and defendant from which could be implied a promise to pay money had and received to the plaintiffs' use, and the existence of adverse relations in respect to the property between the plaintiffs and said James Faulcon, who assumed control over the rents, and directed their payment to the defendant for agricultural advances to the tenants. To this evidence we can see no just grounds of objection. The record is competent proof of all such facts as result from its existence as such, and of the adversary relations of the parties to it. "A deed," says GASTON, J., (and the remark is equally applicable to an adjudication of record,) "is evidence against all the world to establish the fact that such a deed was executed, [or of a judgment ren-

Digitized by Google

dered,] and, of course, all the legal consequences necessarily resulting from that fact." Claywell v. McGimpsey, 4 Dev. 89. So the production of the transcript shows that there was an action successfully prosecuted to recover possession withheld by the said James Faulcon, who assumed to hold the same. Besides, it was under the authority and by direction of the latter that the defendant received the rent money.

The defendant, on his own behalf, delivered testimony to which numerous objections were made, during the course of the examination.

1. The witness was permitted, after objection, to say: "James Faulcon placed the notes in my hands for supplies. Sometimes he gave me statements in writing. I either had notes, or he gave me written statements, authorizing me to collect of different tenants. James had the control. Walter and his sisters [the devisees] lived 6 or 7 miles from Warrenton. I frequently saw plaintiffs, and had business transactions with them. They never made any demand or claim. James Faulcon's wife lived a mile and a half from the part claimed by Walter." A part of the objection now preferred has been already answered in upholding the competency of evidence to show under what circumstances the rent money went into the defendant's hands. The further objection that the writings referred to should have been produced, or their absence accounted for, before letting in parol proof of their contents, is removed by the rulings in Pollock v. Wilcox, 68 N. C. 46; State v. Carter, 72 N. C. 99; Carrington v. Allen, 87 N. C. 354; and State v. Wilkerson, 98 N. C. 696, 3 S. E. Rep. 683,—in which it is held that a principle that requires the production of a writing to prove its contents does not apply when the inquiry into the contents comes up collaterally at the trial, and is not directly involved in the controversy.

2. The next objection is to his testifying to the fact that James Faulcon listed the land for the purpose of taxation. The fact occurring previous to 1885, *ante litem motam*, though of slight, if of any, import as evidence of title, is in our opinion receivable as showing a claim of ownership, for the reason that it is an act done in pursuance of the requirements of law. Austin v. King, 97 N C. 339, 2 S. E. Rep. 678.

3. Upon the cross-examination of defendant this testimony was elicited: "I have seen the will of Isaac N. James Faulcon denied the title of plaintiffs. I know that something had been given in the will to James. I knew that the crop from which I received the rents grew on this land he controlled. I had transactions with the tenants. I do not know that I ever saw him turn out a tenant and put another in. I know that he took notes from them. We lived in the same neighborhood. I never heard him make any bargain to rent, that I remember. I have been through the land with him once." The plaintiffs asked that so much of this evidence as indicated the control of James Faulcon over the land be withdrawn from the jury. This was denied, the court being of opinion that its value as evidence was for the jury, and was not rendered incompetent because drawn out on the cross-examination. Plaintiffs excepted. The exception is not very plainly presented. The objectionable matter is stated to be elicited upon the cross-examination of the witness (the defendant himself) by interrogatories put by the plaintiffs. The answer, thus voluntarily brought out by the plaintiffs, could not be a subject of exception from them, and its withdrawal afterwards from the jury rested in the sound discretion of the court in a matter not reviewable in this court. As is said in McRae v Malloy, 93 N. C. 154: "It is not admissible for counsel to be quiet and allow the evidence to come out and take advantage of it, if favorable, and, if not, to ask that it be stricken out, and not considered." Still less can he complain when it comes out in response to his own inquiries. State v. Efler, 85 N. C. 585.

4. On the redirect examination, the defendant's counsel put this interrogatory to him: "You stated in reply to the question by plaintiffs that you had seen the will. Did you make inquiry into the matter?" The witness was allowed, after objection, to say: "We could find no evidence of title in Isaac N. Faulcon." The substance of the declaration was that the witness did not discover any evidence of title in the testator, under whom the plaintiffs claim. We can see no prejudicial effect in the answer, since, as between the plaintiffs and James Faulcon, the title of the former is adjudged in the possessory action, and it is at most but a negation of a successful search, not disproof of title.

5. The defendant was then allowed to prove a sale of the land as the property of Isaac by the marshal of the United States, under an execution against him, and the marshal's deed therefor to Faulcon Brown, and from the latter a reconveyance to the said Isaac N. This latter deed was admitted to show the time of its registration, and was read to the jury. This was objected to, but we are unable to see any sufficient reasons for the objection, as the entire proceedings relate to the plaintiffs' ancestor, and precede his devise to them, his grandchildren. There were many instructions, 13 in number, asked for by plaintiffs, as follows:

"(1) Every possession of real property is presumed by law to be a title in fee-simple, and it being proved by both plaintiffs and defendant that Isaac N. Faulcon was in possession of the land at the time of his death, there is no evidence before the jury to show that Isaac N. Faulcon was not the owner of the land, and the jury must find that he was (This was not given by the court because the title to the land was not involved, and plaintiffs excepted.)

"(2) There being no evidence impeaching I. N. Faulcon's title, the land went by his

Digitized by Google

will to his grandchildren, and the jury must so consider it in making up their verdict. (This was refused, because the jury were told the title to the land was not involved in the issue. This was not given, and plaintiffs excepted.)

"(3) If John Young entered upon the land under the contract between him and I. N. Faulcon, which was proved, and which was for a lease of four years, and continued in possession after death of said Isaac N., then John Young was tenant of the plaintiffs, and they were his landlords, and that tenancy continued as long as the tenant (John Young) remained on the land, and he could not in law enter into a contract with James A. Faulcon which would make the possession adverse as to his landlord. (The court is of the opinion that this instruction was given in substance in the charge to the jury, as hereinafter stated. The plaintiffs except, because they allege that it was not given as asked.)

"(4) If the jury are satisfied that John Young made the contract with I. N. Faulcon, and continued on the land after his death, there is no evidence to show that there was any possession adverse to the plaintiffs. (The court refused to give this instruction, and plaintiffs excepted.)

"(5) If John Young made the contract with I. N. Faulcon, and entered into possession, and continued in possession after his death, then the plaintiffs are entitled to recover from the defendant all that he received from John Young on account of the rent of the land. (The court refused to give this instruction, and plaintiffs excepted.)

"(6) The same instructions were asked as to the part of the land rented and cultivated by John Faulcon, and were disposed of in the same way.

"(7) If William Faulcon rented and entered upon the land as the tenant of Isaac N. Faulcon, and continued in possession after his death, then the relation of landlord and tenant was constituted between Wm. Faulcon and the plaintiff, and continued as long as William Faulcon continued to occupy the land, and no arrangement between him and James A. Faulcon could change this relation. (The court is of the opinion that this instruction was given in substance. The plaintiffs are of the opinion that it was not, and therefore except.)

"(8) If this relation existed between William Faulcon and plaintiffs, then the plaintiffs are entitled to recover of the defendant all that he received of William Faulcon on account of such tenancy. (The court is of the opinion that this instruction was refused in part and given in part in the charge, as stated below. The plaintiffs except, because, as they allege, the instruction was not given as requested. The same instructions were asked as to Mat Faulcon, and were disposed of in the same way.)

"(9) If William Faulcon made the contract with Walter Faulcon, for himself and his sisters, to lease the land for five years, and occupied it during all that time, as it was testified to that he did, and paid the rents to the defendant, then William Faulcon became the tenant of the plaintiffs, and they are entitled to recover of the defendant all that was received by him from William Faulcon on account of such contract of renting. (This instruction was refused in part, and, the court is of the opinion, given in part, in the instructions given below. Plaintiffs excepted.)

"(10) If the plaintiffs became the owners of the land under the devise in the will of the said Isaac N. Faulcon, and then James A. Faulcon attempted to rent out the land, and to assign the rents to the defendant, Johnston, and Johnston then collected the rents under this assignment, Johnston, the defendant, thereby became a constructive trespasser, and the plaintiffs are entitled to recover from him damages for such unlawful entries, and the amount received by Johnston is the measure of such damages; or the jury may regard the amount thus received as the measure of such damages, and render a verdict for the amount, with interest. (This instruction was refused by the court, and the plaintiffs excepted.)

"(11) That the acts and conduct of Walter Faulcon are not in law an estoppel. (The opinion of the court is that this is given in part and refused in part in the charge of the court, as given hereinafter. The plaintiffs except, on the ground that the instruction was not given as requested.)

"(12) That the jury cannot consider the deeds to Brown and from Brown to Faulcon as affecting the rights of plaintiffs to this land, or in any way affecting their right of recovery. It was admitted only for the purpose of the date of its registration, and for no other purpose, and the court is requested to instruct the jury that they can consider it for no other purpose. (The court thinks that this instruction was given in substance in the charge, as stated below. The plaintiffs except on the ground that it was not given. These general instructions are asked, subject, of course, to proper instructions as to the statute of limitations.)

"(13) Two of intestates of plaintiffs being infants, and one becoming covert during infancy, the statute of limitations cannot apply as to these two, in any view of the case. If it applies at all to Walter B. Faulcon, the adult, it cannot apply to the three years next before the bringing of the action of ejectment. For these three years he can certainly recover. (The counsel for defendant conceded that the statute of limitations was not a bar to any of plaintiffs except W. B. Faulcon, and the court so told the jury. And thereupon the court charged the jury as follows:)

"The title to the land is not at issue in this action. As between James Faulcon and those claiming under him, the title is adjudged in the plaintiffs. It is an established

Digitized by Google

rule that a tenant cannot deny the title of the landlord, and, the relation of landlord and tenant being once established, the tenant cannot change this relation until he surrenders the possession of the land which he received from his landlord back to him, and no contract with another can change that relation so long as tenant remains in possession. If the relation of landlord and tenant existed between Isaac N. Faulcon, John S. Young, John Faulcon, William Faulcon, and Mat Faulcon at the time of the death of Isaac N. Faulcon, and if Isaac N. Faulcon duly made and published his last will and testament, and if that will was duly executed, and if the will was in the words read in evidence, it conveyed to the plaintiffs Walter and his sisters, children of Jesse N. Faulcon, the interest of Isaac N. Faulcon, and the tenants of Isaac N. Faulcon became the tenants of the said Walter Faulcon and his sisters, and they would be entitled to receive the rents from the tenants; and if the defendant received the rents from the tenants of plaintiff, then he would be liable unless exonerated from such liability by some other principle or rule of law. (Plaintiffs except to the foregoing charge of the court.) But if the land was in the adverse possession of James A. Faulcon, he being in the adverse possession of the land, claiming it as his own, and he, being in such adverse possession, caused the annual produce of the land, produced by annual planting and culture, to be taken from the land to the defendant, and the defendant took it in payment of debts due from James A. Faulcon for supplies, or otherwise due, then the defendant would not be liable for the products of the land delivered in kind, or sold and the money paid to him. (To this part of the charge plaintiffs except.) It then becomes material for you to determine the nature of the possession of James A. Faulcon. If he was occupying the land, claiming it as his own, and denying the rights of the plaintiffs, the plaintiffs cannot recover of the defendant, although the land did in fact belong to the plaintiffs. (To this instruction the plaintiffs except. And the plaintiffs further except to the three preceding paragraphs of the charge, taken together.) If James A. Faulcon was not in adverse possession, but took possession of the land as the agent of the plaintiffs, and he misapplied the rents, and paid them to Johnston, and Johnston, knowing that James A. Faulcon was using the rents of the plaintiffs' land by delivering the notes as collateral security for supplies, then he would be liable for the amount received, if he knew of the relation, unless something more is shown. And if the plaintiff Walter Faulcon knew that James A. Faulcon was disposing of the rents, claiming to act as agent of plaintiffs, and he allowed this to go on with his knowledge, and acquiesced, or by his conduct led the defendant to reasonably believe he acquiesced, in such disposition, then he would not be entitled to recover for such rents so disposed of to the defendant; but, as to the other plaintiffs, they, being under disability, would not be estopped. (Plaintiff Walter Faulcon excepts to this charge in his own behalf. Other plaintiffs also except thereto.) Now, in regard to the statute of limitations. The cause of action, if there is any cause of action, accrued at the time the rent was received wrongfully by defendant. A right of action accrued, if any cause of action accrued, at the annual receipts of the rents. The plaintiff Walter Faulcon cannot, under the evidence, recover in his own right anything for his part of rent for any more than three years before the beginning of this suit. The statute of limitations does not bar the other plaintiffs. (To this charge the plaintiffs, except Walter Faulcon in his own right, except.)"

The court gave to the jury, orally, careful instructions as to the issues and the evidence bearing upon them, and told the jury, if the first issue should be found for the defendant, the other issues became immaterial. No exception was made to any except such as were in writing. After the verdict, the plaintiffs moved for a new trial. Motion overruled. Judgment for defendant, and plaintiffs appealed.

Without revising and comparing the directions asked by appellants to be given to the jury, and those given by the court, in order to ascertain if there are any such omissions or variations as might furnish some grounds for complaint, we are content with the single remark that, if correct in themselves, the charge seems to cover the whole matter in dispute, and leave little cause for the appeal. The solution of the controverted question of their right to recover the rents received by the defendant, under the circumstances, rests upon the correctness of the concluding paragraphs of the charge preceding what is said in relation to the statute of limitations, to-wit, that if James A. Faulcon was in the occupancy of the land, claiming it as his own, and denying the right of the plaintiffs, although the land was in law their property, they cannot recover the rents sued for as money received to their use in this action. The question is this: Can the owner of land, in the adverse possession of another, assert title to the crops grown thereon during such occupancy, and, in its assertion, by waiving the tort, pursue and recover the specific articles thus raised, or their money value, in the hands of a stranger who may have received and converted them to his own use, or the rent money paid him by the tenants? The cases cited in the argument conclusively establish the proposition that the crops, the product of the labor of the trespassing possessor and of his agents, belong to him, and are not the property of the owner of the soil. In Brothers v. Hurdle, 10 Ired. 490, the defendant, lessor of the plaintiff in ejectment, recovered of the present plaintiff the land upon which were gathered the growing crops, the product of the year's cultivation, and, being

Digitized by Google

put into possession by the sheriff, took control of the crops, and applied them to his own use. The action was in trover to recover their value. Delivering the opinion, PEARSON, J., says: "The corn, etc., which was attached to the land at the time the defendant was put in possession, passed with it, and belonged to him. But the fodder, etc., which had been severed, although on the premises, did not pass with the land, for it had ceased to be a part thereof, and the defendant had no right to take it. His remedy was an action, not for the specific articles, but for damages by way of mesne profits. If the defendant had a right to take the specific articles, he would for the same reason be entitled to recover their value in trover against the plaintiff, or any one to whom he might have sold them." The same reasoning was applied to turpentine run into boxes cut in the body of the tree, the product of labor, in Branch v. Morrison, 5 Jones, (N. C.) 16, and, when the case was again before this court, reported in 6 Jones, (N. C.) 16. A similar ruling, and in affirmation of that in Brothers v. Hurdle, supra, was made in the later case of Ray v. Gardner, 82 N. C. 454.

If, then, James Faulcon was in the hostile occupation of the land when the crops were made by the several tenants, the crops did not in law belong to the plaintiffs, and the defendant, in taking and converting them to his own use, did not become liable to the plaintiffs because they were not the property of the plaintiffs. The principle that the owner of goods wrongfully seized and sold may waive the tort and ratify the sale, and recover the proceeds from the purchaser, has no application to the present case. The jury having by their verdict established these adverse relations, and there being no error in the instruction leading thereto, the judgment must be and is affirmed.

(102 N. C. 457)

MOFFITT *et al.* v. MANESS.

(*Supreme Court of North Carolina.* March 25, 1889.)

MORTGAGES—BONDS—PAROL EVIDENCE—JUDGMENT.

1. Where a mortgage recites the execution of a bond to which it is collateral, and is introduced in evidence on foreclosure without the bond, and no exception to its admission is made, and no special instructions in reference to the absence of the bond are asked, it will be assumed that the bond was signed, sealed, and delivered.

2. A bond and mortgage for a sum certain cannot be shown by parol to have been intended to cover whatever should be found due on a settlement, there being no allegation of fraud or other equitable matter.

3. Though it is doubtful whether exception was made to the rendition of a judgment on a bond and mortgage without producing the bond, yet, where the objection is insisted on on appeal, the judgment may be set aside, so that, if it appears that the bond has not been destroyed, and is negotiable, and cannot be produced, proper indemnity may be required.

Appeal from superior court, Moore county; MERRIMON, Judge.

Action by E. E. Moffitt and another, executors, etc., of E. N. Moffitt, against Elias Maness. Defendant appeals.

J. W. Hinsdale, for appellant. *W. J. Adams* and *J. C. Black*, for appellees.

SHEPHERD, J. This was a civil action to foreclose a mortgage, tried before MERRIMON, J., and a jury at the October term of Moore superior court, 1888. The plaintiff executors alleged that the defendant executed a bond to their testator in the sum of $580.50, and a mortgage on certain lands to secure the payment of the same. They also allege that no part of said indebtedness has been paid. The defendant denied all of these allegations. The plaintiffs offered in evidence the mortgage, which recited the execution of the bond, and stated that they did not have possession of "any notes against the defendant." The defendant then introduced Eli Howard, who testified that he was subscribing witness to the mortgage, and that he was present with E. N. Moffitt and the defendant, Elias Maness, when it was executed. That they did not go into any settlement when it was executed, but that it was agreed that it should cover whatever should be found to be due upon a settlement. The court held this evidence incompetent. The defendant excepted. This was all the evidence. The court charged the jury that if they believed the evidence they must find that the defendant owed the plaintiffs the sum named in the mortgage, with interest, according to the mortgage. The defendant excepted. Judgment for the plaintiffs. Appeal by defendant.

Whatever effect the non-production of the bond may have upon the character of the judgment which should be rendered, (and of this we will speak hereafter,) there was clearly enough in evidence to warrant the charge of the court and the verdict of the jury. No exception was made to the admission of the mortgage alone, and no special instructions were asked in reference to the absence of the bond. So, in passing upon the exception as to the exclusion of the parol testimony offered by the defendant, we must assume that such a bond was signed, sealed, and delivered by the defendant to the testator. The answer denies the execution of the bond and mortgage, and sets up no equitable defense whatever. We must therefore determine the question in its legal aspects alone. There is, we fear, too great a tendency to relax the well-settled rules of evidence against the admissibility of parol testimony to contradict, vary, or add to the terms of a written contract; and it is thought that the courts, in their anxiety to avoid probable injustice in particular cases, are gradually construing away a principle which has always been considered one of the greatest barriers against fraud and perjury. Even the supreme court of Pennsylvania, which perhaps has gone further than any other in this direction, sounds the alarm, and BELL, J., who delivered the opinion of the court in Rearick v.

Digitized by Google

Rearick, 15 Pa. St. 66, says: "Were the door opened still wider for the admission of all the loose *dicta* of the parties, running, it might be, as in this instance, through a long course of years, the flood of evil would become so great as to sweep before it every barrier of confidence and safety which human forethought, springing from experience, is so sedulous to raise against the treachery of memory and the falsehood of men. To avoid, therefore, what would really be a social calamity, it is recognized as a settled maxim that oral evidence of an agreement, * * * entertained before its execution, shall not be heard to vary or materially affect it. * * * If any *dicta*, or even decision, in hostility to this axiom are to be found, they must be ascribed to the strong desire we are all apt to be swayed by, to defeat some strongly suspected fraud in the particular case. But these occasional abberrations but lead to the more emphatic reannunciation of a principle found to be essential to the maintenance of that certainty in human dealings, without which commerce must degenerate into chicanery, and 'trade' become another name for 'trick.'" In speaking of the higher dignity and the inviolability of written evidence, TAYLOR, J., in Smith v. Williams, 1 Murph. 428, elegantly remarks that "the writers on the law of evidence have accordingly, in arranging the degrees of proof, placed written evidence of every kind higher in the scale of probability than unwritten; and, notwithstanding the splendid eloquence of Cicero to the contrary in his declamation for the poet Archias, the sages of our law have said that the fallibility of human memory weakens the effect of that testimony which the most upright mind, awfully impressed with the solemnity of an oath, may be disposed to give. Time wears away the distinct image and clear impression of the fact, and leaves in the mind uncertain opinions, imperfect notions, and vague surmises."

Impressed with the warning thus given by these able judges, we will proceed to an examination of the question before us. Here is a bond containing an absolute promise to pay to the obligee a certain sum of money; and, without the slightest suggestion of fraud, mistake, or accident in the pleadings or testimony, it is proposed to show that it was not an absolute promise to pay a definite sum, but "that it was agreed that it should cover whatever should be found to be due upon a settlement." It cannot, it seems to us, be doubted that the proposed testimony materially contradicts and varies the terms of the writing. The most specious reasoning is incapable of reconciling them. The bond is a solemn declaration that so much is now due. The testimony offered is that the sum mentioned is not due, but is to be determined upon a future settlement. This is clearly in the "teeth" of the writing. In Mahan v. Sherman, 7 Blackf. 380, the language of the court is: "They set up a verbal contract, made at the time the note was executed, varying the terms of the note. The note is for the payment of a certain sum on a specified day. A verbal contract contemporaneous with the note is relied on to show that the note was not to be paid till a certain account should be adjusted, and the amount credited on the note. That would be making the promise conditional, which, upon its face, is absolute." In Erwin v. Saunders, 13 Amer. Dec. 520, the defendant, the maker of the note, "offered evidence to prove that the note was given conditionally, to be void if it should be shown that Saunders, then in insolvency, had included in his inventory the amount due Erwin, the amount of the note." The evidence was held to be inadmissible. In Dyar v. Walton, 7 S. E. Rep. 220, which is a case directly in point, the supreme court of Georgia say: "The defense, when analyzed, resolves itself into an effort to vary a written contract by parol, and to shun the consequences of gross negligence. If, at the time the notes and mortgages were given, there was an agreement entered into that they should be varied by the result of subsequent examination, that agreement ought to have been embodied in the written contract, or in some other writing, whereby to establish it. The omission to do either is decisive of this branch of the defense. There is no allegation in the plea, and no indication in the evidence, that this agreement was intended to be embraced in any writing, or that it was left out by fraud or mistake. Its effect, if allowed to have any, would be to overrule the writing executed as the result of the settlement, and to reopen the settlement altogether." These authorities, upon the pleadings in this case, fully sustain his honor in rejecting the testimony. But the defendant strenuously insists that the entire contract was not reduced to writing, and that his case is governed by the principle laid down in Manning v. Jones, Busb. 368; Daughtry v. Boothe, 4 Jones, (N. C.) 87; Twidy v. Saunderson, 9 Ired. 5, and a long line of decisions collected in Ray v. Blackwell, 94 N. C. 13, and ending with Cumming v. Barber, 99 N. C. 337, 5 S. E. Rep. 903. We think that a careful examination of these cases will show that even where the contract lies partly in parol, that part which is in writing is not to be contradicted. In Manning v. Jones, NASH, C. J., said that the testimony admitted added no new covenant to the deed made by Jones, nor did it contradict or explain any one that was contained in it. And ASHE, J., in Sherrill v. Hagan, 92 N. C. 345, speaking of Manning's Case, said: "It was held that the proof was admissible; the deed being an execution of one part of the agreement, the other having been left in parol, so that the proof offered was not to add to, alter, or explain the deed." So in Cumming v. Barber, the parol testimony was admitted because the writing was "silent" upon the matter sought to be proved. And in Ray v. Blackwell, the present chief justice said that "the cases cited do not contravene

Digitized by Google

this rule, and rest upon the idea that the writing does not contain the contract, but is in part execution of it." The case of Kerchner v. McRae, 80 N. C. 220, goes nearer the line than any other, but does not cross it. The testimony admitted was that at the time the bond was executed it was agreed that the obligees were to credit it with the proceeds of certain cotton which had been deposited with them for sale by the testator of the obligors. Even here the terms of the bond as to the amount due were not impugned, as in our case, but an agreement was shown that the proceeds of certain cotton were to be applied as a credit, and the decision was put upon three grounds: *First*, because the contract was partly in parol; *second*, because no exception was made to the submission of an issue upon the matter sought to be proved; and, *third*, because the agreement, if established, constituted a "counter-claim or set-off." Conceding that the first ground was a correct one, the case is easily distinguished from ours. There it was not sought to be proven that the sum stated in the bond was not the amount due, and the testimony offered related only to the manner of payment. Here the testimony, as we have said, is for the purpose of directly proving that what is asserted to be due by the bond is false, and that the true amount is to be ascertained by a future settlement. Our decisions, in applying the rule mentioned, all clearly establish that the terms of that part which is in writing cannot be varied by parol. What the defendant seeks to prove is not something consistent with the terms of the bond, as in the cases cited, but is in conflict with the very matter which the bond itself determined. To say that in the absence of fraud such a contradiction is to be permitted of a solemn instrument duly sealed and delivered is to strike a fatal blow at the sancity given to such writings.

It will be observed that there was no condition precedent upon which the bond was to take effect. Even where it is held that bonds may be shown by parol to be payable only on contingencies, "it is not allowable when the terms of the bond are thereby impugned." 2 Whart. Ev. § 1067. Howell v. Hooks, 2 Dev. Eq. 258, in addition to the cases first cited, removes our case from all doubt. It was charged that a son procured an absolute bond from his father, and that, in writing it, he fraudulently left out a condition that it was to indemnify him against loss by reason of his having become bail for his brother. There was no proof of fraud, nor that the bond was written other than as the parties intended, but there was evidence of the declarations of the son "that his father gave him the bond as an indemnity, and that it was to be paid, if he suffered; otherwise destroyed." In our case it is contended that the bond was a security for a debt, and there can be no distinction in principle between them. RUFFIN, J., in delivering the opinion, says: "The evidence is as to the manner in which the son should use the bond upon certain contingencies and that drawn from his verbal declarations. To act upon it would be to insert a condition inconsistent with the legal operation, and contradict the express terms of the instrument; which would break down all distinction as to degrees of evidence, and destroy the confidence that ought justly to be reposed in solemn contracts. * * * I believe no case can be found in which a court of equity, more than a court of law, has received parol evidence of the agreement directly in the teeth of the contract as reduced to writing." As no fraud was proved in the case cited, or in the one before us, it is unnecessary to consider the effect of such a transaction, where fraud or other equitable matter is pleaded. We have therefore discussed this question, as proposed, in its legal phases alone.

The principles upon which parol testimony is excluded in the case of written contracts are plain; but their application to the infinite variety of transactions daily arising is exceedingly difficult, and the books are full of conflicting decisions upon the subject. We think we have gone far enough in this state in their liberal application, and that the wise rules which are intended for the protection of the provident should not be refined away for the relief of the negligent. For the reasons given we think that there was no error in the ruling of the judge who presided at the trial, and that the verdict should not be disturbed. It is doubtful from the record whether any exception was made to the rendition of the judgment without accounting for the absence of the bond. It is, however, insisted upon here, and, to avoid any possible injustice, it is ordered that the judgment be set aside, so that, if it appears that the bond has not been destroyed, and was negotiable, and cannot be produced, a proper indemnity may be required by the court. 2 Daniel, Neg. Inst. § 1481. Affirmed and modified.

(103 N. C. 162)

SCROGGS v. ALEXANDER.

(*Supreme Court of North Carolina.* April 1, 1889.)

APPEAL—REVIEW.

An administrator sued a legatee under his decedent's will for a debt due the estate, and judgment was rendered for plaintiff, with a stay of execution until the clerk should make a final report showing the distributive share of defendant, which sum, if any, should be credited on the judgment. Upon a motion to modify the judgment, by vacating the stay, exhibits were filed showing that there had been such a report, which was confirmed, from which the court found as a fact that there was nothing due the legatee, and no exception was taken to the finding. *Held*, that in the absence of such an exception the judgment directing execution to issue should not be reversed, though an appeal was pending from the judgment confirming the report.

Action by Scroggs, administrator, etc., of A. R. Simonton, deceased, to modify a judgment rendered in his favor against Mary M. Alexander by setting aside a stay of execution

Digitized by Google

therein directed. Judgment for plaintiff, and defendant appeals.

Batchelor & Devereux, for appellant. *W. M. Robbins*, for appellee.

DAVIS, J. This is an appeal from a judgment of MCRAE, J., rendered at May term, 1886, of the superior court of Iredell county, modifying judgments theretofore rendered, and authorizing execution to issue. The complaint alleged that on the 31st day of March, 1873, the defendants executed a note under seal for the sum of $1,297, payable to the plaintiff, as administrator with the will annexed of A. R. Simonton, deceased, and that the same had not been paid, and judgment was demanded therefor. The answer, so far as material to the question before us, stated that the defendant, Mary M. Alexander, was one of the distributees of A. R. Simonton; that all his debts had been paid; and that her share in his estate would amount to more than the sum due on the note declared on; and asked judgment that the note be paid over to her in satisfaction of her distributive share in the estate of the deceased, and that the plaintiff be enjoined from collecting it. There was a replication, admitting "that the defendant, M. M. Alexander, is one of the legatees under the will of A. R. Simonton," but denying that all the debts of the deceased had been paid, or that the defendant's interest in the estate would amount to as much as is due on the note or to any considerable portion thereof. At January special term, 1884, judgment was rendered in favor of the plaintiff for $2,136.80, with the further judgment "that no execution issue upon this judgment until the clerk of this court shall ascertain and declare the amount of the distributive share of said Mary M. Alexander in the estate of A. R. Simonton, deceased, on final account of the same, and the judgment shall be subject to a credit, before execution issues, with the amount (if any) of said distributive share." At spring term, 1884, upon the suggestion of the defendants and admission of the plaintiff that a credit had been omitted, the judgment was corrected by substituting the sum of $1,547.65 for the sum of $2,136.80, and confirmed in all other respects. At May term, 1886, the judgment appealed from was rendered, so modifying the previous judgment as to authorize execution to issue.

The case states, among other things: "That it appears to the court by the report of J. B. Connelly, clerk of this court, and referee in the case of J. H. Scroggs, Administrator, etc., of A. R. Simonton, v. Mary M. Alexander and others, * * * that M. M. Alexander has been paid in excess of her share of A. R. Simonton's estate the sum of $211.53." It further appears that the report of the referee referred to was made in proceedings instituted for a final account and settlement of the estate of A. R. Simonton, and that it was confirmed at the same time at which the judgment in this case was rendered, and that an appeal was taken to this court from the judgment confirming it. The account of the administrator, stated by the clerk, is filed as an "exhibit" in this action, and from that account it appears that there is nothing from the "distributive share" of M. M. Alexander to be credited on the judgment in favor of the plaintiff against her, and that appearing to the court, it properly authorized execution to issue. But it is insisted by counsel for the defendant that there was an appeal from the judgment confirming the report of the referee in the case of Scroggs v. Mary M. Alexander and others, and that his honor erred in authorizing execution to issue in this case, before the appeal in that was determined. It is sufficient to say that "the amount of the distributive share of said Mary M. Alexander in the estate of said A. R. Simonton deceased" was ascertained and declared in this action upon the report of the clerk, and there was no exception taken thereto. The fact that the report of the referee in the case of Scroggs, Administrator, v. Mary M. Alexander and others, though the same as that upon which the action of the court in this case was based, was appealed from, (upon what grounds this case does not disclose,) cannot be considered by us in this appeal, though it may not be improper to say that the judgment of the court below was affirmed in that, as it must be in this case. See the case of Scroggs v. Stevenson, 100 N. C. 354, 6 S. E. Rep. 111. No error.

(103 N. C. 127)

COOK v. PATTERSON.

(*Supreme Court of North Carolina.* April 1, 1889.)

USURY—EQUITABLE RELIEF.

1. Plaintiff sought to enjoin the enforcement of a mortgage given by him on the ground that the debt to secure which the mortgage was given included usury, at the same time tendering the amount actually due the defendant with legal interest. *Held*, that as a condition upon which the relief asked by plaintiff would be granted, judgment should be given for the defendant in accordance with the tender of the plaintiff.

2. In such case where judgment was given for the defendant for the amount actually due, less interest, he was entitled to costs, under Code N. C. § 528, providing that to either party for whom judgment shall be given there shall be allowed as costs his actual disbursements.

Appeal from superior court, Iredell county; BROWN, Judge.

Armfield & Turner, for appellant.

AVERY, J. The plaintiff alleged in his complaint that, being embarrassed with debt, he applied to defendant for the loan of $350 with which to pay off his indebtedness; that defendant agreed at first to loan that amount, if he could secure payment by a mortgage on a certain tract of land, charging 8 per cent. and a small bonus to cover expenses, but, when the plaintiff applied for the money in order to fulfill his promises to his creditors, the defendant required him to execute a note for $390, with interest at 8 per cent. per annum, when in fact he loaned plaintiff only $350. Plaintiff further alleges that defend-

Digitized by Google

ant stated that he required a bonus of $40 for the loan, and that he did execute a mortgage on the land first mentioned by defendant to secure the payment of said note for $390, dated February 11, 1884, and that the defendant had advertised the said land, and was threatening to sell by virtue of said mortgage, and that since the execution of the note the plaintiff had made several payments on the note. The plaintiff prayed for an injunction. The defendant averred that he loaned plaintiff, and actually furnished him, $330 in money; that he charged plaintiff $10 for cost of getting an abstract of title to his land; and therefore took the note for $390, with interest at 8 per cent. per annum.

At the trial the following issues were submitted to the jury, viz.: "(1) Was the sum of $40, or any other sum, included in the note as excessive interest over eight per cent.? If so, what sum? *Answer.* Yes; thirty dollars. (2) What payments have been made by the plaintiff thereon? *A.* February 6, 1886, $51.50; November 11, 1886, $25.75. Total, $77.25." The findings of the jury were as above indicated. Upon these findings of the jury and the pleadings the defendant moved the court for judgment for the amount of his debt, and legal interest and costs of action. The court declined such judgment, and, upon motion of plaintiff's counsel, ordered judgment for defendant for the sum of $360, less credits, $77.25, and declined to allow defendant any part of the legal interest due upon said debt, or any costs up to and including this term of the court. Defendant appealed.

The defendant, after reducing the amount apparently due by payments, and making allowance for usurious charges, was entitled to recover a judgment. There was no allegation that the whole debt had been paid, or, in any view of the case, forfeited, and judgment was actually rendered for $360, less the payments ascertained by the jury to have been made, or for $282.75. Section 528 of the Code provides that "to either party for whom judgment shall be given there shall be allowed as costs his actual disbursements," etc. It is clear that the defendant was entitled to recover costs. In Costin v. Baxter, 7 Ired. 111, the facts were that the plaintiff declared in three counts, and entered a *nolle prosequi* in two, but recovered on the remaining count. This court held that the defendant was not entitled to recover for charges of witnesses summoned to meet the counts abandoned by plaintiff upon a proper construction of the act of 1777, (Rev. St. c. 31, § 79.) In Wooley v. Robinson, 7 Jones, (N. C.) 30, it was held that the party who prevailed and obtained judgment must recover costs, under Rev. Code, c. 31, § 75, unless otherwise directed by some particular statute. The older statutes construed by the court in those two cases do not differ materially, so far as the question before us is involved, from section 528. In the absence of any special provision of law taking this case out of the general rule, it (the general rule) should have been followed in rendering judgment. This is not an action brought to recover usurious interest under section 3836 of the Code. The action was in fact brought more than two years after the first payment made on the note, but the plaintiff declares in his complaint that he is willing to pay the amount due, with legal interest at 8 per cent.

The defendant moved the court for judgment for the amount of the debt, after making the deduction, with legal interest, and we think that in refusing this motion his honor erred also. If the defendant had invoked the aid of the court by asking for a judgment for his debt, the rule adopted by the court below would have been applied. But when the plaintiff asks the court to interfere, and grant an injunction till the true amount due can be ascertained, he is deemed subject to the rule that one who seeks equitable relief must do equity. The court will therefore compel him, as a condition upon which the aid of the court is extended to him, to pay the amount that is justly due in good faith. Manning v. Elliott, 92 N. C. 48; Purnell v. Vaughan, 82 N. C. 134; Simonton v. Lanier, 71 N. C. 498. In the first two of the cases cited, it was held that the condition upon which relief is granted in cases of this kind is the payment of what is really due. The plaintiff contracted to pay interest at 8 per cent., and it was lawful to agree to that rate on the amount found to be really due, ($360.) Moreover, in his complaint he tenders a judgment for the amount justly due and legal interest at 8 per cent. That rate was allowed in Simonton v. Lanier by this court, when in fact the defendant had agreed in the note to pay interest at the rate of 1½ per cent. per month. It is just and equitable that he should perform so much of the agreement on his part as was not in contravention of law. The judgment must be modified in conformity with this opinion.

(102 N. C. 485)

RUSSELL v. KOONCE.

(*Supreme Court of North Carolina.* April 8, 1889.)

APPEAL—PRACTICE—MISTAKE.

In an action against K. and D., K. filed his own answer, and an attorney put in an answer for D. A *nol. pros.* was entered as to D., and a verdict rendered against K., who appealed, and served his case on plaintiff. The latter then filed a counter-case, and served the attorney with a copy, who returned it with the indorsement that he did not represent K. Plaintiff's affidavit on *certiorari* stated that the attorney acted for both defendants. The attorney's affidavit stated that during his argument to the jury plaintiff announced his *nol. pros.* as to D., and that he remarked that, though not attorney for K., he would out of courtesy to K. continue his argument as applicable to K.'s defense. *Held* that, as the action of plaintiff was the result of mistake, the cause would be remanded, with leave to proceed in the proper manner.

Certiorari to superior court, New Hanover county; CONNOR, Judge.

Batchelor & Devereux and *S. W. Isler*, for appellant. *T. W. Strange*, for respondent.

Digitized by Google

SMITH, C. J. This action, brought against Frank D. Koonce and Anthony Davis, was tried at spring term, 1887, of the superior court of New Hanover, and, a *nol. pros.* being entered as to the latter, a verdict was rendered upon the issues in favor of the plaintiff, and he recovered judgment. Thereupon the defendant, Koonce, appealed, and prepared and filed his case on appeal. The plaintiff, in the way of exceptions, filed with the clerk a counter-case, a copy of which was sent to H. R. Kornegay, supposed to be counsel for the appellant, who, as appears from his affidavit filed in the cause, denies that he represented the appellant at the trial, and returned the paper to the plaintiff's counsel by the next mail, with an indorsement to that effect. The record, with copies of these papers, was subsequently transmitted to this court in obedience to a writ of *certiorari* so commanding, and came up for hearing at the present term. The transcript shows that the said Koonce filed his own answer, while that of the other defendant was put in by Kornegay as his counsel. It is stated in the affidavit of plaintiff's counsel, read before us, that Kornegay acted as counsel for both defendants, and it so appears of record, while in the explanatory affidavit of the latter he states that during his argument before the jury the plaintiff's counsel announced their purpose to enter a *nol. pros.* as to Davis, whereupon he remarked that, although not the attorney of defendant Koonce, as his line of defense was prepared for Davis, out of courtesy he would pursue the argument in its application to Koonce. The transcript only discloses the fact that the one answer bears the signature of "H. R. Kornegay, attorney for defendant Davis;" the other that of "F. D. Koonce, for himself." It is obvious that the course of action pursued in preparing the case for this court is the result of misapprehension, and the counsel for appellee had reason to infer from the continuance of the defense against the claim, after their purpose to enter a *nol. pros.* as to Davis was made known, that the same counsel represented both defendants. It is, under these circumstances, proper that time now be allowed the parties to prepare the case on appeal, to prevent a failure of justice, and to this end we remand the cause to the court below, with leave to them to proceed to make the case up, as from the rendition of judgment, in the mode prescribed by law, and, in case of disagreement, to be settled by the judge who tried the cause.

(103 N. C. 349)

STATE v. BRACCO.

(*Supreme Court of North Carolina.* April 9, 1889.)

CONSTITUTIONAL LAW—LICENSE.

Acts N. C. 1887, c. 135, § 25, imposing a license tax in certain cases for selling goods, wares, and merchandise, is, in so far as it applies to non-resident drummers and all non-residents selling goods by wholesale or by sample, inconsistent with the United States constitution.

Appeal from superior court, Watauga county; MCRAE, Judge.

J. C. L. Gudger, for defendant. *The Attorney General*, for the State.

MERRIMON, J. The defendant is charged in the indictment with having, as a "drummer" from another state, sold and attempted to sell to the merchants named therein in the county specified in this state, at the instance and for the benefit of merchants named in another state, goods, wares, and merchandise by wholesale and by samples, as specified, without having obtained a license so to do from the treasurer of this state, in violation of the statute. Acts 1887, c. 135, § 25. He pleaded not guilty, and on the trial the jury rendered a special verdict, in substance and to the effect that he had sold goods, wares, and merchandise as so charged. The court, being of the opinion upon the facts found that the defendant was guilty, directed a verdict to be entered accordingly, which was done, and thereupon judgment was entered against the defendant, and he appealed.

The cases cited in the brief of the learned counsel for the defendant abundantly show that the statute, (Acts 1887, c. 135, § 25,) in so far as it applies to non-resident "drummers," and all persons non-resident, selling goods, wares, and merchandise by wholesale or by sample in this state to persons resident in this state, is not in harmony, but inconsistent with, and in contravention of, provisions of the constitution of the United States, and therefore inoperative and void. It is sufficient to cite some of the cases decided by the supreme court of the United States in point. Robbins v. Taxing Dist., 120 U. S. 489, 7 Sup. Ct. Rep. 592; Corson v. Maryland, 120 U. S. 502, 7 Sup. Ct. Rep. 655; Asher v. Texas, 128 U. S. 129, 9 Sup. Ct. Rep. 1. There is therefore error. The judgment and verdict of guilty must be set aside, and a verdict of not guilty entered upon the special verdict, and judgment given in favor of the defendant. To that end let this opinion be certified to the superior court according to law. It is so ordered.

(103 N. C. 397)

STATE v. JACOBS.

(*Supreme Court of North Carolina.* April 1, 1889.)

DISTURBANCE OF PUBLIC WORSHIP.

Where, on an indictment for disturbing public worship, the gist of the offense charged is the disturbance of a religious congregation, in refusing to let them enter the church and engage in religious services, as was their custom, evidence is admissible that defendant acted under a *bona fide* belief that he had the title to and the right to the possession of the premises.

Appeal from superior court, Robeson county; PHILIPS, Judge.

The Attorney General, for the State.

SMITH, C. J. The indictment against the defendant, found at January term of Robeson superior court, charges that the defendant,

Digitized by Google

"being a person regardless of the solemnities of the public worship of God," did in said county "willfully interrupt and disturb a certain assembly of people, there met for the public worship of God, at a certain church known as 'New Hope Church' in the county aforesaid, by then and there forbidding the said congregation to enter the house of worship, or holding meeting therein, by then and there preventing the said congregation from entering into said house of worship, to the great injury," etc. Upon his arraignment the defendant entered a motion to quash the indictment for that the facts set out do not constitute an indictable offense, the determination of which the judge reserved until the evidence was heard, and afterwards denied. The defendant then put in his plea of not guilty, upon the trial of which he was convicted by the jury, and from the judgment thereon appeals.

The principal witness examined for the state, Calvin Lowry, testified substantially as follows: On the first Sabbath of the past year, a stated time for holding religious services in the church known as "New Hope Church," he, with a wagon in which were his family of 10 or 12 persons, came to the house for religious worship, and found it surrounded with a rail fence three or four rails high, and found the defendant there, who had constructed a small room of about four feet square in one of the corners of the house. That, on halting, defendant ordered the driver of the wagon to keep on, but by witness' direction he halted, and witness got out and started to the house, when he was met by the defendant, and forbidden by him to enter, and was prevented from entering, and prevented from having the intended religious services. That there were present at this time from 50 to 100 persons, who had come to attend, and were compelled to hold a meeting a short distance off in the open air, at which, after singing and praying, and giving out future appointments, the meeting was closed, and those in attendance dispersed. That the place had been used for public worship for 75 or 100 years; two houses for the purpose had rotted down, one had been burned, and the present one put up in its place. That there were others with defendant, who was in the small corner room, which he said was his residence, and was at the open and unclosed part of the house. That defendant had posted notices forbidding any one to enter the church, as had been done by the other opposing claimants, forbidding those of defendant's party to enter. This testimony was in its material facts corroborated by other witnesses for the state, who were examined in reply to defendant's testimony. The defendant, examined on his own behalf, testified, in substance: That he had forbidden the said Calvin Lowry to go upon the premises, telling him the land belonged to witness, and he so believed. He was then asked by his own counsel to state why he did this; the purpose of the inquiry being to ascertain if the disturbance was wanton, willful, and contemptuous. The question was disallowed, the proposed evidence ruled inadmissible on the solicitor's objection, and defendant excepted. The witness said he had told Calvin that there had been confusion enough, and witness wanted him to go on and let them alone, as he was disturbing the congregation; five or six persons standing around heard it. That Calvin then went away, took a chair out of his wagon, sat down, and began to sing, while witness and those with him went to the school-house, and there had their meeting. That at the time of the conversation in which Calvin was forbidden to enter none but himself and family had come,—not more than a dozen had arrived,—but the Sunday-school scholars came afterwards, and thus increased the number; and witness was in possession; nor had witness words with any one else except Calvin. That witness had himself been preaching in the house, and there was no more disturbance than such as resulted from his prohibiting and thereby preventing the use of the church that day by him and his party. That witness and his set held meetings in the school-house, and he used the small inclosure in the church as a place for prayer, when it was convenient, three or four times a week. In this testimony, of which the above is a summary, and relates to what occurred, the defendant is in a measure sustained by another witness, and it suffices to show what facts transpired to support the charge of disturbance of a religious meeting, and to warrant the verdict.

Waiving the question of the sufficiency of the indictment in alleging a criminal offense, and of the evidence offered in its support, about which, as unnecessary, we abstain from expressing an opinion, we think there is error in excluding the testimony offered to show the *bona fides* of the action of the defendant in asserting his supposed right of property in taking possession of the premises, and excluding those who had come to worship. The gist of the offense charged is the disturbance of a religious congregation in refusing to let them enter and engage in religious services, as it was accustomed to do, within the church building. There was no interruption in the service held a short distance off under the tree, nor before, further than that produced by the demand and the attempt to enter, not attended with violence, and the defendant's refusal to allow it. This refusal is the criminal act imputed to the defendant, and proved by the witness, and none other by which the intended religious services in the house were frustrated, and partially were conducted elsewhere. The conduct of the defendant was lawful if he had a title to the premises, and, if he had not, but *bona fide* believed that he had such right to the premises, and acted under that belief, however inopportune the time and manner of asserting it, he did not incur liability to a public prosecution, even though

Digitized by Google

many persons had come to worship there, and were not allowed to do so. To amount to a misdemeanor, the disturbance of the contemplated religious exercises must not only be actual and voluntary, but wanton, proceeding from a reckless disregard of the proprieties of time and place, and an indifference to the rights of others, as interpreted in State v. Ramsay, 78 N. C. 448, where the subject is discussed. The ruling in this case has been invoked in support of the present prosecution as establishing the proposition that persons arrived at a place of public worship, and about to assemble for that purpose, when prevented from doing so by another are disturbed, and the criminal act committed. But the case does not go thus far. There the congregation had formed within the church, and were awaiting the beginning of the regular service by the minister, who was present in the pulpit, and, according to some of the witnesses, a voluntary singing, a prelude thereto, was going on. The defendant, who had been expelled, began to speak about the matter of his expulsion, when he was told he could not proceed, and defiantly did proceed until put out of the house, and, re-entering, resumed his speaking in disregard of repeated commands and remonstrances from the minister, and by his noise and disorderly conduct broke up the meeting, and the members present left, and went home. This was declared to be the misdemeanor charged. Besides the actual disturbance of a religious congregation, not a congregation of religious persons engaged in transacting secular business of the denomination, (held not to be an indictable offense in State v. Fisher, 3 Ired. 111,) there must be in association with the act a criminal intent, that is, an intent to do, knowing the consequences, those acts which necessarily tend to disturb, and do disturb, such religious congregations in their worship, or to break it up, and prevent the proposed religious services. If the intent does not coexist with the fact of disturbance, but is the sole result of an honest claim of property and of a right to possess and hold it, no ground is afforded for a criminal prosecution, unless it is asserted and maintained in a violent and disorderly manner, and in excess of the just and firm maintenance of the asserted claim. The court below took a different view, and refused to hear any evidence explanatory of the defendant's conduct, and showing his good faith, sustaining the exception of the state on the ground "that the acts must speak for themselves, and the defendant cannot be heard to say what was meant by his conduct." It is very true that the defendant could not be permitted to vary the nature, or dispute the obvious and necessary results, of what he did, as ruled in State v. King, 86 N. C. 603; State v. Voight, 90 N. C. 741; Moore v. Cameron, 93 N. C. 51; and which follow and sustain Cheatham v. Hawkins, 80 N. C. 164,—but it is otherwise where the act alleged to be criminal is done in the exercise of a supposed right, not extending beyond reasonable limits, and becomes a misdemeanor only when associated with a wanton intent, as has been already defined. The interruption charged consists, not in tumultuous conduct, or violence, or menace of violence in manner or word, but simply in withholding from present use the church in which the persons assembling had come to engage in worship; and surely, if this was done as an owner, rightful or not, it would not constitute the grounds for a criminal prosecution, as it would not for a civil action, unless at the instance of the party having title. This is fully warranted by State v. Hanks, 66 N. C. 612; State v. Ellen, 68 N. C. 281; State v. Hause, 71 N. C. 518; State v. Crosset, 81 N. C. 579; State v. Ramsay, supra. From the evidence it seems that there were two parties claiming the church, each of whom had posted up notices forbidding the other to enter upon the premises, and that the defendant with his associates took prior possession, and when the leader of the other party came he and his associates were unable to enter, and out of this controversy springs the present prosecution, and accordingly each claims himself to have been disturbed by the other. The exclusion of the evidence, tendered, as we understand the proposal, to prove the *bona fides* of the defendant's conduct in taking and maintaining possession, is an error entitling the defendant to a *venire de novo*, and it is so adjudged.

(103 N. C. 328)

STATE v. HARGRAVE.

(*Supreme Court of North Carolina.* April 1, 1889.)

FALSE REPRESENTATIONS — INSTRUCTIONS — VARIANCE.

1. Defendant, having proved a ticket as a witness in a criminal prosecution, assigned his claim against the county to another. The assignee gave the ticket to a deputy of the clerk, who marked it as assigned. The ticket was misplaced, and the county commissioners audited the claim without notice of the assignment. Defendant then went to the clerk, and stated that he had not assigned the claim, and thereupon the clerk gave him an order for the amount, which he collected. *Held* sufficient evidence to go to the jury that defendant obtained the order by false representations.

2. A charge that if defendant fraudulently, designedly, knowingly, and falsely represented, whether by words or acts, that he had not assigned the claim, and that he was the owner when in fact he was not, and that by reason thereof he obtained the order, he must be guilty, is correct. The *scienter* is distinctly left with the jury.

3. Payment of the order to defendant discharged the county from liability, and an allegation in the indictment that the assignee of the claim was defrauded by the false representations to the clerk was not a variance from the facts proved.

The Attorney General, for the State.

AVERY, J. This was a criminal action tried at the December term of the superior court of Davidson county, before PHILIPS, Judge. The bill of indictment was as follows: "The jurors for the state," etc., "present that Levi Hargrave, late of the county of Davidson, on the 5th day of July, in the

Digitized by Google

year of our Lord one thousand eight hundred and eighty-eight, * * * unlawfully and knowingly devising and intending to cheat and defraud A. L. Clodfelter of his goods, moneys, chattels, and property, did then and there unlawfully, knowingly, and designedly falsely pretend to A. L. Clodfelter that he, the said Levi Hargrave, * * * was the owner of one witness ticket, on its face calling for $4.10, and had right to convey the same to said Clodfelter, and had right to obtain goods thereon, made in favor of him, the said Levi, in the case of State v. Mebane; whereas, in truth and fact, he, the said Levi Hargrave, was not the owner of the said witness ticket, and did not then and there have the right to assign the same to said Clodfelter, and did not then and there have the right to obtain goods on said ticket from the said Clodfelter as he, the said Levi Hargrave, then and there well knew, by * * * which said false pretenses the said Levi Hargrave did unlawfully, knowingly, and designedly obtain from the said A. L. Clodfelter one pair of shoes and two pairs of socks, being * * * the property of the said A. L. Clodfelter, with intent to cheat and defraud, * * * contrary to the form of the statute in such case made and provided, and against the peace and dignity of the state." Second count: "The jurors for the state," etc., "present that Levi Hargrave, * * * of the county of Davidson, on the 5th day of July, in the year of our Lord one thousand eight hundred and eighty-eight, * * * unlawfully and knowingly devising and intending to cheat and defraud A. L. Clodfelter of his goods, moneys, chattels, and property, did then and there unlawfully, knowingly, and designedly falsely pretend to W. N. Kinney, clerk and agent of F. R. Loftin, register of deeds of said county, that he, the said Levi Hargrave, was the owner," etc., "of a certain county order, which is as follows; that is to say: '$2.10. Office Board of County Commissioners, Davidson County, N. C., July 3rd, 1888. Ordered that the county treasurer pay Levi Hargrave two and 10-100 dollars, for 1-2 fees, State vs. Wm. Mebane. No. 271. A true copy. F. R. LOFTIN.' Whereas, in truth and fact, he, the said Levi Hargrave, was not the owner and entitled to the possession and proceeds of the said order; he, the said Levi, having long before that time assigned his right, title, and claim thereto for value to the said A. L. Clodfelter, as he, the said Levi Hargrave, then and there well knew, * * * of which said false pretense and pretenses, he, the said Levi Hargrave, did then and there unlawfully, knowingly, and designedly obtain from the said W. N. Kinney, clerk and agent as aforesaid of the said county register of deeds, the said order," etc., "being then and there the property of the said A. L. Clodfelter,—to the great damage of said A. L. Clodfelter, contrary to the form of the statute," etc., "and against the peace and dignity of the state."

The defendant was a witness in a criminal prosecution, and proved a ticket for $4.20, and, the costs having been taxed against the county of Davidson, was entitled half the amount from the county. He assigned this claim against the county to one A. L. Clodfelter, and received from him goods to the amount due on the order from the county. Clodfelter gave the writing to one Meyer, deputy of the clerk of said court, who marked the defendant's witness ticket as transferred to the use of Clodfelter. The defendant told Clodfelter that half the charges were due him from the county, and thereupon the latter gave him meat, flour, etc., out of his store, to the value of $2.10, and took the assignment. The claim was audited and allowed by the board of county commissioners, and W. N. Kinney, who was register of deeds and *ex officio* clerk of the board, was empowered by the board to deliver an order to the county treasurer to pay the amount due to the owner. The clerk of the court or his deputy had the assignment, made by defendant to Clodfelter, and therefore failed to notify the board of commissioners or their clerk of the transfer of the ticket, or to make the fact of assignment appear in the bill of costs sent to the board to be audited. Clodfelter notified Kinney that the claim had been assigned to him, and was told by the latter that he had no previous notice of the transfer. Clodfelter went again to the clerk of the court, to find the written assignment. Before Clodfelter again applied to Kinney for the amount due on the witness ticket, the defendant had told Kinney that he had not assigned the claim to Clodfelter, and that he was still the owner of it, as Kinney testified he had been induced by that representation to give defendant the order incorporated in the bill of indictment. The defendant collected the amount due on the order from the county treasurer. The defendant told W. N. Kinney, register of deeds, who was charged by the board of county commissioners with the duty of issuing drafts to the county treasurer to pay claims audited and allowed by said board, that he was entitled to receive an order for $2.10, allowed on a witness ticket previously proven by defendant, and that he had not assigned the said ticket. This representation was false, for he had already transferred the ticket in writing to A. T. Clodfelter, and received goods for it. If Kinney was induced by the falsehood to deliver the order set out in the bill of indictment, the defendant obtained something of value from Kinney. Being, therefore, a false representation of a subsisting fact calculated to deceive, and which did deceive, whereby the defendant obtained the order mentioned, (which was property,) his honor did not err in overruling the demurrer to the evidence, and in refusing to give the first instruction asked, which is in the following language: "There is no evidence sufficient to go to the jury that the defendant obtained the order produced in evidence from Kinney by any false and fraud-

Digitized by Google

ulent representations, and therefore they must acquit the defendant." The representation was calculated to deceive, because the clerk had by accident mislaid the assignment, and Kinney had no evidence in his office of the fact that Clodfelter was the real owner.

After recapitulating the evidence, and explaining the offense of "false pretense," as defined in the case of State v. Phifer, his honor instructed the jury as follows: "If the jury believe, beyond a reasonable doubt, that the defendant, Levi Hargrave, fraudulently, designedly, knowingly, and falsely represented to W. N. Kinney, whether such representations be in words or acts, that he had not assigned his claim to Clodfelter, and that he was the owner of the order when in truth and in fact he was not, and that by reason thereof he obtained the order from Kinney, he must be guilty. If the jury are not so satisfied, they must acquit." We think that the instruction given was substantially in compliance with the law, as stated in State v. Dixon, 101 N. C. —, 7 S. E. Rep. 870; State v. Wilkerson, 98 N. C. 696, 3 S. E. Rep. 683; and State v. Phifer, 65 N. C. 326. The question of *scienter* was distinctly left with the jury, and they, under the instruction, passed upon every matter material in arriving at a conclusion as to defendant's guilt.

The second paragraph of the prayer submitted for defendant was a request to the court to tell the jury that there was no evidence that the claim was assigned to Clodfelter, when the latter and the witness Leonard had both testified that an assignment in writing was signed by defendant in their presence. We do not understand the request to suggest a doubt as to whether the defendant could lawfully transfer such a claim in the manner described by the witnesses. That question is settled, however. Harris v. Burwell, 65 N. C. 584; Havens v. Pots, 86 N. C. 31. The question raised by the third paragraph of the instruction asked, whether Kinney issued the order, because the bill of costs sent over from the clerk's office contained no notice of the transfer, or because of the representation by the defendant that he was the owner of the claim, was fairly submitted to the jury. Under the instruction given they could not have found the defendant guilty without being fully convinced from the testimony that he obtained the order only by falsely representing that he was the owner. The judge was not bound to give instruction in the words of counsel. Brink v. Black, 77 N. C. 59. We do not think that it is material whether Kinney was told by Clodfelter of the assignment to the latter, and the fact could only be considered by the jury in determining what reason operated on Kinney's mind, and induced him to issue and deliver the order. We see no error in the refusal to give the jury the charge requested in the fifth paragraph of instructions asked. The jury declared by their verdict, in the light of the testimony and the instruction given, that they were satisfied beyond a reasonable doubt that the order was obtained by means of the falsehood told by the defendant to Kinney.

Paragraph 3 of the prayer submitted was as follows: "The bill of indictment charging that A. T. Clodfelter was cheated and defrauded, and, the evidence being that the county alone, if anybody, and not Clodfelter, was cheated and defrauded, the jury should acquit the defendant." The point raised was whether the court should have held that there was a fatal variance between the charge and the evidence, and directed a verdict of not guilty to be entered on that ground. The board of county commissioners exercise all of the powers granted to the county as a municipal corporation, and are the only persons through whom the corporation can be sued. Code, §§ 702–705, both inclusive. The board intrusted orders for audited claims against the county to the register of deeds, who was *ex officio* clerk of the board, for delivery. If he delivered them to parties, the treasurer would pay them. The clerk had sent to the board of commissioners evidence to show that, in a state case in which a defendant had been convicted, Levi Hargrave had been allowed to prove a ticket as a witness on behalf of the state, and that the defendant in that case, after conviction, had taken the insolvent debtor's oath, and had been discharged from custody for costs charged against him, thereby making the county liable for half the costs. The ticket was presumptive evidence of the facts appearing from it. Deaver v. Commissioners, 80 N. C. 116. The clerk had not made out the charges of Hargrave to the use of Clodfelter, and Kinney, therefore, as lawful agent of the county, could issue an order to the person who was presumed to be the rightful owner of the amount taxed against the county on the ticket proved by him, and, when that order was paid, the county was discharged from liability. The clerk might and probably ought to have noted the assignment on his record, and stated in the bill of costs that the ticket was assigned to the use of Clodfelter, if he had sufficient evidence of the transfer, but he failed to do so. The natural consequence of procuring the order from Kinney, and collecting it, was to discharge the county, when but for the falsehood Kinney would have delivered the order to Clodfelter, and he would have received the money. We think that there was evidence of an intent to defraud Clodfelter, and that the fraud contemplated was in the end a fact accomplished. If the exception growing out of the refusal to give the instruction prayed for can be fairly construed to raise the same question as a motion in arrest of judgment on the ground that the bill in this form could not be sustained, we find the form given by Wharton, and taken from a precedent approved in another state, and drawn upon a statute substantially the same as ours. 1 Whart. Prec. Ind. No. 528. Making a false representation to one person

Digitized by Google

with intent to defraud another was expressly held by this court to be indictable in State v. Dixon, supra. It has been held by this court, the supreme court of Massachusetts, and other courts that, where a person makes a false representation to an agent with intent to defraud the principal, a conviction on a bill of indictment embodying such a charge would be sustained. State v. Wilkerson, supra; Com. v. Harley, 7 Metc. 462; Com. v. Call, 21 Pick. 515; Whart. Crim. Law, §§ 2145, 2146; Bish. St. Crimes, § 134. While no case heretofore decided by this court has presented precisely the point whether a charge that a defendant who obtains something of value from one person by a false representation made to him with intent to defraud a third person, not connected as agent, is sufficient we think that the facts bring the case within the meaning of the statute, and clearly within the mischief intended to be remedied by it. It is analogous to the case of State v. Dixon, supra, and clearly comes within the principle stated in that case. There is no error. The motion for new trial is refused.

(103 N. C. 353)

STATE v. CRAWLEY.

(Supreme Court of North Carolina. April 9, 1889.)

CRIMINAL TRESPASS—EVIDENCE.

On indictment under Code N. C. § 1120, for going or entering on land after being forbidden, and without a license, defendant may show that he went on the land in good faith claiming to have or having title thereto; but such defense will not avail unless he show reasonable ground for a belief that his claim was well founded.

Appeal from superior court, Burke county; ARMFIELD, Judge.

S. J. Ervin, for defendant. *The Attorney General*, for the State.

MERRIMON, J. The defendant was arrested upon a criminal warrant, and convicted before a justice of the peace of the offense of having unlawfully and willfully entered upon the land of the prosecutrix after having been forbidden by her so to do, and without a license, in violation of the statute. Code, § 1120. Thereupon he appealed to the superior court, and there pleaded formally not guilty. There was a verdict of guilty, and judgment thereupon against him, and he appealed. On the trial the evidence produced by the state tended strongly to prove the defendant guilty. He "claimed to enter under a *bona fide* claim of right and title, and offered to show title in the land in himself, which the court excluded;" and, among other things, the court said to the jury: "That even if there was a parol license [which prosecutrix denied] it could be revoked, and defendant could not justify under it, and, after being forbidden, if the defendant had entered inside of the field of the prosecutrix that she had held in actual possession and cultivation for thirteen years or more, and committed the acts testified to, he would be guilty; that if defendant had a *bona fide* claim of title he was put to his civil action to assert it, and could not justify an attempt to assert it in this way." This is assigned as error. If this were a prosecution for forcible entry, or forcible trespass on land, in that case the question of force, without regard to the claim of right or title to the land by the defendant, would become material, and it might be that the evidence produced on the trial would warrant a verdict of guilty. But the defendant is charged with a very different offense, —that of simply going or entering upon the land of the prosecutrix after she had forbidden him, and without a license so to do, in violation of the statute, (Code, § 1120,) which makes such act a misdemeanor. Just after the close of the late civil war it became a common grievance of the owners of land (and it still prevails to some extent) that idle, roving, aimless people, for purposes of mischief, and not infrequently other classes of people for purposes of sport, would go or enter without force or the display of force upon their lands, and do mischief, greatly to their annoyance, and sometimes to their substantial injury, leaving them remediless. The purpose of this statute, first enacted in 1866, was to suppress such mischief and grievance. It was not part of its purpose to prevent any person who had an honest claim or title to land from going or entering upon and taking possession of it peaceably and quietly, when and if he could do so. It was not intended to apply when force was employed in going upon the land. That case had already been provided against. This court has repeatedly and uniformly so in effect interpreted the meaning of the statute. State v. Crossett, 81 N. C. 579; State v. Winslow, 95 N. C. 649, and the cases there cited. The defendant therefore had the right to prove, if he could, that he went upon the land in good faith, claiming to have or having title thereto, and the court erred in refusing to allow him to produce evidence for that purpose. But such claim would not avail him unless he should satisfy the jury, in the absence of title, that he made it in good faith, and he had reasonable ground to believe that his claim was well founded. A mere belief on his part that he had such claim would not be sufficient; he was bound to prove that he had reasonable ground for such belief, and the jury should so find under proper instructions from the court. State v. Bryson, 81 N. C. 595. The evidence went to prove that the defendant entered upon and took possession of the land by force. If he did so, then he ought to have been indicted for such forcible entry. State v. Bryant, ante, 1, (decided at this term.) There is error. Let this opinion be certified to the superior court according to law. It is so ordered.

Digitized by Google

(103 N. C. 344)

STATE v. CAMPBELL.

(*Supreme Court of North Carolina.* April 8, 1889.)

LARCENY—PROPERTY SUBJECT OF.

1. A due-bill is an "obligation," within the meaning of Code N. C. § 1064, making an "order, bill of exchange, bond, promissory note, or other obligation" the subject of larceny.
2. One cannot be convicted of larceny of such due-bill if it has previously been paid.

Appeal from superior court, Yadkin county; PHILIPS, Judge.

A. E. Holton, for defendant. *The Attorney General*, for the State.

MERRIMON, J. The defendant is charged with the larceny of "one due-bill of the value of fifty-four cents, of the goods, chattels, and moneys," etc. The indictment contains but a single count, and concludes, against the "form of the statute in such case made and provided, and against the peace and dignity of the State." The defendant pleaded not guilty. On the trial the state produced evidence tending to prove "that the due-bill alleged to have been stolen was given by J. W. Windsor to one Bud Morgan for fifty-four cents, and afterwards taken up and paid off by said Windsor, and laid by him on a counter or shelf in his store, for the purpose of showing his wife how to date a due-bill; whence it was taken by the defendant a few days thereafter." It was contended for the defendant that, if he "took the due-bill after it had been paid off and taken up by the" prosecutor and was worthless, it was not the subject of larceny, and he requested the court to so instruct the jury. The court declined to give them such instruction, but told them "that if the defendant took the due-bill with a felonious intent, notwithstanding it had been paid off and taken up, the defendant would be guilty." The defendant excepted. There was a verdict and judgment against him, and he appealed.

The defendant is not indicted for the common-law offense of larceny, but for larceny as prescribed by the statute, (Code, § 1064,) which, among other things, declares that "if any person shall feloniously steal, take, and carry away, or take by robbery, * * * any order, bill of exchange, bond, promissory note, or other obligation, either for the payment of money or for the delivery of specific articles, being the property of any other person, or of any corporation, (notwithstanding any of the said particulars may be termed in law a 'chose in action,') such felonious stealing, taking, and carrying away, or taking by robbery, shall be felony of the same nature and degree, and in the same manner, as it would have been if the offender had feloniously stolen or taken by robbery money, goods, or property of any value, and such offender for every such offense shall suffer," etc. The choses in action thus made the subjects of larceny are not deemed such subjects at the common law. They are very important instrumentalities employed constantly in trade and commerce, and are valuable as species of property to the owners of them. They are susceptible of being stolen easily, and are such things as, in the absence of protection of them against larceny by the principles of the common law, require to be so protected by criminal enactments; hence the statutory provision partly recited above. They are regarded and treated as certain written evidence of valuable and useful orders, promises, or obligations to pay money, or for the delivery of specific articles. They are valuable and useful as such evidence, and, for the purposes of the statute cited, have no other property or quality of value; however, the paper or other thing on which they may be written might possibly be treated as bits of personal property of trifling value, and therefore the subject of larceny at common law. Indeed, in cases similar to the present one, it has been not uncommon as a measure of caution, to put two or more counts in the indictment, charging in the first one the larceny of a note, bond, or other thing mentioned in the statute; and also, in a second one, the larceny of the paper on which they were written. State v. Banks, Phil. (N. C.) 577; Whart. Crim. Law, §§ 349, 350, 1759, 1838; Rex v. Vyse, 1 Moody, 218. When, however, the indictment charges the larceny of one of the several species of choses in action specified in the statute, and there is no count for a larceny at common law, as suggested, the state must prove the larceny of the chose in action as charged, else the prosecution must fail, because the charge is not for the larceny merely of a piece of paper on which the note or other thing is written, but of the valuable written evidence of the chose in action, as charged and designated in the statute. It is the latter, embodied and evidenced by the writing, that is charged to have been stolen. It would not comport with just and settled criminal procedure to indict a person for the larceny of a promissory note, and allow him to be convicted upon such charge of stealing a piece of paper. Stealing the latter, if an offense at all, is a common-law offense, and essentially different from the statutory offense of stealing a promissory note. The former is not necessarily a part of, or embraced by, the latter. The note might be written on parchment, linen, silk, or cotton cloth, or the like. Neither principle nor statutory provision requires promissory notes and like things to be written on paper, though ordinarily, for the greater convenience, they are so written.

The defendant is charged with the larceny of a "due-bill," and he contends that it is not within the terms or meaning of the statute, which by its terms embraces "any order, bill of exchange, bond, promissory note, or other obligation," etc. A "due-bill" is usually a simple acknowledgment by the maker thereof of a debt due to the person named in it, without any promise therein expressed to pay the same, and such an acknowledgment is not a promissory note, or negotiable by indorsement. It might be such note if it con-

Digitized by Google

tained words of promise. Story, Prom. Notes, § 14, and note; Chit. Bills, (12th Amer. Ed.) 129, 526. The "due-bill" charged to have been stolen is not specified with as much precision and fullness as it should have been. We must take it to be simply a "due-bill," and therefore it does not come within the meaning of the words, "any order, bill of exchange, bond, promissory note;" but we think it is embraced by the other words, "or other obligation." The word "obligation," in its most technical meaning, implies *ex vi termini* a sealed instrument, but it certainly has also a very broad and comprehensive legal signification, and embraces all instruments of writing, however informal, whereby one party contracts with another "for the payment of money, or for the delivery of specific articles," whether the same be under seal or not. The words "or other obligation" are used in a remedial and comprehensive sense, as appears from the purpose of the statute and the enumeration of the several classes of obligations made the subject of larceny by it; they imply like or similar obligations; some under seal, and others not. A "due-bill" is evidence of an obligation to pay money. The maker by it acknowledges the indebtedness, and the law implies and raises the obligation to pay it. Hence it is the subject of larceny, as prescribed by the statute.

The defendant further contended that the evidence in connection with the "due-bill" put in evidence on the trial went directly to prove that it had been paid and absolutely discharged; that it was therefore without force or value, and not the subject of larceny. There was evidence that it had been so paid, but the court declined to give the instruction asked for by the defendant, and instructed the jury "that if the defendant took the due-bill with a felonious intent, notwithstanding it had been paid off and taken up, the defendant would be guilty." This is assigned as error. We think the court should have given the instruction asked for, or the substance of it. The "due-bill," such as we must take that charged in the indictment to have been, was not negotiable by indorsement. The evidence went to prove—indeed, it was not denied—that it had been paid. It had therefore ceased to have force or effect as an obligation; it was no longer an obligation such as contemplated by the statute; it no longer had any value as such; and therefore it was not within the purpose of the statute, nor the subject of larceny as a "due-bill" or an "obligation." It may be that if the indictment had contained a count for larceny at common law of the paper on which the "due-bill" was written, the defendant might upon the evidence have been properly convicted, but it contained no such count, and we do not decide that he could or could not. Whart. Crim. Law, § 1749; Rosc. Crim. Ev. (4th Amer. Ed.) 624; Rex v. Phipoe, 2 Leach, 673; Reg. v. Morris, 38 E. C. L. 209. This case is very different from a class of cases cited and commented upon by the attorney general, in which the promissory notes or other instruments charged to have been stolen had been taken up in the course of business, and might be reissued or put in circulation again, and used from time to time. In all such cases the promissory note or other obligation had not become extinct, and had not lost its value for the purposes contemplated by it. There is error. The defendant is entitled to a new trial, and we so adjudge. To that end let this opinion be certified to the superior court. It is so ordered.

(103 N. C. 350)

STATE v. LOW.

(*Supreme Court of North Carolina.* April 9, 1889.)

CRIMINAL PRACTICE—APPEAL—SECURITY FOR COSTS.

An affidavit of inability made by a defendant in a criminal case, to enable him to appeal without giving security for costs, is defective where the record shows that it contains no averment that the application was made in good faith, as required by Code N. C. § 1235, in such cases.

Appeal from superior court, Yancey county; CLARK, Judge.

The Attorney General, for the State.

SMITH, C. J. The charge against the defendant is for selling spirituous liquors in the county of Yancey, a territory in which a popular vote had been taken, and declared to be in favor of prohibition, according to the provisions of volume 2 of the Code, c. 2. After conviction and judgment, the defendant obtained leave of the judge, upon his affidavit of inability to give security or make a money deposit upon an appeal, to take the appeal *in forma pauperis*, and the transcript of the record has been brought to this court. Upon examination, the affidavit which is sent up is found to be fatally defective in failing to state "that the application is in good faith." This is essential to its sufficiency to sustain the appeal in criminal causes, under section 1235 of the Code, as determined in State v. Payne, 93 N. C. 612, and State v. Jones, Id. 617. The motion of the attorney general to dismiss the appeal must be allowed. Had the record simply stated the allowance of the appeal, unaccompanied with the affidavit of the defendant, and the certificate of counsel, we should have proceeded to hear, assuming that the leave granted was rightful and proper, and based upon sufficient grounds, on the maxim, *omnia rite præsumuntur*. State v. Jones, supra. Counsel for the defendant seem, in preparing the papers to enable him to prosecute his appeal without giving security, to have followed the provisions of sections 552 and 553, which relate to appeals in civil cases, and do not require the averment of good faith, the omission of which is a fatal defect in the affidavit in criminal cases, not adverting to section 1235. Appeal dismissed.

Digitized by Google

STATE *v.* MCCOURY.

(*Supreme Court of North Carolina.* April 9, 1889.)

Appeal from superior court, Yancey county; CLARK, Judge.

The Attorney General, for the State.

SMITH, C. J. The conviction and judgment in this case were upon an indictment for carrying a pistol concealed about the person of the defendant, and leave to appeal was given without security upon an affidavit in which appears the same fatal defect as in that of State v. Low, ante, 411. It must be disposed of in the same manner. Appeal dismissed.

(102 N. C. 540)

JAMES MEYER BUGGY CO. *v.* PEGRAM *et al.*

(*Supreme Court of North Carolina.* April 8, 1889.)

COMMISSIONERS OF DEEDS.

Under Code N. C. § 632, relating to the appointment of commissioners of deeds resident in other states, etc., it is immaterial whether the persons whose acknowledgments are taken by a commissioner are domiciled in the state where the acknowledgments are taken or not.

Watson & Buxton, for appellants. *J. L. Patterson*, for appellee.

AVERY, J. This was a civil action heard at February term, 1889, of the superior court of Forsyth county, before PHILIPS, Judge. The defendant T. H. Pegram, Jr., on the 31st of October, 1887, executed his promissory note for value to plaintiff for $334.50, upon which at May term, 1888, of said court the plaintiff recovered judgment for the full amount of the debt, with interest and costs, and no part of said judgment has been paid. On the 5th of December, 1887, said Pegram executed a deed of trust, conveying his personal property and a town lot to the defendants Buxton and Grogan, for the benefit of his creditors, with a power of sale, and said trustees have sold, and, after satisfying some liens prior to said deed of trust on said lot out of the proceeds of sale, have now in hand a sufficient balance to pay plaintiff's debt in full. The foregoing facts are allegations of the complaint not denied. The plaintiff in his complaint alleges, further, that: (6) T. H. Pegram, Jr., and his wife, Helen L. Pegram, at the time of the execution of the above-mentioned deed of trust were citizens and residents of the town of Winston, county of Forsyth, state of North Carolina, both having been born and reared in said state, as plaintiff is informed and believes, and had been such residents and citizens for many years previous to said assignment to Grogan and Buxton, and that they are still citizens and residents of the state of North Carolina; and that said Pegram had been for many years previous to assignment engaged in business in the town of Winston. (7) That said deed of trust was drafted by an attorney residing in the county of Forsyth, state of North Carolina, and was taken by said Pegram from this state to the city of Richmond, state of Virginia, whither he and his wife were going for a pleasure trip of only a few days, and there acknowledged by them in the following form: "State of Virginia, City of Richmond. Personally appeared before me, James M. Downan, commissioner of affidavits for the state of North Carolina, on the 5th day of December, 1887, Thomas H. Pegram, Jr., and Helen L. Pegram, his wife, the persons whose names appear to the foregoing deed, who both duly acknowledged the due execution of the same as their act and deed. Wherefore, Helen L. Pegram, being being by me privately examined, separate and apart from her husband, doth say she executed the same freely of her own accord, without fear or compulsion of her said husband or any other person, and that she doth still voluntarily assent thereto. Witness my hand and official seal the day and year above. [Seal] JAMES M. DOWNAN, Comm'r of State of N. C. residing in State of Virginia. North Carolina, Forsyth County. The foregoing certificate of James M. Downan, commissioner of affidavits for the state of North Carolina in the state of Virginia, is adjudged to be correct. Let the instrument, with the certificate, be registered. Witness my hand and official seal this 6th day of December, 1887. C. S. HAUSER, C. S. C. Forsyth County. Registered in the office of the register of deeds for Forsyth county, in book 4, p. 529, at 9 o'clock A. M., Dec. 6th, 1887. D. P. MAST, Register." (8) That before the beginning of this action the plaintiff demanded of all the defendants the payment of said promissory note, which demand was refused. (9) That the defendant T. H. Pegram, Jr., has no other property or effects liable to execution sufficient to satisfy the judgment of the plaintiff, he also being irredeemably insolvent beyond the property embraced and named in the above deed of trust. Wherefore the plaintiff demands judgment (1) that said deed of trust be declared null and void as to the plaintiff. (2) That the assignees, Grogan and Buxton, be held and declared trustees for the plaintiff of the moneys received by them from the sale of the real and personal property attempted to be conveyed in said deed of trust, or of so much thereof as will satisfy the judgment of the plaintiff; and for such other and further relief as the plaintiff may be entitled to.

All of the allegations of the complaint were admitted in the answer, except that the defendants denied that the wife of T. H. Pegram went to Richmond on a pleasure trip, and averred that she was an invalid, and went there to be treated by a physician, expecting to be detained for an indefinite period for that purpose. The only question discussed was whether the acknowledgment of the deed of trust before the commissioner was valid, and from the ruling of the court that the deed of trust was properly proved the defendants appealed. The judgment was as follows: "This cause coming on to be heard, it is now adjudged that, upon the complaint and answer, the plaintiff do recover of the defendants the sum of $358.32, and interest from the 16th day of February, 1889.

Digitized by Google

on the said $358.32, and the costs of this action, and that said assignees be declared trustees of the proceeds of said sale of real and personal property described in the complaint, and that said deed of trust be null and void so far only as the plaintiff in this action is concerned."

We think that the Code, § 632, confers upon commissioners of affidavits, regularly appointed, full authority to take the acknowledgment, within the states for which they are appointed, of the grantors of any deed conveying land lying in this state, and, when necessary, to take the privy examination of a married woman who is a grantor joining her husband in the execution. When the certificate of such commissioner is adjudged correct by the clerk of the superior court of the county in which the land lies, and the deed is registered upon order of the latter, the registration will be deemed valid for all purposes. If a deed of trust is so proved and registered in obedience to the order of such clerk after adjudication by him it will be effectual to pass the title of land or other property conveyed in the deed to the trustee, and will create a lien, as against subsequent purchasers for value or docketed judgments of later date, in favor of the *cestui que trust* named in the deed. It is not material in such cases whether the grantors, or either of them, are, at the time of the execution of the deed or deed of trust, residents of this state or domiciled in the state in which the acknowledgment is taken.

Counsel contended that the ruling of this court in the case of De Courcy v. Barr, Busb. Eq. 181, is decisive of the question raised in this case. We cannot concede the position to be tenable. The court in that case construed section 2, c. 21, Rev. St., as empowering commissioners of affidavits to take the acknowledgments of non-residents only, upon the ground that the section declared that the acknowledgment should have "the same force and effect, etc., as if the same had been made" before some one of "the judges of supreme jurisdiction in any other state." Section 5, c. 37, Rev. St., authorized judges of courts of supreme jurisdiction in other states to take the acknowledgment of grantors residing "in any of the United States other than this state." The Revised Code was enacted at the next session of the general assembly held after that decision was rendered, and the law as embodied in section 2, c. 21, Rev. Code, seems to have been drawn with the purpose of enlarging the powers of commissioners of affidavits, and enabling them to take and certify acknowledgments of grantors to deeds, whether they were non-residents, or residents of this state temporarily absent from the state. The section last named has been in force since its enactment by the legislature of 1854–55, being almost the same as section 632 of the Code. The latter gives to acknowledgments, taken before commissioners of affidavits, "the same force and effect, for all purposes, as if the same had been made or taken before any competent authority in this state." It does not seem that any serious doubt has been entertained as to the true meaning of the law now in force. It has been considered as conferring upon a commissioner of affidavits the same authority to take the proof of execution or the acknowledgment of grantors who may be in the state for which they are appointed, (whether there temporarily or as residents,) as to the execution of deeds conveying land or other property located in this state, that are required or allowed by law to be registered, that is given by law to the clerk of the superior court of the county in which the land lies, but the clerk has power to adjudge that the execution has been properly proved, and order the registration; while the commissioner is *funotus officio* as to any given deed, when he has attached to it his certificate, as to proof or acknowledgment of its execution. Evans v. Etheridge, 99 N. C. 43, 5 S. E. Rep. 386; Simmons v. Gholson, 5 Jones N. C. 401. The plaintiff is not entitled to judgment against the defendants Buxton and Grogan. He has already recovered judgment against the defendant Pegram. There is error. Judgment reversed.

(102 N. C. 529)

McCULLOH *et al.* v. DANIEL.

(*Supreme Court of North Carolina.* April 9, 1889.)

TENANCY IN COMMON—ADVERSE POSSESSION.

Where an order of sale of the land of a decedent to pay debts is made without service of any process on certain of the devisees, and the sale thereunder purports to be of the entire interest in the land, the deed is color of title against all the devisees. The doctrine of tenancy in common cannot be applied to the purchaser in such case.

T. B. Bailey and *A. E. Holton*, for appellants. *E. L. Gaither*, for appellee.

DAVIS, J. Civil action tried before CLARK, J., at spring term, 1888, of the superior court of Davie county. The plaintiffs alleged that they were the owners of two undivided fifths of the land in controversy, as devisees of Alfred McCulloh, deceased, and that the defendant is the owner of the other three-fifths, as tenant in common with plaintiffs, and is in possession, and wrongfully withholds the same, and they demand judgment that they be "let into possession," etc. The defendant answers at much length, averring several grounds of defense, and among them, in substance, that the land in question was sold publicly by James M. Johnson, executor of Alfred McCulloh, deceased, on the 1st day of May, 1869, in obedience to a decree of the superior court of Davie county, at which sale the defendant became purchaser; that the sale of the land was confirmed, the purchase money paid, and a deed under a decree of the court executed to him therefor, and that he has held the same ever since adversely to all persons under the said deed; that the purchase was "with the full knowledge and without objection on the part

Digitized by Google

of the plaintiffs, and that by their acts and conduct he was encouraged to buy" said land. There are also averments of fact showing possession adverse to the plaintiffs, and the recognition by them of the sole ownership of the defendant; and he relies upon his purchase and deed, and adverse possession thereunder, and the statute of limitations. After referring to the complaint and answer, to be taken as a part thereof, the following is the statement of the case on appeal: The testator died, and James M. Johnson duly qualified as his executor prior to the 11th day of September, 1867, at which time said executor filed his petition for the sale of the land in controversy for assets to pay the debts of said Alfred McCulloh. An order of sale was granted, and the land was sold at public auction, at the court-house in Mocksville, when and where defendant bought. The sale was, at fall term, 1869, of Davie superior court, confirmed. Defendant paid the purchase money, and on the 6th day of November, 1869, took a deed from the executor for the entire tract of land, and has been in the exclusive and adverse possession of the same under said deed from that time down to the present. The judgment purported to be against all the heirs at law of Alfred McCulloh, deceased, but as a matter of fact the plaintiffs were not served with process, nor did they appear and file any answer. The only question presented on the appeal is that of lapse of time and statute of limitations; the above facts being agreed. The plaintiffs contended that the defendant only obtained by his purchase the undivided three-fifths interest of the three devisees made parties to the proceeding to sell the land for assets, and that, as he had not been in possession of the land for 20 years, their rights were not barred, as they claimed to be tenants in common with defendant. The court, being of opinion that the land descended to the heirs at law only *sub modo*, subject to the prior right of the creditors of testator to subject it to payment of his debts, and the sale having been adjudged of the entirety owned by such testator, and not of the interest of any of the tenants in common, the deed made in pursuance thereof, purporting to convey the entire interest of such testator, was color of title of the testator's interest; and it being admitted that defendant has been in exclusive adverse possession under known and visible lines and boundaries of the land under said deed from its date (1869) down to this date,—directed the jury to find the issue submitted in favor of defendant. Verdict and judgment for the defendant, and exception and appeal by plaintiffs.

This case cannot be likened to a sale of one tenant in common under execution, as in Ward v. Farmer, 92 N. C. 93, or to any one of the numerous cases of a sale of one tenant in common, whether purporting to sell his own interest only or the entire interest in the land, cited by the counsel for the plaintiffs. It is insisted for the plaintiffs that as in fact no process was served on them, the sale as to them was absolutely void, and the effect of the deed was to constitute the defendant a joint tenant with them, and could not confer a title adverse to them. We are relieved by the facts in this case of the necessity of considering this question. The defendant does not claim under a deed from any one or more of the heirs or devisees of Alfred McCulloh, or under a deed purporting to sell the interest of one or more of the heirs, but he claims against all of them, and not under any of them, under a deed from J. M. Johnson, made under a decree of the superior court of Davie county in certain judicial proceedings to sell land of the testator to make assets; and an adverse possession under such a deed for seven years would confer a perfect title against all persons who are laboring under no disability, and this even if the deed had been made by a stranger, and without any pretense of judicial or other sanction. The defendant having held the land under the deed referred to exclusively and adversely to the plaintiffs for more than seven years,—from November, 6, 1869, to the bringing of this action, September 17, 1877,—there was no error in the ruling of his honor. There is no error.

(102 N. C. 411)

STRICKLAND *v.* COX.

(*Supreme Court of North Carolina.* April 9, 1889.)

JUDGMENT—CONDITIONAL.

1. A court cannot delegate its judicial functions to its clerk, so that he may set aside a judgment upon the performance of a condition.
2. Alternative or conditional judgments at law are void in civil as well as in criminal cases.

Appeal from superior court, Surry county; CLARK, Judge.

This case was submitted upon the following agreed statement: This was a civil action, brought by plaintiff for the possession of the land described in the complaint, returnable to August term, 1887. At the November term, 1887, Judge GILMER granted judgment for plaintiff for possession of the land, to be stricken out if defendant filed a justified bond, in the sum of $200, within 30 days from the adjournment. The defendant failed to file in 30 days the justified bond required in said judgment, but within 30 days, and without notice to plaintiff, did file with the clerk an affidavit that affiant was unable to give the justified bond required, and also unable to make the deposit; and also, at same time, defendant's attorney filed with the clerk the certificate required by statute, and, upon producing the affidavit and certificate, the clerk made an order allowing defendant to defend the suit without bond. After the expiration of the 30 days, to-wit, on the 13th February, 1888, the defendant having failed to file the justified bond as required, the clerk issued a writ of possession, and delivered same to the sheriff, and same was duly executed the 16th February, 1888, by M. L. Patterson, a regu-

Digitized by Google

lar deputy-sheriff, by putting defendant out and plaintiff in possession of the said land. That defendant, after due notice to plaintiff, moved his honor, CLARK, J., at the spring term of said court, to set aside said writ of possession, on the ground that the same was illegally issued, and for an order of restitution; that said motion was allowed; and the judge assigned the following grounds: *First*, that the judgment of Judge GILMER contained a condition, and was therefore void; *secondly*, that the clerk was legally authorized to make the order he did, allowing defendant to defend the suit without bond, and that the writ of possession, issued after such order, was without legal authority, and therefore void; and rendered judgment setting aside the writ of possession, and ordering a writ of restitution. From this judgment plaintiff appealed.

Watson & Buxton and *W. F. Carter*, for appellant. *R. L. Haymore*, for appellee.

SHEPHERD, J. We are aware that it has not been unusual to render judgments like the one in question, but, as they have generally been granted as an indulgence to defendants, and acquiesced in by them, their validity has never been directly determined by this court. "At law, the judgment is yea or nay, for one party and against the other." Freem. Judgm. § 2. And a court cannot delegate its judicial functions to its clerk, so that he may set aside a judgment upon the performance of a condition. Alternative or conditional judgments at law are void in civil as well as in criminal cases. State v. Bennett, 4 Dev. & B. 43; State v. Perkins, 82 N. C. 682. There is no error in the ruling of his honor.

(103 N. C. 337)

STATE v. WILKERSON.

(*Supreme Court of North Carolina.* April 9, 1889.)

FALSE PRETENSES—INSTRUCTION—EVIDENCE.

1. On indictment for false pretense, by which defendant sold an unsound horse, it appeared that defendant knew the horse had a disease of long standing, and that lameness would only occur after about three days' driving; also that the purchaser, discovering that the horse limped, was assured by defendant that it had never been lame, and that the limping was the result of recent shoeing, and was temporary. *Held*, that an instruction that, if the purchaser could perceive the lameness, the principle of *caveat emptor* applied, and defendant was not guilty, was properly refused.

2. Where a witness who testified in a preliminary examination is insane at the time of trial, it is no objection to the admission in evidence of his testimony, as taken down by the justice, that the evidence is not signed by the witness, where the case purports to set out only an extract of the examination, as it will be presumed that the witness did sign it.

The Attorney General, for the State. *R. H. Battle*, for appellant.

SHEPHERD, J. This was an indictment for false pretense, tried before PHILIPS, J., and a jury, at fall term, 1888, of Stanly superior court. The pretense charged was "that a certain bay horse, which he, the said J. M. Wilkerson, (the defendant,) then and there had, was sound, and not lame, whereas in truth and in fact the said bay horse was not sound, and was lame from a diseased shoulder." The indictment further charges that by reason of said false pretense, falsely and fraudulently made, the defendant induced the prosecutor, one W. L. Daniels, to exchange horses with him. There was evidence on the part of the state tending to sustain the charge, and there was evidence on the part of the defendant that the prosecutor tried the horse, and said that "it limped some." There was also evidence to the effect that the prosecutor, after discovering that the horse limped, was assured by the defendant that the animal had never been lame, and that said limping was the result of having been recently shod; was temporary, and not the result of disease; and that the horse was as sound as a dollar. There was evidence to the effect that the lameness was produced by an old disease, the signs of which were not apparent upon inspection. In the course of the trial the state introduced J. W. Bostian, a witness for the state, who testified "that he was the justice before whom the preliminary trial was had, and that at the trial before him one J. P. Talbert was sworn and examined as a witness, and that his evidence was duly recorded by him, and returned to the clerk with the whole record; that J. P. Talbert is now insane, and is confined in the Morganton Insane Asylum; that the defendant was present and with counsel, and cross-examined Talbert and the other witnesses; that the evidence so taken down by him at the trial and returned to the clerk is just as it was when he returned it, and was in his handwriting." The state then offered to read to the jury the evidence of J. P. Talbert, taken down by the committing magistrate. The court allowed it to be read, and the grounds of admission were the facts as testified to by J. W. Bostian, [the justice,] in addition to insanity of witness Talbert, which was admitted. The defendant excepted. The defendant's counsel asked for the following instructions: "(1) If the horse was lame at the time of the trade, and the prosecuting witness could perceive the lameness, as he testified he did, then the principle of *caveat emptor* applies, and your verdict will be not guilty." This was refused. "(2) If the jury believe from the evidence that the horse was lame when Wilkerson traded him, and at the time of the trade he told the prosecuting witness that he took the horse at his own risk, then the principle of *caveat emptor* applies, and the jury should return a verdict of not guilty." This was given. "(3) If the jury find from the evidence that Wilkerson believed the horse to be sound and well at the time of the trade, then the jury should find the defendant not guilty." This instruction was given. The fourth instruction was to the same effect as the above, and was given. "(5) There is no evidence that the condition of the horse,

Digitized by Google

at the time Dr. Ivey had him, was ever brought to the knowledge of Wilkerson." Refused. "(6) There is no evidence that the condition of the horse, at the time Foreman owned him, was ever brought to the knowledge of Wilkerson." Refused. "(7) There is no evidence that Wilkerson knew that the horse ever had a disease of the shoulder." Refused. "(8) If Wilkerson did not know that the horse had a diseased shoulder, then the jury will return a verdict of not guilty." This was given. The judge charged the jury that if the defendant at the time of the trade represented that "the horse was sound as a dollar, and all right;" that he was not lame, and never had been; and these representations were false, and the defendant knew them to be false, at the time they were made, and the prosecuting witness was thereby deceived, he would be guilty. The defendant excepted because the court "refused to give the instructions numbered 1, 5, 6, and 7, as asked for, and to the instruction given by the court, not included in the instructions asked for." There was a verdict of guilty, and the defendant appealed.

The first exception is addressed to the admission by his honor of the written examination of Talbert, the objection being that the examination was not signed by the witness. To this the attorney general answers that the alleged omission should have been assigned in the court below. It is well settled by our authorities that when a general objection is made, either to the competency of a witness or to the reception of testimony, the party objecting may avail himself of any grounds that may exist in support of his contention. But in the case of testimony, "if only a part is incompetent, the exception will not be entertained if they are severable." Hammond v. Schiff, 100 N. C. 175, 6 S. E. Rep. 753. When the objection is made the court may in all cases require the grounds of objection to be stated, and only those stated can be made the subjects of exception and review. State v. Kemp, 87 N. C. 538; State v. Secrest, 80 N. C. 451. In fairness to the judges, and in aid of an intelligent ruling upon the questions presented, we go further, and say that if, after being requested by the court, a party refuses to state the grounds of his objection, his exception shall avail him nothing. In this case there was a general exception, but we are unable to perceive any reason why the examination should not have been admitted. The case does not purport to set out anything but a mere extract from the examination, and we do not feel at liberty to assume from this that the witness did not sign it. The presumption is that the justice performed his duty, (State v. Parish, Busb. 239;) and his testimony, and the remarks of the judge, strongly tend to show that the objection and ruling were based only upon the sufficiency of certain extrinsic facts, necessary to be shown before the examination could be read. If the witness did not sign it, the defendant could have made it so appear by having the entire examination brought up as a part of the case. This he has failed to do, and the exceptions must be overruled.

The fifth, sixth, and seventh prayers for instruction were properly refused, as a perusal of the testimony will show that Foreman sold the horse to Ivey, and, after the defendant bought it, Foreman called his attention to the diseased shoulder, and that the defendant told him that he had "gotten the shoulder all right." This disposes also of the exception to the testimony of Foreman and Ivey, the objection being that the defendant had no knowledge of the diseased shoulder while they owned the animal. It was immaterial whether the defendant knew of it then or not, as it was brought to his knowledge before he traded with the prosecutor. Besides, the testimony was admissible to show that the horse was in fact diseased. The other prayers for instruction, except the first, were given. This is predicated upon a part only of the testimony of the prosecutor, and entirely ignores his statement that when he called the defendant's attention to the "limping" of the animal, the defendant assured him that it was not lame from any disease, had never been lame, and was as "sound as a dollar," at the same time suggesting that the "limping" was caused by the animal having been recently shod. Mr. Wharton, in his work on Criminal Law, volume 2, § 2128, says: "We have seen that to cheat at common law it is essential that the fraud should be latent. It was in part to meet this difficulty that the statute of false pretenses was passed, and under this statute it has been repeatedly held that it matters not how patent the falsity of a pretense may be, if it succeeds in defrauding." After speaking of some cases modifying this view, he concludes by saying: "It is submitted, however, that whether the prosecutor had the means of detection at hand, or whether the pretenses were of such a character as to impose upon him, are questions of fact to be left to the jury, as they must necessarily vary with the particular case. If fraudulent and false pretenses were used, and goods obtained by them, nothing but very gross carelessness will justify an acquittal. The statutes suppose defective caution, for if there were perfect caution no false pretenses could take effect." We think that these principles govern this case. It is true that in State v. Young, 76 N. C. 260, the doctrine of *caveat emptor* was recognized as applicable to false pretense, but, to quote the language of the court, "the fact misrepresented was that the cotton was 'good middling,' but this was a matter of observation, and the defect was as patent to the prosecutrix as to any one else, and there the doctrine of *caveat emptor* must apply." That case was quite distinct from this. There, in the very nature of things, the prosecutrix could judge of the quality of the cotton, and nothing was said or done by

Digitized by Google

the defendant to mislead or deceive her. It was at most a mere matter of judgment, which she, like other purchasers, was expected to exercise. In our case the pretense was that the animal was sound, and was not lame, and the evidence tended to show that the defendant knew that it had a disease of long standing, called "swinney," which was not perceptible, and that the lameness would not occur until after about three days driving; that when the prosecutor discovered symptoms of lameness, his suspicions were allayed by the assurances of the defendant, as above stated. In view of these circumstances his honor very properly refused to charge that the mere fact that the prosecutor perceived the lameness at the time of the trade entitled the defendant to a verdict of not guilty. This would be disregarding all the testimony tending to show the stratagem and fraud of the defendant, and putting the case to the jury only upon that part of the testimony which was favorable to him. No proper instruction having been refused, and there being no error in the charge as given, we see no reason to disturb the verdict. There is no error.

(86 Va. 35)

JINKINS *et ux.* v. LAWRENCE *et al.*

(*Supreme Court of Appeals of Virginia.* April 11, 1889.)

DEVISE—CONSTRUCTION.

Testator owned two adjacent lots with the houses thereon numbered 712 and 714. They were separate and well defined, and there was a vacant space between the houses consisting of the eastern 5 feet of No. 714, and the western 14½ feet of No. 712, there being a fence on the dividing line of the lots. The five feet mentioned were paved and used as an alley to afford access to No. 714 as a side entrance, when testator bought the property, which was purchased as one body. He devised his "two brick houses and lots Nos. 712 and 714, and also the vacant lot between said houses," to defendants. Later he made a codicil whereby he revoked so much of the devise as "relates to the house and lot No. 712, * * * and the vacant lot between this house and lot No. 712 and lot No. 714," and devised "this said brick house and lot No. 712, and the vacant lot between this and the adjoining property, No. 714," to complainants. *Held*, that the codicil did not revoke the devise as to the five-foot alley, which passed to defendants as part of lot No. 714.

George P. Haw and *W. W. Cosby*, for appellants. *Meredith & Cocke*, for appellees.

FAUNTLEROY, J. The petition of William S. Jinkins and Isabella, his wife, William Y. Jinkins, and Archer Lee Jinkins, and Charles B. Jinkins, an infant, who sues by his next friend, William S. Jinkins, the last three being all of the children of William S. Jinkins and Isabella, his wife, and R. D. Wortham, trustee for William S. Jinkins and Isabella Jinkins, complains of a final decree of the chancery court of the city of Richmond, rendered against them on the 21st day of April, 1888, in the suit of Jinkins and others against Lawrence and others. The object of the suit is to obtain the construction of two devises made in the last will and testament of J. J. Pendleton, deceased, which was admitted to probate in the chancery court of the city of Richmond on the 6th day of October, 1885. The fifth clause of the said will is in these words and figures, viz.: "*Fifthly.* I give and devise unto my executor hereinafter named my two brick houses and lots, Nos. 712 and 714, and also the vacant lot between the said two houses, situated on the north side of Clay street, between Munford and Gilmer streets, the said two houses, lots, and vacant lot being the ones nearest to Munford street, to hold to my said executor, and his heirs and assigns, forever, upon the following trust, nevertheless, that is to say, for the use and benefit of both my nephew, James F. Lawrence, and his wife, Arietta Lawrence, during the term of their natural lives, and, upon the death of either, to the survivor of them; and, at their death, he, my said executor shall sell the said houses and lots, and shall divide the proceeds arising from the sale thereof equally between all of the children of the said James F. Lawrence that are now living, or that may hereafter be born to him in lawful wedlock, the issue of any child or children dying, leaving issue, to take the share of his, her, or their parents." The testator made a codicil to his said will on the 27th day of November, 1884, as follows, viz.: "Whereas I, J. J. Pendleton, have made my last will in writing, bearing date the 13th day of February, 1883, now I do hereby make this codicil thereto, to be taken as part thereof. I do hereby revoke that part of the devise contained in the fifth clause of my said will which relates to the house and lot No. 712, on Clay street, and the vacant lot between this house and lot No. 712 and lot No. 714; and I do hereby give and devise this said brick house and lot No. 712, and the vacant lot between this and the adjoining property, No. 714, to my executor named in my said will, upon the following trust: for the use and benefit of my friend William S. Jinkins and his wife, Isabella, during the term of their natural lives; and he, my said executor, shall permit them, or the survivor of them, to manage the said property, and to receive the rents, issues, and profits arising therefrom; and, upon the death of both of them, the said property shall pass in fee to the children of the said William S. Jinkins and Isabella, his wife. I desire to say that the above devise is made as a grateful acknowledgment of the kind attention shown to me by my friend William S. Jinkins during my sickness."

The appellants contend that under the said codicil to said will they take the house and lot 712, and the whole of the vacant land, that is, the ground not actually built upon between the house No. 712 and the house No. 714, which is 19 feet and 6 inches. The appellees answered the bill, and denied that the appellants are entitled to the five-foot alley, which is, and has always been, a part of lot No. 714, as known in the plan of the city, and in their answer they set forth facts which the appellants expressly admit to be true.

Digitized by Google

The lower court decided against the claim of the appellants to the five-foot alley, and held that the codicil did not revoke the fifth clause of the will as to the said five feet, and that it was devised and went to the appellees, as an essential and obvious component part of lot No. 714, devised to them by the will.

The only question presented by this appeal is whether the chancery court of the city of Richmond in its decree properly construed the fifth clause of the will and the codicil of the testator. We are of opinion that the decree complained of is plainly right, and that the construction of the will and codicil of the testator, made by the said decree, is manifestly just and true to the intention of the testator. Indeed, it is difficult to understand how there could be any doubt or contention as to the explicit and discriminating directions of the testator. The record shows that all the property mentioned in the fifth clause of the will and in the codicil were two lots, Nos. 712 and 714 West Clay street. The lots were adjoining lots, but separate and well defined, and had never been merged; and the vacant space between the two houses consisted of a portion of each separate lot, viz., the eastern 5 feet of lot No. 714, and the western 14 feet 6 inches of lot No. 712, defined by a fence which has always been on the dividing line between the two lots, as numbered on the city plan 714 and 712 respectively. The said five feet of space were, during the life-time of the testator, and at the time he bought the lot No. 714, its side entrance, and had been for many years paved with stone and used as an indispensable necessity and part of lot No. 714, and it was an exact complement of the 27 feet front of lot 714, conveyed by deed of October 15, 1867, from Charles Heiss and wife to John J. Pendleton, the testator. When the testator made his will, February 13, 1883, he devised his two lots, No. 712 and No. 714, and the vacant space, of course, "between these two said houses," to his nephew, James F. Lawrence, and his wife, for their joint lives, remainder to their children in fee; but when he came to alter this devise by the codicil made November 27, 1884, so as to take away from his nephew and wife and children lot No. 712, and to devise it to his friend William S. Jinkins, and his wife and children, he carefully discriminates his language, and devises to William S. Jinkins and wife, with remainder to their children, "this said brick house and lot No. 712, and the vacant lot between this and the adjoining property No. 714." In the fifth clause of the will he devised all the unoccupied space as the "vacant lot between these two said houses;" but, when he came, nearly two years thereafter, to modify this devise of both his two brick houses and lots Nos. 712 and 714 to his nephew, he uses the careful and significant description of what he devises to his friend Jinkins and wife and children, "this said brick house and lot No. 712, and the vacant lot between this and the adjoining property," having first said in the codicil: "I do hereby revoke that part of the devise contained in the fifth clause of my said will which relates to the house and lot No. 712, on Clay street, and the vacant lot between this house and lot No. 712 and lot No. 714." There is no error in the decree appealed from, and it is affirmed.

(85 Va. 867)

WATSON v. COMMONWEALTH.

(*Supreme Court of Appeals of Virginia.* March 7, 1889.)

MURDER—INSTRUCTIONS—RECORD.

1. On a murder trial, defendant having shot deceased with a gun, after fighting and abusive language by both, an instruction that if deceased used the most grievous words of reproach, aggravated with the most provoking circumstances, and upon such provocation defendant killed him with a deadly weapon, it was murder in the first degree, is error, as the presumption is that every killing is murder in the second degree, and the burden is on the prosecution to raise it to the first degree.

2. The record on appeal, as certified by the judge, cannot be called in question by a certificate of the clerk as to whether certain instructions were given.

Davis & McIlwaine, for plaintiff in error. *R. A. Ayers*, Atty. Gen., for the Commonwealth.

LACY, J. This is a writ of error to a judgment of the circuit court of Greensville county, rendered on the 27th day of October, 1887. The plaintiff in error was indicted for the murder of one Joe Robinson in the said county, and, upon the trial, found guilty of murder in the first degree by the jury, and sentenced by the court to be hung. The killing was on the 26th of December, 1886, with a shotgun, and was done in the presence of a number of people, and was the result of a good deal of previous controversy, including both fighting and abusive language, on the part of both parties. A number of exceptions were taken at the trial, and the evidence was certified, and a motion was made to set aside the verdict and grant the accused a new trial, which was overruled, and the plaintiff in error sentenced in accordance with the verdict. Whereupon the plaintiff in error applied for and obtained a writ of error from this court.

The first error assigned is as to the action of the court in the instructions given by the court, and the action of the court in refusing the instructions asked for on the trial by the accused. Among those given was the following: "(5) The court will instruct the jury if they believe from the evidence that Joe Robinson used the most grievous words of reproach, aggravated with the most provoking circumstances, and upon such provocation Randall Watson made use of a deadly weapon to kill Joe Robinson, then the jury must find him guilty of murder in the first degree." It is contended by the plaintiff in error that this instruction presented as a proposition of law that all killing done with a deadly weapon, no matter what grievous words were spoken, or however provoking may be the circumstances, is murder in the first degree. While

Digitized by Google

it is true as a general proposition of law that a man shall be taken to intend that which he does, or which is the immediate or necessary consequences of his acts, and when a man shoots another down with a shotgun the presumption that the killing was intended is a rational one, it is equally true that every killing is presumed by the law to be murder in the second degree, and the burden is upon the commonwealth to raise it by proof to murder in the first degree. It cannot be proper in any case to instruct the jury that the use of a deadly weapon by the slayer, alone, raises the crime to the degree of murder in the first degree, in the absence of proof of the characteristic of that crime; and it certainly can never be proper to instruct the jury that this presumption of law arises by the use of a deadly weapon, superior to all proof of insults and provoking circumstances, whatsoever they may be, adduced by the defendant at the trial in extenuation of his crime.

This instruction does not correctly expound the law. It was error to give it, and for that cause the judgment must be reversed, and the verdict set aside, and a new trial granted to the accused.

There are many other errors assigned, but it is not necessary to consider them, as in the view we take of it the case will have to go back for a new trial. The attorney general argues that this instruction was not in fact given by the judge below, because the bill of exceptions sets forth that seven instructions were asked for by the commonwealth and six given and one rejected, and only five instructions appear in the record, and the clerk has given a certificate that only five were asked for by the commonwealth, all of which were copied by him. But we can only consider the case upon the record as made by the court, and the certificate of the clerk as to what was done or was not done cannot add to or detract from the record as made by the court; and certainly we cannot in any case allow the record, as certified by the court, to be contradicted and nullified by the recollection of the clerk. The judge has certified that he so instructed the jury, and of that fact there can be no question in this court raised by the clerk. As was said by this court in Dejarnette's Case, 75 Va. 883: "We carefully refrain from any expression or even intimation of opinion with respect to the character and nature of the defense made for the accused. This is a matter for the jury, exclusively. Our duty is performed in seeing to it, as far as within us lies, that the prisoner obtains a fair trial by an impartial jury, according to the established principles and rules of criminal law, recognized by the courts, and enforced by the constitution and laws of the country."

We are of opinion, for the reasons stated, to reverse the judgment of the circuit court of Greensville county, and to set aside the verdict of the jury, and award to the accused a new trial.

(86 Va. 33)

MUSTAIN v. PANNILL'S EX'R.

(*Supreme Court of Appeals of Virginia.* April 11, 1889.)

JUDICIAL SALES—APPEAL—RECORD.

1. Where, in a suit to sell land to pay debts, the commissioner reports that the rents and profits will pay the debts within five years, and an ineffectual attempt to rent it in compliance with a decree to that effect is made, but at a distance from the land, and at a time of the year when it is very difficult to rent land, it is error to direct a sale.

2. If the copies of the advertisements posted by the commissioner appointed by the court to rent the land in such case are in no wise referred to in his report, or in the decree of sale subsequently made, they will not, though copied into the record, be considered as part thereof on appeal.

Appeal from circuit court, Pittsylvania county.

Bill by the executor of W. L. Pannill, deceased, against Robert H. Mustain, for the sale or rental of defendant's land to discharge liens thereon. Decree of sale, and defendant appeals.

Rutherford & Page and *P. R. Berkeley*, for appellant. *Staples & Munford*, for appellee.

HINTON, J. This is an appeal from a decree of the circuit court of Pittsylvania county, directing a sale of the land of the appellant. The record is extremely meager, and, in the opinion of the majority of the court, what purports to be copies of the advertisements of renting, being neither set out in the reports of the commissioner appointed to rent out the land, as a part of his report, nor referred to therein as exhibits filed therewith, nor noticed in the decree, are not to be deemed parts of the record. But, from what is set out in the record, it does appear from the report of the commissioner to whom the case was referred, from the testimony before him, that the liens resting on the land could be paid off from the rents and profits of the land for five years; that the land was exposed for renting at periods in the year when it is almost impossible to rent land at all, and that the land was exposed for renting at a distance from the premises. In this posture of the case it seems to the court that there cannot be a safe determination of the controversy at this time, and that the decree should be reversed, and the cause be remanded, with directions to refer it to the commissioner again to ascertain whether the liens can be paid off from the rents and profits of said land within five years, to be further proceeded with in order to final decree.

(86 Va. 26)

SLATER *et al.* v. MOORE.

(*Supreme Court of Appeals of Virginia.* April 11, 1889.)

FRAUDULENT CONVEYANCES—WHAT CONSTITUTES

Defendant purchased goods on credit, representing that he was the owner of certain land. The record title thereof was in him. Afterwards he caused to be recorded a deed of the land to his daughter, the consideration being one dollar, love

Digitized by Google

and affection. The deed bore a date prior to defendant's purchases. Defendant offered a check in evidence, which he contended was the consideration for the deed. The check bore alterations and erasures, which were not explained, and the draughtsman of the deed testified that the check was not mentioned or produced when the deed was drawn. Immediately upon execution of the deed plaintiff took it, and locked it up, where it remained till recorded. *Held*, that the deed was without consideration and fraudulent as to creditors.

Appeal from corporation court of Norfolk.
Burroughs & Bro., for appellants.

FAUNTLEROY, J. The petition of Slater, Myers & Co., George A. Lathrop & Co., and Edward Bruce & Co., complains of a decree of the corporation court of the city of Norfolk, entered on the 28th day of January, 1888, in a suit in equity, wherein the said petitioners are complainants, and Peter Moore is defendant. The record discloses that in August, 1885, Peter Moore lived in the city of Norfolk, Va., and resided in a house on the corner of Cumberland and Washington streets numbered 30 Cumberland street. The complainants were wholesale liquor merchants, residing and doing business in the city of Richmond, Va., and the city of Baltimore, Md. In the latter part of July and the first part of August of that year Peter Moore addressed letters to the complainants and others, wholesale liquor merchants, stating that he was about to go into business, and making inquiries as to the prices of liquors. In the latter part of July, 1885, or on the 1st day of August, 1885, a salesman representing the firm of E. B. Bruce & Co., in response to the letters of the said Peter Moore, visited Peter Moore at his residence, No. 30 Cumberland street, Norfolk, at which interview Peter Moore stated that he was about to go into business; that he owned the house No. 30 Cumberland street, in which he lived, and which he valued at $5,000; that he wished to buy on four months' time, from E. B. Bruce & Co., to the extent of 10 per cent. on the value of the house; and that he would buy from no other house. An order for $490 worth of goods was filled out, and a duplicate left with Peter Moore. On the 14th of August, 1885, the said salesman returned and visited Peter Moore at his residence, No. 30 Cumberland street, and went with him to his store at the corner of Butte and Hawk streets. On their way to the store he informed the salesman that he had written to his house (Bruce & Co.) the day before to send the goods. The salesman telegraphed his house to send the goods, which came the next day, and the salesman saw them received and put up in Peter Moore's store on the 16th of August, 1885. On the 5th of March, 1886, George A. Lathrop & Co. sold to Peter Moore a bill of goods amounting to $256.63, upon his representations that he owned the house and lot No. 30 Cumberland street, and upon an examination of the records of the clerk's office of the corporation court of Norfolk city, where they found that the said house and lot No. 30 Cumberland street stood in the name and as the absolute property of Peter Moore. On the 1st of November, 1885, Slater, Myers & Co., wholesale merchants in Richmond, Va., sold and delivered to Peter Moore, doing business in Norfolk, Va., goods to the value of $407.90 upon four months' time. On the 21st of January, 1886, they sold and delivered to the said Peter Moore other goods of the value of $199.48, on 90 days' time; and on the 4th day of February, 1886, they sold and delivered to the said Peter Moore other goods to the value of $61.50. On the 10th day of March, 1886, E. B. Bruce & Co. sold and delivered to said Peter Moore a bill of goods amounting to $91.25. All of these said debts were contracted by Peter Moore before and on the 10th day of March, 1886, and upon his express representations that he owned the house No. 30 Cumberland street, and upon the faith that the public records which showed title in Peter Moore were true. On the 10th day of March, 1886, Peter Moore placed upon record a deed executed on the 17th of August, 1885, conveying the house and lot No. 30 Cumberland street to his daughter, Martha V. Moore, "in consideration of one dollar, and the love and good will" he bears his daughter. Shortly after this he made an assignment of all the stock of goods in the store he was conducting, the proceeds of which were not enough to pay more than the rent due the landlord. Peter Moore is insolvent. The appellants instituted this suit, alleging the facts aforesaid, and charging that the deed of August 17, 1885, from Peter Moore to his daughter, Martha V. Moore, is a mere voluntary deed of gift, and not based upon a consideration deemed valuable in law; and that the said deed was absolutely void, and of no effect whatever, except from the 10th day of March, 1886, the day of its recordation, as against their aforesaid debts against Peter Moore, contracted previous to that said date; and that the said deed was made with intent to hinder, delay, and defraud the creditors of Peter Moore, the grantor. The prayer is that the said deed of August 17, 1885, may be declared null and void, and be set aside; and that the said house and lot No. 30 Cumberland street may be sold, and the proceeds applied to the satisfaction of their said debts against the said Peter Moore. The bill makes Peter Moore and Martha V. Moore parties defendant, and calls for answers from them, but waives the sanction of an oath. In their answers it was claimed that the deed was made August 17, 1885, for a valuable consideration, which was the surrender on that day of a check for $1,600, drawn by Peter Moore on the Exchange National Bank of Norfolk, March 29, 1884, in favor of his daughter, Martha V. Moore, and never presented, at the request of the drawer. During the progress of the cause, Martha V. Moore, the grantee in the deed, died, leaving the grantor her heir at law, and the

Digitized by Google

cause was duly revived against Peter Moore by *scire facias*. At the hearing upon the bill, petitions, answers, and depositions the court dismissed the bill and petitions, with costs against the complainants.

The deed of August 17, 1885, is upon its face a voluntary deed, but the defendants claim that there was a valuable consideration in the check for $1,600, which they say was surrendered at the time the deed was executed. The check, when produced in evidence, had an alteration or erasure in material parts of it. The figures $1,600 on the upper left-hand corner of the check appear to have been tampered with, and in the body of it, where the words "sixteen hundred" are written, it had a plain erasure, obvious to the naked eye. No evidence was offered to account for the alterations and suspicious appearances of the check, and, when it was offered in evidence, the party in whose favor it was drawn, Martha V. Moore, was dead, and her father, Peter Moore, the drawer of the check, as her heir at law and privy in estate, now seeks to avail himself of it to support a valuable consideration as a basis for his voluntary deed. "Every alteration on the face of a written instrument detracts from its credit, and renders it suspicious, and this suspicion the party claiming under it is ordinarily held bound to remove." 1 Greenl. Ev. § 564, approved in Priest v. Whitacre, 78 Va. 151, and Elgin v. Hall, 82 Va. 680; Angle v. Insurance Co., 92 U. S. 342; Batchelder v. White, 80 Va. 103. Warren, who drew the deed, testifies that when he drew the deed the check was not mentioned or referred to, and that he never saw it until after this suit was brought to set aside the deed as a voluntary deed without any valuable consideration.

We are of opinion that the proffer in evidence of this defaced, erased, and unexplained check, which was not mentioned or referred to at the time the deed was made, is insufficient to establish a valuable consideration for the deed. The deed was made August 17, 1885, and was instantly handed back to the grantor, Peter Moore, who locked it up in his iron safe, and kept it there until he put it to record, on the 10th day of March, 1886. The deed was not only a voluntary unrecorded deed up to that date, but the facts in evidence are such to convince the mind that, without doubt, the deed was actually fraudulent, and was made as a trick or contrivance to elude the lawful pursuit of his creditors; and, indeed, he began and continued business with the deliberate purpose of obtaining credit upon the house No. 30 Cumberland street, and at the same time of having it in his power, by means of this deed, to prevent those from whom he should obtain credit upon the faith and ostent of his ownership of the house from subjecting it to the payment of their debts thus contracted.

Peter Moore having contracted a debt on the faith of his ownership of the house, he immediately thereafter executed the deed of August 17, 1885, to his daughter for the house, who leaves it in his custody and concealment unrecorded, and he continued to buy goods on the faith of his title of record, to which he appealed, and referred his creditors for assurance of his asserted title and ownership of the house. He continued to occupy the house after the execution of the deed, just as before, and to pay the taxes upon it as his own property. Even if the daughter acted innocently of her father's fraudulent intent, yet she made Peter Moore the custodian of her secret title deed, and enabled him, by concealing it, to obtain credit on the faith of his asserted and recorded ownership of the property, and she must be held to constructive notice of his fraudulent intent and scheme; and, if one of two innocent parties must suffer by the fraud of the grantor, she, the grantee, who put it in the power of the grantor to commit the injury, must bear the consequences. Story, Ag. §§ 56, 264; Bank v Turquand, 85 E. C. L. 248; Batchelder v. White, 80 Va. 108, and cases there cited; 2 Pom. Eq. Jur. § 688, treating of notice and its effects; Briggs v. Jones, L. R. 10 Eq. 92.

By the terms and the intendment of section 5, c. 114, Code 1873, an unrecorded deed speaks only from the date of its recordation, and is void, as against creditors for value and without notice, "until and except from the time that it is duly admitted to record." The deed of August 17, 1885, being a voluntary and unrecorded deed, had no existence until the 10th of March, 1886, as against *bona fide* creditors, although it were untainted with fraud, and good between the grantor and grantee as of its date; and it is only deeds which are recorded within 60 days from their date of acknowledgment that, upon recordation, relate back, and are valid as of their date of acknowledgment. Section 7, c. 114, Code 1873. Though as between the grantor and grantee the deed required neither recordation nor a valuable consideration, yet it is the policy of the law, as to the registry of deeds, to protect creditors and purchasers against "secret trusts and latent titles," by requiring the public records to exhibit a true and accurate assurance of title and ownership of lands, and all incumbrances affecting them, so that all persons dealing with the land, or in respect thereto, may be able to discover in whom the title is vested, and anything affecting the title. 2 Pom. Eq. Jur. § 649; Anderson v. Anderson, 2 Call, 198; Harvey v. Alexander, 1 Rand. (Va.) 240; Neslin v. Wells, 104 U. S. 428-439; Bump, Fraud. Conv. (3d Ed.) 39.

The deed of August 17, 1885, is a fraudulent deed, and it must be vacated and set aside as having been made by Peter Moore with the intent to hinder, delay, and defraud the appellants, his *bona fide* creditors. The decree appealed from is wholly erroneous, and must be reversed and annulled, and the cause remanded to the corporation court of Norfolk for further proceedings in accordance with this opinion. Reversed.

Digitized by Google

(30 S. C. 412)

CARROLL v. GILES.

(*Supreme Court of South Carolina.* March 23, 1889.)

CONTRACTS—RESTRAINT OF TRADE.

Plaintiff agreed to furnish for the defendant everything necessary to run a barber-shop in a certain town, and the latter agreed not to do any work as a barber for any one else, or to open a shop for himself in such town at any time, and to convey to plaintiff the patronage which had been extended to him. The proceeds of the business were to be equally divided between them. *Held*, that the stipulation of the defendant was an unreasonable one, and could not be specifically enforced.[1]

Appeal from common pleas circuit court of Marlboro county; FRASER, Judge.

Action by Hezekiah W. Carroll against John H. Giles. Judgment was rendered dismissing the complaint, and plaintiff appeals.

D. D. McCall and *T. W. Boucher*, for appellant. *Townsend & McLaurin*, for appellee.

MCGOWAN, J. The plaintiff and defendant entered into a written agreement, the important part of which was as follows: "Witnesseth that H. W Carroll, of the first part, hereby promises and agrees to furnish all furniture necessary to run a complete 'barber-shop.' Said H. W. Carroll agrees to pay all current expenses of the shop, including rents, washing, oil, materials to run the business, etc. The said John H. Giles, of the second part, promises and agrees to keep the business diligently, to do all the work necessary to run the shop, and keep the shop cleanly and in order, and to be responsible for the breakage of any or all furniture which may be placed in his care. He further agrees to collect charges for all work done, and to make a prompt and full settlement of the business, daily, to H. W. Carroll or his authorized agent, and to be personally responsible for all amounts charged or credited to any party or parties; and he furthermore agrees that, in consideration of the shop being furnished for his use, he binds himself, and hereby agrees not to do any work, now or hereafter, outside of the shop owned by H. W. Carroll, or hire to any party or parties, or open a shop of any kind to carry on the barber business, either directly or indirectly, in Bennettsville, S. C. He hereby agrees to convey all patronage extended to him heretofore to the business owned by H. W. Carroll. We and each of us mutually agree to divide the gross receipts of the business equally between us," etc. The defendant, Giles, worked for about one month in the shop of the plaintiff, and, becoming dissatisfied, he left. He however returned, and made an agreement with the plaintiff to stay in the shop at 10 cents an hour, or a dollar per day, until he could get another man; but he only stayed one day, and left again, saying he would not stay any longer on any terms, and opened another barber-shop on his own account in the town of Bennettsville. Thereupon the plaintiff commenced this action, demanding judgment that the defendant be enjoined from further carrying on for himself or any one else, either directly or indirectly, the barbering business, either in a shop or otherwise, within the town of Bennettsville, at any time hereafter, and for $100 damages, etc.

The defendant resisted, stoutly denying that he had any "patronage" or "good-will" to transfer, or that there was any consideration for the alleged contract on his part not to do any work at his trade in Bennettsville outside of plaintiff's shop, which, as he understood it, was to continue only while there was a continuance of the partnership, and not "to bind him forever," which, as construed by the plaintiff, was not reasonable, against public policy, and intended to create a "monopoly" in Bennettsville as to the barbering business. He claimed that the contract was nothing more than an ordinary executory partnership in business, without limitation, which either party could terminate, and that he terminated it for the good and sufficient reason that the plaintiff failed to carry out his part of the agreement, especially in not allowing him (the defendant) to manage the business of the shop, but in bringing in other persons who were disagreeable; and, as a counter claim, he alleged that he had been injured $100.

The circuit judge dismissed the complaint, saying: "There is nothing in the case to put the defendant on any other footing than another ordinary artisan. Thus, in a case of an agreement between an artisan and his employer that the former shall work for the latter, and no other person, the court will not interfere to enforce the covenant to render services. 3 Wait, Act. & Def. 141, § 1. A different rule prevails where the services involve the exercise of power of mind, as of writers and performers. Machine Co. v. Morse, 4 Amer. Rep. 513; High, Inj. § 741," etc.

From this decree the plaintiff appeals, upon the following exceptions: "(1) Because his honor erred in holding that the contract set forth in the complaint, and which was admitted at the trial, is not such a one as can be specifically enforced. (2) Because his honor erred in holding that the case proved is not one for the exercise of equity jurisdiction by injunction. (3) Because his honor erred in holding that an action for pecuniary damages was the only remedy the plaintiff had for a breach of the alleged contract. (4) Because his honor erred in holding that the action was for affirmative specific performance, whereas it is submitted that it was

[1] For discussions of the validity of contracts tending to form monopolies, and in restraint of trade, see full and exhaustive notes to Telegraph Co. v. Railway Co., 11 Fed. Rep. 1; Car Co. v. Railway Co., Id. 625; Sharp v. Whiteside, 19 Fed. Rep. 156. See, also, Dolph v. Machinery Co., 28 Fed. Rep. 553, and note; Lumber Co. v. Hayes, (Cal.) 18 Pac. Rep. 391, and note; Coke Co. v. Coke Co., (Ill.) 13 N. E. Rep. 169; French v. Parker, (R. I.) 14 Atl. Rep. 870; People v. Refining Co., 8 N. Y. Supp. 401.

Digitized by Google

brought to restrain a breach of contract, and therefore negative in the relief sought. (5) Because his honor erred in not holding that the contract was valid and binding, and that the plaintiff was entitled to an injunction to restrain a breach thereof. (6) Because his honor erred in not holding that the contract, being reasonable in its nature, limited as to locality, and for specific personal services, could be specifically enforced. (7) Because his honor erred in not holding that this was a case where there was no adequate remedy at law, and hence one peculiarly within the equity jurisdiction of the court," etc. In respect to contracts which affect business relations, Mr. Pomeroy says: "It has been the policy of the law to promote the freedom of engaging in and carrying on all kinds of business which are beneficial to the public. * * * Contracts in general restraint of trade, whatever be their form, or the nature and immediate object of their stipulations, are void. * * * On the other hand, contracts in partial restraint of trade are valid. To this end they must be partial with respect to the territory included; reasonable with respect to the amount of territory, the circumstances and rights of the party burdened, and the one benefited by the restriction, and the number and interests of the public, whose freedom of trading is circumscribed; and made upon a valuable and sufficient consideration. The jurisdiction of equity is generally exercised in respect to these contracts for the purpose of indirectly compelling their specific performance by means of an injunction," etc. 2 Pom. Eq. Jur. § 934. Such contracts are frequently made in connection with a sale of a business and good-will, the vendor stipulating that he will not carry on the same business within a specified distance from the old place and for a specified time, or will not solicit his old customers for his trade, and the like. These kinds of stipulations, if reasonable as to territory and time, will be enforced against the vendor, often by an injunction, as to negative stipulations especially. Mitchel v. Reynolds, 1 Smith, Lead. Cas. 705, and notes; 2 Pom. Eq. Jur. § 934, and authorities cited in the notes. "Sale of a business and good-will, and contract not to engage in the same business in a certain town for a certain time, held valid." Hedge v. Lowe, 47 Iowa, 137. "A contract not to carry on a certain trade within a specified time will be enforced." Ellis v. Jones, 56 Ga. 504. There is not much science or power of mind necessary in the business of barbering, but some degree of skill and practice is required, and, being a trade, we suppose that, so far as the nature of the business is concerned, we may consider it as within the principle above indicated. But is this a case falling within the rule? It does not strike us so. There was no sale here of "a business and good-will by the defendant," in which the price paid was enhanced by the vendor stipulating not to carry on the same business in a specified locality and for a specified time. It is true that the defendant was a barber, going about the town and county barbering, but had no shop, patronage, or good-will to sell. The plaintiff did not purchase his outfit from the defendant, giving him a liberal price, in consideration of his unusual stipulation to stay with him or go out of the business. It seems to us that the contract was really nothing more than one of a partnership, indefinite in duration, in which one party stipulated to furnish the capital or outfit, and the other to contribute his labor and skill, "dividing the gross receipts equally;" and that the stipulation on the part of the defendant never to do any barbering in Bennettsville outside of the plaintiff's shop "now or hereafter" was "unreasonable," and not of such a character as to call for the exercise of the equitable jurisdiction in requiring it to be specifically performed. The judgment of this court is that the judgment of the circuit court be affirmed.

SIMPSON, C. J., and MCIVER, J., concur.

(28 S. C. 38)

HARDIN v. MELTON.

(*Supreme Court of South Carolina.* May 5, 1888.)[1]

APPEAL—REHEARING.

Petition for rehearing after judgment on appeal must show that the court overlooked some fact or question of law material to the case as presented by the appeal.

On petition for rehearing. For former opinion, see 4 S. E. Rep. 805.

PER CURIAM. To entitle a party to a rehearing after judgment pronounced by this court, it should appear in the petition filed for that purpose that this court overlooked some fact or some question of law material to the case as presented by the appeal. Now, the only question mentioned in the petition as having been overlooked by this court is the third herein, to-wit: "That the fund in the hands of W. A. Clark, administrator of C. D. Melton, should be adjudged primarily liable for the satisfaction of the Wright judgment." It is conceded that the circuit judge did not pass upon this question; nor is it stated in the "case" as a ground upon which respondent would undertake to sustain the circuit decree; nor is any error alleged to the circuit judge in failing to consider and adjudge said question. It is true, one of respondent's counsel, Mr. Glenn, in his argument contended that said fund should be first applied to said judgment before the land in question should be made liable. But this did not raise the question for review by this court; said court being confined to the correction of errors below. We may say, however, that had this question been properly before us, under the case of McAliley v. Barber, 4 S. C. 47, it could not have availed the respondent.

[1] Publication delayed by failure to obtain copy of opinion at time of its delivery.

Digitized by Google

As to the other ground upon which the petition is based, it is manifest that this is nothing more than to have a question already fully considered by this court reargued, which this court has uniformly held cannot be done, except, as stated above, where either a question of law or a fact material to the case, and appearing in the record, has been overlooked. It is ordered that the petition be dismissed.

(82 Ga. 62)

EUBANKS v. STATE.

(*Supreme Court of Georgia.* March 1, 1889.)

BURGLARY—SUFFICIENCY OF EVIDENCE.

On a trial for burglary, it appeared that prosecutor's house was broken open, and a gun, pistol, and other articles were stolen. It also appeared that one M. had found the gun and pistol in the possession of some children, and that defendant then said that they belonged to one H., who had tried to get him to pawn the gun for whisky. M. then told him to carry them to H. When the articles were turned over to defendant the gun had but one hammer, and the pistol had no cylinder, but when defendant carried them to where H. was the gun had two hammers, which circumstance defendant did not explain; and, on being asked where the pistol cylinder was, defendant took a cylinder from his pocket, which did not fit the pistol, but which, prosecutor testified, was stolen from his shop at the time of the burglary, and defendant gave no satisfactory explanation of his possession of it. H. denied that the articles belonged to him, or that he had ever asked defendant to pawn a gun for whisky. *Held*, that a conviction was warranted.

Error from superior court, Sumter county; FORT, Judge.

Indictment of Holly Eubanks for burglary. The evidence for the state showed that the store-house of the prosecutor was burglariously entered, and that a breach-loading shotgun and repeating pistol and other articles were taken from it; that a pistol cylinder was among the things taken; and this gun and pistol, and the cylinder, which did not belong to the pistol, about a week after the burglary were found in possession of the defendant. Upon being arrested, the prisoner pulled the cylinder out of his pocket, and handed it to prosecutor, who had asked him for it. Defendant said that the pistol and gun belonged to a man named Hooks. It appeared that the same gun and pistol were found by one Mimms in the possession of some little children; that Mimms took them, and placed them in his house; that defendant saw the gun, and said that it belonged to one Hooks, who had tried to get him to pawn it for some whisky the night before, and Mimms told him if it was Hooks' gun to carry it to him; that defendant carried them to Chapman's, where he said Hooks was, and where defendant was arrested; that just before he was arrested he told Chapman that the gun belonged to Henry Hooks, and that he (defendant) got it of Mimms. Defendant told Chapman that Hooks had told him (defendant) to pawn the gun for whisky. Hooks testified that he had never seen the gun, pistol, or cylinder before the trial, and that he never asked defendant to get whisky or pawn a gun for him. Defendant was convicted, and brings error from an order denying his motion for a new trial, based on the ground that the verdict was contrary to the law, the evidence, and the instructions.

L. J. Blalock and *J. A. Ansley*, for plaintiff in error. *C. B. Hudson*, Sol. Gen., for the State.

SIMMONS, J. We have carefully read the evidence in this record, and think there is sufficient evidence to authorize the finding of the jury. There is no doubt that the house was broken open, and that the gun and pistol found in possession of the defendant were stolen when the house was broken open. When the gun and pistol were turned over to the defendant by Mimms, the gun had but one hammer on it. When the defendant carried the gun and pistol to Chapman's store, the gun had two hammers upon it. The defendant did not undertake to explain, either by evidence or in his own statement, how the second hammer got on the gun, between the place he received it and Chapman's store. When Mimms turned the pistol over to the defendant, it had no cylinder on it. After the defendant was arrested, he was asked where the cylinder was. He took the cylinder of a pistol from his pocket, and handed it to the prosecutor. This cylinder did not fit the pistol, but the prosecutor testified that it was one of the cylinders stolen on the night when his shop was burglarized. The explanation the defendant gave as to how he came in possession of that particular cylinder was not satisfactory. The defendant also claimed that the gun and pistol did not belong to the prosecutor, but to one Hooks. Hooks denied this in his testimony. Taking these facts in connection with the other testimony in the case, we think there was sufficient evidence to authorize the verdict of the jury, and, as the trial judge was satisfied with their verdict, we are not disposed to reverse his judgment in refusing to grant a new trial. Judgment affirmed.

DEAN v. GEORGIA PAC. RY. CO.

(*Supreme Court of Georgia.* April 20, 1887.)[1]

BLECKLEY, C. J. This case falls within the settled rule that a first grant of a new trial will not be disturbed, no abuse of discretion appearing. Judgment affirmed.

HODGES v. ROBERTS, Sheriff.

(*Supreme Court of Georgia.* March 29, 1887.)[1]

PER CURIAM. Where a rule was brought against a sheriff for money in his hands, who answered, setting up certain cost *fi. fas.* as superior to the claim of the movants, and the case was heard, by agreement, by the judge without a jury, on the rule and answer and

[1] Publication delayed by failure to obtain copy of opinion at time of its delivery.

Digitized by Google

certain evidence, and from this decision exception was taken directly to this court, without a motion for new trial, the evidence should be brought up in the bill of exceptions, or exhibited thereto, and identified by the original signature of the judge. The incorporation in the record, certified by the clerk, of what purports to be a copy of an agreed and approved brief of evidence filed in the clerk's office, is not sufficient. Writ of error dismissed.

GLENN v. BOTTS *et al.*

(*Supreme Court of Georgia.* June 13, 1887.)[1]

PER CURIAM. After argument of these cases, and before any decision was delivered, counsel for plaintiff in error moved to withdraw the bills of exceptions, on the ground that each case had been settled. In support of the motion, he presented the written agreements of counsel of record for defendants in error, stating that a settlement had been agreed upon, and consenting that the cases might be withdrawn. On the hearing other counsel who had been heard on the argument, not representing the original parties, but others who were interested in the decision, objected to the withdrawal, and cited the case in 41 Ga. 523, (Green v. Express Co.) The motion to withdraw was sustained.

(82 Ga. 574)

SMITH v. DE VAUGHN.

(*Supreme Court of Georgia.* March 28, 1889.)

CONDITIONAL SALES.

An instrument of writing by which the maker binds himself to pay a sum of money, and mortgages and conveys a mule as security, with a recital that part of the debt is the purchase money for the mule, and a further provision that it was to remain the vendor's property until paid for, shows a conditional sale, with reservation of title, and is not a mortgage so far as the price of the mule is concerned.[2]

Error from superior court, Dooly county; KIBBEE, Judge.

Martin & Smith, for plaintiff in error. *George W. Buzbee*, for defendant in error.

SIMMONS, J. De Vaughn sued Mary A. Smith in an action of trover and bill for a mule. On the trial the plaintiff introduced the following instrument in writing:

"$232.80. MONTEZUMA, GA.,
"Jany. 16th, 1886.

"On the first day of October next, I promise to pay J. E. De Vaughn, or order, the sum of $232.80, for value received, and, to secure the payment of this note, I hereby mortgage and convey unto the said payee, his heirs and assigns, the following described property, to-wit: one dark mare mule named 'Queen,' about ten years old, for which this note is given in part, said mule to remain the property of J. E. De Vaughn until paid for." (Then follows a waiver of homestead and exemption, and of exemption from garnishment; and the instrument is signed by Winchew Smith in the presence of two witnesses, one a magistrate, and recorded about 10 months after its date.)

The only question in this case is whether the above instrument was a mortgage, or a conditional sale, with reservation of title in De Vaughn. The court below held that it was a conditional sale, with reservation of title, and so instructed the jury. A verdict was returned for the plaintiff, and the defendant excepted.

We think the court was right in its ruling. While the instrument is somewhat anomalous in its character, under the facts of the case disclosed by the record, we do not think that it was intended by the parties as a mortgage, so far as the price of the mule was concerned. The husband of the defendant purchased this mule from the plaintiff, De Vaughn. De Vaughn held the title to the mule at the time of the purchase, and, so far as the price of the mule was concerned, there was no prior indebtedness between DeVaughn and Smith. The title being in De Vaughn, he had a right, under the law, to reserve the same until the purchase price of the mule was paid. He did reserve it in the instrument itself, as will be seen by reference thereto. If Smith had paid the purchase money for the mule, he would then have acquired title thereto, and it is possible that the instrument might have been foreclosed as a mortgage for the $80 of the old indebtedness incorporated in this instrument, and this may have been the reason that the paper was written both in the form of a mortgage and bill of sale. The cases of Cully v. Bloomingdale, 68 Ga. 756; Findley v. Deal, 69 Ga. 359; and Frost v. Allen, 57 Ga. 327,—relied on so strongly by counsel for the plaintiff in error,—were all different in their facts from this case. In those cases the title to the property was in the defendants, and they undertook to convey the title to secure debts. In this case the title was in the seller, (the plaintiff,) and the purchaser gave this instrument to secure the purchase money, and agreed that the title should remain in the vendor until the purchase money was paid. Judgment affirmed.

(82 Ga. 628)

LONG v. GEORGIA LAND & LUMBER CO.

(*Supreme Court of Georgia.* March 23, 1889.)

DEED—PROOF OF—EVIDENCE.

An unrecorded deed, not showing the place of its execution, or reciting the fact of its delivery, is not admissible to prove title in trespass, though more than 30 years old, whether offered as an ancient document or not, if no offer is made to prove that it came from proper custody, or in any other manner to show its due execution.

Error from superior court, Dodge county; KIBBEE, Judge.

[1] Publication delayed by failure to obtain copy of opinion at time of its delivery.

[2] As to when a transaction will be considered a conditional sale, and when a chattel mortgage, see Cake v. Shull, (N. J.) 16 Atl. Rep. 434, and note; McComb v. Donald's Adm'r, (Va.) 5 S. E. Rep. 558, and note.

Digitized by Google

C. C. Smith and *J. H. Martin*, for plaintiff in error. *John F. De Lacy*, for defendant in error.

SIMMONS, J. H. R. J. Long, as surviving executor of James Long, deceased, brought his action against the Georgia Land & Lumber Company for trespass upon lot of land 85, in Telfair county. Upon the trial the plaintiff offered in evidence a deed from William and John Cleghorn to James Long to the land in question, dated in 1810. The place of execution of this deed did not appear, and there was no recital of delivery therein. The introduction of the deed was objected to for these reasons. The objection was sustained by the court, and the defendant had a verdict; whereupon the plaintiff excepted, and the only ground of exception is that the court erred in ruling out said deed.

We do not think the court erred in so doing. The deed was not recorded; therefore it was incumbent on the plaintiff to prove its execution. There was no offer on his part to do this; hence the deed was inadmissible. It was argued here, however, that the court should have admitted it as an ancient deed, it being more than 30 years old. We have looked through this record, and do not find therein any intimation that the deed was offered as an ancient document. Even if it had been, the court did right to exclude it, unless the plaintiff had offered preliminary proof as to its coming from the proper custody, etc. There was no proof of this sort offered, and the court was right in excluding the deed.

Judgment affirmed.

(82 Ga. 577)

HILTON *et al.* v. MCADAMS.

(*Supreme Court of Georgia.* March 28, 1889.)

APPEAL—PRACTICE—RECORD.

Where, on writ of error from an order denying a motion for a new trial because there was no proper approval of the brief of evidence filed in the case, the brief of evidence, or any approval or action upon it, is not embodied in the bill of exceptions, and, although the record is sent up, it is nowhere mentioned in the bill of exceptions as a part thereof, judgment must be affirmed.

Error from superior court, Camden county; ATKINS, Judge.

Ira E. Smith, by *Harrison & Peeples*, for plaintiffs in error. *S. C. Atkinson*, (by *E. H. Myers*,) for defendant in error.

SIMMONS, J. It appears from the record in this case that the trial between these parties occurred in April, 1886, and a verdict was rendered in favor of McAdams against Hilton & Foster. On the same day the defendants moved for a new trial, and were given until June 12th, following, to make out and file a complete brief of testimony. Several other orders were taken extending the time for hearing the motion for a new trial. At the November term, 1887, the motion came on to be heard before C. P. GOODYEAR, Esq., judge *pro hac vice*. Counsel for the respondent then moved to dismiss the motion for a new trial, (1) because there was no proper approval of the brief of evidence filed in said case by the judge trying it; and (2) because a copy of the documentary evidence introduced was not embodied in the brief of evidence, as the law requires, there being no agreement of record permitting the use of the original documentary evidence. The trial judge granted the motion, and the movants excepted.

It is impossible for us to say from this record whether the judgment of the court below was right or wrong. The bill of exceptions failed to embody therein the brief of evidence on the trial below, or any approval or action upon it whatever. It is true the record was sent up and certified by the clerk, but it is nowhere mentioned in the bill of exceptions as a part thereof. We therefore cannot look to the transcript sent up by the clerk to ascertain whether there was an approval of the brief of evidence or not. As it is incumbent on the plaintiff in error to show error in other ruling of the court below, and this not having been done in the present case, the only thing we can do is to affirm the judgment. Judgment affirmed.

(82 Ga. 597)

CRIBB v. WAYCROSS LUMBER CO.

(*Supreme Court of Georgia.* March 23, 1889.)

PLEADING—AIDER BY VERDICT.

Where an action is brought against the "W. L. Co.," and service is made upon one as the president of the defendant, who files pleas to the declaration, an objection taken after verdict, for the first time, that the declaration did not allege that the defendant was a corporation, is not available.

Error from superior court, Ware county; ATKINSON, Judge.

L. A. Wilson, by *Harrison & Peeples*, for plaintiff in error. *J. L. Sweat*, for defendant in error.

SIMMONS, J. The declaration filed by Cribb alleged "that the Waycross Lumber Co., of said county, is indebted to your petitioner in the sum of $500, upon a breach of contract." The breach of contract alleged is that the Waycross Lumber Company contracted with him for the building of seven miles of tramroad for it for the purpose of running trains thereon to haul logs to a steam saw-mill, the consideration of the contract being a certain sum per mile, and the deed to it to the right of way for said road through petitioner's lands. The petition alleged that after he had made the deed to the right of way, engaged hands, etc., and had completed two miles of the road, the defendant took charge of the work, and placed it in the hands of another contractor, etc., damaging petitioner $500. Process is prayed against "the Waycross Lumber Co." Service was made upon "Mr. George Waters, president of the Waycross Lumber Co." The defendant filed a plea of not indebted, which was sworn to by "Geo. Waters, president of the

Digitized by Google

Waycross Lumber Co." A verdict was rendered for the plaintiff for $500, upon which judgment was entered April 6, 1888. At the same term at which verdict and judgment were had, defendant moved in arrest of judgment, and that the judgment be set aside, on the following grounds: (1) Because plaintiff has failed to allege in his declaration that the Waycross Lumber Company is a corporation, copartnership, or other person capable of being sued. (2) Because no legal judgment can be entered upon said declaration, there being no person sued against whom said judgment could be enforced. The prayer of the petition was granted, and the judgment and verdict arrested and set aside. To this ruling the plaintiff excepted.

We think the court erred in setting aside the verdict in this case. The name of the party defendant imported a corporation. After verdict it was too late to take exception upon the ground that the declaration did not allege that the defendant was a corporation. If the defendant was not a corporation, this should have been taken advantage of before verdict, by plea. Besides, Waters was served with process as president of said company, and as president filed pleas to the declaration. This question was settled in the case of Academy v. Hardin, 78 Ga. 39, 3 S. E. Rep. 305. CLARK, J., in his opinion in that case, explains and distinguishes it from the case of Barbour v. Albany Lodge, 73 Ga. 474, relied on by counsel for the defendant in error. Judgment reversed.

(82 Ga. 523)

McGOWAN v. LUFBURROW *et al.*

(*Supreme Court of Georgia.* April 8, 1889.)

EXECUTORS AND ADMINISTRATORS—EQUITY—JURISDICTION.

1. Where a petition is filed in equity by the executrix of an estate, alleging that certain debts are owing by the estate, and that it is necessary to sell land belonging to it to pay such debts, and any part of the indebtedness alleged in the petition is found to be due by the estate, the chancellor has jurisdiction to order a sale of a part of the property to pay such indebtedness.

2. Code Ga. §§ 2263-2265, declaring contingent remainders to be estate, the minors, interested in the estate as contingent remainder-men, were properly represented before the chancellor by their next friend, and are bound by the decree.

3. It is not necessary to file the petition any number of days before the term at which the decree is granted; Code Ga. § 4221, providing for the filing of *ex parte* petitions in chancery, not prescribing any time wherein such a petition shall be filed.

Error from superior court, Chatham county; ADAMS, Judge.

G. A. Mercer and *Chisholm & Erwin*, for plaintiff in error. *R. R. Richards, Lester & Ravenel*, and *J. E. Wooten*, for defendants in error.

SIMMONS, J. 1. The real and important question in this case is whether the court had jurisdiction to pass the order of May 13, 1872, authorizing the executrix to sell the land in controversy. We think that it did. The executrix of this estate, together with her sons in their own right, and her sons' children by next friend, filed their petition to the chancellor, wherein they alleged that certain debts were owed on account of the estate. It is true that in the schedule of such debts, annexed to the petition, they showed that the larger portion thereof consisted of drafts drawn, sometimes by the son upon the executrix, and accepted by her, sometimes by the other son, and accepted by his brother, and sometimes by the executrix, and accepted by the son; but besides these drafts were certain accounts for improvements upon the estate. At any rate, the petition alleged that the estate owed debts, and that it was necessary to sell a part of the estate for the purpose of paying them. If this petition had been addressed to the ordinary of the county, no one would doubt that he would have had jurisdiction to hear and determine the facts alleged therein; and, if proper proof had been made before him, he could have passed an order authorizing the executrix to sell a sufficient portion of the property to discharge the debts due by the estate. If, therefore, the ordinary would have had jurisdiction to hear and determine the facts set out in the petition, the chancellor in this case also had jurisdiction; for it is well settled by the adjudications in this state that a court of equity has concurrent jurisdiction for the purpose of distributing estates. Dean v. Cotton Press Co., 64 Ga. 670. The jurisdiction of all courts depends upon the allegations in the pleadings. Counsel for the defendants in error contended that these pleadings, upon their face, show the want of jurisdiction, because the allegations show that the debts were debts of the life-tenants, instead of debts of the estate. That may be true as to the larger portion of the indebtedness, but it does not follow that, because the life-tenants were bound on the notes and drafts, they were not originally the debts of the estate. In the case of Dean v. Cotton-Press Co., supra, it appeared that the executor had borrowed money to pay off the mortgage. Besides, as we have seen, a portion of this indebtedness seemed to be for repairs made by a contractor upon the property of the estate; and on the trial of this case the jury found that a part of the debt was against the estate. If any part of the indebtedness alleged in the petition was due by the estate, the ordinary would have had jurisdiction to pass an order for the sale of a portion of the property to pay off that indebtedness, and a court of equity, having concurrent jurisdiction, as above shown, would have the like power. The law presumes that, when an application of this sort is made to the chancellor, he will make a proper investigation as to the truth of the allegations contained therein. It does not appear from the record that such an investigation was not made by the chancellor in this case; and it may be that he heard testimony on the subject, and ascertained, as the jury subsequently did, that at least a por-

Digitized by Google

tion of this indebtedness was due by the estate. If he did, and had the proper parties before him, the judgment is not void, and cannot be attached collaterally. Code, § 3593.

2. Did he have the proper parties before him? It is not disputed that the executrix and the two sons were properly before him, because all three united in the application. The contention is, however, that these plaintiffs (the defendants in error here) were minors at that time, and were not bound by the decree, because the court had no jurisdiction over them. We do not agree with this view of this case. The record shows that these minors were represented by their next friend, who joined in the petition for the sale of this property. The object of the decree was to pass to the purchaser their remainder interest in the property sought to be sold. It is true that the remainder at that time was a contingent one as to them, and it is further true that some courts and text-writers declare a contingent remainder not an estate, but only a chance to have one; but, whatever difference may have heretofore existed between courts and text-writers upon this subject, our Code has settled it by declaring that a contingent remainder is an estate. Code, §§ 2263-2265. These minors, therefore, had an interest or an estate which was to be passed upon by the chancellor. They were properly represented before him by their next friend. The Code, §§ 4221, 4222, declares that "all proceedings *ex parte*, or in the execution of the protective powers of chancery over trust-estates, or the estates of the wards of chancery, may be presented to the court by petition only, and such other proceedings be had therein as the necessity of each cause shall demand." "A court of equity is always open, and hence the judge in vacation and at chambers may receive and act upon such petitions, always transmitting the entire proceedings to the clerk to be entered on the minutes or other records of the court." This court, in construing these sections, in the case of Sharp v. Findley, 71 Ga. 665, says: "The very minute this petition came before this chancellor, and disclosed the fact that the land of infants was involved, his wards were before him, and the case was concerning 'an estate of the wards of chancery.'" See, also, 3 Pom. Eq. Jur. § 1305, and notes. Here, as we have shown, was an application before the chancellor concerning the estate of infants. According to this decision, just as soon as the application was presented to him, they became his wards, or the wards of chancery. He thereby obtained power and jurisdiction over their persons and their property. Having shown that at least a part of the indebtedness represented in this petition was a debt against the estate, and that the ordinary of the county would have had jurisdiction to pass an order for the sale of a sufficient portion to pay the debts, and that a court of equity has concurrent jurisdiction, the payment of the debts of an estate being a part of the distribution thereof; and having shown that these children were properly before the chancellor, and that their estate was involved in the application made by them,—we think it follows as a logical sequence that the court had jurisdiction both of the subject-matter and the person. Having jurisdiction of the subject-matter and the person, it had the power and authority to grant the decree, set out in this record, for the sale of the land.

3. But it is contended that, while this may be true, the decree was passed at chambers, and not in term-time, and that the chancellor had no power to pass such a decree in chambers. We have looked into the evidence in the record upon this subject, and we are inclined to think that the decree was passed by the chancellor in term-time, and not in chambers. The evidence of the clerk of Messrs. Hartridge & Chisholm, who prepared this application, is that it had been prepared some time before the meeting of the superior court in May, 1872, and that on the first day of the term this petition was presented to the chancellor in open court. The decree passed in the case was put upon the minutes of the court of that day, and we presume these minutes were signed by the judge either at the termination of the proceedings of that day or at the termination of that term of the court. It is true that on the back it is marked, "In chambers;" but these words were left out by the clerk when he recorded the decree on the minutes of the court. From these facts we conclude that the order was passed in term-time.

4. But it is said that, admitting this to be true, still the petition was not filed 30 days before the court convened. Although the law at that time required bills to be filed 30 days before the term, we think nevertheless that the failure to file this petition 30 days before the term at which the decree was granted could at most have been nothing more than an irregularity. The petition was not filed against any defendant, but all of the parties in interest joined therein. No defendant was called on to show cause why the prayer thereof should not be granted. We think, therefore, that the omission to file the petition 30 days before the term, even had it been irregular, would not have made the decree entered thereon void. But in our opinion it was not necessary to file an *ex parte* petition any number of days before the court. Section 4221 of the Code, supra, does not prescribe any time wherein a petition of this character should be filed. It seems that, if it is filed on the very day it is acted on by the chancellor, the filing is in sufficient time.

5. Taking this view of the facts and law of this case, it is unnecessary for us to discuss the other questions which were so ably and elaborately argued before us by counsel on both sides of the case; nor to comment on the cases cited by them, as to what a chancellor can or cannot do in chambers. Hav-

Digitized by Google

ing decided in favor of the jurisdiction, all controversy is closed. A judgment is a solemn thing,—the utmost solemnity of the law. Every doubt should be given in its favor, especially when the rights of a *bona fide* purchaser are involved. Such purchasers are favorites of courts. Judgments reversed.

(82 Ga. 566)

HORAN v. STRACHAN *et al.*

(*Supreme Court of Georgia.* March 25, 1889.)

REMOVAL OF CAUSES—DISCRETION OF STATE COURT.

In foreign attachment proceedings, where the defendant files a petition for the removal of the suit to the circuit court of the United States, alleging that the amount involved is sufficient to give jurisdiction to the federal court, and that the plaintiffs are citizens of Georgia, while the defendant is a citizen of England, and the record, down to the time of filing the petition, does not show the residence of the parties, nor the amount involved to be otherwise than as alleged by defendant, it is error for the court to refuse to grant the petition. If any issue of fact is made upon the petition it must be tried in the federal court.

Error from city court of Savannah; HARDEN, Judge.

Geo. A. Mercer, for plaintiff in error. *Garrard & Meldrim*, for defendants in error.

SIMMONS, J. On December 7, 1887, before a magistrate of Chatham county, Ga., Strachan & Co. made affidavit for and obtained an attachment against James Horan. The attachment was made returnable to the February term, 1888, of the city court of Savannah. The ground of attachment was that Horan resided out of the state. The residence or place of business of plaintiffs in attachment does not appear in any of the attachment proceedings. The indebtedness alleged was $4,975. The attachment was levied upon a steam-ship, machinery, tackle, etc. On the day the attachment was levied, December 7, 1887, defendant gave bond, and the property levied upon was released. On the first day of the February term of said city court, defendant filed a petition in said court for the removal of the suit therefrom to the circuit court of the United States, under act Cong. March 3, 1887, alleging in the petition that the suit was of a civil nature; that the matter and amount in dispute, exclusive of interest and cost, exceeded $2,000; and that the controversy in the suit was between citizens of the state of Georgia, plaintiffs in said suit, and defendant, who was a citizen of England, a subject of the queen of Great Britain and Ireland, and a non-resident of Georgia. The proper bond accompanied this petition. Plaintiffs objected to the removal, for the following reasons: (1) The cause is not removable under the law, as shown on the face of the petition and pleadings. (2) F. G. Strachan, one of the plaintiffs, and a necessary party to the cause, was not, at the commencement of this suit, nor is he now, a citizen of Georgia, but, on the contrary, was then, and still is, a citizen of England, and subject of the queen of Great Britain and Ireland. (3) This is not a suit of which the circuit court of the United States is given jurisdiction under the law, being a case of foreign attachment, jurisdiction not being conferred by law, by original process, or by removal. (4) Defendant cannot confer jurisdiction on the United States circuit court by admitting the right of said court to proceed against him in this cause. (5) Defendant is an alien, and has no right of removal, under the law, in this case. Plaintiffs showed by the affidavit of said Strachan that he was a subject of the queen of Great Britain and Ireland, and was not a citizen of the United States of America. The judge of the city court refused to allow the removal, on the ground that there was an alien on one side and an alien and a citizen of Georgia on the other. To this ruling defendant excepted.

The court erred in refusing to grant the order to remove this case to the United States court. In the case of Railway Co. v. Dunn, 122 U. S. 513, 7 Sup. Ct. Rep. 1262, the supreme court of the United States held as follows: "When a petition for a removal of the cause to a circuit court of the United States is filed in a cause pending in a state court, the only question left for the state court to determine is the question of law, whether, admitting the facts stated in the petition to be true, it appears on the face of the record, including the petition, the pleadings, and the proceedings down to that time, that the petitioner is entitled to a removal; and, if an issue of fact is made upon the petition, that issue must be tried in the circuit court."

Judgment reversed.

(103 N. C. 118)

HOLMAN v. MILLER.

(*Supreme Court of North Carolina.* April 1, 1889.)

JUDGMENT—LIEN.

Under Code Civil Proc. N. C. § 435, providing that judgments shall be entered by the clerk on the judgment docket of the court, and, if docketed within 10 days from the end of the term, shall be a lien on the debtor's real estate from the beginning of the term, a deed executed in November is superior to a judgment rendered in the preceding August, and docketed in the following July.

Armfield & Turner, for appellant. *Furches & Coble*, for appellee.

SHEPHERD, J. This was a civil action tried upon complaint, answer, and demurrer to the answer, before PHILIPS, J., at the February term, 1889, of Iredell superior court. The facts are that the plaintiff, as trustee under a deed in trust executed by Charles L. Summers, and registered in Iredell county on the 14th of November, 1886, sold for cash certain lands, and that the defendant became the purchaser in the sum of $610. The defendant contends that the plaintiff cannot make a good title because of the existence of a prior lien upon the land by virtue of a judgment rendered at August term, 1886, of the superior court of said county. At the said term a judgment was rendered against the

Digitized by Google

said Summers and others for $6,000, which greatly exceeds the actual value of the land. The said judgment was not docketed until the 21st of May, 1888. It does not appear that there was ever any execution or levy. His honor held that the plaintiff was entitled to recover, and the defendant appealed.

The question presented for our consideration is whether an undocketed judgment prevails over a registered deed in trust to secure creditors. Under the law as it existed prior to the adoption of the Code of Civil Procedure, there was no provision for the docketing of judgments, and a lien upon the property of the debtor was acquired only by issuing a writ of *fieri facias*, which bound the property of the debtor from the teste. Under the present system, no lien is acquired upon land, in the absence of an execution and levy, until the judgment has been "docketed in the judgment docket." Code, § 435; Sawyers v. Sawyers, 93 N. C. 321; Williams v. Weaver, 94 N. C. 134. Code, § 433, provides that judgments "shall be entered by the clerk of said superior court on the judgment docket of said court. The entry shall contain the names of the parties, and the relief granted, date of judgment and date of docketing, and the clerk shall keep a cross-index of the whole, with the dates and numbers thereof. All judgments rendered in any county by the superior court thereof, during a term of the court, and docketed during the same term, or within ten day thereafter, shall be held and deemed to have been rendered and docketed on the first day of said term." Code, § 83, requires a separate and distinct docket for this purpose. So it is very clear that unless the judgment is docketed upon this particular docket, there can be no lien by virtue of the judgment alone. The docketing is required in order that third persons may have notice of the existence of the judgment lien. "The dogget, or, as it is commonly called, the 'docket' or 'docquet,' is an index to the judgment, invented by the courts for their own ease and the security of purchasers, to avoid the trouble and inconvenience of turning over the rolls at large. The practice of docketing judgments seems to have obtained as early as the reign of Henry VIII. * * * Purchasers are not bound to examine for judgment liens further than to look into the proper dockets." Freem. Judgm. § 343. The observance of this law is regarded as so important to subsequent purchasers and mortgagees that, wherever the system of docketing judgments obtains, a very strict compliance with its provisions in every respect is required. In Brandling v. Plummer, 26 Law J. Ch. 326, the mere omission to insert the "number roll of the entry" was held by the lord justice to be fatal. In Ridgway's Appeal, 15 Pa. St. 177, the failure to record the Christian names of the defendants invalidated the docketing of the judgments as to subsequent purchasers or judgment creditors. In Buchan v. Sumner, 2 Barb. Ch. 165, it was held "that the docketing of a judgment against Palmer Sumner under the letter 'P,' the initial letter of his Christian name, instead of the letter 'S,' the initial letter of his surname, was not even a substantial compliance with the requirements of the statute." In Landon v. Ferguson, 3 Russ. 349, the judgment had been carried into the proper office to be docketed, but, from mistake of the officer, the docket was not completed. Lord GIFFORD decided that the holders of the judgments were not even in equity entitled to a priority. In our case no attempt whatever appears to have been made to have the judgment docketed, and, although it was the duty of the clerk to have done so, his omission is no excuse for the judgment creditor, as the authorities all clearly establish that it was his duty to see that his judgment is rightly entered on the judgment docket. The remedy of the party aggrieved is against the prothonotary or clerk. The purchaser is not bound to look beyond the judgment docket. Ridgway's Appeal, supra; Freem. Judgm., supra.

Holding, as we do, that the judgment is not a lien upon the property as against this defendant, it is unnecessary for us to consider whether such a defense, had it been valid, could have been asserted by a purchaser at a sale like this, especially where the record is silent as to what was proclaimed as the terms and conditions of the sale made by the trustee. We are of the opinion that the plaintiff is entitled to recover. No error.

(102 N. C. 406)

TULBURT *et al. v.* HOLLAR *et al.*

(*Supreme Court of North Carolina.* April 9, 1889.)

EXECUTORS AND ADMINISTRATORS—COURTS OF PROBATE—RES ADJUDICATA—LIMITATION OF ACTIONS.

1. Code N. C. §§ 108, 1521, confers power to revoke letters testamentary and of administration, and to appoint a successor in the administration. *Held*, that the probate court has power, for sufficient cause, to permit an administrator to resign, and to appoint a successor; and having done so, and no exception or appeal having been taken, and nearly 20 years having elapsed, the judgment cannot be disturbed.

2. Section 1517 provides that, on revocation of letters of an executor or administrator, his bond may be prosecuted by the person succeeding to the administration. *Held*, that an administrator *de bonis non*, and not the next of kin, is the proper person to sue on the bond of a removed administrator.

3. A settlement by an administrator, who has resigned, with his successor, under the direction of the court, terminates the trust, and is a fulfillment of his obedience to the lawful orders of the clerk (who by section 102 is authorized to act as judge of probate) or other court touching the administration, as required by his bond.

Appeal from superior court, Wilkes county; CLARK, Judge.

Action by Tulburt and others against Hollar and others. Plaintiffs appeal. Code N. C. § 102, provides that the office of probate judge is abolished "and the duties heretofore pertaining to clerks of the superior court, as judges of probate, shall be performed by the clerks of the superior court as clerks of said court. * * *" Section 1518 relates to

Digitized by Google

proceedings to require an executor, etc., to give a new bond.

W. W. Barber, for appellants. *Glenn & Glenn*, for appellees.

DAVIS, J. Civil action tried before CLARK, Judge, at March term, 1888, of the Superior Court of Wilkes county. The material facts are as follows: J. W. Tulburt died intestate, in Wilkes county, in 1865, and the plaintiffs are his next of kin and distributees. In October, 1865, the defendant Israel Hollar was duly appointed administrator of said Tulburt, and executed his bond as such, with Noah Brown, the intestate of the defendant Jarvis, as his surety, and this action is brought by the plaintiffs, alleging breaches of the administration bond, and demanding an account and settlement. The defendants answer, admitting the death of J. W. Tulburt, and the appointment of Hollar as his administrator, and the execution of the bond, but denying the alleged breaches, or that there is anything due from the said Hollar to the plaintiffs. For a further defense, they say that in 1869 the letters of administration to the defendant Hollar were revoked by the probate court of Wilkes county, and, at the request of the next of kin and the widow of said Tulburt, he was removed by the court from said office of administrator, and has not acted as such since; that upon his removal, and at the same time, one F. D. Welborn (who had married the widow of the intestate) was duly appointed by the court administrator in his stead, and executed his bond as such, and within a few days thereafter the defendant Hollar made a full settlement with the court, and with said F. D. Welborn, as the substituted administrator, and paid and delivered over to him, as such administrator, the whole of the estate of J. W. Tulburt, deceased, which had come or ought to have come into his hands, and thereafter the said Welborn held and administered the same; that said Welborn died about three years before the bringing of this action. The defendants insist that the plaintiffs cannot maintain this action "(1) because no administrator *de bonis non* or other representative of the estate of J. W. Tulburt is a party plaintiff; (2) because Mary M. Welborn, who is still living, and was the widow of said J. W. Tulburt, and entitled to a part of his personal estate, is not a party; (3) because of the great lapse of time," etc.

The following was the evidence: The docket of the judge of probate, from which this entry appears: "Court of Probate, May 21, 1869. Israel Hollar resigns his administration on the estate of J. W. Tulburt, and, on the account of his going to remove permanently beyond the limits of the state, one of defendants applies for letters of administration *de bonis non* on the said estate; and, he having entered into bond in the sum of $600, with J. J. Foster, J. H. Thompson, and R. F. Hacket as sureties, the said bond is accepted and him duly qualified." It was also admitted that said Hollar intended to remove when such proceedings were had, but did not do so, and is yet alive. F. D. Welborn acted as administrator 17 years, and is now dead. Upon this evidence his honor intimated an opinion that the plaintiffs could not get along without making the administrator *de bonis non* of J. W. Tulburt, deceased, a party. In deference to his honor's opinion the plaintiffs submitted to a judgment of nonsuit, and appealed.

We have not been favored with any argument on behalf of the appellants, but it is suggested that the action is brought against the defendant Hollar, and the surety on his bond, upon the assumption that he had no right to resign as administrator, and that the appointment of Welborn was void, and therefore no administrator *de bonis non* could be appointed. In Washington v. Blunt, 8 Ired. Eq. 254, it is said that an executor, after having accepted and entered upon the discharge of his trust, cannot resign, but can "only be removed upon a suggestion of unfitness or unfaithfulness." However that may have been with regard to executors, and assuming it to have applied to administrators, we are not called upon to determine whether the removal of an executor or administrator from the state would not constitute such "unfitness" or disqualification as would justify his removal, and a resignation and acceptance and the appointment of a successor can have no other practical effect than a removal or revocation of letters. Section 103 of the Code, which confers upon clerks of superior courts power "to grant letters testamentary and of administration," also confers upon them the power "to revoke letters testamentary and of administration." By section 1521 it is made the duty of clerks in all cases of revocation to "appoint some other person to succeed in the administration," etc. Section 1517 enacts that, "whenever the letters of an executor, administrator, or collector are revoked, his bond may be prosecuted by the person or persons succeeding to the administration of the estate," etc. And an action, even if pending against the removed executor or administrator, can only be continued against him within the limitations prescribed in section 1514. In Taylor v. Biddle, it was said by BYNUM, J.: "Without invoking the aid of our statutes, the power of removal is inherent in the office at common law, and must of necessity be so to prevent a failure of justice." 71 N. C. 5. We think it clear that the probate court had the power, for good and sufficient cause, to remove the administrator, or for like cause, as necessarily equivalent, to permit him to resign his trust, and appoint F. D. Welborn in his stead; and it appears that this was done in proceedings instituted for that purpose, and no exception was taken thereto or appeal therefrom, and it is too late to disturb the judgment of the probate court after a lapse of nearly 20 years. Whether whatever action can be brought should not be against the representative of the deceased administrator, F. D. Welborn, and the sure-

Digitized by Google

ties on his bond, it is not necessary for us to determine, but an administrator *de bonis non* is the proper person to bring the action. See Code, § 1518; Latham v. Bell, 69 N. C. 135; Carlton v. Byers, 70 N. C. 691; Merrill v. Merrill, 92 N. C. 657, and numerous cases there cited. In the case of Beall v. New Mexico, 16 Wall. 540, to which attention has been called by the chief justice, it was held that an administrator *de bonis non* could not maintain an action on the bond of the original administrator, but that it must be brought by the persons directly beneficially interested in the estate, whether distributees, next of kin, or creditors; and it is there said: "To the administrator *de bonis non* is committed only the administration of the goods, chattels, and credits of the deceased which have not been administered." However it may be elsewhere, under the section of the Code and decision referred to, it is different in this state; and it is well settled that such an action cannot be maintained by the next of kin, distributees, or creditors. When Hollar settled with Welborn, his successor, under the direction of the court, it terminated his "trust," and was a fulfillment of his obedience to the "lawful orders of the clerk or other court touching the administration of the estate committed to him," as required by the condition of his bond. There is no error.

(103 N. C. 86)

THORNTON v. LAMBETH.

(*Supreme Court of North Carolina.* March 25, 1889.)

APPEAL—PARTNERSHIP.

1. When no final judgment has been entered in a case appealed, but an order has been made which, in effect, disposes of the whole matter in controversy, the appeal may be dismissed with an opinion on said order.

2. The fact that a partner, who has purchased goods for his firm, has given his individual notes in payment, does not deprive him of his right to have said notes paid out of the partnership assets before any distribution of profits is made.

Appeal from superior court, Cumberland county; FRED PHILIPS, Judge.

Civil action in the nature of a bill in equity to close a partnership between plaintiff, A. G. Thornton, and defendant, J. A. Lambeth. From an order confirming the report of the referee as to the claim of C. P. Vanstory, a creditor intervening as a party, plaintiff appeals.

R. P. Buxton, for appellant. *Thomas H. Sutton*, for respondent.

DAVIS, J. This action was originally commenced against the defendant, Lambeth, for the settlement of a partnership account. It was alleged that the plaintiff and defendant were partners, and, among other things, that, with the exception of property of small value, the defendant was in the possession of the partnership assets, and refused to render an account. It was further alleged that he was insolvent, and judgment was demanded for an account, and also that the defendant be enjoined from disposing of the partnership effects, and for the appointment of a receiver. The defendant answered, admitting some and denying others of the allegations of the complaint. A temporary restraining order was granted, and, upon its return, and hearing upon affidavits, it was found as a fact that the plaintiff and defendant entered into a copartnership for the purpose of buying and selling horses and mules, by the terms of which the defendant was to furnish the capital, and the plaintiff his services, in the prosecution of the partnership business, and the profits arising therefrom were to be equally divided. It was further found that the partnership effects, with exceptions named, were in the hands of the defendant, and that he refused to account and settle with the plaintiff. An order was made appointing a receiver to collect and take charge of the partnership assets, and, by consent of parties, there was a reference to take and state an account of the copartnership, etc.

The referee filed his report, from which it appears that a number of exceptions were made by the plaintiff to his rulings. Among other things, the referee found as a fact that the defendant, during the existence of the partnership, gave to C. P. Vanstory two promissory notes, aggregating $1,078.70, signed by himself alone, and that they "were given for stock purchased of Vanstory, and used in the partnership business," and that said notes, except $1,000, remain unpaid. He finds as a conclusion of law that these notes are partnership liabilities, and must be paid out of the partnership assets. By motion in the cause, Vanstory was made a party defendant, and he filed an answer, asserting his claim and right to have it discharged out of the partnership assets. It was admitted that the defendant, Lambeth, is insolvent, and it was agreed that if the finding of fact and conclusion of law by the referee in regard to the Vanstory debt, excepted to by the plaintiff, should be sustained, it would obviate the necessity of passing upon the other exceptions, and upon being heard before PHILIPS, Judge, at May term, 1888, of the superior court of Cumberland county. He gave judgment sustaining the ruling of the referee, and the defendant appealed.

The case states that "the insolvency of Lambeth was admitted, and that the plaintiff never asked for a personal judgment against him," and it appears that the only thing settled by the court below is that "C. P. Vanstory recover of said partnership of J. A. Lambeth and A. G. Thornton, trading as J. A. Lambeth, the sum of $978.20, with interest from April 1, 1887. The receiver will pay over to said C. P. Vanstory the sum of money in his hands, not in excess of costs and expenses." The action was brought for an account and settlement of the partnership, and, whether the defendant be insolvent or not, there should be some judgment finally disposing of the action; and counsel for plain-

Digitized by Google

tiff in this court insists that he is entitled to judgment against the defendant for the balance reported in his favor, without reference to the solvency or insolvency of the defendant.

We think the appeal should be dismissed as prematurely taken, or the case remanded, to the end that such judgment may be rendered as will, if not appealed from, or if affirmed on appeal, determine the action; and, as it is agreed that the decision of the court upon the question raised by the Vanstory claim will practically put an end to the controversy, we will dismiss it, with our opinion upon the point intended to be raised. This course is warranted by precedent. State v. Divine, 98 N. C. 784, 4 S. E. Rep. 477; Railroad Co. v. Reidsville, 101 N. C. 404, 8 S. E. Rep. 124. The business of the copartnership was that of trading in horses and mules, and the notes given to Vanstory were for the purchase of stock used in this business. It appears from the account filed that Lambeth was the purchasing partner for the firm; for nearly the whole of his credits, amounting to over $14.000, were for horses and mules purchased for the firm, many of them from Vanstory, and sold by the firm. That one partner has the right to have the partnership effects applied to the discharge of partnership debts, when necessary for that purpose, is too plain to be questioned. It is equally clear that, where partners are to share in the profits of the partnership business, there can be no such thing as "profits to be equally divided" till the partnership debts are paid, and all its liabilities discharged. But it is insisted for the plaintiff that Vanstory accepted Lambeth's notes in payment for the horses and mules, and thereby gave credit to him alone; and, though the mules and horses were purchased for the firm, and used in its business, and were never paid for, yet Lambeth, the purchasing member of the firm, is alone liable to Vanstory, and the latter cannot look to the firm, because, as is insisted, he did not trust the firm, but took the notes of Lambeth alone. We cannot see the force of this argument, for, if Lambeth had paid Vanstory for the stock, instead of giving his notes, he would have been entitled to credit for the amount paid, as was the case, and was done, with the $100 paid by him on the debt to Vanstory; and, as he was liable for it, he had a right to have it discharged out of the partnership effects before any division of profits could be had. Scott v. Kenan, 94 N. C. 296; Stout v. McNeill, 98 N. C. 1, 3 S. E. Rep. 915.

We think that upon this ground the ruling of the court below was correct; but there is another ground upon which the ruling can be sustained. When one member of a firm buys goods on his own credit, without disclosing the fact that he is a member of the firm, and the goods are received and used by the firm, it would be liable to the vendor for the price of the goods; and, in such case, in order to exempt the firm from liability, it would be necessary for it to prove that the vendor knew that the purchasing party was a member of the firm, and elected to give credit to him alone. Poole v. Lewis, 75 N. C. 417. Upon examination it will be found that the authorities cited by counsel for the plaintiff (Story, Partn. § 140 et seq.) have reference to cases in which the creditor has knowingly elected to take the separate security of one partner, and give exclusive credit to such partner.

For the reasons already stated, and to the end that such judgment may be rendered as will determine the matters in controversy, we dismiss the appeal, with the opinion above given.

(103 N. C. 391)

STATE v. GILES.

(*Supreme Court of North Carolina.* April 1, 1889.)

BASTARDY—CONSTITUTIONAL LAW—PROCEDURE.

1. The court has power to allow the affidavit of the relatrix in bastardy proceedings to be amended, after motion to quash, so as to correct the middle name of the affiant.

2. Civil proceedings in bastardy are not barred by former proceedings which were dismissed, on the ground that the relatrix had not lived in the county long enough to confer jurisdiction on the court.

3. Evidence of illicit intercourse of relatrix with others, at a time other than when the child must have been begotten, unconnected with other evidence tending to show the falseness of her charge against defendant, is inadmissible to impeach her testimony.

4. A commitment in bastardy proceedings, under the laws of North Carolina, in default of payment of a fine, and a sum for the use of the relatrix, is not an unconstitutional proceeding, as it is but an exercise of a power to compel obedience to an order of the court, and, under section 2967 of the Code, the prisoner may be relieved under the insolvent law.

5. The voluntary entering on a jury trial, without objection, is sufficient "consent" to bestow jurisdiction, under act N. C. Jan. 28, 1887, c. 37, authorizing the Cumberland superior court to "try by consent of parties any jury cause at said criminal terms."

Appeal from superior court, Cumberland county; MERRIMON, Judge.

F. P. Jones, for appellant. *The Attorney General*, for the State.

SMITH, C. J. The defendant being accused upon the oath of Mary J. Warren, made before a justice of the peace of Cumberland county, of being the father of a bastard child born of her body, upon a warrant issued by such justice was arrested and brought before him for the purpose of inquiry into the truth of the charge. Upon the trial of the issue of paternity, it was found against him, and from the judgment the defendant appealed to the superior court. At the trial of the issue at March term, 1889, of the superior court of Cumberland, the jury returned a similar verdict, and thereupon it was adjudged "that the defendant pay a fine of ten dollars; that he pay all the costs of this case; and that he pay also into court, for the benefit of Mary J. Warren, the sum of fifty dollars,—thirty dollars of which is to be paid in cash, and the balance in in-

Digitized by Google

stallments of ten dollars cash each year hereafter until the full amount be paid; and that he give bond in the sum of two hundred dollars, with sufficient sureties, to indemnify the county of Cumberland against the maintenance of the child; and he is ordered into the custody of the sheriff until this order is complied with." From this judgment the defendant appeals, assigning the various errors set out in the transcript of the case on appeal.

1. When the cause was called for trial, the defendant moved to quash the proceedings upon the several grounds: (1) For a variance in the name of the mother, as she is designated in the affidavit and the warrant, —in the first being called Mary K. Warren and in the latter Mary Jane Warren; (2) for that the affidavit fails to allege that it is made voluntarily, or that affiant is a single woman; and (3) for that it also omits to aver that the child is likely to become a county charge, or upon what particular county it may become a charge. Thereupon leave was given to amend in these particulars, which being made, the motion to quash was denied, and the defendant excepted to the rulings both in refusing the motion and in allowing the amendments.

The affidavit and warrant to which the objections apply are not found in the record, and we must therefore accept the statement of what they contain as set out in the specifications of the appellant as correct, and we must also assume that the amendment allowed in the affidavit was with assent of the affiant, and truthful in fact, so that the only question is as to the power of the court to permit amendments that remove the grounds of the appellant's objections. Without considering the consequences of a variation in the middle name, or the letter as an initial representing it, when the rightful Christian and surname are given, in the absence of any evidence or suggestion even that both names do not designate one and the same person, or that either is borne by any one else, the defect, if of any force, is remedied by the permitted correction. The possession of the power of the court to correct such inadvertencies, and to allow much more serious amendments, and even at a later stage in the case, is so well understood and settled in this state in civil actions as not to require of us the production of decided cases. They will be found in Seymour's Digest, under title "Amendment," to which we will only add State v. Smith, ante, 200, (decided at the present term.)

There is no force in the argument that an amendment that removes objections, valid in the form of the affidavit as then existing, must be made before they are taken, and cannot be made afterwards, since it is precisely for such a purpose that the power is conferred, to be exercised in furthering the ends of justice at the discretion of the judge, in order that such as are trivial, and do not affect the substantial and understood matters in controversy, may be removed. Code, §§ 269, 270.

2. The defendant produced the record of a previous proceeding instituted against him upon the same charge, and dismissed when carried to the superior court, as a bar to this. We have but a fragment of the record of this case, and it is confined to what transpired in the cause after it reached the superior court, none other being sent up. It is very imperfect and inconsistent in itself, even, for it appears therefrom that a jury, whose names are mentioned, was impaneled "to try the issues of traverse joined between the state and the defendant," and the verdict rendered is that "the ——— guilty, as charged in the bill of indictment." Then follows this entry: "Motion to quash for want of jurisdiction. Motion overruled." The explanation furnished in the case transmitted on the appeal to this court is that the issue was, as now, as to the paternity of the child, and that at the trial it was shown that the said Mary Jane was born and had resided in Sampson county until her child was two months old, when she removed to Cumberland, and within 12 months thereafter made an affidavit charging the defendant with being its father, upon which that proceeding was based. Upon the ground, as we understand, that the mother, not having resided in Cumberland for a year, had not acquired a settlement therein, so that the child had become a county charge, the jurisdiction did not then reside in the county. Code, § 3544. The year had, however, transpired before the present proceeding was initiated, and the former interposes no obstacle to the exercise of the jurisdiction that now does attach to try the cause upon its merits.

3. In the course of the trial to which the defendant assented after his motion was overruled, the defendant proposed to put to the witness W. M. Warren, then undergoing examination, the following interrogatory: "Were you with Mary J. Warren in a certain field when one B. A. Strikland was to meet her for illicit intercourse upon a prior engagement, and you being there prevented her from carrying out the engagement?" Upon objection from the state the question was disallowed, and the defendant excepted, at the time stating that the evidence was sought to impeach her character as a witness. A question in relation to an attempted intercourse between the same parties on another occasion was proposed, and in like manner ruled out. The answer to these exceptions is found in the fact that illicit intercourse with others, and even when approaching a habit, does not, unconnected with other evidence tending to show the falsehood of the charge, of which none appears, rebut the presumption given by the statute to the examination of the woman, and hence the defendant has not been made to suffer harm from the rejection of the evidence. This is decided in State v. Bennett, 75 N. C. 305, and in State v. Parish, 83 N. C. 613. It

Digitized by Google

would have been otherwise if the proof had been of habitual intercourse with another man about the time when, in the course of nature, the child must have been begotten, as held in State v. Britt, 78 N. C. 439. So, too, as the effect is given to the examination without discrimination as to the misconduct or reputation of the woman making it, for indeed the very case discloses the want of virtue, neither would these repel the statutory presumption, alone and unaided, and there was no error in refusing the evidence offered for the purpose stated.

4. The defendant further objects to the assumption and exercise of jurisdiction at the term of the trial, because by law it is devoted to criminal actions only, and moved to set aside the verdict for this cause. This objection comes too late after trial, as it involves acquiescence and consent. The act distributing the superior courts among the districts after the increase in the number to 12 (Acts 1885, c. 180) provides for the holding of four terms of the court in the county of Cumberland for the trial of criminal cases, and two terms, of two weeks each, for the trial of civil cases alone, designating the time of each. But an amendment was made by the act of January 28, 1887, c. 37, to the clause appointing the terms for this county, by superadding thereto as follows: That any and all civil process may be made returnable to any term of the courts for Cumberland; and after the criminal business is disposed of, at any term set apart for the trial of criminal cases, the court shall proceed to hear and determine all civil cases which do not require the aid of a jury, and may try by consent of parties any jury cause at said criminal terms. When a motion is not opposed which should be, if any objection exists to its being granted, it is deemed to be assented to, as held in Atkinson v. Whitehead, 77 N. C. 418, and subsequent cases following it. Much more does the voluntary entering upon the trial before the jury give, if not an express and direct, an implied, assent to the jurisdiction assumed and exercised.

5. The remaining exception is to the judgment itself, as inconsistent with the constitution, though following the statute in that it imposes upon the defendant the payment of $50 for the use of the woman, and a fine of $10 besides, and imprisons for an indefinite period in case of default in making payment. The fine is *quasi* penal, but the payment of the residue is not, and the proceeding is not in the exercise of a criminal, but of a civil, jurisdiction, in providing for the present support of the child, and an indemnity to the county against its becoming a further public charge. The commitment is in the usual form to secure obedience to its order, not, as the objection has it, for confinement in the house of correction for the term of 12 months, as might have been done under section 38 of the Code. The error in the contention consists in regarding the requirement of the payment of these amounts, and an enforcement by imprisonment, as an award of punishment for a criminal offense, which in no sense they are, unless the $10 fine may be so considered. It is but the exercise of a power to compel obedience to the order of the court, and an imprisonment, from which the party may be relieved under the insolvent law, as if committed for fine and costs in a criminal prosecution. Code, § 2967; State v. Davis, 82 N. C. 610; State v. Bryan, 83 N. C. 611. There is no error, and the judgment is affirmed.

(103 N. C. 408)

STATE v. SMITH.

(*Supreme Court of North Carolina.* April 1, 1889.)

MUNICIPAL CORPORATIONS—ORDINANCES.

Ordinance No. 20 of the town of Rockingham, N. C., requiring citizens between the ages of 18 and 45 to work the streets and roads, and making persons willfully failing when summoned for such purpose guilty of a misdemeanor, and imposing a fine or imprisonment as a penalty, is a valid ordinance, authorized by the town charter giving authority to adopt such ordinances as may be deemed necessary for the improvement of the streets, etc., and by the Code, § 3808, giving towns power to require streets to be kept in repair by assessments of labor against the inhabitants.

Appeal from superior court, Richmond county; PHILLIPS, Judge.

The Attorney General, for the State.

MERRIMON, J. The defendant was arrested by virtue of a criminal warrant issued by the mayor of the "town of Rockingham," on the 11th day of January, 1888, wherein he was charged with having violated the ordinance No. 20 of that town, in that, on the 27th day of January, 1888, he "did unlawfully and willfully fail to attend and work the streets and roads of the town of Rockingham, after being lawfully summoned so to do by the town constable," etc., and he was taken before the mayor, before whom he confessed that he had so refused to work on the said streets and roads; whereupon the mayor gave judgment that he be fined the sum of two dollars, and he, having excepted, appealed to the superior court of the county of Richmond. In the latter court, he pleaded not guilty. On the trial, the jury rendered a special verdict to the effect that the defendant was, at and before the time specified, between the ages of 18 and 45 years; that he willfully failed and refused to attend and work on the streets and roads of the town mentioned in the warrant, after he had been duly notified so to do; that he was a tax-payer of that town; that no part of the taxes levied for defraying its expenses were applied to keeping the streets and roads therein in repair, and in reopening the same, except for the purchase of lumber for sidewalks, and building bridges on streets laid out but not completed; that the said ordinance No. 20 provided as follows,—that is to say: "That every male citizen residing in the corporate limits of said town, between the ages of eighteen and forty-five years, shall work the streets and roads of the same un-

Digitized by Google

der the direction of the town constable three or more days in each year, as may be necessary to keep said streets and roads in good condition. Any person liable to work on the streets and roads who shall willfuly fail to attend and work when summoned so to do, after notice of two days by the town constable, shall be guilty of a misdemeanor, and fined two dollars, or imprisoned two days, upon conviction before the mayor of said town." The court being of opinion that the defendant was not guilty, a verdict to that effect was entered. Thereupon the court gave judgment for the defendant, and the solicitor for the state having excepted, appealed to this court.

The statute (Code, § 3820) makes it a misdemeanor for any person to violate an ordinance of a city or town, punishable by fine not exceeding $50 or imprisonment not exceeding 30 days; and it (section 3818) gives the mayor or other chief officer of towns and cities jurisdiction of such offenses. (State v. Cainan, 94 N. C. 880; State v. Wood, Id. 855,) so that the mayor had jurisdiction of the offense charged in the warrant, if, indeed, it were committed, and this depends upon the validity of the ordinance in question. It is not denied that the defendant violated it as charged, if it had validity. The "town of Rockingham" is incorporated, and its charter (Private Acts 1887, c. 101, § 19) confers upon its commissioners very large and comprehensive powers. It provides that they "shall have power to make such by-laws, and adopt such regulations or ordinances, for the government of said town, as a majority of them may deem necessary to promote the interest, and insure the good order and government, of said town, for the improvement of the streets, and the preservation of the health in the same, and to make all such other police regulations as the interest, comfort, and convenience of the citizens of the said town may require;" and section 26 thereof empowers them "to open and lay out any new street or streets within the corporate limits of said town; * * * to widen, enlarge, make narrower, change, extend, or discontinue any street or streets, or any part thereof, within the corporate limits thereof," etc. In the absence of some provision otherwise appearing expressly or by reasonable implication, the power thus conferred implied the further power and authority to employ means appropriate to accomplish such important purposes. Otherwise the power conferred to improve, repair, and keep in repair existing streets, and to open and change others, would be useless and nugatory. It is not to be presumed such practical absurdity was intended.

It did not contravene any principle of law, or any statutory provision, to require all male residents of the town between the ages of 18 and 45 years to render reasonable compulsory service for such purposes, notwithstanding they may have paid taxes for other purposes. Every one may, in a proper way, be required to contribute of his personal service, or his means in the shape of assessments of money, or taxes proper, towards the due administration and enforcement of all just police regulations properly established. This is a part of the price he must pay for the support, advantage, and protection of the government under which he lives, and of which he takes benefit in the protection of his life, liberty, and property. Government could not live and be efficient without such exactions and contributions properly applied. The laws of this state from the earliest period of its existence have required the ordinary highways to be laid out and kept in repair mainly, if not altogether, by compulsory service of the inhabitants of the districts or localities in which they were situate. Such assessment or exaction of service is a public charge in addition to ordinary taxes, and is an appropriate means of keeping the public roads in proper repair, and there is no legal reason why streets and roads within towns and cities may not be laid out and be kept in repair by the like means, if their charters so allow. Cooley, Const. Lim. 637, 638; 2 Dill. Mun. Corp. §§ 678, 762. The commissioners had ample power to make the ordinance in question. The charter gave them authority, as we have seen, to "adopt such regulations or ordinances for the government of said town as a majority of them may deem necessary to promote the interest and insure the good order and government of said town, for the improvement of the streets," etc., and there is no word or provision in it that restricts the power in respect to the manner or method of keeping the streets in repair. This court, in State v. Commissioners, 4 Dev. 345, in interpreting the charter provisions, substantially like that we now have under consideration, held that the commissioners of Halifax had authority to require the inhabitants of the town, subject to work on the public roads, to work on the streets. That case is very much in point here, and fully sustains what we have said. But if there could be any doubt as to the proper interpretation of the provision in question, it is removed by the general statute (Code, § 3803) in respect to towns and cities, which expressly confers upon the commissioners thereof power to require streets to be laid out and kept in repair by assessments of labor against the inhabitants thereof. This provision is applicable to "the town of Rockingham," because not inconsistent with its charter, or any particular statutory provision in respect to it. Code, § 3827 There is therefore error. The court should, upon the special verdict, have directed a verdict of guilty to be entered, and given judgment upon the same. The verdict of not guilty must be set aside, and a verdict of guilty entered, and further proceedings had in the court below according to law. To that end let this opinion be certified to that court. It is so ordered.

Digitized by Google

(102 N. C. 236, 262)

HUGHES *et al.* v. HODGES.

(*Supreme Court of North Carolina.* March 25, 1889.)

HOMESTEAD—CONVEYANCE BEFORE ALLOTMENT—WIFE NOT JOINING.

1. Const. N. C., after exempting from forced sale "every homestead, and the dwelling and buildings used therewith, not exceeding in value $1,000, to be selected by the owner thereof," provides (article 10, § 8) that nothing contained in the foregoing sections of this article shall operate to prevent the owner of a homestead from disposing of the same by deed; but no deed made by the owner of the homestead shall be valid without the voluntary signature and assent of his wife, signified on her private examination, according to law. *Held*, that a land-owner who is not in debt may, by deed absolute or by mortgage, convey his land that has never been allotted to him as a homestead, without the joinder of his wife in the deed, free from any restriction growing out of the provisions of article 10, § 8, whether his land was acquired or his marriage was celebrated before or after the adoption of the constitution of 1868.

2. When the grantor seeks to have a conveyance in which his wife has not joined declared void, under article 10, § 8, he must show (1) that a homestead had, prior thereto, been allotted to him in the land conveyed, as provided by law; or (2) that there was an unsatisfied judgment constituting a lien upon the land when conveyed, and upon which an execution might still issue, and make it necessary to have his homestead allotted, or a mortgage reserving an undefined homestead, and constituting a lien that could not be enforced without allotting a homestead in the land, or (3) that the conveyance was void because executed with intent to defraud creditors, and that the grantor did not already have a homestead allotted in other lands.

MERRIMON, J., dissenting.

This was a civil action, heard before GRAVES, J., at the spring term, 1888, of the superior court of Northampton county. The plaintiffs are the executor and heirs at law of Samuel Calvert, On the 8th of January, 1876, defendant executed three notes of that date, but falling due in one, two, and three years after date, payable to said Samuel Calvert, and at the same time executed to said Calvert also a mortgage deed conveying 35 acres in Northampton county to secure the payment of said notes. This action was brought to foreclose. At the time when the defendant executed the mortgage deed, (8th January, 1876,) he owned no other land except the tract conveyed in said deed, and another tract of two acres, both of which together are not worth $1,000. The defendant acquired title to one undivided half interest in said land in the year 1865, but did not become the owner of the other half until the ——— day of ———, 1876. The defendant was first married in 1873, and his first wife was living on the 8th of January, 1876, but did not join in the execution of the deed. She died in the year 1881, and he married a second wife in the year 1882. This action was brought in June, 1879, after the last of said notes became due. The defendant contended that the deed, or writing purporting to be a deed, executed by the defendant on the 8th of January, 1876, was void as a conveyance, and that no interest in said land passed by said deed. The plaintiffs insisted, on the other hand, that the deed was valid without the joinder of the wife in its execution, and vested the title to the whole of said land in fee-simple in Samuel Calvert, subject to the trusts set forth therein. The court adjudged that the defendant, and all persons claiming under him, be "foreclosed of all equity of redemption in and to the reversion in the land mentioned in the complaint," after the termination of the homestead estate, and ordered that a commissioner sell the reversion unless the debt adjudged to be due from defendant should meantime be discharged. Both plaintiffs and defendant appealed, and both cases are considered together, the appeal of plaintiffs being first in order.

T. W Mason, for plaintiffs. *R. B. Peebles*, for defendant.

AVERY, J., (*after stating the facts as above.*) When we approach the consideration of the question whether the organic law or the statute law shall be so construed as either to preserve unimpaired, or to greatly restrict, the right of the citizen to aliene his own land, it is wise to recur to the fundamental principles embodied in our state and national constitutions, or to the elements of the common law, that have proven consistent with the genius of our institutions. Every citizen has the right to enjoy the fruits of his own labor, and, when his earnings are invested in land, the rule is that he acquires with the title the incidental right of absolute and unrestricted alienation. The few instances in which the law has trammeled the citizen in the exercise of this power in order to reach some beneficent end are the exceptions that establish instead of destroy the rule. The *jus disponendi*, subject only to the exceptions mentioned, is a vested right, protected even against hostile state legislation by that clause of the constitution of the United States which prohibits the enactment of any law impairing the obligations of a contract. Bruce v. Strickland, 81 N. C. 267. In our declaration of rights, (Const. art. 1, § 31,) more than a century since, perpetuities were coupled with monopolies, and denounced as "contrary to the genius of a free state." This was followed by the act, passed in the same spirit, which converted a fee-tail estate in its very inception into a fee-simple, with the incidental right to sell, and with the avowed object of attaching the absolute *jus disponendi* to the estate created. It has been repeatedly declared to be sound public policy to remove every obstacle to the ready sale of real estate upon the market, in order to benefit commerce, and thereby promote general prosperity. It was in furtherance of this object that our general assembly, but a few years since, so altered our registration laws that persons proposing to purchase lands could be well advised as to the titles by a careful inspection of the public records. This leading purpose is subordinated, however, to two wise provisions for the protection of women and children,—dower, a creature of the common law; and the homestead, which is imbedded in the

Digitized by Google

organic law; but, while the humane exemption clauses of the constitution have found favor with the courts, they have been carefully so construed as to carry out the kindly purpose for which they were created, but to restrict alienation only so far as is necessary to effectuate that object. If we will bear in mind, in the progress of this discussion, how essential to the protection of the rights of the citizen, and how important to the promotion of commercial prosperity, it is to guard well the right of alienation, and to restrict it only so far as is necessary in order to extend the blessings of a homestead to those for whose support it was intended, we will find it a beacon light to guide us safely through the mazes of conflicting authorities, emanating from more than a score of appellate courts, when the true way to steer through the sea of doubt and perplexity might otherwise be obscure.

What was the legislative intent in enacting laws providing for the exemption of homestead and fixed amounts in value of personal property from sale under execution? A few definitions of a homestead given by the different courts of the Union will show what they have declared was the object of the law-making power in creating them. The homestead law was called by the supreme court of California "A beneficent provision for the protection and maintenance of the wife and children against the neglect and improvidence of the father and husband." This court has declared that the purpose was to provide every man a home for his wife and children. Jacobs v. Smallwood, 63 N. C. 113. We must acknowledge that there is some apparent conflict between Adrian v Shaw, 82 N. C. 476, and the authorities there cited,—Gheen v. Summey, 80 N. C. 190, and Lambert v. Kinnery, 74 N. C. 348, on the one hand, and the case of Hager v. Nixon, 69 N. C. 108, and Mayho v. Cotton, Id. 289, on the other; and the inconsistency of these authorities as to the true interpretation to be given to section 8, art. 10, must be removed, either by modifying the abstract rule laid down in Adrian v. Shaw or by directly overruling the plain principle announced in Mayho v. Cotton, as the only safe solution of all the cases that might depend upon the true meaning of the restriction contained in said section. In Gheen v. Summey the court say: "It is settled by the construction of this court that the homestead right is a quality annexed to land whereby an estate is exempted from sale under execution for a debt, and it has its force and vigor in and by the constitution, and is in no wise dependent on the assent or action of the creditor. And therefore it results, as has been expressly held, that the action of the sheriff in assigning the same by metes and bounds is not needed to any extent to vest the title, but merely as finding the quantum so as to enable him to ascertain the excess, if any, and levy on and sell it." The only question that arose out of the facts of that case was whether a previous appeal by the judgment creditor to the township board of trustees, (under Battle, Revisal, c. 55,) to have a new allotment of homestead, which allotment was made, estopped the creditor from selling the homestead afterwards to satisfy a debt created before 1868, the creditor having sold the excess previously, and soon after allotment. Only the constitutional construction established by Edwards v. Kearzey, 96 U. S. 595, was involved in that case, and therefore the definition of the homestead given was an *obiter dictum*. So much of the definition as is taken from Littlejohn v. Egerton, 76 N. C. 468, and 77 N. C. 379, is not inconsistent with the principle laid down in Mayho v. Cotton, but in the later case of Adrian v. Shaw the court not only repeated the definition given in Gheen v. Summey, (the latter part of which was substantially taken from Lambert v. Kinnery,) but added to the definition another quotation, in substance, at least, from the latter case, as follows: "Title to the homestead can only be divested in the mode prescribed in section 8, art. 10, of the constitution." As we shall see presently, the facts did not in either case warrant the giving of any general definition of a homestead, and that given was unnecessary. In Adrian v. Shaw the facts were that one Jackson and wife joined, with privy examination of the wife in proper form, in conveying, on April 22, 1872, the only tract of land that Jackson owned, and which was worth less than $1,000, but no homestead had been laid off in the land. Jackson and wife left the state, and after they had left execution issued in 1874 on a judgment docketed November 20, 1871, against Jackson in the county where the land was located. The plaintiffs, Adrian & Villers, purchased at the execution sale, and the question presented and decided was whether the deed of Jackson and wife conveyed any estate in the land to their grantee, and whether Adrian & Villers had any right to recover possession from the grantee of Jackson and wife. The court held that Shaw took under the deed from Jackson and wife an estate at least for the life of Jackson, because the sale was made subject to the right of a judgment creditor who already had a lien upon the land, with the incidental power to have the homestead allotted in it, and sell the excess, if any. In Lambert v. Kinnery, the facts were that a sheriff sold all of the land of a debtor without having a homestead assigned him in it, and the plaintiff was the purchaser at execution sale. It was also in evidence that the defendant (the debtor) had declared at the court-house door, while the sheriff was selling the land, that it did not belong to him, but to another. The case therefore involved both the question whether the homestead right could be surrendered by the owner by estoppel *in pais*, and whether the sheriff could defeat the right by refusing to allot. The idea, therefore, that the homestead right so vested by operation of law in every owner of land that it could not be divested, except by a conveyance

Digitized by Google

executed in accordance with the provisions of section 8, art. 10, must have been advanced with a view to the facts of that case only, because to accept and interpret the language literally, and apply it to all cases, would lead us into many contradictions, not to say absurdities. Unless the language of the court in Adrian v. Shaw, interpreted in its broadest sense, shall be held to bind this court to a construction of the constitution, fraught with consequences so serious, we are still at liberty to consider and determine whether section 8, art. 10, of the constitution deprives the husband of the power to convey an unascertained homestead as well as one already laid off, either on petition of the owner or by an officer who has an execution in his hands.'

The case of Littlejohn v. Egerton was twice before this court, and so far from justifying the limitation which is contended for by the defendant, upon the power of sale on the part of the husband in a case like this, the facts and the reasoning of the court in both cases tend rather to sustain the opposite view of the case. In the first appeal (76 N. C. 468) it appeared that the homestead had been first allotted so as to cover a portion of Littlejohn's land, and the excess was sold to satisfy executions in favor of his creditors, and subsequently that Littlejohn consented to the sale of the homestead, and that his conduct at the time of, and his language in reference to, it were such as to amount to an estoppel *in pais*. The court held that he could not waive his right of homestead in favor of his creditors, except by a deed in which his wife should join with privy examination. In the second appeal, (77 N. C. 379,) a doubt was suggested whether Littlejohn's homestead had been laid off so as clearly to define it by metes and bounds. The court held that "a homestead right is a quality annexed to land, like a condition, whereby an estate is exempted from sale under execution for debt, and cannot be defeated by failure of a sheriff to have the homestead laid off by metes and bounds." The two cases presented singly the two points that had previously been decided in the case of Lambert v. Kinnery at one view. All of these rulings looked to the beneficent end of protecting the home of the family, when the husband or father was embarrassed with debt, and pursued by his creditors, either against his own improvidence or the misconduct of officers. The homestead right would be worse than a delusion if it could be defeated by language used either by accident or design by the drunken or reckless owner, or by the arbitrary refusal of an officer to have it ascertained by metes and bounds.

But the new question, fairly presented by both appeals in this case, is not whether the owner of an unallotted homestead can always, by a conveyance executed without the joinder and privy examination of his wife, defeat her right or that of his children to a homestead in the land, but whether he has the power to alien all of his land before a part or the whole is designated by law as an actual homestead, subject to the dower right of the wife, and, where the husband is free from debt, to no other incumbrance. In Hager v. Nixon, 69 N. C. 110, Justice RODMAN, for the court, says: "It seems that the idea of a homestead which the framers of our constitution had in mind was ownership and occupancy of land exempted from execution obtained on any debt during the life of the owner. To this original conception was added a continuance of the exemption during the minority of any one of the owner's children. * * * The idea apparently was that the exemption should attach to the property of the owner, or to some part of it, during her life-time. * * * We infer this from section 3, art. 10, of the constitution. 'The homestead after the death of the owner thereof, shall be exempt from the payment of any debt during the minority of the children, or any one of them.' It is implied that the ancestor had been the owner of the homestead, by which, in this connection, must be meant a part of his property set apart and designated as exempt, and not merely land occupied and owned by him. So, in section 5, 'If the owner of a homestead die, leaving a widow, but no children, the same shall be exempt from the debts of her husband, and the rents and profits thereof shall inure to her benefit during her widowhood, unless she be the owner of a homestead in her own right.' The whole design of the constitution, so far as it can be gathered from article 10, was to exempt property of a debtor to a certain value from execution; * * * the purpose of a homestead law is to regulate between a debtor and his creditors, and to affect other interests incidentally only, and to the least possible degree consistent with its main purpose."

No explanation is needed for quoting so extensively from that opinion, as it lays a broad foundation for the rule that is decisive of this case. A land-owner who is not in debt may convey his land that has never been allotted to him as a homestead without the joinder of his wife in the deed, subject only to her right of dower if she survive him, but free from any restriction growing out of the provisions of section 8, art. 10, of the constitution, whether his land was acquired, or his marriage was celebrated, before or after the ratification of the constitution of 1868. The main purpose being to protect the family against the creditor, why should the law needlessly interpose with a mailed hand, when a thrifty man, who owes nothing, and holds his land unincumbered, attempts, it may be, to realize a handsome profit by a sale to one who is willing to incur the risks of the survivorship and incident rights of the wife, or to allow a satisfactory discount for such risk? While both live, a dutiful wife can compel her husband to support her according to her station in life, and, if she survive him, any land of which he was seised during coverture is subject to her

Digitized by Google

claim of dower. If the husband make a fraudulent conveyance, the wife not joining in the deed, then the proceeding of the creditor to have the deed vacated inures to the benefit of the family, because the creditor ultimately subjects the reversionary interest to the payment of the debt, while the wife and children of the debtor get the homestead in the land. The validity of the husband's conveyance is therefore subject also to the restriction, as all deeds should be, that it shall be made in good faith. Crummen v. Bennet, 68 N. C. 494; Arnold v Estis, 92 N. C. 162. But in Mayho v. Cotton the question presented was whether the owner had the right to select his homestead in any land of which he had title. After declaring that the owner might, under the constitution, locate his homestead, without restriction, in any tract of land owned by him, the court say in that case what seems to be decisive, in the very plainest terms, of both appeals brought up in this action: "Neither is it material that the wife of the defendant did not by deed assent to his receiving a homestead in the swamp place. Section 8, art. 10, of the constitution applies only to a conveyance of a homestead after it is laid off." After deciding that the husband might determine, as between his different tracts of land, the location of the homestead, without the assent of the wife, the court went further, and construed section 8 to apply only to allotted homesteads, evidently having in view the possible difficulty that might grow out of conceding to the owner the power to select as between a number of tracts of land, and determine in which one his homestead should be marked out. Suppose the owner, being free from debt, should convey all of his land, including a dozen tracts, any one of which is worth more than a thousand dollars, and to a dozen different persons, but his wife fails to join in the conveyance to any one of the grantees, and no homestead had been allotted. Suppose, then, that he should invest the proceeds of the sale in a dozen other tracts of land. If financial misfortune then overtook him, surely it would not be contended that all of the conveyances were void, or even that they were effectual to pass only the reversionary interest. He could not take a homestead in all of the tracts, and it would be absurd to allow him to incumber a particular one at his own option, and in the face of his own deed. The only safe rules as to the meaning of section 8, art. 10, of the constitution may be deduced from the two cases last cited. Where there is no creditor, there is no reason for restricting the owner in the sale of land not allotted as a homestead by any construction placed upon that section, because the whole plan of homestead exemptions was framed for the purpose of affording protection against debt. But it does not follow from the mere fact that a man owes debts that section 8, art. 10, of the constitution is to be construed to disable him from conveying his lands without the joinder of his wife, unless the deed were executed with intent to defraud his creditors, and no homestead has been allotted to him; or unless the land conveyed by him is subject to a lien of a judgment or a mortgage reserving the homestead right, that cannot be enforced without allotting a homestead, in order to ascertain and subject to sale the excess. The rule in Mayho v. Cotton is so far modified as not to apply when the husband is embarrassed with debt.

It was not the intention of the framers of the constitution to restrict the rights of thrifty and successful men, who ask and need no such interference in their affairs. Hence, when the sheriff holds executions against a debtor, the latter will not be allowed ignorantly, or by collusion with the creditor, to conclude himself and family from the right to claim a home by the use of any mere words. It was never intended that an effectual estoppel should be so created, and allowed so easily to defeat the leading purpose apparent in article 10 of the constitution,—the protection of the debtor's family. The ideal homestead created by the constitution, and located by proceedings under the statute, is born of financial embarrassment, and exists, as to any given body of land, only when the creditor can arm the sheriff with process to sell it to satisfy a judgment; or a mortgagee, holding subject to an express reservation of the right of homestead in the land mortgaged, has the right to foreclose, and what is exempt has not already been located, as the law prescribes; or where the debtor has executed a deed to land with intent to defraud creditors, and has no homestead allotted to him in other lands. The constitution does not annex the quality to the land of one who is free from financial embarrassment, for the right, operating, as it does, to exempt an estate from sale for debt, must, of necessity, be the creature of debt. In Markham v. Hicks, 90 N. C. 204, this court held that the effect of the assignment of a homestead was simply to attach to an existing estate the quality of exemption from sale under execution, and the designation of the homestead right as "a quality annexed to the land whereby the estate is exempted from sale under execution" was an inadvertent and inaccurate expression, in so far as it conveyed the idea of carving new estates out of the land of the debtor. But, in either view of the nature of the homestead right, there can be no doubt that it relates to and grows out of debt, and exempts land from sale under execution for debt. The definition given in Littlejohn v. Egerton has been repeated only because it still stands as a part of the later definition given in Adrian v Shaw and Gheen v. Summey. We cannot reconcile the decisions in all the cases cited upon any other principle than this.

In corroboration of this view, we find that not only was it held by this court that the constitution allowed the owner to determine where the homestead should be laid off, but

Digitized by Google

it has been expressly held that where land was acquired by a husband, and the marriage was celebrated before the constitution of 1868 was ratified, the husband had a vested right in the land, and could convey it without the joinder of the wife, unless the husband has either had the homestead allotted on his own petition, or it has been laid off by an officer according to law. Bruce v. Strickland, 81 N. C. 267; Sutton v. Askew, 66 N. C. 172; Castlebury v. Maynard, 95 N. C. 281, Gilmore v. Bright, 101 N. C. 382, 7 S. E. Rep. 751. In the case of Lee v. Moseley, 101 N. C. 311, 7 S. E. Rep. 874, this court held that a homestead in land in this state would be deemed abandoned by the owner if he removed his residence to South Carolina, and the court were united as to that view. The case is cited merely to call attention to the fact that a right of homestead can be abandoned without a deed in which the wife joins with privy examination, and, if the rule stated in Adrian v. Shaw is to be taken literally, and construed to mean that all land vests in all cases without exception before allotment as a homestead, and "can only be divested in the mode prescribed in section 8, art. 10, of the constitution," then a change of residence to another state, not being the mode prescribed in said section, would not have divested the right of homestead out of the claimant in that case. Moreover, if we accept the theory in its broadest sense, that the law so vests a right of homestead in every man who holds title to land that it cannot be divested except in the manner prescribed in said section, it would follow that the owner would be compelled to marry, and procure the joinder of his wife, with privy examination, in order to make a valid title to a purchaser, because he cannot otherwise comply with the rule, literally construed and enforced.

It would astound the members of the legal profession, and the people of the state generally, to be informed that a phrase, apt to be repeated inadvertently even by courts, because it is concise and euphonious, though uttered heretofore unnecessarily, will be adhered to with the result of making utterly void every deed that has not the sanction of a wife. It would seem consonant with reason, as well as the express authority of Mayho v. Cotton, to construe the language quoted in Adrian v. Shaw, from Lambert v. Kinnery, in the qualified sense which we have suggested is the true meaning. As between the creditor having a lien, on the one side, and the debtor and his family on the other, the constitution does create a right to a home for the benefit of the debtor's family in his land, —a home that may never be marked out by metes and bounds. The debts may be discharged before the homestead is allotted, and then the inchoate right, as applied to the debtor's land, no longer exists; but, when the creditor reduces his claim to judgment, the law places him and the debtor "at arm's length," and frustrates every effort of either to evade the section of the constitution that gives the wife the veto power, by requiring an allotment of the homestead as antecedent to any sale, and her assent, with privy examination, before the improvident husband can dispose of it. So, if the debtor sells to defraud his creditor, when the latter moves in the court to set aside his deed and subject the land to his claim, the constitution gives first the right to an undefined homestead, and the law made in pursuance of the constitution ascertains its bounds, so soon as he seeks to sell. Until the owner contracts debts, there is no undefined homestead right attaching to his land; and, unless his homestead has already been allotted, section 8, art. 10, of the constitution does not restrict his power to convey. If, however, the homestead has once been laid off at the instance of creditors, though the debts may be discharged, the restriction remains, and renders the joinder of the wife essential to a valid conveyance of it. The definition given in Adrian v. Shaw must be considered modified and restricted in its application so as to conform to the view we have expressed in this opinion.

The defendant conveyed his land by mortgage deed to secure money loaned to him on the land, as we infer. Until proof to the contrary is offered, the presumption is in favor of his power to convey, and the defendant offers no evidence of the existence of a debt or judgment against himself. For the purpose of this discussion there can be no difference between a mortgage and an absolute deed. His first wife, who was then living, did not join, and did not therefore convey her right to dower, had she survived her husband, but she died in 1881; and it is not necessary to discuss the rights of the defendant's second wife. If is sufficient to say that neither she nor any other person can be allowed a homestead in the land. No homestead having been allotted before the deed was executed, in 1876, or since, the deed of the defendant to the plaintiff's testator was valid, and passed the land to the grantee for the purposes mentioned therein, subject only to a contingent right no longer hanging over it. We therefore hold that the judge erred in ordering the sale of the reversionary interest, and should have adjudged that the entire interest, instead of the reversionary interest only, be sold, unless the debt should be paid by the time mentioned. In the plaintiff's appeal there was error. Let this opinion be certified, to the end that the judgment may be modified.

IN DEFENDANT'S APPEAL.

AVERY, J. The defendant contends that the court below erred in refusing to declare the mortgage deed void, and in ordering the sale of the reversionary interest in the land. From the discussion of plaintiff's appeal it will appear that the presumption of law is in favor of the validity of this and every other deed executed in due form. If the defendant seeks to have it declared void, because it

Digitized by Google

was made in disregard of the requirements of section 8, art. 10, of the constitution, the burden is upon him to show that the homestead right attached to the land and vitiated the conveyance, without the joinder of the wife, with privy examination, for one of the three following reasons: (1) That a homestead had been allotted to him in the land described in the mortgage deed, either on his own petition or by an officer in accordance with law. (2) That there was an unsatisfied judgment or judgments that constituted a lien upon the land, when conveyed, and upon which execution might still issue, and make it necessary to have his homestead allotted, or a mortgage, reserving an undefined homestead, and constituting a lien that could not be enforced without allotting a homestead to defendant in the land. (3) That the mortgage deed was void because executed with intent to defraud the defendant's creditors, and that defendant did not have a homestead allotted already in other lands.

In order to rebut the presumption of validity by bringing the deed under the prohibition contained in section 8, art. 10, of the constitution, one of the three grounds of objection mentioned must be made to appear by any person who would raise a question as to the effect of the conveyance. We are assuming, for the purpose of presenting the case in its strongest aspect for the defendant, that, in order to protect the right of homestead, the doctrine of estoppel would be held not to apply, and the defendant himself would no more be restrained from impeaching his own deed (which would be, as a rule, considered good *inter partes*) than he would be precluded by such conduct and language on his part as would, for any other purpose, be deemed an estoppel *in pais* against his claim to any right in the land. But in Crummen v. Bennet and Arnold v. Estis, cited in the opinion on plaintiff's appeal, this court held that the bargainor in a fraudulent deed was not estopped by his deed to claim homestead in the land conveyed. In Spoon v. Reid, 78 N. C. 244, the fraudulent grantor was held to be estopped, not by his deed, but by the record of the proceedings to allot the homestead. The same principle is announced in Whitehead v. Spivy, ante, 319, (at this term.) It might endanger the security of the homestead to parties to concede that the owner of land by his deed simply could destroy the homestead by way of estoppel. There is no error.

MERRIMON, J., (*dissenting.*) I cannot concur in so much of the opinion of the court in this case as declares and decides that a resident of this state, having a wife, and land in which he has a homestead, can make a valid sale and conveyance thereof, not subject to, but divested of, the right of homestead therein, "without the voluntary signature and assent of his wife, signified on her private examination according to law," if such sale and conveyance shall be made before the homestead shall be valued and laid off as prescribed by the statute; nor in the interpretation given of numerous decisions of this court cited in the course of the opinion, some of which I will advert to presently.

The constitution (article 10, §§ 2, 3, 5, 8) provides as follows: "Every homestead, and the dwelling and buildings used therewith, not exceeding in value one thousand dollars, to be selected by the owner thereof, or in lieu thereof, at the option of the owner, any lot in a city, town, or village, with the dwelling and buildings used thereon, owned and occupied by any resident of this state, and not exceeding the value of one thousand dollars, shall be exempt from sale under execution or other final process obtained on any debt. But no property shall be exempt from sale for taxes, or for payment of obligations contracted for the purchase of said premises. The homestead, after the death of the owner thereof, shall be exempt from the payment of any debt during the minority of his children, or any one of them. If the owner of a homestead die, leaving a widow but no children, the same shall be exempt from the debts of her husband, and the rents and profits thereof shall inure to her benefit during her widowhood, unless she be the owner of a homestead in her own right. Nothing contained in the foregoing sections of this article shall operate to prevent the owner of a homestead from disposing of the same by deed; but no deed made by the owner of the homestead shall be valid without the voluntary signature and assent of his wife, signified on her private examination according to law." Thus the homestead, exempt from such sale for the time specified, is created, defined with particularity, and much in detail, and is given and secured to every resident in this state, if he shall have a homestead. Nothing is left to statutory regulation, except to prescribe how it shall be valued and laid off. Unquestionably the makers of the constitution had the power and authority to make such an organic provision, and they were the judges of the propriety and expediency of it. It seems to me that the plain purpose and effect of it was to create and give directly to every resident of this state the right to have his homestead (the place where he lives or might select to live) in the measure and way, and for the time prescribed, "exempt from sale under execution or other final process obtained on any debt;" and that such right attaches to any land he may have as homestead, when and as soon as he has the same, and, having attached to the land, it remains and runs with it, and the latter cannot be divested of it, while the owner continues to be a resident of this state, until the wife, if there be one, shall give her assent to a conveyance of it to some person by the owner thereof in the way prescribed. It is not contemplated or intended that such right shall arise and spring into active operation and have full force and effect only when the owner of the homestead shall be in debt, or when there shall be docketed judg-

Digitized by Google

ments against him, or when executions shall be going against his real property; but it arises presently out of, and continues to exist and run with, the land, as indicated per force of the constitution, whether the owner is in debt or not, ready at all times to serve, and at all times serving, the beneficent purpose of preventing the sale of the homestead as defined, under such legal process as that mentioned, whenever and however the occasion for such active prevention may arise or come about. The right of exemption from sale ever accompanies and attaches to the homestead as defined by the constitution, and the title of the owner to it can pass, when he has a wife, only with her assent, signified in the way prescribed. It is not true that the homestead right is operative and beneficial only when the owner is in debt, or pressed by "final process obtained on any debt." It is ever operative. The owner, though he might owe nothing, and be possessed of good wealth, has it; his wife and children have the benefit of it; and he could divest himself of it only with the assent of his wife. He might have it valued and laid off to him, though ordinarily he would not do so. The statute (Code, § 511) so expressly provides.

A leading and important feature of the purpose is, when the husband has a wife, to secure the benefit of the homestead to her and the children of the marriage, against the possible reckless trading adventures, improvidence, and dissipation of the husband. It is not intended that he shall have power as to the homestead to deprive his wife and children of a home. Justice and sound public policy forbid that he shall have unrestricted power to do so. Hence the broad and strong provision that "no deed made by the owner of the homestead shall be valid without the voluntary signature and assent of his wife, signified on her private examination according to law." While the wife lives, the husband can make no valid sale of the homestead without her assent so given; and it makes no difference whether the homestead has been valued and laid off or not, as provided by the statute, because the homestead exemption from such sale is given by the constitution and not by the statute. The latter is only in aid of the former, and its purpose is simply to locate and ascertain where the homestead is, its value and boundaries. The limitation upon the husband's power to sell it without the wife's assent is very broad and comprehensive. The words employed are "no deed made," etc., implying that no sale of it shall be valid without her assent. There is nothing in the constitution nor in the statute that in terms, or by the remotest implication, gives the husband power to sell it without the wife's assent before it is valued and laid off to him, but there are these words of inhibition and limitation upon his power, strong and broad as they can be. It is not provided particularly that he may sell it before or after it is valued and laid off without her consent, but that he shall not sell it at all without her consent. In view of the important purpose to be subserved by such limitation upon the husband's power of sale, can any good and substantial reason be assigned why he should by implication be allowed to sell it without the wife's assent, before it shall be valued and laid off? I can conceive of none whatever, but I can readily suggest grave ones why he should not be allowed to do so. He may not be embarrassed and his homestead imperiled by docketed judgments and executions; he may be free from debt; but he may be a reckless, adventurous trader; he may be improvident, and hazard his home on a single transaction; he may be dissipated, drunken, a desperate gamester, and turn his wife and children out of doors, homeless, upon the turn of a die—on the result of a game of cards. This he might and could accomplish if he could sell and convey the homestead without the wife's assent. He might willfully refuse to have his homestead valued and laid off to him, to the end he might sell it, untrammeled by the wife. Such a man would have a motive, more or less controlling, impelling him to do so. The very purpose of the limitation is to cut off, as far as practicable, such possibilities,—to protect his wife and children against such husbands and fathers; and they may and would often need such protection as certainly before as after the homestead shall be valued and laid off.

It is a serious mistake to conclude that the homestead provision is intended simply to protect a debtor and his family against the creditor. It as certainly intends further to protect the wife and children against the shortcomings of the reckless, unworthy husband and father. The second section of the article of the constitution recited creates, defines, and gives the right of homestead and protection as to it against the creditor. The eighth section thereof affords protection against the husband in the restriction upon his power of alienation of it. This section is certainly intended to serve this purpose; otherwise it is meaningless and nugatory, and such protection is intended to be incident to and continuous with the homestead as long as it lasts, if there be a wife and children of the owner of it.

It is said that the homestead provision is a restriction upon, and embarrassing to, the freedom of trade and the transfer of real property, and so it is to a certain extent; but the end to be secured by it is one of great moment to the commonwealth, society, and families. It is of much consequence that families, wives, and children, shall have homes,—homes that they cannot be ejected from by the creditor of the husband and father, and that the recreant and faithless father cannot drive them from. This is quite as important as trade, and the people did wisely when they so provided in their organic law. A constitutional provision, so beneficent in its spirit, is not to be so strictly construed in the interest of trade as to impair and destroy in great part its efficiency

Digitized by Google

The law favors the freedom of trade, but it as well and as certainly favors the right of homestead, and there exists not the slightest reason of policy why plain words and phrases should receive strained and unnatural interpretation, to the prejudice or abridgement of that right. Besides, as I have said, the makers of the constitution have the power and authority to make such organic provision, and it is not to be impaired by interpretation founded in reasons of supposed policy. The restriction upon the husband's power of alienation of the homestead in favor of the wife and children is no more objectionable than that upon his power to aliene his lands in favor of his wife as to her right of dower therein. He cannot sell and convey his land free from the wife's right of dower, unless she shall join in the conveyance. No more can he sell and convey the right of homestead without her consent. The conditions of society require such restriction upon the hurry of trade; they are essential to its good, and the common good. It is said the restriction upon the husband's power of alienation of the homestead before it is valued and laid off to him will give rise to confusion and inconvenience; and the inquiry is propounded, suppose the husband should in such case sell his lands in parcels, without his wife's assent, to numerous persons, in which parcel would the homestead be located? The answer is not difficult. The husband shall not sell the homestead, or any land subject to it, without the assent of his wife. Whoever buys without it, does so at his peril, and he takes subject to the right of homestead, to be asserted freely upon any part of or all the land, just as the purchaser of the land of the husband would take it subject to the right of the wife to dower therein, if she fail to join in the conveyance thereof, and she would take her dower therein, if she should survive her husband, just as if no sale of the land had been made by the husband in his life-time. Such objection seems to me to be without force. Surely it has not such weight as to warrant the strained construction the court puts upon the limitation upon the husband's power in question.

It seems to me that what I have thus said is reasonable and just. It is fully sustained by a multitude of decisions of this court made in the course of the last 20 years, and I will now advert to some of them: In Lambert v. Kinnery, 74 N. C. 348, the defendant was a resident of this state, and had land, (that then in question,) which was all he had, and which was sold by the sheriff under execution; but he failed to have the homestead of the defendant, at or before the time of sale, valued and laid off to him. Hence the plaintiff, the purchaser at the sale, contended that the defendant had no homestead; that none had been allotted to him, and his remedy was against the sheriff; but the court held otherwise—that he had a homestead—saying that "this allotment of a homestead by the sheriff was not required in order to vest title to it in the owner, for that is done by the constitution, but for the purpose of ascertaining if there was any excess, which only was the subject of levy and sale. * * * The defendant, having a vested estate in the homestead, conferred by the constitution, can lose or part with it only in the mode prescribed by law, to-wit, by deed, with the consent of the wife, evidenced by her privy examination." The court held in that case that the defendant therein had his homestead exempt from sale under final process, although it had not been valued and laid off, by virtue and per force of the constitution, and hence he could not sell and convey it without the assent of the wife. In Beavan v. Speed, 74 N. C. 544, the owner of the homestead had stipulated in a promissory note that he waived "the benefit of the homestead," etc. The court said: "It is clear that the owner of a homestead is not the only object of solicitude and care in our fundamental law, but the wife, if there be one, and children, if there be any, have rights in the homestead, fixed by the constitution, which cannot be divested save in the manner prescribed by that instrument, to-wit, by the deed of the owner, accompanied by the voluntary signature and assent of his wife, signified on her private examination, according to law. * * * This is justly considered one of the most beneficent provisions of the constitution. But the construction contended for by the plaintiff, if adopted, would entirely defeat it, and would enable a thriftless husband by a 'dash of a pen,' to turn his wife and children out of house and home." In Abbott v. Cromartie, 72 N. C. 292, the court held that "the defendant owned the legal estate in the land, and the constitution confers no new estate upon him, but only confirms an existing one, to the extent therein expressed, and restricts his powers of alienation and to charge it with his debts. Having, then, the estate in the land exempt from execution, he can part with it only by the formalities prescribed by law." In Littlejohn v. Egerton, 76 N. C. 468, the court said: "The constitution (article 10, § 8) permits a husband to dispose of his homestead by deed, provided the wife signs the deed 'and is privily examined according to law.' So the idea of an estoppel by matter *in pais* is out of the question." This was material in support of the decision of the court. In Bank v. Green, 78 N. C. 252, the court said: "The homestead is not the creation of any new estate, vesting in the owner new rights of property. His dominion and power of disposition over it are precisely the same after as before the assignment of homestead." The wife must, therefore, join in the deed of conveyance of the same to make it effectual. In Murphy v. McNeill, 82 N. C. 221, the chief justice said: "The land, having been acquired since the adoption of the constitution (1868) and the enactment of the law to carry into effect its provisions for a limited exemption of the debtor's property, is subject to the homestead, and the deed

Digitized by Google

made without the wife's assent is inoperative to defeat the right thereto. In Jenkins v. Bobbitt, 77 N. C. 385, it is held that the husband's deed, without the wife's concurrence, is effectual in passing what is called his estate in reversion, or, in other words, the land itself, subject to the burden or incumbrance of the homestead, as defined in the constitution, and that the title to this can only be divested in the mode therein pointed out. Lambert v. Kinnery, 74 N. C. 348; Beavan v. Speed, Id. 544.

"The right to the homestead exists by virtue of positive law, and the laying it off by metes and bounds is only necessary in ascertaining if there be any and the extent of the excess which may be appropriated to the demands of creditors. It follows, therefore, that, while the plaintiff cannot deprive the defendant of the possession of the land, he is entitled to a decree of foreclosure and sale of the land charged with the homestead incumbrance." This case is directly in the face of what is decided in the present case, and expressly decides that a sale of the homestead not valued and laid off, is void without the assent of the wife. In Adrian v. Shaw, 82 N. C. 474, the court said: "The homestead is a right defined and secured by the constitution, and vests in the resident owner of the land, independent of any legislation on the subject. * * * Cooley on Constitutional Limitations, says: 'The provision of the constitution which defines a homestead, and exempts it from forced sale, is self-executing, at least to this extent, that though it may admit of supplementary legislation in particulars, when itself is not as complete as may be desirable, it will override and nullify whatever legislation, either prior or subsequent, would limit or defeat the homestead which is thus defined and secured.' 4th Ed. c. 4, p. 101. And in this state it is held that the homestead right is a quality annexed to land whereby the estate is exempted from sale under execution for a debt, and it has its force and vigor in and by the constitution. This court held that the title to the homestead is vested in the owner by virtue of the constitution of the state, and no allotment by the sheriff is necessary to vest the title thereto." This case is an important one, and much in point. It was well and thoroughly considered. There was an application to rehear it, (Adrian v. Shaw, 84 N. C. 832,) and the court declared upon such application their entire satisfaction with what was said and decided by it. The following named cases are all more or less to the same effect: Jenkins v. Bobbitt, 77 N. C. 385; Wharton v. Leggett, 80 N. C. 169; Gheen v. Summey, Id. 187; Watkins v. Overby, 83 N. C. 165; Wyche v. Wyche, 85 N. C. 96; Burton v. Spiers, 87 N. C. 87; Cumming v. Bloodworth, Id. 86; Murchison v. Plyler, Id. 81; Mebane v. Layton, 89 N. C. 399; Castlebury v. Maynard, 95 N. C. 281.

I believe I am fully warranted in saying that no case pertinent here, decided by this court, can be found in substantial conflict with what is said and decided in the numerous cases I have cited above. In Mayho v. Cotton, 69 N. C. 291, the learned judge who delivered the opinion said, *obiter* simply, that "section 8, art. 10, of the constitution applies only to a conveyance of the homestead after it has been laid off." This remark is made at the end of the opinion. No reason is given for it, and it was not at all material to what was decided.

I cannot help thinking that the opinion of the court in this case is a substantial departure from the settled and proper interpretation heretofore given to the clauses of the constitution recited above, and that it will have the effect materially to impair the more important and beneficent features of the homestead established by the constitution.

(103 N. C. 1)

HARDING *et al.* v. LONG *et al.*

(*Supreme Court of North Carolina.* April 9, 1889.)

CANCELLATION OF DEED—FRAUD.

In an action to cancel a deed alleged to have been procured by false and fraudulent representations, it is error to charge, on an issue submitted to a jury, that the jury must be "satisfied beyond all reasonable question" that such representations were made to induce the execution of the deed. Satisfactory proof is all that is required.

This was a proceeding brought before the clerk of the superior court of Yadkin county to have dower allotted, and tried on issues framed for the jury, at the spring term, 1889, of said court, before PHILIPS, J. The defendant Mary E. Harding had executed a deed for her unassigned dower in the land of her deceased husband to the plaintiffs, who were his brothers, for the consideration of $275. When the plaintiffs asked before the clerk in this proceeding to have dower assigned to them, as her grantees, in her husband's land, she answered that the plaintiffs, being her brothers-in-law, had her confidence, and, taking advantage of her distress, immediately after her husband's death made false and fraudulent representations as to the condition of his estate, especially the probable value of her dower after selling the land to satisfy a debt secured by mortgage thereon, and thereby induced her to execute said deed. The following issue was submitted to the jury: "Was the deed described in the petition of the plaintiffs obtained from the defendant Mary E. Harding through fraud or undue influence on the part of plaintiffs?" In support of this issue the defendant Mary E. Harding introduced testimony tending to show fraud and undue influence by representations made by the plaintiffs, her brothers-in-law, that the estate of her husband would be worth very little after the payment of debts. Plaintiffs introduced testimony to the contrary. There was a judgment for plaintiffs, and defendants appeal.

A. E. Holton and *Glenn & Glenn*, for appellants. *Batchelor & Devereux*, for appellees.

Digitized by Google

AVERY, J. We think that the judge who tried the case erred in instructing the jury as to the measure of testimony required to establish the allegation that the execution of the deed had been procured by fraud or undue influence. Defendant asked the court to instruct the jury "that if the price paid by the plaintiffs was so inadequate as to amount to apparent fraud, or the situation of the parties so unequal as to give the plaintiffs the opportunity of making their own terms, the burden rests on the plaintiffs to show that the transaction was fair, and that there was no fraud or undue influence." The court charged the jury as follows: "The defendant Mary E. Harding claims that the deed executed was obtained from her by the fraudulent misrepresentations of the plaintiffs, and that advantage was taken of her situation and distress consequent upon the recent death of her husband. The plaintiffs claim that she acted voluntarily, with a full knowledge of her rights and what she was doing; that no fraudulent misrepresentations were made, or fraudulent and controlling influence was exercised, to induce her to make the deed. Mere inadequacy of price alone is no ground for setting aside the deed executed by Mary E. Harding. Fraud or undue influence must be proved, and the burden is upon the defendant Mary E. Harding, who seeks to set aside the deed, to satisfy the jury by clear, strong, and convincing proof that fraudulent misrepresentations were made, or a fraudulent and controlling influence was exercised, to induce her to make the deed which she would not otherwise have made. Unless the jury are so satisfied beyond all reasonable question, they must answer the issue 'No.'"

In order to give proper effect to the words "so satisfied," we must consider the instruction as if the language used had been the following: "Unless the jury are satisfied beyond all reasonable question that fraudulent representations were made, or a fraudulent and controlling influence was exercised, to induce her to make the deed, which she would not otherwise have made, they must answer the issue 'No.'" In Lee v. Pearce, 68 N. C. 77, it was held by this court to be error to instruct a jury that fraud must be proved beyond a reasonable doubt in order to justify a verdict finding fraud. In the opinion, Chief Justice PEARSON, for the court, says: "It is very questionable whether this formula, which has been acted upon in the trial of capital cases, has answered any useful purpose; but it has never been extended to civil actions. There the rule is, if the evidence creates in the mind of the jury a belief that the allegation is true, they should so find." The facts in that case were that the plaintiff alleged that one of the defendants, taking advantage of the friendly and confidential relations subsisting between him and the testatrix, under whom the plaintiffs claimed, fraudulently induced her to sign a deed, conveying her land to the other defendant, his wife. Here, the *feme* defendant's brothers-in-law are charged with having abused her confidence, and induced her to convey her dower interest. There is no sufficient allegation in either case that the relations were such as to raise a presumption in law of fraud, so as to shift the burden, and require the party charged with the fraud to rebut it by satisfactory evidence. The issue in that cause, as in this, was, under the former practice, cognizable only in a court of equity. We are unable to draw any distinction between proving "beyond reasonable doubt" and beyond "reasonable question," unless we treat the latter expression as the stronger of the two. One of our leading lexicographers defines "question" to mean (in such connections as that in which it appears in the charge of the judge) "doubt," another, "dispute." So, if the former definition be adopted, the words are synonymous; if the latter be correct, it may be that there is still room for reasonable dispute, when the doubt that lingers in the mind is no longer within the domain of sound reason.

The rule that the evidence must be sufficient to produce belief in the minds of the jury that the allegation of fraud is true, in order to invalidate and set aside a deed, is equivalent to saying that the fraud alleged must be true to the satisfaction of the jury, or so as to satisfy the minds of the jury of their truth; and this has been declared by this court to be very different in its import from proving a fact beyond a reasonable doubt. State v. Ellick, 2 Winst. Eq. 56; State v. Vann, 82 N. C. 635. In State v. Vann, Justice DILLARD, for the court, says, in reference to testimony offered in behalf of a prisoner: "And, in the making of such extenuating or acquitting proofs, the law puts on him the *onus* to do so, not excluding all reasonable doubts, but merely to the extent of satisfying the jury." On the other hand, in State v. Payne, 86 N. C. 611, Justice ASHE, delivering the opinion, after calling attention to the fact that in State v. Ellick the erroneous principle stated in State v. Johnson, 3 Jones, (N. C.) 266, had been overruled, and a defendant was no longer required to establish mitigating or justifying circumstances beyond a reasonable doubt, says further: "In it [referring to State v. Ellick] is corrected what we consider as erroneous in the decision of Com. v. York, 9 Metc. 93, that matters of excuse or extenuation which the prisoner is to prove must be decided according to the preponderance of evidence. It is more correct to say, as we think, that they must be proved to the satisfaction of the jury." The exact language used by the court in Lee v. Pearce, supra, was adopted in the instruction given by the court below in McLeod v. Bullard, 84 N. C. 515, and, being excepted to, was approved by this court in overruling the exception.

Counsel for the plaintiff insisted that the rule laid down for this court by Justice MERRIMON in Ely v. Early, 94 N. C. 7, as appli-

Digitized by Google

cable where actions are brought to correct deeds, must govern this case. The language used in Ely v. Early, and made the basis of instruction in this case, to which it was never intended to apply, was as follows: "That the court may, in the exercise of its equitable jurisdiction, correct a mistake in a deed or other written instrument, such as that alleged in the complaint, is not controverted; but it will do so only where the mistake is made to appear by clear, strong, and convincing proof. The court must be satisfied from the evidence, beyond reasonable question, of the alleged mistake." Speaking of the deed they say further: "In such cases the court will not disturb the deed or other writing, and upon the strong ground that the parties have agreed to make the writing evidence between them as to the matters contained in it. It must stand until, by a weight of proof greater than itself, a court of equity, in the exercise of a very high and delicate jurisdiction, shall correct it." That action was brought by the plaintiff in part to correct a deed made by mutual mistake of the grantor and grantee as alleged, and it will be observed that the court, in express terms, lay down the rule as applicable only where the parties ask the equitable relief of correcting a deed. There was no reason why the distinction should have been drawn in that case between the degree of proof necessary in cases of that kind and other cases involving an issue of fraud. In Loftin v. Loftin, 96 N. C. 100, 1 S. E. Rep. 837, it was held that the evidence of the existence and loss of a deed, offered with a view of setting it up, must be clear and convincing. Deans v. Dortch, 5 Ired. Eq. 331; Fisher v. Carroll, 6 Ired. Eq. 485; and Plummer v. Baskerville, 1 Ired. Eq. 252,—were cited to sustain the view of the court. In Hemphill v. Hemphill, 99 N. C. 436, 6 S. E. Rep. 201, this court held that a deed absolute upon its face cannot be corrected so as to convert it "into a trust, upon a mere preponderance of evidence, or without some facts *dehors* the deed inconsistent with the idea of absolute ownership, but only upon such full proof as in the old court of equity would satisfy a judge." This view is sustained by a long line of cases in our own court. Briggs v. Morris, 1 Jones, Eq. 194; Taylor v. Taylor, Id. 246; Kemp v. Earp, 7 Ired. Eq. 167; Moore v. Ivey, 8 Ired. Eq. 192. The principle announced in Ely v. Early is fully sustained both by our own decisions and other authorities. Harrison v. Howard, 1 Ired. Eq. 407; Brady v. Parker, 4 Ired. Eq. 430; Newsom v. Bufferlow, 1 Dev. Eq. 379; Clemmons v. Drew, 2 Jones, Eq. 314; Wilson v. Land Co., 77 N. C. 452; Burger v. Dankel, 100 Pa. St. 113; Story, Eq. Jur. §§ 153–158; 2 Pom. Eq. Jur. §§ 858, 859.

We search in vain among our own decisions, and counsel have referred to none, where proof so full and clear has been required in order to establish the allegation that the execution of a deed was procured by false and fraudulent representations in order to hinder, delay, or defeat creditors, and the case of Lee v. Pearce, supra, which has been so often cited upon another point, is express authority to show that proof satisfactory to a jury is sufficient in such cases. We cannot agree that the line should be drawn so as to require convincing proof in all cases heretofore exclusively cognizable in a court of equity. The weight of authority is against that view. Bigelow, in his work on Fraud, (page 474, c. 17, § 3,) declares the rule to be as follows: "It is not necessary for the evidence to show beyond a reasonable doubt that a party is guilty of fraud. It is settled law that upon the trial of a civil action, in which the claim or defense is based on alleged fraud, the issue may be determined in accordance with the preponderance or weight of evidence, except in cases of resulting trusts arising on verbal agreements to buy for another. In other cases of fraud, nothing more is required than that the evidence should be sufficient to satisfy the conscience of a common man, although the evidence does not amount to absolute certainty. Evidence of fraud is not required to be more direct and positive than that of facts and circumstances tending to the conclusion that it has been committed. Hence an instruction to the jury that the fraud in question could not be found by them except upon clear and undoubted proof of it is erroneous."

The view of the author that fraud may be proven by a mere preponderance of evidence is supported by some eminent text-writers and other authorities. Wait, Fraud. Conv. § 281; Painter v. Drum, 40 Pa. St. 467; Rea v. Missouri, 17 Wall. 532; Clarke v. White, 12 Pet. 178.

We conclude, therefore, that the true rule is, as far as our own adjudications have settled the question, that in order to get the aid of a court to correct a deed, whether on the ground of mutual mistake, mistake of one of the parties, and fraud on the part of the other, or that it was drawn by mistake an absolute deed, when it was intended to be a mortgage or deed of trust, or to establish a resulting trust arising on a verbal agreement to buy for another, or to set up a lost deed, such allegations of the party seeking the relief as are necessary to show his right to it must be established by clear and convincing proof; and evidence *dehors* the deed, and inconsistent with it, must be shown, in order to set up a parol trust, and have the deed reformed. Williams v. Hodges, 95 N. C. 32; Smiley v. Pearce, 98 N. C. 185, 8 S. E. Rep. 631; Shields v. Whitaker, 82 N. C. 522. But, on the other hand, where the relief demanded by a party is that a deed shall be declared void because its execution was procured by false and fraudulent representations or undue influence, or that it was executed with intent to hinder, delay, or defeat creditors, the allegations material to establish the fraud must be proved so as to produce belief of their truth in the minds of the jury, or so as to satisfy the jury

Digitized by Google

of their truth, or to the satisfaction of the jury.

It may be that other cases will arise hereafter that will fall on the one side or the other of the line. This view of the case is perfectly consistent with all of the decisions of this court. Bump, in his work on Fraudulent Conveyances, pages 562, 563, says what is equivalent to the rule laid down by Chief Justice PEARSON: "If the evidence is admissible as conducing in any degree to the proof of the fact, the only legal test applicable to it upon such issue is its sufficiency to satisfy the mind and conscience, and produce a satisfactory conviction or belief. What amount or weight of evidence is sufficient proof of a fraudulent intent is not a matter of legal definition." It seems that the author expresses his view of the measure of testimony necessary to warrant a verdict on issues of fraud in language almost identical, and in words certainly equivalent in meaning, to the rule laid down by Chief Justice PEARSON in Lee v. Pearce, supra. The author says subsequently what still more strongly sustains our view: "It is not necessary, however, that the fraud shall be proved beyond a reasonable doubt."

In Kerr on Fraud and Mistake, page 382, we find that the author's view of the amount of evidence necessary to establish fraud is also expressed in language of the same import as that used in Lee v. Pearce: "Fraud will not be carried by way of relief one tittle beyond the manner in which it is proved to the satisfaction of the court." On page 384, the same author says: "It is not, however, necessary, in order to establish fraud, that direct, affirmative, or positive proof of fraud be given. In matters that regard the conduct of men, the certainty of mathematical demonstration cannot be expected or required. Like much of human knowledge on all subjects, fraud may be inferred from facts that are established." In a note to the foregoing paragraph, Bump says, (page 385, note:) "This means no more than that the proof must be such as to create belief, and not merely suspicion. A rational belief should not be discarded because it is not conclusively established."

The distinction that we have drawn in marking out the line dividing the causes of action that cannot be established without clear and convincing evidence, and in some cases without proof *dehors* a deed, and inconsistent with it in its original shape, and the ordinary issues of fraud falling under the general rule that it is sufficient to prove fraud to the satisfaction of the jury, is sustained by sound reason as well as high authority. One who comes into a court of conscience, declaring that he is in truth a party to a deed, which is the highest and most solemn evidence of his contract, and asks that, while the contract is allowed in part to stand, some of the provisions or stipulations shall be altered by striking out portions of the deed, and inserting in lieu contradictory expressions, and asking a court of equity, in effect, to assist him in evading a statute created to prevent fraud, because its rigid enforcement, and a strict adherence to the law of estoppels, may work a remediless wrong without such relief, occupies a different position from one who disavows *in toto*, for himself or those under whom he claims, a deed apparently executed, upon the ground that its execution was procured by fraud or undue influence, or from one who seeks to set aside the deed of another as in fraud of the rights of creditors or subsequent purchasers for value. The former should be held to stricter and stronger proof to establish his right to the relief asked. So, too, one who invokes the aid of a court to set up, by parol evidence, and in the face of the denials of those interested adversely, a solemn deed, the stipulations of which are sometimes void unless in writing, on the ground that it has been once executed but has been lost or destroyed, is properly required to produce the clearest evidence of loss, because, if the rule were otherwise, a premium would be offered for perjury, and the rights of good men would be often imperiled by the groundless claims of those who are mercenary and dishonest.

While we have drawn the line of distinction between the two classes of actions of which Lee v. Pearce is selected as the representative head on the one hand, and Ely v. Early on the other, it is not improper to emphasize and support, by more explicit citation of authority, the statement already made, that, as applicable to allegations of mistake, requiring, as the appropriate remedy, the reformation of a deed, the language used in the latter case, and adopted by the judge below in his charge, is not stronger than is warranted by older decisions of our own court, and sustained by such writers as Story and Pomeroy. We find an intimation by Judge HALL in Newsom v. Bufferlow, 1 Dev. Eq. 381, that the allegation in such cases must be proved "beyond rational doubt." The authorities already cited show repeated recognitions of the rule that the proof must be clear and convincing. Judge Story, in his work on Equity Jurisprudence, section 153, referring to cases in which one asks the court to correct a deed on the ground of mistake, says: "The proof must be such as will strike all minds alike as being unquestionable, and free from reasonable doubt. The distinction, here attempted to be defined, in regard to the measure of proof, is much the same which exists between civil and criminal cases; or that distinction which is expressed by a fair preponderance of evidence, and full proof." Pomeroy states the rule in reference to proof in correcting mistakes quite as broadly: "Courts of equity do not grant the high remedy of reformation upon a probability, nor even upon a mere preponderance of evidence, but only upon a certainty of the error." Section 859.

We have not deemed it necessary to discuss the other exceptions, as that to the

Digitized by Google

charge is decisive of the right to a new trial. For the error complained of in his honor's charge a new trial will be awarded.

(103 N. C. 411)

STATE v. FARRAR.

(*Supreme Court of North Carolina.* April 12, 1889.)

CRIMINAL LAW—APPEAL.

Where the transcript on an appeal from a conviction for felony fails to show that a court was duly held by a judge at the time or place prescribed by law; that a grand jury was drawn, sworn, and charged; that the indictment was returned by a grand jury; or that a plea of not guilty was entered, and is therefore so fatally defective that the assignments of error cannot be decided thereon; and it appears from it that there may probably be a perfect record in the court below, or one that could, by proper entries *nunc pro tunc* of facts which actually occurred, be perfected,—the case will be remanded, that the trial court may supply the defects, and send up a correct transcript.

Appeal from superior court, Chatham county; BYNUM, Judge.

The Attorney General, for the State.

MERRIMON, J. The transcript of the record of this appeal fails to show that a court was held by a judge at the time and place prescribed by law; that a grand jury was drawn, sworn, and charged; that a grand jury presented the indictment set forth in what purports to be the record, in open court, or at all; that the plea of not guilty was formally entered,—and there are other defects of less importance. It is fatally defective, and we cannot decide the questions intended to be presented by the assignment of error. The attorney general, insisting that the appeal is without merit, moved to dismiss it for the causes stated.

Enough is presented by what purports to be the transcript of the record to satisfy us that there is very probably in the court below a perfect record, or one that may be perfected; and we see, also, that it may be that the defendant can assign such grounds of error as might entitle him to a new trial. He is charged with larceny, the offense is serious, and we therefore deem it safe and proper to remand the case, to the end the record may be perfected, if it is not so, and a perfect transcript thereof sent to this court, as the law requires to be done. If the record does not fully set forth what was done in the course of the action, as, for example, that the grand jury was drawn, sworn, and charged, and presented the indictment in open court, or that the plea of not guilty was formally entered of record, when it was so treated by the court and parties, but was not so entered, by inadvertence, the court ought, the facts properly appearing, to direct the proper entries to be made *nunc pro tunc*. Plainly the court has the power, and it is its duty, to make its records express the truth in all respects. The court has frequently, in the exercise of its sound discretion, with the view to justice, remanded cases not unlike the present one. State v. Butts, 91 N. C. 524; Spence v. Tapscott, 92 N. C. 576; State v McDowell, 93 N. C. 541; State v. Johnston, Id. 559; Holly v. Holly, 94 N. C. 639; Holley v. Holley, 96 N. C. 229, 1 S. E. Rep. 553. Let the case be remanded.

(102 N. C. 550)

McMILLAN *et al.* v. REEVES *et al.*

(*Supreme Court of North Carolina.* April 8, 1889.)

ADMINISTRATORS—ACTIONS—JURISDICTION.

1. Plaintiffs' intestate sold certain land, giving a bond for title, and taking notes for the purchase money. After intestate's death, plaintiffs compromised with the vendees, who were insolvent, by surrendering the notes and receiving back the bond for cancellation. Being desirous of selling the land to turn the proceeds into money, plaintiffs sued the heirs of intestate, some of whom, by reason of infancy or other reasons, could not join in a conveyance, and other interested parties, to obtain an order of sale. All the heirs consented to a sale, and the land was sold, but the purchaser resisted a motion to confirm the sale for want of jurisdiction in the court and of the parties. *Held*, that as the purchase-money notes were personalty at intestate's death, and were, to prevent loss, converted into realty, and in order to effect a reconversion a sale was essential, which, owing to the minority, etc., of some of the heirs, could only be effected by the equitable assistance of the court, plaintiffs could maintain such a suit though the intestate left no debts to be paid out of his realty.

2. Whether the clerk of the superior court, in the exercise of his probate jurisdiction, has jurisdiction to entertain such a suit is immaterial after the action is removed into the superior court before the judge; as the parties all being represented, and as the superior court would have had jurisdiction of such an action originally brought before it, the proceedings become *coram judice*, and a sale thereunder is valid.

3. Where the record shows that all parties are represented by counsel, and the authority of the counsel to act for those not served with process is not disputed, such power will be assumed for the purpose of sustaining the jurisdiction of the court to order such a sale

Appeal from superior court, Alleghany county; H. G. CONNOR, Judge.

Action by George T. Reeves, F. J. McMillan, and Andrew McMillan, administrators, etc., of Alexander B. McMillan, deceased, against the heirs of said McMillan and others to sell certain land. The sale was ordered and made, and the purchaser, David C. Edwards, resisted a motion to confirm, because, as he alleged, no valid title could be conveyed by the proceedings. From an order of confirmation said Edwards appeals.

Busbee & Busbee, for appellant. *Strong, Gray & Stamps*, for appellees.

SMITH, C. J. In December, 1874, George T. Reeves, F. J. McMillan, and Andrew McMillan, administrators of Alexander B. McMillan, filed their petition in the superior court of Alleghany, before the clerk, against numerous defendants, alleged to be the heirs at law of the intestate, praying that the land described therein "be sold and converted into personal assets," and for general relief. It is therein recited that the intestate in his life-time contracted to sell to the persons

Digitized by Google

designated as Pierce, Hale & Co. the tract of land (describing it) for a sum of which a very small portion was paid to the intestate before his death, and to recover the residue the plaintiffs instituted suit against the vendees; that the suit terminated under a compromise arrangement in favor of the defendant, and by the surrender of the bond for the purchase money to them; that at the same time the title-bond executed by the intestate was returned by the defendants for cancellation, and they relinquished all claim in the land to the plaintiffs, to the end it might be resold to raise the residue of the purchase money due on the original contract. On February 3, 1875, an order was entered in these words: "It appearing to the court that the defendants residing in the state have been duly served with summons, and that publication has been made for the non-resident defendants, upon reading the petition of the plaintiffs it is adjudged that the plaintiffs sell the land described in the petition at public auction to the highest bidder, after giving thirty days' notice, on a credit of six months, and report their proceedings to this court." Pursuant to this order the land was put up and sold, and, as it appears, purchased by David C. Edwards, to whom notice was subsequently issued of an intended motion to confirm the sale, and order a collection of the purchase money, to be heard at the clerk's office on October 30, 1875. To this the said Edwards made answer, which, so far as material to the present inquiry, and in condensed form, is as follows: He declares his willingness to pay the purchase money as soon as a good title to the premises can be made to him, and alleges several defects in the title, as well as a want of jurisdiction in the court to order its conveyance; that the defects consist in the want of words of inheritance in the deed of one Reeves to one Ausborn, and the deed from the latter to the intestate, preceding owners, under whom he claims, and a mistake in the boundary as described in the first of said deeds; that the contract of sale entered into in the intestate's life-time remains in force, and one of the original purchasers is dead, leaving heirs, to whom his equitable interest has descended. That the land has been sold for taxes, and bought by Frank McMillan, to whom a deed therefor has been executed; that in the suits against Pierce, Hale & Co. some necessary parties were not served with process, and consequently are not bound by what was done in disposing of that cause. Thereupon a summons was issued, and a further complaint filed, wherein are repeated the allegations in the former, with the superadded explanatory statement that the first contract of sale was made with Alexander Pierce and Jeremiah Jennings, who agreed to admit into the benefits of their purchase others, to-wit, James Wilkerson and John Wilkerson, acting jointly, and associates, who entered into the bond sued on, substituted for that first given for the purchase money, enlarged as before explained to the sum of $3,300 from $2,200, the contract price. Steps were adopted to bring in these other parties alleged to be interested, and at spring term, 1880, it was adjudged that the defendants have been duly served with process, and one W. E. Hardin was appointed guardian *ad litem* to three, ascertained to be minors, and he put in an answer, admitting the plaintiffs' allegations to be true.

The cause being in the superior court, and under the direct cognizance of the judge, after several continuances, at spring term, 1888, was, by consent, referred to Q. F. Neal, "to take the evidence, find the facts thereon, and report the same, with his conclusions of law, arising upon the objections filed by David Edwards to judgment being rendered against him for the purchase money for the lands purchased by him, and especially whether the plaintiff can make a good title to the said land." The report was accordingly made, in which are found the facts, (which have been briefly stated,) in great detail and accuracy; and, further, that at the hearing before the referee on August 9, 1888, Messrs. Field & Doughton, attorneys of said court, declared that they were the attorneys of record, and in this case represented the heirs of A. B. McMillan, deceased, "which fact," in the words of the referee, "I find to be true, and as such attorneys they fully acquiesce in and agree to said sale, and here insist upon its confirmation, agreeing to submit to any orders or decrees of this court now or hereafter to be made, by which the title to said land may be perfected to the respondent, and divested from the heirs of A. B. McMillan, deceased." The referee adds that the attorney of the widow of the deceased, Kelly Boyden, "also agreed to any decree as to her rights, so as to perfect the title in the respondent." As conclusions of law, the referee finds as follows:

"(1) I decide that all the interest of Pierce, Hale & Co. and of Pierce & Jennings, in this land, has been divested from them by the compromise above mentioned, and the proceedings and judgment of this court, instituted to bar and conclude their said interests, and also by the presumption of abandonment arising under chapter 65, § 19, of the Revised Code, as construed by the case of Headen v. Womack, reported in 88 N. C. 468. (2) That the heirs of A. B. McMillan were properly before the court in this case as defendants, it having been so adjudged by the court; and that the facts in the case bring it within the letter and spirit of section 185 of the Code. (3) Upon the main question involved I decide that the clerk of the superior court of Alleghany has no jurisdiction over the subject-matter of this suit, brought by the plaintiffs as administrators; for the sale of land for distribution as personal assets, made by consent of many of the heirs, or all of them indeed, did not confer jurisdiction upon the said court, or authorize or legalize the orders and decrees made therein;

Digitized by Google

and for want of jurisdiction the orders of sale and all the proceedings in the said suit were a nullity. The title to said land being in the heirs of A. B. McMillan, deceased, divested of all equities in Pierce, Hale & Co., or others, the plaintiffs, as administrators, cannot perfect the title to the respondent. All of which is respectfully submitted.

"QUINCY F. NEAL, Referee."

1. The plaintiffs except to the report in that the referee ruled that the probate (superior) court had not jurisdiction of the subject-matter of the action.

2. That he erred in finding, as a conclusion of law, in his third conclusion, that the plaintiffs and defendants could not by waiving all irregularities, and could not by consent, confer such jurisdiction upon this court, so as to enable it to vest in the respondent a title to said land.

Respondent D. C. Edwards excepts to the report of the referee, "for that the referee erred in his conclusions of law that the heirs of A. B. McMillan who had not been served with process were bound by the orders of the clerk that those served could answer for all."

The judgment of the court was as follows:

"This cause coming on for a hearing upon the referee's report and the exceptions thereto, the plaintiffs being represented by Vaughan & Boyer, the defendants by R. A. Doughton and W. C. Fields, and the purchaser—also a defendant—by J. W. Todd, all of said counsel being regular attorneys of this court, and duly empowered to represent their said duties in this behalf, the defendants, upon the intimation of the court that, the names of the defendants not appearing in the summons, the same was defective, requested and obtained permission to file the supplemental petition, setting out the names of all of the defendants and heirs at law of A. B. McMillan, deceased, and requesting the confirmation of the sale heretofore made in this cause; and the court finding as a fact that the names of the persons set out in said supplemental petition are all of the heirs at law of the said A. B. McMillan, deceased, and that R. A. Doughton and W C. Fields, attorneys as aforesaid, have powers of attorney from said persons, proceeded to hear and pass upon said exceptions of the parties to said report. The first exception of the plaintiffs and defendants is * * *, and the report is so amended that the same became immaterial. The supplemental petition filed by the defendants removing the objection upon which the exception filed by D. C. Edwards, the purchaser, is based, the said exception is overruled. In regard to the other exceptions filed by the plaintiffs and the defendants, the court being of the opinion that the judgments rendered in the superior court of Alleghany county in the action wherein the plaintiffs, administrators of A. B. McMillan, were plaintiffs, and Pierce & Jennings and others were defendants, wherein the defendants, heirs at law of said A. B. McMillan, were plaintiffs, and the said Pierce & Jennings and others were the defendants, vested the legal title to the lands in controversy in the heirs at law of said A. B. McMillan, discharged of any trust, and that the plaintiffs, as administrators, had no power or duty in respect to the same; that the clerk had no jurisdiction to render the judgment directing a sale of said land for the purpose set out in said petition; that the summons and all the proceedings had in said proceeding are injudicious. The court being further of the opinion that the plaintiffs and defendants, being the owners of the said lands, were entitled to a sale thereof for partition, and that they had a right to elect to so treat and regard this proceeding, and waive all irregularities therein; that they have so elected, and that they are entitled to have the sale and all proceedings in connection therewith ratified and confirmed; that the purchaser, having entered into the possession of the said land under and by virtue of said sale, and received the rents and profits thereof since 1875, cannot be heard to object to the confirmation thereof and payment of the purchase money upon a good and sufficient deed being tendered him. It is therefore considered and adjudged by the court (the parties, pursuant to the act of 1887, c. 276, having requested that the cause be retained in this court for final judgment) that the sale made to D. C. Edwards by the plaintiffs pursuant to the judgment herein be, and the same is, in all things confirmed, and that all orders, judgments, and decrees heretofore made in this cause in respect to said sale be confirmed; and that upon the payment of the purchase money and interest due from said D. C. Edwards, according to the terms thereof, to the commissioner hereinafter named, the said commissioner to execute a good and sufficient deed to said D. C. Edwards, conveying to him all of the right, title, and interest which the plaintiffs and defendants acquired in said lands as the heirs at law of A. B. McMillan; also all right to dower therein which the defendant Mary Alexander acquired as the widow of the said A. B. McMillan; that the said D. C. Edwards pay to the commissioner hereinafter named, within ninety days from January 1, 1889, the amount of said purchase money and interest due as aforesaid; that upon his failure to pay said purchase money within said time, the said commissioner to proceed to sell the said lands for cash at the court-house door in Sparta, first giving thirty days' notice of such sale in the newspaper having the largest circulation in said county, and posting a notice thereof at the court-house door and four other public places in said county; that in the event such sale becomes necessary he make report thereof to the term of this court next ensuing thereafter; that W. C. Fields, be, and he is hereby, appointed a commissioner, with power to perform and execute the provisions of this judgment, and make report thereof to the next term of this court. The exceptions of the plaintiffs and defendants * * *,

Digitized by Google

that * * * of the dower of Mary Alexander may be ascertained by a referee. The costs will abide the final judgment herein. The cause will be retained for further orders and decrees.

"H. G. CONNOR, Judge Presiding.

"We hereby assent to the provisions of the foregoing judgment.

"E. L. VAUGHAN,
"Attorney for F. J. McMillan, Plaintiff.

"R. A. DOUGHTON & W. C. FIELDS,
"Attorneys for the heirs of A. B. McMillan.

"H. K. BOYER,
"Attorney for Polly Alexander."

It will be seen from the foregoing recapitulation of facts and rulings that the appeal of the respondent Edwards brings up for review but two questions: (1) The validity and effect of the jurisdiction exercised in ordering and confirming the sale; and (2) the sufficiency of the proceedings to bind all the parties in interest by a conveyance made under the direction of the court.

The first of these exceptions has been most earnestly pressed in the argument, and the conclusion of the referee maintained by the counsel of the appellant, of a total want of jurisdiction and consequent nullity of the proceedings. There seems to be some misapprehension of the nature and purposes of the action having for its object the sale of the land and its conversion into personal assets, with which ordinarily the administrator has nothing to do, unless the fund to be raised by the sale of the realty is required to pay the debts and expenses of administration. The administrators came into possession of the debt due for the purchase money, and the legal estate in the land descended to the heirs, charged with its payment. They were but trustees holding the title as security for the payment of the debt, and interested only as distributees in having it discharged by the proceeds of sale; the vendees being insolvent, and this being the only means of obtaining payment. Their interest in the subject-matter lay in securing an enlargement of the personal estate passing into the hands of the administrator, and with which he was chargeable. The action upon the note was brought, as well as that in the name of the heirs at law, to regain possession of the land, to compel an appropriation of the land to the discharge of the debt; and the compromise was effected primarily to obtain the land, exonerated from liability under the title-bond as a security for the debt, to be surrendered for that purpose in place of the personal obligation assumed in the note. It was proposed in this way, not to extinguish the debt, and *pro tanto* diminish the personal estate in the administrator's hands, but, as it was the only resource from which the debt could be made, to accept the land itself, the purchasers surrendering the title-bond and all equities and rights arising under it as the sole security, and to raise the money by subjecting it to a sale. The result would of course be to replace for the notes whatever sum could be made by selling the security in the personal estate, of which the note constituted a part. To this end the assent of the heirs was necessary, and was given in the adjustment arrived at, and consummated in the disposition of the two actions, as far as could be, by the parties to them. But the sum lost in the surrender of the note could only be reinstated, and the personal estate belonging to the distributees made good, by the sale of the land, and hence recourse was had to the present proceedings to divest the title out of the heirs, who, being numerous and scattered, and some of them under age, could not by voluntary deeds effectually pass the title to a purchaser.

It is not material to inquire into the question of the jurisdiction invoked in initiating the suit, since any objection on this account is obviated by the removal of the cause into the superior court presided over by the judge, and the submission of all the parties thereto to his exercise of jurisdiction in the premises as fully as if the action had there originated. As, then, the court, assuming to exercise jurisdiction, did possess it fully over the subject-matter of the action and the parties to it, in which all the heirs were represented by counsel, the cause was in a strict sense *coram judice*, under the ruling in West v. Kittrell, 1 Hawks, 493, and Boing v. Railroad Co., 87 N. C. 360, even without the aid of the act of 1887, c. 276, which sustains the jurisdiction thus acquired, and authorizes the court "to proceed to hear and determine all matters in controversy in such action," etc.

No exception has been taken at any time by any party to the action. On the contrary, by their respective counsel they have at all times assented to what was done, and even to the final decree rendered in the cause. The appellant's objection has no force, unless the proceeding in its entirety is a nullity, and it certainly cannot require argument to combat such contention. Peoples v. Norwood, 94 N. C. 167. There can be no successful resistance made to the proposition that a title obtained under the decree or judgment to which all those having any property or interest in the land are privy as parties, in a case whereof the court has cognizance, will be perfected against them, and each *sui juris* estopped to dispute it. While the want of power in the court to entertain and proceed with the cause has been most urged in the argument before us, the appellant's only exception appearing in the record is to the alleged ruling that the service of process upon some of the defendants, on account of their number, would be sufficient to bind all, under section 185 of the Code. The act does indeed so provide, but, if it were otherwise, the whole of the heirs are represented by counsel professing to act for all, and the decree itself recites that "the names of the defendants set out in the supplemental petition are all of the heirs at law of the said A. B. McMillan, and that the attorneys R. A. Doughton and W. C. Fields, appearing for them,

Digitized by Google

"have powers of attorney from said persons." These facts come before us not controverted, and remove, if there be any force in the objection, the complaint of the ruling from which the appeal is taken. The other alleged defects set out in the appellant's response seem not to have been relied on at the hearing below, and are not the subject-matter of complaint presented in the appeal. There is no error, and the cause will proceed at the point where it was interrupted at the appeal, until fully disposed of.

(103 N. C. 19)

WALLACE *et al.* v. DOUGLAS.

(*Supreme Court of North Carolina.* April 8, 1889.)

UNITED STATES MARSHAL—REFERENCE.

1. The compensation of deputy United States marshals is a matter between them and the marshal, and there is no law of congress giving them a claim against the government therefor, and an assignment of his claim for services by a deputy-marshal is not an assignment of a claim against the United States, and therefore void, unless made in accordance with the provisions of Rev. St. U. S. § 3477.

2. Where a reference requires the referee to report "whether he allows or overrules exceptions to the evidence," and the referee fails to pass on objections to certain evidence offered, whereby the party objecting thereto has no opportunity to assign error in that respect, it is reversible error. SHEPHERD, J., dissenting.

Appeal from superior court, Iredell county; FRED PHILIPS, Judge.

Suit by Wallace Bros. against R. M. Douglas. Judgment for plaintiffs, and defendant appeals.

D. M. Furches and *W. M. Robbins*, for appellant. *Armfield & Turner*, for appellees.

MERRIMON, J. The plaintiffs allege, in substance, in their complaint that on the 4th of December, 1879, and for several years next before that time, the defendant was marshal of the United States in the Western district of North Carolina. That W. J. Patterson, I. F. Patterson, Jr., and S. P. Graham during a part of that time had been, and at the time specified were, his deputy-marshals, and as such deputies had respectively earned fees for large amounts, and, by their respective agreements with the defendant as such marshal, they became and were, respectively, to have each two-thirds of the fees by him so earned. That large sums of money were so due to each of said deputies. And the said W. J. Patterson drew his order upon the defendant, and the following is a copy thereof: "$325.00. November 16th, 1881. Pay to the order of W. J. Patterson three hundred and twenty-five dollars, value received, and charge the same to the account of W. J. PATTERSON. To R. M. Douglas, U. S. Marshal. Accepted. Payable when I receive funds to the use of W. J. Patterson. R. M. DOUGLAS, U. S. Marshal." And the said J. T. Patterson, Jr., likewise drew his order upon the defendant, and the following is a copy thereof: "2d. $200. December 4th, 1879. Pay to the order of myself two hundred dollars, value received, and charge the same to the account of J. T. PATTERSON, Jr., D. M. To R. M. Douglas, U. S. Marshal,"—which has the following written across the face thereof: "Accepted. Payable when I receive funds to the use of J. T. Patterson, Jr. R. M. DOUGLAS, U. S. Marshal." The said drafts were accepted by the defendant as stated and recited at the end of each. And the said S. P. Graham assigned to the plaintiffs, of the fees so due to him, the sum of $98.82, and such assignment was recognized and "accepted" by the defendant, to be paid when he should receive funds to the use of the said Graham, as deputy. That the plaintiffs became the owners of the said drafts by proper indorsements. That the claims of the said deputies against the defendants for fees had been audited in the treasury department of the United States, and "funds to the use of" said deputies, respectively, more than sufficient to pay the said amounts, had been received by the defendant as marshal. That he nevertheless refused, upon demand, to pay the money so due the plaintiffs. And they demand judgment for the same, and for costs. The defendant failed to file an answer to the complaint, and, upon motion of the plaintiffs, judgment by default and inquiry was entered against him. Thereupon, by consent of parties, it was by proper order referred to a referee "to hear the testimony, take and state an account, and report to this court," etc. Afterwards the referee made report favorable to the plaintiffs.

In the course of taking the account the plaintiffs put in evidence copies of certain accounts stated and audited between the defendant as marshal and the United States, purporting to be certified by the register of the treasury, for the purpose of proving that the defendant had been allowed and had received the fees earned by his deputies named, as alleged. The defendant objected to the admission of these copies, stating numerous grounds of objection to them, and their competency and sufficiency as evidence. The referee, without deciding that they were or were not competent, received them in evidence, and considered them in connection with other evidence in drawing his conclusions of facts and making his report filed. At a subsequent term of the court, the report so made was set aside, and it was re-referred to the same referee, with instructions to retake and restate the account required, and particularly, for the present purpose, the court directed as follows: "(6) For the purpose of enabling the commissioner to find these facts, the case is reopened for further evidence on both sides; and that the commissioner will make his report under this order to the next term of this court, in which report he will pass upon and report whether he allows or overrules the exceptions to the evidence made by either plaintiffs or defendant; and the judgment signed in this case, at this term of the court, is hereby set aside and vacated. All exceptions of defendant,

Digitized by Google

not as to the merits of the controversy, are overruled." The referee proceeded to execute the order of reference, and made report, from which it appears, that at a time and place specified, he "proceeded to reopen the cause, when and where further testimony was introduced by the parties; and after due consideration of the testimony heretofore introduced, together with the evidence produced at this time," he drew conclusions of fact, and conclusions of law arising thereupon. But he did not "pass upon and report whether he allowed or overruled the exceptions to the evidence," the copies of accounts stated and audited between the defendant and the United States, objected to as above stated. He retook and restated the account, and made report thereof, to which the defendant filed numerous exceptions. Only the first and fifteenth of them need be reported here, and the following is a copy of them: "(1) Defendant excepts to said report for the reason that said referee fails to pass upon the competency and relevancy of certain alleged transcripts from the treasury department, register's office, Washington, D. C., offered in evidence by plaintiffs, and objected to by defendant, (Nos. 4, 5, and 6, on pages 2, 3, and 4 of testimony taken in October, 1887,) as he was required to do by the order of CONNOR, J., recommitting this case to said referee." "(15) That it is contrary to the laws and regulations of the United States government to sell and assign such claims as those sued on by the plaintiffs, and they are not entitled to recover on that account." The court overruled all the exceptions, confirmed the report, and gave judgment for the plaintiffs, and the defendant, having excepted, appealed to this court.

No statutory provision of the United States brought to our attention, or of which we have knowledge, gives or secures to deputy-marshals any claim against the government for, or any interest in fees or compensation earned by, them as such deputies. Neither fees nor compensation are prescribed by statute for them, nor are they recognized or treated as entitled to the same as of legal right, or as creditors of the government. The fees they earn are certainly ordinarily for and belong to the marshal. In the nature of their employment and duties they act in his name and place, and the fees they earn are due to him, and are charged in his name. They are little more than his agents or servants, invested with some measure of his authority conferred by law, and they are recognized by the law only to determine his rights and liabilities, and the rights and liabilities and duties of third parties arising out of what they do or fail to do as deputies. Their claims for compensation are against the marshal accordingly as he and they agree upon the measure of it, and how and when it shall become due and payable. No doubt, he may allow to them, and they may agree to accept, the fees they earn in his name and for him, or a part of them, as compensation, to be paid to them when such fees shall be allowed to him by the proper auditing authorities of the government, and he shall be paid the same under existing laws, or he may pay them fixed salaries. The matter of their compensation is between them and the marshal, not between them and the government. The statute (Rev. St. U. S. §§ 780, 784, 829, 830, 833, 834, 841, 844, 846) prescribes the fees and compensation the marshal may have, the maximum amount he may take, how he shall account with the government, that he shall give bond, and be liable for breaches of the conditions thereof, but no fees or compensation are prescribed for his deputies, nor is their liability prescribed. The marshal is liable for their misfeasance or non-feasance, within the sphere of his office. Section 833 requires the marshal, in making his semi-annual report to the attorney-general of the fees and emoluments of his office, to "state separately therein the fees and emoluments received or payable for services rendered by himself personally, those received or payable for services rendered by each of his deputies, naming him, and the proportion of such fees and emoluments which by the term of his service, each deputy is to receive." And there is a provision in section 841, cited, restricting allowances on account of deputies. The purpose of these requirements and provisions is not to give deputies any claim against the government, but to facilitate the adjustment and settlement of the accounts of the marshal, and to prevent him from receiving more than the maximum of compensation allowed to him by law. There are numerous other statutory provisions, all pointing more or less directly to the right of the marshal to have claims against the government for fees and emoluments earned by him for services rendered by himself and his deputies in a variety of ways, but none that give deputies such right. The deputies of the defendant named in the pleadings, as to their claims in question, did not, therefore, have any claims against the United States for fees and emoluments or otherwise, as implied by the fifteenth exception of the defendant, but their claims were against him for such parts of the fees earned by them, respectively, as he agreed with each he should have, to be paid by him when the government should allow and pay his claims against it. The defendants each assigned his claim, or part of it, whether by draft or otherwise, against the defendant, and not his claims against the government, and hence the statute (Rev. St. U. S. § 3477) making absolutely void "all transfers and assignments made of any claim upon the United States, or of any part or share thereof, or interest therein, whether absolute or conditional," etc., unless made in the particular way prescribed, has no pertinency or application here, and does not affect the rights of the plaintiffs; and for the like reason, Trist v. Child, 21 Wall. 441; U. S. v. Gillis, 95 U. S. 407; Spofford v. Kirk, 97 U.

Digitized by Google

S. 484,—cited and relied upon by the defendants,—are not applicable. The court, therefore, properly overruled the fifteenth exception of the defendant.

We are of opinion that the defendant's first exception should have been sustained. The referee was expressly directed by the court to "pass upon and report whether he allows or overrules the exceptions to the evidence [that heard by him] made by either plaintiffs or defendant;" the purpose being to afford opportunity to the court to decide upon the competency of evidence objected to, upon proper exception to the ruling of the referee. The latter failed to pass upon the evidence objected to in question, nor did the court. That it did not is assigned as error.

It might be said that the referee, and, after him, the court, did, by implication, decide that the evidence was competent and unobjectionable, and possibly this is so; but the defendant was deprived of opportunity to assign error in that respect, and, if there were error, we cannot correct it, in the absence of exception or error assigned. The gist of the exception is that the defendant did not have opportunity to assign error in the respect mentioned. This seems to us to have force and merit. The counsel for the plaintiffs insisted on the argument that the objection embraced by the exception "does not go to the merits of the controversy," and therefore, in view of the order of the court, the exception should not be sustained. We cannot accept this argument as a valid one. The evidence objected to, if competent, was very important indeed. It went directly and strongly to prove that the accounts of the defendant as to fees earned by his deputies named in the pleadings had been allowed as to each by the government, and he had received the money on account thereof as to each to an amount greater than each had assigned to the plaintiffs, which they seek to recover in this action. The defendant seriously contends that the certified copies of accounts audited and settled, objected to, are not evidence against him in this action, and the objection may be well founded. We do not decide now that it is or is not. The court below should have decided upon the objections to the evidence, so that the complaining party might have had opportunity to assign error, and appeal to this court. The first exception must be sustained, and the court, without a re-reference, will decide upon the questions of law raised by the defendant's objections to the evidence referred to in it, and give judgment upon the report of the referee, if this may properly be done; or, for sufficient cause, it may set aside the report, and direct the account to be retaken, and proceed in the action according to law. All the other exceptions of the defendant were properly overruled, except in so far as the matters of them may be affected by the decisions of the court in respect to the evidence referred to in the first exception. There is error. To the end that further proceedings may be had in the action in accordance with this opinion, let the same be certified to the superior court. It is so ordered.

SHEPHERD, J., (*dissenting.*) I do not concur in the disposition made of this case. The evidence objected to is fully set forth in the case upon appeal, and its competency was thoroughly argued by counsel. If it is incompetent, it will be necessary for us to know whether the referee considered it in finding the facts, and the case should be remanded. If it is competent, it is immaterial whether he acted upon it or not; and it would, it seems to me, be doing a vain thing to remand the case in order to get his opinion upon the subject. I think we should now pass upon the competency of the testimony.

(102 N. C. 525)

BERRY v. HENDERSON.

(*Supreme Court of North Carolina.* April 15, 1889.)

WIFE'S POWER TO CONTRACT—WIFE'S SEPARATE ESTATE.

1. As a justice of the peace has only jurisdiction of common-law actions, he cannot entertain an action on a note given by a married woman not a free-trader, though she retains the property for which the note was given, and uses it after her husband's death, as at common law a married woman's contract is absolutely void.

2. Whether a cooking-stove is a "necessary" within the meaning of Code N. C. § 1826, which provides that no married woman, not a free-trader, may make a contract to affect her property except for necessary personal expenses, or the support of her family, without the written consent of her husband, is a question of fact for the jury.

Appeal from superior court, Burke county; R. F. ARMFIELD, Judge.

Civil action brought by B. A. Berry, and tried on appeal from a justice of the peace, upon a note executed by W. C. Henderson, the defendant, for the price of a cooking-stove purchased by the defendant. It was admitted that the note sued upon was executed by the defendant during her coverture for the purchase of a cooking-stove; that the husband of the defendant had died since the execution of the note; and that said cooking-stove had been in use during his life and since his death in cooking for the family. The court said that the jury would be charged that a cooking-stove was not a necessary, and that a note given for the purchase money of a cooking-stove did not fall within any of the exceptions specified in section 1826 of the Code, it being bought during coverture, and that plaintiff could not recover. To this ruling plaintiff excepted. Plaintiff offered to show that said stove was in use during the life-time of the husband, and had been in use since, the cooking for the family being done thereon, and that defendant was worth about eight or ten thousand dollars, and to argue therefrom that the stove was a necessary for one in her condition of life. His honor excluded the evidence, and stated that he would charge the jury upon the evidence which was admitted,

Digitized by Google

and upon that offered, that the plaintiff could not recover, to which plaintiff excepted. Upon this intimation from the court the plaintiff, in deference to the opinion of the court, submitted to a judgment of nonsuit, and appealed.

T. G. Anderson, for appellant. *I. T. Avery*, for appellee.

SHEPHERD, J. The defendant moved to dismiss this action for want of jurisdiction, and it is very clear that the motion must be allowed. It has been repeatedly decided by this court that a justice of the peace has no jurisdiction to enforce the engagements of a married woman unless she is a free-trader. In Dougherty v. Sprinkle, 88 N. C. 301, RUFFIN, J., speaking for the court, says "that no such jurisdiction can be exercised by the court of a justice of the peace, seeing that, according to all authorities, his is but a common-law court, and that his jurisdiction does not embrace causes of a peculiarly equitable nature. Fisher v. Webb, 84 N. C. 44; Murphy v. McNeill, 82 N. C. 221; McAdoo v. Callum, 86 N. C. 419; Lutz v. Thompson, 87 N. C. 334. At law a *feme covert* is incapable of making a contract of any sort, and any attempt of hers to do so is not simply voidable but absolutely void. If, however, she be possessed of separate property, a court of equity will so far recognize her agreement as to make it a charge thereon. But even in that case, and in that court, her contract has no force whatever as a personal obligation." The present chief justice, in Smaw v. Cohen, 95 N. C. 87, says, in speaking of Dougherty v. Sprinkle, supra, that "the decision has reference to contracts generally entered into by married women, and their enforcement against their separate estates. They are held to be obligatory, not upon the contracting *feme covert* personally, but upon her separate estate, and as the proceeding is, in its nature, equitable, as in a bill for foreclosure of a mortgage, the relief could not be had in a justice's court." MERRIMON, J., in Planing-Mills v. McNinch, 99 N. C. 519, 6 S. E. Rep. 386, recognizes the law as above stated by sustaining the jurisdiction of the superior court in an action against a married woman for an amount under $200. He says: "It is expressly decided that the superior courts have jurisdiction in such cases;" citing Dougherty v. Sprinkle. We would have been content to have simply cited the latter case in support of the view we have stated, but, as its correctness was earnestly questioned, we have thought proper to cite other later cases in which it has been most completely sustained.

As this claim may be further prosecuted in the proper jurisdiction, it may not be improper to say that we do not concur in the ruling of his honor to the effect that "a cooking-stove, *per se*, was not a necessary," and did not fall within any of the exceptions specified in Code, § 1826. This should be determined in view of all of the circumstances surrounding the defendant,—such as her manner of living, her pecuniary means, and those of her husband, and to what extent he contributed to the support of herself and family. The mere fact that the wife has a separate estate does not absolve the husband from his duty to support his family. Schouler, Dom. Rel. § 109.

It was suggested on the argument, in support of the jurisdiction of the justice, that the defendant, having kept and used the stove after the death of her husband, is liable as upon contract for the price. The answer is that no new promise is alleged in the complaint; that the action is brought upon the note executed during coverture; and the note, being void at law, and not merely voidable, could not be ratified in this way so as to sustain the common-law jurisdiction of the justice. Especially is this true when, in her answer, the defendant signifies her willingness to restore the property. If, however, the circumstances were such as to make her original engagement binding in equity under section 1826, it would be a sufficient consideration to support an express promise made after discoverture. 3 Amer. & Eng. Cyclop. Law, 841. This would be entirely consistent with Felton v. Reid, 7 Jones, (N. C.) 269, for there the original transaction was binding neither in law nor equity, and the promise was properly held to be void. The justice having no jurisdiction, the action must be dismissed.

(102 N. C. 519)

EDWARDS *v.* DICKENSON.

(*Supreme Court of North Carolina.* April 15, 1889.)

DEED—DESTRUCTION OF BY GRANTOR—REMEDY.

1. In North Carolina, where the grantor in an unregistered deed regains possession of it after delivery, and wrongfully destroys it, the grantee's title is not thereby divested, and his remedy is to compel a re-execution.

2. In such case, the grantee cannot waive the tort, and sue upon an implied promise to restore the consideration. The title being in him, notwithstanding the spoliation, no such promise can be implied.

Appeal from superior court, Alleghany county; PHILIPS, Judge.

A. E. Holton, for appellant. *C. M. Busbee*, for appellee.

SMITH, C. J. The plaintiff on the 3d day of August, 1888, sued out of the office of the clerk of the superior court of Alleghany a summons against the defendant, and simultaneously a warrant of attachment against his estate, he being a non-resident, and, to complete the service, obtained an order of publication, which was accordingly executed. At spring term, 1889, the defendant's counsel, A. E. Holton and George W. Bower, entered for him a special appearance, and moved to dismiss the action for the reason that notice of the attachment had not been given, as directed by law, which was denied, and thereupon they entered a general appearance for him. The complaint filed, the demurrer

Digitized by Google

thereto, and the ruling of the court upon the issue thus made, and the judgment entered, from which the defendant takes an appeal, are as follows:

Plaintiff alleges: "(1) That on the 23d of January, 1873, he purchased of the defendant a valuable tract of land lying in our said county of Alleghany, on Little river, adjoining the lands of Morgan Edwards, Solomon Fender, and others, being the lands whereon plaintiff now lives. The defendant at the time executed and delivered to plaintiff his several good and sufficient deeds for said lands, and plaintiff paid to defendant the price in full for the same, to-wit, twenty-two hundred dollars. (2) That plaintiff took possession of said deeds, but failed at the time to register the same, and kept them in his own possession until about the winter of 1874 or 1875. When about starting to the west, where he expected to remain some time, he deposited said unregistered deeds with defendant, who is his father-in-law, for safekeeping, and in whom plaintiff had entire confidence, and did not doubt said deeds would be returned when called for. (3) That after plaintiff returned from the west he sent to defendant, asking him to return said deeds, but on some pretense he declined to do so; and about the 23d of March, 1885, plaintiff went to defendant, and demanded the said deeds, when he (the defendant) peremptorily refused to give them to plaintiff; and soon thereafter plaintiff discovered that the defendant had at some time, while they were in his possession, mutilated and destroyed said deeds, and had conveyed said land in fee to the wife of the plaintiff, who is defendant's daughter, and intending thereby to advance her out of his estate, and by this act of defendant he has rendered himself wholly unable to surrender said deeds to plaintiff, or to recover said land to him, thereby becoming indebted to plaintiff for the value of said land, which, after deducting all just credits to which the defendant is entitled, amounts to twenty-five hundred dollars, and interest thereon. (4) That plaintiff is a resident and citizen of our said county and state, and the defendant, for his whole life, has been and now is a citizen of Virginia. Plaintiff, therefore, demands judgment (1) for twenty-five hundred dollars, and interest thereon from December, 1873; (2) for such other and further relief as the nature and justice of plaintiff's case demands, and for costs."

The defendant moved to dismiss the proceeding, on the ground that the notice had not been given according to law, and, upon the court's overruling this motion, the defendant filed a demurrer as follows: (1) That the complaint does not state facts sufficient to constitute a cause of action, in that it shows that the title of the lands is still in the plaintiff, and at the time the defendant executed the deed to plaintiff's wife the defendant had no title to the lands, and could not divest the plaintiff's title by such conveyance; (2) that the plaintiff cannot recover damages for the value of the lands, based upon a destruction or mutilation of plaintiff's title deed, but plaintiff has his remedy to have the same sustained; (3) that on the plaintiff's own showing he has title to said lands, and cannot be divested by the defendant without consent of plaintiff, wherefore defendant demands judgment that the action be dismissed, and the motion of attachment set aside, and for costs.

Judgment: "It is adjudged and declared by the court that the said demurrer be, and is hereby, overruled, at the cost of the defendant, and that the defendant have leave to answer."

The probate and registration of a deed conveying land as a substitute, dispensing with the old form of livery of seisin, (Code, § 1245,) have been so far deemed necessary to its efficacy in transferring the estate that if, before such registration, it be surrendered and canceled, the title will remain undivested in the maker, where no intervening rights of others have been acquired to be affected thereby. This is held in Hare v. Jernigan, 76 N. C. 471, and many other cases cited in the argument of counsel, down to that of Southerland v. Hunter, 93 N. C. 310. In the latter case, it is said that registration is now held to be "an inseparable incident to the efficacy of the deed itself." Yet an unregistered deed is not wholly inoperative as a conveyance of real property, possessing but the force of an executory contract to convey. It is more than an equity. It is an incomplete conveyance of the land, lacking registration only to make it perfect; and, when registered, relating back to the time of execution, and passing the estate from that period. It is recognized as so far an executed instrument acting upon the title that, when delivered, if lost before registration, it will be set up in equity, and another conveyance decreed, whether it was made upon a valuable consideration or not, against the vendor or his devisee or heir at law, (Hodges v. Hodges, 2 Dev. & B. Eq. 72; Plummer v. Baskerville, 1 Ired. Eq. 252;) and this, in behalf of a purchaser from the vendee, (McCain v. Hill, 2 Ired. Eq. 176.) It may be sold under execution, independently of the act subjecting trust-estates to levy and sale. Morris v. Ford, 2 Dev. Eq. 412. A conveyance made before, but registered after, death, defeats the wife's claim to dower under the former law, in which she only was entitled to claim it in such lands as the intestate owned at his death. Norwood v. Marrow, 4 Dev. & B. 442. The surviving wife may have a lost or fraudulently destroyed deed set up, to the end that she may have dower in the legal estate assigned her therein. Tyson v. Harrington, 6 Ired. Eq. 329. These and other adjudications in the same line show that an unregistered deed transmits, not a mere equitable right to have it registered, if existing, or restored, in order thereto, by a decree for the execution of another, or in itself ac-

Digitized by Google

complishing the same result, but an inchoate legal estate deficient only in the want of registration under the statutory requirement. Phifer v. Barnhart, 88 N. C. 333. "An unregistered deed for land passes," in the language of MERRIMON, J., "an inchoate legal, as well as the equitable, title, to become complete and absolutely operative for all proper purposes, according to its true intent, as soon as it shall be registered." Austin v. King, 91 N. C. 286. While such is the operation of a deed for land from its delivery, the conveyance may be defeated by its voluntary cancellation by all the parties thereto, and, as between them, the estate left undisturbed in the grantor. Hare v. Jernigan, supra; Beaman v. Simmons, 76 N. C. 43; Davis v. Inscoe, 84 N. C. 396; Fortune v. Watkins, 94 N. C. 304. "But such cancellation," quoting from the opinion in Austin v. King, supra, "can be made only by agreement of the parties to it, or those claiming under them, and it cannot be made fraudulently, and to the prejudice of third parties."

There was no consent given by the plaintiff, according to his own allegations, to the destruction of the deed, with reference to the making of another, or other purpose of benefit to him; but the act was a betrayal of trust,—an act of spoliation of a muniment of title, not impairing it or the plaintiff's estate in the land. It was done not only in disregard of fiduciary obligations, but for the wrongful purpose (a purpose not allowed by law) of vesting the estate in the daughter, for which an ample remedy is afforded in the right to demand another, commensurate in its operation with the former, and putting the estate in the plaintiff after registration, in the plight and condition it would have been had the first been kept and registered, as decided in Hodges v. Spicer, 79 N. C. 223. The cancellation, being made with a fraudulent intent, is a tort, the quality of which, as such, is not changed, though the right of action for the tort may be surrendered by the party wronged, by the subsequent submission of the plaintiff to it with a view to seeking a remedy which might be founded upon a consent originally given, upon or without some anticipated advantage to arise out of the cancellation. Regarding the complaint as waiving the tort, the plaintiff is left without redress; for, as there is no positive promise, so none can be implied in law to restore the purchase money or the unpaid part of it; and it is not a case of the failure of consideration, admitting the recovery of the money paid. If the waiver be permitted, it would leave the plaintiff remediless, because it constitutes no consideration upon which to base an implied, in the absence of a positive, promise to return the money in whole or in part. This results from the fact that no promise can be inferred from an act itself tortious, because of an assent that takes away its quality as such. But the spoliation is itself a wrong for which an action will lie, and some redress be given by the law, not commensurate with the value of the premises, because the plaintiff can regain them, and his loss will be measured by damages in securing the restoration of the deed. The judgment overruling the demurrer must therefore be affirmed.

(103 N. C. 122)

WARLICK v. LOWMAN.

(*Supreme Court of North Carolina.* April 15, 1889.)

PRIVATE WAYS—PETITION.

1. Code N. C. § 2056, provides that "if any person be settled upon or cultivating any land to which there is leading no public road, and it shall appear necessary, reasonable, and just that such person should have a private way to a public road over the lands of other persons, he may file his petition before the board of supervisors of the township, praying for a cartway to be kept open across such other person's lands, leading to some public road," etc. *Held*, that while it is essential that the petition shall state sufficient facts to show that the road asked for is "necessary, reasonable, and just," and that there is no public road to answer the purpose, yet the petition is not required to be so formal and precise as ordinary pleadings, and it is sufficient if enough is stated to show with reasonable certainty the existence of the state of facts mentioned in the statute.

2. After objections have been filed to the petition and a jury has been impaneled to try the issue of fact thus raised, it is too late to move for the first time to dismiss the petition upon the ground that it does not state sufficient facts to entitle the petitioner to have the cartway prayed for, where the defects consist merely of informalities of statement.

Appeal from superior court, Burke county; ARMFIELD, Judge.

The plaintiff filed before the proper "board of supervisors of public roads" his petition for a cartway, whereof the following is a copy: "*To the Board of Supervisors of Public Roads, etc.:* The undersigned respectfully petitions to said board for the granting of a public cartway leading from his dwelling and lands and through the lands of Sarah Lowman into the public highway leading from the Newton road to Rutherford College for the reasons herein set forth: That your petitioner desires said cartway as a way to the nearest public mill where he can get grain ground, and also said way is his only way to his nearest church and public worship, Sunday-school, and burying-ground, said way or route being the only practical way that the petitioner can travel to either of the above-named places by wagon, buggy, or cart; and, furthermore, said petitioner desires said cartway to haul logs over to his nearest saw-mill, where he can get sawing done; and, further, petitioner carries on and is engaged in the business of blacksmithing, and the above-named cartway is greatly desired as a way for the public to pass and repass to his shops. Petitioner respectfully asks that you carefully consider the complaint set forth in this petition, and then grant the relief hereby demanded." The petition was heard, and the prayer thereof allowed by the board, and the respondent, having made objections, appealed to the board of commissioners of the county, and they also allowed the prayer of the peti-

Digitized by Google

tion from which the respondent appealed to the superior court. In that court, a jury was impaneled to try the issues of fact raised by the respondent's objections to the petition. Pending the trial, and before evidence was produced, upon objection made by the respondent's counsel, the court held (1) that the petition was insufficient to entitle the plaintiff to the relief he seeks; (2) that the facts alleged in said petition are not sufficient to give the court jurisdiction to grant any relief; and that, as the supervisors had no jurisdiction, this court could have none on appeal; and at once directed a juror to be withdrawn, and a mistrial, and thereupon dismissed the petition, and the plaintiff appealed.

S. J. Ervin and *J. T. Perkins*, for appellant. *J. T. Avery*, for appellee.

MERRIMON, J., (*after stating the facts as above.*) The statute (Code, § 2056) provides that "if any person be settled upon or cultivating any land to which there is leading no public road, and it shall appear necessary, reasonable, and just that such person should have a private way to a public road over the lands of other persons, he may file his petition before the board of supervisors of the township, praying for a cartway to be kept open across such other person's lands, leading to some public road, ferry, bridge, or public landing; * * * and, if sufficient reason be shown, shall order the constable to summon a jury," etc. This statutory provision is in derogation of the free and unrestricted use and enjoyment of the land by the owner thereof over which the cartway is established, and must be construed strictly. The petitioner is not entitled to have it simply as a convenience, or because it enables him to reach a public road, ferry, bridge, or public landing from the land upon which he may be settled, or which he may be cultivating, by a shorter or more convenient route, but because there is no public road serving such purpose, and because also it is "necessary, reasonable, and just" that he should have the cartway. Hence, if he have one or more private ways, or by a parol license an unobstructed way across the land of some person other than that of the respondent, he is not entitled to have it. In such case it would not be "necessary, reasonable, and just" that he should have it. If he should in any way be deprived of such private way, he might become entitled to the cartway, because it might thus become necessary, as contemplated by the statute. It is the absence of a public road in the case provided for, and because it is "necessary, reasonable, and just," that the petitioner may have a cartway across the land of another. Lea v. Johnston, 9 Ired. 15; Caroon v. Doxey, 3 Jones, (N. C.) 23; Burgwyn v. Lockhart, 1 Winst. 264; State v. Purify, 86 N. C. 681. The application for a cartway must be made by petition in writing, and it should state intelligently the grounds of the application,—the facts, sufficient in their substance, to entitle the petitioner to have his prayer granted; otherwise the respondent may move to dismiss or quash it, or the court may *ex mero motu* direct it to be done. And so also the respondent's objections to the petition should be in writing, to the end the same may be filed in the proper office, and so, also, that the court can see what issues of fact and law are raised, and try the same, and dispose of the petition upon its merits. It would be much better to have such pleadings formal and precise; thus, they would be more intelligible and satisfactory. But this is not essential; it will be sufficient if the petition and the objections thereto state the substance of the material facts, however informally this may be done, and such informalities should be helped by proper amendment, and the proceedings should be upheld when they embody the substance of the matter. They are summary in their nature, and are begun and prosecuted before a class of officers very useful and important, who are generally laymen, and not familiar with legal precision and form. Such proceedings are to be helped at all times, when this can be done, by amendment. This is especially so where they have been allowed to be conducted without objection made in apt time.

The petition in this case is not precise or formal in the allegation of the material facts; but it seems to us that it states facts sufficient in their substance and meaning to entitle the petitioner to have his prayer granted, if they be accepted as true, as they must be for the present purpose. *First*, it was necessary to allege that the petitioner was "settled upon or cultivating land." The petition asks for a "cartway leading from his dwelling and lands, and through the lands of Sarah Lowman, into the public highway" mentioned. By the words "his dwelling and lands" is fairly meant his home,—the place where he lives,—where he is "settled;" and this meaning is made the more manifest by other facts stated in the petition. *Secondly*, the petition should have stated that there was no public road leading to the dwelling of the petitioner,—the place where he was "settled." This is sufficiently alleged, in the absence of objection made in apt time, in that it is informally stated that the cartway prayed for "is his only way to his nearest church and public worship, Sunday-school and burying ground, said way or route being the only practical way that the petitioner can travel to either of the above-named places by wagon, buggy, or cart." And the implication intended is that the petitioner has no other way than the cartway asked for to reach a public road leading to the public mill mentioned, and no other way leading from a public road to his residence and the blacksmith shop. It seems that the parties so understood, accepted, and acted upon the meaning of the petition until after the jury was impaneled to try the issues of fact raised in the superior court. The petition states facts

Digitized by Google

which, if true, sufficiently allege that the cartway was "necessary, reasonable, and just." If the petitioner had no way to a public road from his residence,—the land where he lived,—surely he ought to have a cartway. It may be that these allegations were not true, but the court deprived the petitioner of the opportunity to prove them by directing a mistrial, and dismissing the petition. They were informal,—not perfect,—but the purpose and the grounds of them could be seen and understood by the parties and the court, and it was too late, after the jury was impaneled to try the issues of fact raised, to sustain a motion then made for the first time to dismiss the petition upon the ground that it did not sufficiently state facts to entitle the petitioner to have the cartway prayed for. Johnson v. Finch, 93 N. C. 205; Halstead v. Mullen, Id. 252; Warner v. Railroad Co., 94 N. C. 250. There is error. The court should have disposed of the case upon its merits. There must therefore be a new trial, and we so adjudge. To that end let this opinion be certified to the superior court. It is so ordered.

(102 N. C. 545)

HOLLER v. RICHARDS.

(*Supreme Court of North Carolina.* April 15, 1889.)

STATUTE OF FRAUDS—VERBAL PROMISE—PLEADING.

Where plaintiff declares upon a verbal promise, void under the statute of frauds, and defendant either denies that he made the promise, or sets up another and different contract, or admits the promise and pleads specially the statute, evidence to prove the verbal promise is incompetent.

Appeal from superior court, Caldwell county; CLARK, Judge.

B. C. Beckwith, for appellant.

AVERY, J. This was a civil action tried at fall term, 1888, of the superior court of Caldwell county, before CLARK, Judge. The plaintiff alleges in his complaint that he bought the tract of land in controversy in this action at a judicial sale by a commissioner, (or by assignment took the place of bidder,) and had paid a portion, to-wit, a little more than one-half of the purchase money, when he agreed to sell the defendant the timber on said land suitable for being sawed into lumber, and that defendant persuaded him to convey by deed absolute one undivided half of said land to him, (defendant,) by representing that it was necessary to do so in order to protect him (defendant) in using the timber, and by solemnly promising that so soon as he should cut and use the timber he would reconvey to the plaintiff said undivided half interest. Plaintiff prays to have defendant declared a trustee for him as to one-half the land. The defendant in his answer denies the alleged verbal agreement, and avers that the plaintiff, after the purchase at the sale, found that he was unable to pay the purchase money and proposed to the defendant to advance the last payment in order to prevent the court from ordering a resale on motion of the petitioners in the special proceeding, and proposed that the defendant should in consideration of said payment take a deed for one undivided half interest, and the defendant did pay the second note executed by said Holler for the purchase money, and by direction of said Holler the deed was made to defendant and Holler as tenants in common. The case stated by the judge is as follows: "The plaintiff testified that he purchased the land at a commissioner's sale, and sold the timber on the land to defendant. On the defendant's alleging that another party claimed a pretended interest in the land, and that he needed a deed to the land to protect the possession, it was agreed between them that a deed absolute on its face should be made jointly to the plaintiff and the defendant, but that the defendant should hold it only for the purpose aforesaid of protecting his timber right, and should reconvey the undivided half interest in the land to the plaintiff as soon as and whenever the marketable timber was cut off. Upon the inducement of such representation, and relying thereon, the deed was made to plaintiff and defendant jointly by the commissioner, under the direction of the plaintiff. The defendant objected to the above evidence, on the ground that it contradicted the deed, and was an agreement concerning land not reduced to writing. Objection overruled. Exception by defendant. There was other evidence, but this was the only exception. Verdict and judgment for plaintiff. Appeal by defendant." The issue and finding thereon were as follows: "Did defendant take deed for a half interest in the land upon an agreement that he was to have all the timber on said land, and when it was cut off he would reconvey to plaintiff? *Answer*. Yes." The judgment of the court was, in substance, that William Richards holds title to one undivided half of the factory land, (103 acres, described in the complaint,) as trustee for Martin Holler, the plaintiff, and that said Richards forthwith execute and deliver to said Holler his deed conveying all the interest of said Richards, being one undivided half in said land, to said Holler in fee-simple, and that said plaintiff do recover costs.

The plaintiff does not allege in his complaint that he ever made any payments, except $10 due on the first half of the purchase money, and subsequently the whole of the first payment, and lastly $10 on the last half, the deferred payment. The defendant alleges, positively, that he paid the amount of purchase money still due, when he bought from plaintiff the second note. To the allegation, by way of new matter in the answer, that defendant had paid the second note for purchase money given by the plaintiff, the plaintiff replies: "As to paragraph one of the new matter, that it is true that the administrators of W. Bean were pressing him on the second note; but he denies that he approached defendant, and agreed to assign

Digitized by Google

one-half interest in the land on his paying said note, and that by reason of said payment the deed was made to said defendant and plaintiff as tenants in common. He avers the truth to be as stated in the complaint."

Counsel for the defendant confined the discussion to the question whether the testimony of the plaintiff, if admitted to be true, would be sufficient to establish his equity in the undivided half of the land in controversy, conveyed by the commissioner to the defendant. The objection, however, is to the competency, not the sufficiency, of the plaintiff's evidence in itself. We must therefore determine, at the threshold, before reaching the point presented by counsel, whether the nature of the action is such that the testimony was admissible to be considered with other evidence tending to prove the plaintiff's right to the relief demanded, even though without the aid of extrinsic facts his testimony as a whole does not constitute proof of a cause of action. One who asks a court for relief must allege and prove such facts as will establish, if true, his right to the remedy specified. Willis v. Branch, 94 N. C. 142. The plaintiff does not pretend that the deed was executed by mistake, but admits that it was drawn with his assent, if not by his request, so as to convey to the defendant a half interest in the land. The pleadings do not justify the conclusion that the plaintiff paid the whole of the purchase money, and therefore claimed in the court below that his testimony was competent to be considered in connection with other testimony tending to establish a resulting trust in his favor as to the interest conveyed to the defendant. Had the complaint contained an allegation of mistake, or set up such a claim of resulting trust, it may be that his honor's ruling would have been correct; if so, the question whether there was evidence *dehors* the deed, and in addition to the evidence of the plaintiff, such as required the court to submit an issue to the jury, might have been raised at the close of the evidence; and then the principle stated in Hemphill v. Hemphill, 99 N. C. 436, 6 S. E. Rep. 201, and the other cases cited by counsel, would have applied. But the complaint does not show who paid the second installment of the purchase money, while the answer sets up as new matter that it was paid by the defendant Richards, and the replication contains no denial of the payment alleged in the answer. We must assume, therefore, that the defendant paid a large proportion, probably about half of the purchase money, that the plaintiff had agreed to pay, and that the deed was therefore made to him with the assent of the plaintiff. The right to recover, therefore, rests upon the naked allegation of the plaintiff that the defendant made a verbal promise to reconvey when the timber should be cut off the land, and that allegation is denied in the answer. In view of the state of the pleadings, then, the testimony of the plaintiff did not tend to show his right to any relief, and the objection ought to have been sustained by the court. It may be added that upon the finding on the issue simply that the defendant had promised verbally, when the deed was delivered to him, to reconvey to the plaintiff when he had cut all of the timber off the land, leaves the plaintiff's right to relief to depend, still, entirely upon a verbal promise, when there is no principle, in view of the denial of the defendant, to take the case out of the operation of the statute of frauds. Where the plaintiff declares upon a verbal promise, void under the statute of frauds, and the defendant either denies that he made the promise, or sets up another and a different contract, or admits the promise and pleads specially the statute, testimony offered to prove the promise is incompetent, and should be excluded on objection. Gulley v. Macy, 84 N. C. 434; Morrison v. Baker, 81 N. C. 76; Young v. Young, Id. 91; Bonham v Graig, 80 N. C. 224. The case of Michael v. Foil, 100 N. C. 178, 6 S. E. Rep. 264, to which our attention has been called, is not at all analogous to this. There the plaintiff brought his action, not to compel a reconveyance or affect the deed in any way, but upon a verbal promise to pay money that might be realized by a future sale of the mineral interest in land conveyed. The court below erred in admitting the testimony, and the defendant is entitled to a new trial.

(103 N. C. 147)

ARMFIELD *et al.* v. COLVERT *et al.*

(*Supreme Court of North Carolina.* April 15, 1889.)

WITNESS—COMPETENCY—TRANSACTIONS WITH DECEASED PERSONS.

1. In an action brought by the executors of a deceased partner against all the surviving members of the firm for a settlement of the partnership affairs, it appeared that the partnership was the successor of another firm, of which the decedent and G., one of the survivors, were members. *Held*, that it was error, under Code N. C. § 590, forbidding a party to an action to give testimony in his own behalf, against the executor of a deceased person, as to any communication or transaction with the decedent, except where the executor is examined on his own behalf, or the testimony of the decedent is given concerning the same transaction, to permit G. to testify that the decedent and all the other members of the new firm had entered into an agreement as to the basis of merging the business of the old firm into the new, and that, in pursuance of such agreement, G. had aided the decedent in estimating the value of the property of the old firm.[1]

2. The fact that one of the other surviving members and defendants was examined on behalf of plaintiff, with regard to a declaration of the decedent not relating to the said transaction, did not affect the competency of such evidence.[1]

3. Where such action was tried before a referee, who found that objection was taken by the plaintiffs "in apt time" to any testimony of G. concerning transactions with decedent, the fact that the

[1] As to the competency of witnesses to testify concerning transactions with subsequently deceased persons, see Wilcox v. Corwin, 3 N. Y. Supp. 317; Brigham v. Gott, Id. 518; Mullins v. Chickering, (N. Y.) 18 N. E. Rep. 377; Welch v. Adams, (N. H.) 1 Atl. Rep. 1, and exhaustive note; Keithley v. Stafford, (Ill.) 18 N. E. Rep. 740, and note.

Digitized by Google

referee entered the objection at the close of the testimony of G., instead of attaching it to the utterances of the witness to which it was directed, did not make the objection unavailable.

Appeal from superior court, Iredell county; CLARK, Judge.

This was a civil action, heard on exceptions to the report of a referee, at November term, 1887. The plaintiffs brought the action for the settlement of the partnership affairs of the firm of Gaither & Colvert, composed of the testator of plaintiffs, A. F. Gaither, and the defendants W. J. Colvert, J. G. Colvert, J. E. Stimpson, W. G. Bennett, and W. C. Nicholson. This partnership was formed in the year 1876, and the partners continued to carry on the business of buying and selling leaf tobacco, and of manufacturing plug and smoking tobacco, till about the year 1880. A. F. Gaither, testator of the plaintiffs, died in 1883, leaving a last will and testament, in which plaintiffs were appointed the executors, and they have duly qualified as such. W. G. Bennett had died before the hearing, and a *nol. pros.* was entered as to him by plaintiffs. The cause was referred, and on the coming in of the report of the referee a number of exceptions were filed by the plaintiffs, but all were overruled by the court below, and a judgment was rendered confirming the report of the referee.

The first witness offered for the plaintiffs before the referee was W. G. Nicholson, one of the defendants, who testified that he himself put $1,065 into the business; A. F. Gaither, about $2,000; W. J. Colvert, about $2,000; J. G. Colvert, about $1,000; J. E. Stimpson, about $1,000; and W. G. Bennett, about $1,000. He testifies, further, as follows: "I think W. J. and J. G. Colvert kept the books of the firm most of the time. W. J. and J. G. Colvert and A. F. Gaither were the principal managers of the firm. W. J. Colvert paid out all the money that I ever saw paid. I think that J. G. Colvert paid out some money. A. F. Gaither had the privilege and access to the books of the firm, but to my knowledge he had but very little to do with the books. I do not know who has the books at this time, nor do I know who had them at the dissolution of the firm. The firm had at its dissolution one hydraulic press, worth $250." After giving a list of articles of the property owned by the firm, and the value of each article, and stating that he did not know what credits the firm had, the witness was turned over to defendants for cross-examination by W. J. Colvert and J. G. Colvert, when in answer to a question he said: "As to sums put in by the partners aforesaid, my knowledge was derived from a meeting that the partners had. A. F. Gaither told me he put in $2,000." This was objected to by the Colverts and Stimpson as incompetent. The witness continued: "No one was present at the time A. F. Gaither told me he had put in $2,000. I did not hear Gaither say at the meeting, above referred to, that he had put into the firm $2,000. I heard at said meeting J. G. Culvert say that A. F. Gaither had put in about $2,000. I also saw said amount stated in a book, being the same book in which my subscription was written." It is not material to give all of the testimony of this witness.

We find, among the exceptions filed by plaintiffs and relied on in the argument, the following, to-wit: "(11) That he erred in considering the evidence of W. J. Colvert and J. G. Colvert and J. E. Stimpson concerning transactions and communications with A. F. Gaither, the testator of the plaintiffs, when the record of evidence shows that the same was objected to, and that the same was incompetent under section 590 of the Code."

The testimony of J. G. Colvert, so far as it relates to transactions or communications, seems to have been objected to, as the obnoxious portions of his testimony were elicited from him, but the referee entered the objection at the close of the testimony. The testimony of J. G. Colvert bearing upon this question is as follows: "The entries on page 102 to 106 were not made four or five years after the old firm ceased to do business, except the last two lines on page 106, which were in the latter part of 1876, from page 102 to 106, inclusive. All from 102 to 107 was the settlement of the old partnership, and agreed to by all the partners. The agreement between the partners of the old firm was to take an aggregate of debits and credits, and the difference between them was to be the ratio of their part, in the new firm, of the $13,547.40. A. F. Gaither was considered an ordinary business man by some, and good by some. It was the object of the partners of the old firm to make a just settlement in proportion to the difference of debits and credits, as shown on page 107. *Question.* When the settlement was made between the old partners of the firm of A. F. Gaither, was it not done upon the basis of their respective interest in said firm? *A.* It was, as shown on page 107, after deducting their debits. After their interests were prorated through the $13,547.40, I think there is no error making $263.57 the basis of A. F. Gaither's interest in the old firm. If there is a clerical error, I am willing to have it corrected. A. F. Gaither put into the old firm, sundry times, $2,808.25. I did not consider the indebtedness of the partners to the old firm, but considered the difference of the debits and credits as assets of the new firm. The list made from page 102 to 106 was made by Gaither and myself, we having been appointed at the first meeting in 1876 as a committee to value the machinery and take a list of all notes and accounts of the old firm. All the members of the new firm were present at this meeting. Gaither and myself took a list in the middle of 1876, and after the said meeting. The reason why we did not take the list at once was that there were teams out, and we had to get up the notes and money before we could take the

Digitized by Google

list. We went to the factory, and examined the machinery, and valued it as the books show. Notes were taken by Gaither, calling out the names of makers of the notes and the amounts, and the witness wrote them down in Book A. This book, after the entries were made, was left in the firm's office, in a safe in said office. A. F. Gaither had access to the office and safe. Most of the entries on page 2 are in the handwriting of A. F. Gaither, and said page contains a portion of Gaither's account. Some entries on page 83 are in Gaither's handwriting. This page contains a portion of W. G. Nicholson's account. Some entries on page 6 were made by A. F. Gaither, and contain a portion of W. G. Nicholson's account: Cash paid, $1.00, July 7, 1877; August 1, 1877, cash paid, $2.00; by amount of account on Augustus Sharpe, August 11, 1877, $1.00. I see on page 6 the word 'paid,' and it is spelled 'paide,' Gaither's usual way of spelling this word. The most of the entries on page 59 are in Gaither's handwriting. I find 'paid' in several places on this page, and spelled 'paide,' which words are written by Gaither. Some entries on page 58 are in the handwriting of Gaither, containing in part W. G. Bennett's account. Gaither, W. J. Colvert, and myself kept Book A, and made entries in it. On page 102 the item entered as cash on hand, $7,126.67, was the cash on hand at the formation of the new firm, together with that collected before the list was made, on the old debts, and a small quantity of leaf tobacco estimated as cash at what it was bought at. Also some smoking tobacco, which came from the old firm. The hydraulic press, and shapers and retainers, sold in December, 1883, had been in use from and before the creation of the new firm and up to the time that the firm ceased to do business, in 1880. G. W. Nicholson, J. E. Stimpson, and myself were present at the sale of the machinery and other property. The sale was at public auction. Nicholson did not buy any of the articles sold. He did not forbid the sale, and made no objection, so far as I heard. I think Gaither took the watch above referred to for the debt, and I think the trade was done by writing. I think the debtor from whom the said watch was purchased lived in South Carolina." Plaintiff and defendant Nicholson in apt time objected to all the foregoing evidence touching any matter with A. F. Gaither.

Book A is offered in evidence by defendants Colvert and Stimpson, to which the plaintiff and defendant Nicholson objected.

Cross-examination of W. G. Nicholson resumed: "A. F. Gaither made some entries on page 2 of Book A. I say positively that A. F. Gaither made no entries on page 6. Gaither made on page 58 an entry of one line. I think that there's no other entry on said page in Gaither's handwriting. Gaither made one entry on page 59, 'Paid Mary Jane, $1.00.' I can't say that there is any other entry by Gaither on said page. I was frequently about the office during the existence of the firm, and never inspected my own account as kept there on the books of the firm. Did not have an opportunity to inspect the books. I never asked to inspect them, nor was ever refused by any one to do so. I think it very doubtful whether I could have seen the books if I had asked."

It appeared also in evidence that there was a firm doing business under the name of A. F. Gaither, prior to the year 1876, composed of A. F. Gaither, W. J. Colvert, J. G. Colvert, and J. E. Sharpe, and the assets of the old firm were put into the new. The adjustment of the debts and credits of each partner in the firm of Gaither & Colvert was made, therefore, to depend, in some measure, upon the amount of his share in the property and money of the old firm merged into the new.

It is not necessary to give the report of the referee in full. One of the conclusions of law is as follows: "A. F. Gaither is indebted to the firm of Gaither & Colvert $1,529.38, money and goods taken out of said firm more than he put in, aside from the stock originally put in by him. Saved of said Gaither's original stock which he will be entitled to retain the sum of $213.45, which sum is to be deducted from the aforesaid sum of $1,529.38, leaving $1,315.93. I therefore direct that judgment be rendered against the plaintiffs in this cause for the sum of thirteen hundred and fifteen dollars and ninety-three cents in favor of the firm of Gaither & Colvert."

On the top of page 102 of the Book A is the following entry: "Below is a list of cash, amount of tobacco, machinery, and value, amount of due-bills, notes, and other articles and value, etc., belonging to A. F. Gaither, J. G. Colvert, and J. E. Stimpson, the old tobacco firm, when W. G. Nicholson and W G. Bennett came into the firm in the spring of 1876." There follows, on page 102 to 106, an inventory of the cash, property, and value, and the solvent credits of the old firm put into the new. The entries begin:

Cash on hand	$7,126 67
Morrison, Gaither & Co	390 66
Hydraulic press & retainers	475 00
2 sets of shapers	210 00
Pair of bank scales	20 00

The aggregate value of all of the assets of the old firm recorded on page 106 is $15,863.27; deducting old notes uncollected, $2,315.87. The result stated at the bottom of said page is, old firm worth, spring of 1876, $13,547.40. On page 107 are the following entries:

A. F. GAITHER.

Amounts, Dr. and Cr., of old firm, spring of 1876:

Dr.	Cr.
$495 15	$2,808 25
	2,544 68
	$ 263 57

JOHN G. COLVERT.

Amounts, Dr. and Cr., of old firm, spring of 1876:

Dr.	Cr.
$495 15	$1,738 25
	495 15
	$1,240 10

Digitized by Google

WM. J. COLVERT.

Amts., Dr. and Cr., of old firm, spring of 1876:

Dr.	Cr.
$1,599 81	$4,072 41
	1,591 81
	$2,480 60

JOHN R. STIMPSON.

Amounts, Dr. and Cr., of old firm, spring 1876:

Dr.	Cr.
$931 10	$2,022 49
	931 10
	$1,086 89

Code N. C. § 590, provides that a party to an action shall not be examined on his own behalf against the executor of a deceased person, concerning a personal transaction for communication between the witness and the deceased, except where the executor is examined in his own behalf, or the testimony of the decedent is given in evidence concerning the same transaction.

D. M. Furches, for appellants. *W. M. Robbins*, for appellees.

AVERY, J. We do not deem it necessary to set forth the whole of the referee's report. We think the objection that the testimony of the witness Colvert was not competent under section 590 of the Code should have been sustained by the referee, and the eleventh exception of the plaintiffs ought not to have been subsequently overruled by the judge. At the end of the statement of the testimony of J. G. Colvert we find the following: "Plaintiffs and defendant Nicholson in apt time objected to all of the foregoing evidence touching any matter with A. F. Gaither." It is true that this court has held that objections to testimony incompetent by reason of the provisions of section 590 will not be entertained unless they are taken in due time. If so taken, they will be sustained. Meroney v. Avery, 64 N. C. 312. The referee having found that the objection was taken in apt time, we must consider the plaintiffs' exception as having been entered repeatedly at the different times when Colvert testified: *First.* "All of Book A, from page 102 to 107, was a settlement of the old partnership, and agreed to by all of the partners. The agreement between the partners of the old firm was to take an aggregate of debits and credits, and the difference between them was to be the ratio of their part in the new firm of the $13,547.40." *Secondly.* "The list made from page 102 to 106 was made by Gaither and myself, we having been appointed at the first meeting in 1876 as a committee to value the machinery, and take a list of all notes and accounts of the old firm. Gaither and myself took the list." *Thirdly.* "We [Gaither and witness] went to the factory, and examined the machinery, and valued it as the book shows. Notes were taken by Gaither, calling out the names of makers, and witness wrote them down in Book A."

We can find other statements in the testimony of J. G. Colvert that are amenable to the objection of incompetency as transactions or communications with A. F. Gaither, and objection was also made to the testimony of W. J. Colvert in the same way, some portions of his testimony being erroneously admitted; but as there was clearly error in permitting John G. Colvert to testify that his deceased partner entered into an agreement with the witness and the other partners, that the basis of merging the business of the old firm into the new should be that the stock of members of the old firm in that of Gaither & Colvert should be the difference between their debits and credits with the former, and that in pursuance of that plan of adjustment Gaither aided him in determining the value of partnership property, and in making the settlement recorded from page 102 to page 106, Book A, and assented to the statement of the result as to each partner on page 107, which appears in the statement of the case, the defendant clearly had the right to testify that Book A was kept among the papers of Gaither & Colvert, that Gaither had access to it, and that in fact many of the entries in the book were in his handwriting. Leggett v. Glover, 71 N. C. 211. But the referee was acting both as judge and jury in the trial of this case, and the appellate court cannot determine how much weight be attached, in passing upon the facts, to the evidence of Colvert that his deceased partner directly assented to a settlement, and aided him in recording it, when that settlement furnishes in part the *data* from which the referee reached a conclusion as to the amount due each partner at the time of the dissolution. The evidence allowed and acted upon by the referee embraced both a transaction and a communication with the deceased, when the plaintiffs had brought suit for a settlement against all of the partners of their testator, and thereby placed all of them in the attitude of adversaries. This case is therefore distinguishable from Peacock v. Stott, 90 N. C. 518. The plaintiff in that case had brought his action against three partners, (one of whom was dead,) and was allowed to testify as to a transaction with the three partners, because two of them were living, and could contradict him if they would not admit the truth of his statement. This testimony was held admissible, because it was not within the mischief intended to be prevented by section 590 of the Code, viz.: "That, unless both parties to the transaction can be heard on oath, a party to an action is not a competent witness." McCanless v. Reynolds, 74 N. C. 301. The fact that the plaintiffs were compelled, it may be, to select one of the defendants W. G. Nicholson, and examine him, as their first witness before the referee, does not affect the competency of Colvert's evidence; nor did the fact that Nicholson, one of the defendants, testified without objection that he heard Gaither say he had put about $2,000 into the new firm remove the restriction of the law so as to make admissible evidence of Colvert otherwise amenable to objection. When Nicholson testified to that dec-

Digitized by Google

laration of Gaither, the testimony of Gaither was not given in evidence, and, if it had been, it did not relate to the same transaction or communication. It was not connected with the adjustment of the affairs of the old firm, the valuation of its property, and the basis upon which the property was handed over to Gaither & Colvert.

But it has been held by this court that where there was an issue as to the existence of a partnership between a witness and the intestate of the adversary party to the action, the witness would not be allowed, after objection, to testify that such a partnership existed without first negativing the natural supposition that his knowledge of the existence of such a partnership was derived from a transaction or communication with the intestate. Sikes v. Parker, 95 N. C. 232. But it has been suggested that the plaintiffs lost the advantage of their objection to the testimony, though it was taken in apt time, as the referee reports, (and we must construe apt time to mean the very earliest moment that such objection could have been made,) because the referee entered the objection at the close of the testimony of the witness, instead of attaching it to the utterances of the witness, to which it was in fact directed, as incompetent. It is evident that the referee intended, desired, and expected that, in fairness and good faith to the plaintiffs' counsel, the objection should be treated as specifically directed to any portions of evidence of the witness coming within the restrictions of said section. If it were not so, the referee would have omitted the words "in apt time." We cannot consent, therefore, to deprive a party of a meritorious objection, made at the proper time, and place him on a level with one who studiously waits till a witness has delivered all of his testimony, some parts of which are competent and other portions are not, and then excepts to the whole. This court, has refused to consider such exception on the express ground that the judge, if asked in apt time, might have excluded testimony specifically pointed out as incompetent, and that litigation would be endless, if search could be made for a single objectionable sentence in a mass of testimony, when silence at the moment could be construed into a waiver of objection. The rule of practice which requires that the obnoxious evidence should be pointed out and brought to the notice of the court, in order to a direct ruling on its reception, is just and salutary, and is established by authority. Hammond v. Schiff, 100 N. C. 161, 6 S. E. Rep. 753; Barnhardt v. Smith, 86 N. C. 473. But in the case before us the referee says that the obnoxious testimony was pointed out, and he had an opportunity of excluding it and leaving of the "mass of testimony" only such as was competent. Obviously the reason of the rule adopted in the cases last cited does not exist, and the rigorous rule itself should be held inapplicable. To hold otherwise would be "to stick in the bark," and thereby do manifest injustice. There was error in overruling the eleventh exception of the plaintiff, and the judgment is reversed. The cause will be re-referred to the referee. We have deemed it unnecessary to discuss the other exceptions. It may not be improper to call the attention of the parties to the case of Holden v. Peace, 4 Ired. Eq. 223, as bearing possibly upon another question, that was the subject of discussion and exception. Error reversed.

STEDHAM v. CREIGHTON.[1]

(*Supreme Court of South Carolina.* May 18 1888.)

Motion to dismiss appeal.

Ernest Sary, for the motion. *Sheppard Bros., contra.*

A motion was made to dismiss an appeal in a case at law, because the exceptions to the rulings of the presiding judge, on which the appeal was based, had not been taken at the trial, nor within 10 days after the rising of the court. The motion was granted *per curiam*, without prejudice; the chief justice saying that this order would not prevent the appellants from moving to restore the case under the act of 1880, if so advised.

(28 S. C. 609)

SANDERS v. SANDERS, (two cases.)[1]

(*Supreme Court of South Carolina.* May 22, 1888.)

APPEAL—PRACTICE.

A petition was filed to reopen certain orders granting leave to an appellant to serve his "proposed case" and to serve amendments to the "proposed case" on the ground that the opposing attorney had made arrangements with another attorney to appear for him on the hearing of the motion for such orders, but that at the last moment the latter had signified his inability to be present. *Held*, that as the petition did not show that the court had overlooked any principle of law or matter of fact material to the case, nor that judgment was obtained against the petitioner by default, it should be dismissed.

On May 11th, this court, after due notice of the motions, granted the appellant in the first case leave to serve his "proposed case," and the respondent in the other case leave to serve amendments to the "proposed case." These were motions to reopen these orders, the affidavit in support of these motions stating that the opposing attorney had sent his papers to an attorney at Columbia, to appear for him, and on May 10th, at Barnwell, received a telegram, sent by said Columbia attorney from Charleston, saying he would not be in Columbia; and the affidavit further stated that it was then too late for affiant to make other arrangements.

J. C. Davant, for the motions. *Robert Aldrich, contra.*

PER CURIAM. It not appearing in the petitions in the above cases that this court overlooked any principle of law or matter of

[1] Publication delayed by failure to obtain copy of opinion at time of its delivery.

Digitized by Google

fact material to the case in its judgment, sought to be reviewed, and the petitioner having failed to show that the said judgment was obtained against him by his default, it is ordered that said petitions be dismissed.

(30 S. C. 428)

WALDROP *et al. v.* LEAMAN *et al.*

(*Supreme Court of South Carolina.* March 28, 1889.)

TRUSTS—RELEASE—SURETIES.

1. Where a trustee obtains from his *cestui que trust* a release of his contingent remainder in the trust fund, for inadequate consideration, without informing him that a part of the fund has been used in the purchase of land which has been conveyed to the trustee's wife, such release should be held invalid for the suppression of a material fact, though the *cestui que trust* is of full age, and employed counsel to examine the records, etc., to determine the value of his interest. SIMPSON, C. J., dissenting.

2. Though such release be invalid for the reasons mentioned, the trustee's sureties are discharged thereby, as they would be warranted in supposing it final, and that they need not take steps to secure themselves against the trustee's misconduct.

Appeal from common pleas circuit court of Laurens county; W. H. WALLACE, Judge.

Action by E. F. Waldrop and others against Samuel Leaman and others, to vacate a release given by plaintiffs to defendant of the interest of plaintiffs in certain trust funds of which said Leaman was trustee, and to require an accounting. Judgment for plaintiffs vacating the release as to said Leaman, but holding it valid as to his sureties. The plaintiffs and Leaman appeal.

Benet & McGowan and *L. W. Simkins*, for plaintiffs. *Ball & Watts*, *Ferguson & Featherstone*, *Holmes & Simpson*, and *J. S. R. Thompson*, for defendants.

SIMPSON, C. J. Some time in 1866 the defendant Samuel Leaman was appointed by the court trustee of a considerable fund bequeathed by one Robert Workman to John D. Williams in trust for his imbecile son, Robert Workman, Jr., during his life, to be used for the maintenance and support of his said son, "as long as he lives," and at his death the remainder to be equally divided among the children of the said testator then living, "or the child or children of such as be dead; the child or children taking among themselves such part as their parent would be entitled to if living." Williams was the executor of the will, and to him, as executor, this bequest for the purposes mentioned was given; and Leaman, by order of the court, was substituted, 1866, in his stead, as stated. Leaman gave bond for the faithful discharge of the trust, with James Bryson, William Leaman, James Leaman, Mary Waldrop, and the said John D. Williams as sureties, and thereupon took charge of the trust fund, which was turned over to him by Williams. Robert Workman, the testator, died in 1857, leaving three children, to-wit, W. P. Workman, Mary Waldrop, and the *cestui que trust*, Robert Workman, Jr. W. P. Workman died in 1869, without any child or children, and Mary Waldrop died in 1880, leaving children, to-wit, E. F. Waldrop, Emma E. Nance, Mary E. Bryson, the plaintiffs in this action, and Susan Leaman, the wife of Samuel Leaman, and also a grandchild, W. V. Winebrenner, the son of a deceased child. Robert Workman, Jr., the *cestui que trust*, died in 1882. Some time in 1881, after the death of Mary Waldrop, and before the death of the *cestui que trust*, the children of Mary Waldrop, the plaintiffs and defendants here, including the grandson Winebrenner, and the husbands of the females, in consideration of $1,000 to each of said children, and to said grandson, by and under seal, bargained, sold, assigned, conveyed, and released to the said Samuel Leaman, etc., their entire interest, vested or contingent, in the said trust-estate, with the condition that said Leaman was to continue to support and maintain the *cestui que trust* as long as he lived, and upon failure to do so the conveyance was to be null and void. The consideration expressed seems to have been paid, and on the 19th of October, 1882, the deed was recorded in the clerk's office of the county. The *cestui que trust* died, as stated, in 1882, and on the 2d of October, 1884, the action below was commenced by E. F. Waldrop, Emma Nance, and her husband, W. D. Nance, Mary E. Bryson, and her husband, J. H. Bryson, all of whom had signed the deed aforesaid, to vacate the same on the ground of alleged misrepresentation of material facts concerning the trust-estate, fraud, and undue influence, by the said Samuel Leaman in procuring said deed, and also that the said *cestui que trust* had not been properly cared for, and for an accounting as if no such deed had ever been executed. The wife of Samuel Leaman, James Leaman, a surviving surety to the bond aforesaid, the executor of John D. Williams, and his devisees and legatees, were made parties defendant. The main issue in the case was as to the validity of the deed and release, depending upon the testimony as to the alleged misrepresentations, fraud, and undue influence. The case was referred to a special referee, Mr. J. F. J. Caldwell, who reported that while there was no actual fraud or purpose on the part of the trustee, Leaman, to mislead the other parties, yet that it did not appear that he had disclosed the true extent or condition of the estate, and it did appear that he had hidden away a portion thereof by having the Waldrop land, which he had purchased in part out of the trust funds, conveyed to his wife. This, with the gross inadequacy between the trust-estate and the $5,000 paid to the parties, in his opinion was sufficient to warrant the setting aside of the deed as to Leaman, the trustee, and that an accounting be had, which he recommended; in the accounting Leaman to have credit for the $5,000 paid, and for any other loss which he may have sustained in compromising and settling notes, etc., due the trust-estate, under the impression that he owned them individually, after

Digitized by Google

the assignment and transfer above. But he recommended as to the sureties on Leaman's trust-bond that the deed should stand, operating as a complete discharge to them. This report was confirmed by his honor, Judge WALLACE, and from his decree this appeal is before us; the plaintiffs contesting it because the sureties were held discharged, and the defendant Leaman contesting it because said deed was not held valid as to him.

Taking up Leaman's appeal first, there can be no doubt as to the principles of law and equity governing in these matters of settlement between trustee and *cestui que trust*, and as to the conduct required of the trustee in the management of the trust-estate. These principles have been fully and correctly stated in the argument on both sides, and therefore they need no elaboration here. Without referring to authorities or decided cases, of which the books are full, we may say, in brief, that the utmost good faith is required; there must be no *suggestio falsi* or *suppressio veri;* there must be no profit made to the trustee in the management of the estate, and all settlements between them must be fairly made, with no concealment, undue influence, or misleading. But at the same time, if the parties are of full age, *sui juris*, and capable of understanding their rights, with full opportunity of ascertaining them, under no disability, advised as to all the circumstances surrounding the matter or in a situation by reasonable and proper diligence to be thus advised, and they proceed, they must abide the result; and, should their action subsequently result in loss, there is no reason, as is said in Murrel v. Murrel, 2 Strob. Eq. 148, "why the court of equity, or any other, should be called to protect them from the consequences of their folly." McDow v. Brown, 2 S. C. 95; Bossard v. White, 9 Rich. Eq. 496.

Now, the law being plain, the question here as to Leaman is mainly a question of fact. The referee found as matter of fact that there was enough in the conduct of the trustee in connection with the execution of the deed in question to demand that it be vacated, and his honor, the circuit judge, has confirmed this finding; so that the question of reversal or affirmance of this much of the decree comes before us under the rule often referred to and acted upon, not only by our court, but by all of the courts where justice and law are properly administered, to-wit, such findings must be affirmed, and taken as established facts in the case, unless they are clearly without any testimony to support them, or are obviously in conflict with the preponderance of said testimony. We have examined the testimony reported by the referee, with the rule above as our guide; and, while we find some testimony to support the finding of the referee in so far as the plaintiffs Emma Nance and Mary E. Bryson are concerned, we do not find any to sustain the finding as to E. F. Waldrop. It seems to us that Waldrop was the prime mover in this whole matter. He sought Leaman, and proposed to sell. He took advice from an attorney, and through him examined the records, Leaman's return, etc., and no doubt had full information as to the amount of the estate, and of the solvent character of Leaman's bond, and he persisted in having the settlement made. That he was in need of money was not Leaman's fault, nor is there the slightest evidence that Leaman took advantage of his impecuniosity. He was of full age, and intelligent, and made this contract with his eyes open. Under these circumstances, even assuming that it was a foolish one on his part, "there is no reason why this court, or any other, should be called upon to protect him from the consequences of his own folly." As to the inadequacy of the consideration, it is true that, in the light of subsequent events, this looks striking; but is that the way to consider this matter? Ought not the facts that these plaintiffs had no interest until the death of Robert Workman, Jr., and that it depended upon their surviving him whether their interest would be realized; that Robert was stout and robust, and it was not at all certain but that he might outlive them, or some of them; and that Leaman was taking this risk, with the danger of losing all that he had,—to be considered? What would have been the market value of plaintiffs' interests, if put up for sale, thus surrounded? And ought not the inadequacy be looked at from that stand-point? See 3 Amer. & Eng. Cyclop. Law, 40.

So much of the decree as sustains the deed as a discharge of the defendants, sureties on Leaman's bond, we think must be affirmed. The settlement between the trustee and these other parties was no doubt known. It was placed on record, and the sureties were well warranted in supposing that it was final. They were lulled into a feeling of security, and, having no sense of danger, were prevented from even considering the propriety of taking any steps for their protection, which we think was sufficient. See Kirby v. Taylor, 6 Johns. Ch. 242; Aaron v. Mendel, 78 Ky. 427, cited by the referee; Brandt, Sur. § 211; Rosborough v. McAliley, 10 S. C. 245; and Motes v. Madden, 14 S. C. 488. Our conclusion leads to the result that the judgment below should be affirmed as to the plaintiffs Emma Nance and husband, William D. Nance, and as to Mary E. Bryson and husband, J. H. Bryson, and as to the defendants William Leaman, James W Watts, as executor of John D. Williams, deceased, and the devisees and legatees of said Williams; but that it be reversed as to E. F. Waldrop, the deed in question standing good as to him; and that an accounting should be had *de novo*,—the trustee being entitled to a credit of the $5,000 paid out by him under the settlement to the successful parties, and also to the liberal suggestion made by the referee, in regard to any compromises or collections

Digitized by Google

made by him of the notes, etc., due the estate since the execution of the deed.

The other questions raised in the appeal, it seems to us, need not now be considered, in view of the conclusion reached on the question above. I think that the judgment of the circuit court should be affirmed, except so far as E. F. Waldrop is concerned, and that as to him it should be reversed, and that the case be remanded for such further proceeding as may be necessary to carry out the views herein above announced. My brethren, however, do not concur as to Waldrop. They are of opinion that the judgment below should be affirmed as a whole, and in accordance therewith, it is the judgment of this court that the judgment of the circuit court be affirmed.

MCIVER, J., (*concurring specially.*) I concur in the conclusions reached by the chief justice, except that reversing so much of the judgment below as is in favor of the plaintiff E. F. Waldrop. I regard the transaction between the trustee, Samuel Leaman, and the remainder-men after the termination of the life-estate of Robert Workman, Jr., as a sale of their interests to the trustee; and the rule, as I understand it, is that, to sustain such a transaction, the trustee is bound to make the fullest and fairest disclosure of the nature and amount of the trust-estate. Now, although it cannot be doubted that E. F. Waldrop consulted competent counsel and obtained from him full information, so far as the records would show, it does not appear that his counsel either had or could have obtained any information as to the investment of a large amount of the trust funds in the tract of land which Leaman bought and took titles in the name of his wife, three-fourths of the purchase money having been paid out of the trust funds. On the contrary, Leaman, in his own testimony, says that he did not inform the parties of this investment of $1,500 of the trust funds. This, it seems to me, to say nothing of the other circumstances of the case, was a clear *suppressio veri*. But as the special master, in his full and clear report, has so satisfactorily vindicated his conclusions, it would be a work of supererogation to attempt to add anything to what is there so well said. I think the judgment of the circuit court should be affirmed.

MCGOWAN, J. I concur with Mr. Justice MCIVER.

(82 Ga. 105)

DIXON *v.* WILLIAMS.

(*Supreme Court of Georgia.* March 1, 1889.)

EXECUTION—CLAIM BY THIRD PERSON—LABORER'S LIEN.

1. A claimant of personal property levied on under execution on foreclosure of a laborer's lien is not concerned as to the regularity or validity of the foreclosure proceedings, and cannot move to have them dismissed. The only proper motion for him to make is to dismiss the levy as to the property shown to be his.

2. An affidavit is sufficient which seeks to foreclose a laborer's lien in a summary manner, not against land, but against the property of the defendant, and where the execution is levied upon personal property only; and the fact that the clerk in issuing it inserted therein the words "lands and tenements" does not vitiate the execution as to the personal property.

Error from superior court, Brooks county; HANSELL, Judge.

Before the ordinary of Brooks county, on August 14, 1885, C. N. Williams made affidavit that G. G. Potter, of said county, was indebted to him $328.53 principal, and $9.58 interest, "for manual labor performed by said Williams and his minor son, Alonzo Williams, who is a minor, and worked for said Potter, by consent of his father, but his said father, C. N. Williams, was to receive the pay for his said son. Said C. N. Williams avers that he and his said son worked for said G. G. Potter as laborers in and about a factory run by said Potter in Brooks county, Ga.; that, of the $328.53 due said Williams for said labor, the sum of $253.53 is due for affiant's own labor in and about said factory, and the sum of $75 is due affiant for the labor of affiant's said son in and about said factory. Affiant avers that as such laborers he and his said son faithfully performed and completed his contract of labor with said Potter; that since said sum became due he demanded payment of same of said Potter, who refused to pay said debt, and still refuses to pay the same." Affiant further avers "that he makes this affidavit within 12 months of the time said sum of money became due, and for the purpose of foreclosing his laborer's general lien upon the property of said G. G. Potter, now in said county of Brooks." This affidavit was filed in the office of the superior court clerk, upon the same day; and upon the same day the clerk issued execution against "the goods and chattels, lands and tenements of G. G. Potter" for the full sum of principal and interest claimed, and also for costs, "which amounts C. N. Williams has this day recovered against said G. G. Potter by a foreclosure of a laborer's lien for principal, interest, and costs;" the execution being made returnable to the ensuing term of the superior court of said county. Upon the same day this execution was levied upon certain machinery, waste, and other personalty. Potter made defense to this foreclosure, denying the indebtedness, denying that plaintiff was a laborer, denying that he ever made any contract for the labor of Alonzo Williams, and denying that any demand for the payment of the debt was ever made upon him. The issue thus made was found against him. W. N. Dixon then interposed a claim to the property levied on. Upon the trial of the claim case claimant moved to dismiss the affidavit, execution, and levy for the following reasons: (1) Because the proceeding was not in conformity with the law authorizing the enforcement of liens, but was informal and illegal; (2) because plaintiff sought to recover for the labor of his son, a

Digitized by Google

minor; (3) because of a misjoinder in proceeding for the recovery for his own labor as well as for his son's; (4) because there was no allegation setting forth the terms of the contract, as required by law; (5) because, in making the usual oath for the enforcement of his liens against personalty, he further claims in his affidavit that his lien extended to all the property of defendant in the county of Brooks; (6) because the execution did not follow the affidavit; (7) because the execution was illegal in being directed against the goods and chattels of the defendant, and his lands and tenements as well. This motion was overruled. Plaintiff tendered in evidence the verdict of foreclosure, the execution and the levy, which were admitted by the court over the objections of claimant, for the reasons set forth in his motion to dismiss. Plaintiff introduced oral testimony tending to show that the property levied upon was, at the time of the levy, in the possession of Potter, and that it was Potter's property. No evidence seems to have been introduced by claimant. The property was found subject, and claimant moved for a new trial on the grounds stated in the opinion. It was ordered by the court that a new trial be granted unless plaintiff should deduct from the verdict his claim for the services of his son, and write off the same. Plaintiff did write off said sum, and defendant excepted, and contends that a new trial should have been granted unconditionally.

J. G. McCall and *D. W. Roundtree*, for plaintiff in error. *W. B. Bennett*, *J. B. Bennett*, and *E. P. S. Denmark*, for defendant in error.

SIMMONS, J. It appears from the record in this case that Williams foreclosed his laborer's lien against Potter, and had the same levied on certain personal property. Potter made defense to the foreclosure, and denied the indebtedness, and denied that the plaintiff was a laborer, and also denied that any demand for the payment of the debt was ever made upon him. Upon this issue the jury found against him. Dixon interposed a claim to the property levied upon. On the trial of the claim case claimant moved to dismiss the affidavit, execution, and levy, upon the grounds set forth in the report of this case. This motion was overruled by the court. The plaintiff then tendered in evidence the affidavit of foreclosure, the execution, and the levy. The claimant objected thereto on the same grounds that he had before made in his motion to dismiss and quash the execution. This objection was overruled. Plaintiff introduced oral evidence to show that the property levied upon was, at the time of the levy, in possession of Potter, and that it was Potter's property. The claimant introduced no evidence. The jury found the property subject, and the claimant moved for a new trial upon the following grounds: *First*, error in refusing to dismiss the foreclosure proceedings; *second*, because the verdict was contrary to law and to the evidence; *third*, error in admitting in evidence the affidavit, execution, and levy.

1. The court overruled the motion, and the claimant excepted. There was no error in overruling the motion on any of the grounds taken therein. The claimant had no right to move to dismiss the foreclosure proceedings. It was a matter that did not concern him, whether the execution was legal or illegal, as between the plaintiff and the defendant in the execution. The only proper motion for him to have made at that stage of the trial would have been to dismiss the levy. If the court had granted his motion it would have relieved his property (if it was his) from the execution. Gazan v. Royce, 78 Ga. 512, 3 S. E. Rep. 753, and cases cited.

2. There was no error in overruling the motion upon the second ground. There was sufficient evidence to authorize the finding of the jury that the property belonged to Potter, the defendant in the execution. The claimant failed to introduce any evidence whatever denying that it was Potter's property.

3. Nor was there any error in overruling the motion upon the third ground taken therein. In our opinion, all the necessary allegations were made in the affidavit to foreclose the lien. It did not seek to foreclose the lien in a summary manner against land, but against the property, of the defendant, and the execution was levied upon personal property. In the case of Snow v. Council, 65 Ga. 123, relied on by counsel for the plaintiff in error, the laborer sought to foreclose, not only upon the personal property, but upon land also, and the court dismissed the proceedings; holding that a laborer could not foreclose his lien in a summary manner upon land. If that case is well decided, it differs from this as above mentioned. The fact that the clerk, in issuing the execution, inserted therein "lands and tenements," did not vitiate the execution. It was good at least against the personal property. Mitchell v. Printup, 19 Ga. 579; Skipper v. Chess Carley Co., 76 Ga. 752. Judgment affirmed.

(82 Ga. 592)

BENNETT *et al.* v. GRAY.

(*Supreme Court of Georgia.* March 23, 1889.)

LIENS ON SAW-MILLS—PROCEDURE.

1. Under Code Ga. § 1985, declaring that "all persons furnishing saw-mills with timber, provisions, or any other thing necessary to carry on the work of saw-mills, shall have liens on said mills and their products," an affidavit for lien properly alleges that the provisions were furnished to the mill of the person named, and not to the person himself.

2. It is not necessary to allege that the provisions were furnished under a contract.

3. Where the affidavit states that "provisions" were furnished, it need not state that they were necessary.

4. The fact that the execution issued on the affidavit directs the sheriff to levy on the engine and fixtures as well as the saw-mill and lumber, does not make the execution void. If the engine and fixtures were not a part of the saw-mill, the direction as to them was surplusage, and the execution

Digitized by Google

would still be good against the saw-mill and products.

5. An affidavit stating that R. McD. Bennett is a member of the firm of J. F. Bennett & Co., (the lienors,) and that he is the duly-authorized agent of the firm to make the affidavit, signed "J. F. BENNETT & Co., by R. McD. BENNETT," is not the affidavit of the firm, but that of R. McD. Bennett.

Error from superior court, Ware county; ATKINSON, Judge.

H. P. Brewer and *J. L. Sweat*, for plaintiff in error. *C. Symmes*, *S. W. Hitch*, *L. A. Wilson*, and *E. H. Myers*, for defendants in error.

SIMMONS, J. On the 13th day of July, 1886, R. McD. Bennett made oath before the ordinary of Ware county that he was a member of the firm of J. F. Bennett & Co.; that in the months of February, March, April, and May, 1886, they furnished "to the saw-mill of J. M. Bryan, of said county, said mill being situated in said county, at Gordonia, on the Brunswick & Western Railroad, on lot of land number 91 in the Seventh district of said county, provisions and other things necessary to carry on the work of said saw-mill, all of the aggregate value of $233.34. Affiant avers that said amount of $233.34 is now due and unpaid, and that after the same became due he * * * demanded payment of the same of said J. M. Bryan, the owner of said mill, and also of Mrs. Bryan, the wife of the said J M.," who refused, and still refuse to pay; that the demand was made before the expiration of 12 months after the amount became due; and affiant, as duly-authorized agent of J. F. Bennett & Co., makes this affidavit within 12 months after the said amount became due "for the purpose of foreclosing the lien of the said J. F. Bennett & Co. on said saw-mill, and all the lumber now piled and on the yard of said mill, said lumber being the product of said mill." The affidavit is signed "J. F. BENNETT & Co., by R. McD. BENNETT." Upon this affidavit execution was issued "that of J. M. Bryan of said county, and of a certain saw-mill, engine, and fixtures, situated at Gordonia, on the Brunswick & Western Railroad, on lot of land 91 in the Seventh district of said county, and of the lumber on the yard of said saw-mill, said lumber being the product of said mill," there should be made the sum above mentioned, "which J. F. Bennett & Co., for the purpose of foreclosing their lien for articles furnished said mill, made affidavit is due and owing from the said Bryan, the owner of said mill," etc. Upon this execution entry of levy was made on "one saw-mill, engine, and fixtures, situated at Gordonia, on the Brunswick & Western Railroad, on lot of land number 91 in the Seventh district of said county, and all of the lumber now in the yard of said saw-mill," said property levied on as the property of J. M. Bryan. Gray interposed a claim to the property levied on. After issue joined, plaintiff offered his execution and the affidavit as evidence. Claimant objected to the same, and moved to dismiss the levy, and quash the *fi. fa.* on the following grounds: (1) The affidavit alleges that plaintiff furnished the mill of Bryan, and not Bryan; (2) the affidavit is sworn to by Bennett & Co; (3) the *fi. fa.* does not follow the affidavit; (4) withdrawn; (5) the affidavit does not state that the articles furnished to Bryan's mill were under a contract, there being no privity of contract established between plaintiffs and Bryan, to whose mill the goods were alleged to have been furnished; (6) levy void for uncertainty; (7) affidavit does not state what was furnished, except provisions, and that the articles furnished were necessary. Upon the hearing of the motion, plaintiff offered to attach a bill of particulars, if required which was not allowed. The motion was sustained, and plaintiffs excepted. The court erred in dismissing the levy in this case upon any of the grounds contained in the motion.

1. The affidavit properly alleged that the provisions were furnished the mill of Bryan. Section 1985 of the Code declares that all persons furnishing saw-mills with timber, provisions, or any other thing necessary to carry on the work of saw-mills, shall have liens on said mills and their products. The affidavit therefore followed this section of the Code.

2. The next objection is that the affidavit was sworn to by Bennett & Co. We do not think that this exception is well taken. The affidavit sets out that R. McD. Bennett is a member of the firm of J. F. Bennett & Co., and that he is the duly-authorized agent of said firm to make this affidavit. It is true that he signs it "J. F. BENNETT & Co., by R. McD. BENNETT," but in our opinion this did not make the affidavit invalid. It was not the affidavit of Bennett & Co., but of R. McD. Bennett, and if it had been false he could have been indicted for perjury.

3. The next exception is that the execution does not follow the affidavit. This exception is rather vague and uncertain, but we suppose it means that the execution directed the sheriff to levy on the engine and fixtures as well as the saw-mill and lumber. We do not think that would make the execution or the levy void. If the engine and fixtures were not part of a saw-mill, it was surplusage on the part of the clerk to insert them in the body of the execution, and the execution would still be good against the saw-mill and the products of said mill. Dixon v. Williams, ante, 468, last term, and cases there cited.

4. The next exception is that the affidavit does not state that the articles furnished to Bryan's mill were furnished under a contract. We do not think it is necessary, under this section of the Code, to set out the fact or the terms of the contract between the parties. The affidavit does state that the articles were furnished to the saw-mill of Bryan, and states the nature of the articles furnished, and the owner of the mill at the

Digitized by Google

time they were furnished; and we think this was a sufficient compliance with section 1985 of the Code.

5. It is complained in the next ground that the levy was void for uncertainty. It seems to us that it was sufficiently certain and specific. It states that the property levied upon is "one saw-mill, engines, and fixtures," "and all of the lumber now in the yard of said saw-mill," "situated at Gordonia, on the Brunswick & Western Railroad," and the county, the number of the district, and the number of the land lot are also stated. We are at a loss to see how it should have been made more certain.

6. It is also complained that the affidavit does not state what was furnished, except provisions, and that the articles furnished were necessary. The affidavit states that provisions were furnished, and under this section of the Code it is not essential to allege that provisions were necessary. If any other thing is furnished except timber, logs, and provisions, it would then be proper to state that such other things were necessary; for the Code says: "All persons furnishing timber, logs, provisions, or any other thing necessary to carry on the work of saw-mills." If any other articles than those above enumerated should be furnished, the person furnishing the same should then allege that these articles were necessary to carry on the work of the saw-mill. Here, as stated before, the plaintiff alleged that he furnished provisions. It is no more required to allege that provisions were necessary than it would be that the logs or timber were necessary for the mill. Judgment reversed.

(82 Ga. 550)

BROWN *et al.* v. MERCER.

(*Supreme Court of Georgia.* March 23, 1889.)

DISCOVERY—CONTINUANCE.

The provisions of the Code touching discovery at law apply as well to plaintiffs not residing in counties where suits are pending as to those residing there. Where interrogatories are prepared, filed, and commission attached, and where notice of the same has been duly given, if the discovery sought is material, and such as the law requires to be made, if it be not made, a continuance at the instance of the opposite party should be granted.

(*Syllabus by the Court.*)

Error from superior court, Pulaski county; KIBBEE, Judge.

Martin & Smith, for plaintiff in error. *Jordan & Watson, contra.*

BLECKLEY, C. J. The court below held that Code, §§ 3810–3814, touching discovery at law, is not available in behalf of defendants against a plaintiff who is a non-resident of the county in which the suit is pending. We think this construction erroneous. The language of section 3810 is: "Discovery may be had from the opposite party, either nominal or real, in any case pending in any court in this state." And section 3811 says: "The party seeking the discovery may either subpœna the other party as a witness, or else file interrogatories and sue out a commission, as in cases provided for other witnesses." The terms, "as in cases provided for other witnesses," qualify both the right to subpœna and the right to file interrogatories. As other witnesses cannot be brought by subpœna, if they are non-residents of the county in which the cause is pending, neither can a party to the suit be so brought. But it does not follow that such party may not be examined by interrogatories. On the contrary, by the general law applicable to witnesses, (Code, § 3877,) any witness whatever who resides out of the county may be so examined. So far from a non-resident plaintiff being exempt from the obligation to make discovery by answering interrogatories, it is the sole mode by which he can be called upon for discovery at law. A party residing in the county may perhaps be examined in either method,—that is, in person, at court, (his attendance having been enforced by subpœna) or by interrogatories; but, unless he does reside in the county, the only way to reach him is by interrogatories. That a non-resident party is amenable to this mode of examination is clear, not only from the Code, but from prior statutes on the subject. See Cobb's Dig. pp. 465–467; Acts 1853–54, pp. 50, 51. The plaintiff having failed to answer, the court erred in overruling the motion for continuance made by the defendants below based on that ground. The most moderate penalty for such default was the continuance asked for and denied. Judgment reversed.

(82 Ga. 579)

SAVANNAH, ETC., RY. CO. v. FLANAGAN.

(*Supreme Court of Georgia.* Feb. 8, 1889.)

RAILROAD COMPANIES—ACCIDENTS AT CROSSINGS.

1. The declaration alleging that the locomotive was not supplied with proper brakes, evidence respecting its brakes, as compared with those of other locomotives belonging to the same company, was admissible.

2. Where the speed of a train at the time of a negligent homicide occurring upon a public street was material, evidence to show what the speed was on the company's property just before reaching the street was not irrelevant.

3. It was not error to receive evidence of doubtful admissibility, and such was the character of the evidence showing the high speed at which the same engine was habitually run by the same engineer at the same place, and that he habitually neglected to ring the bell.

4. It was admissible to prove that after the homicide the engines of the company were run more slowly along the street which was the scene of the accident.

5. What the company's master machinist testified to at a previous trial of the same case was not admissible against the company, he being still alive and accessible as a witness; but the evidence improperly admitted was not so material as to require a new trial.

6. Nor was there such materiality in the evidence touching the comparative expenses of the deceased and his widow while they were husband and wife.

7. The charge of the court, construed as a whole, was free from substantial error upon the material points.

8. In so far as the trial judge stated facts or his opinion upon facts, he dealt only with matters admitted or conceded. The charge so stating, it is to be taken as true, the contrary not appearing.

Digitized by Google

9. Inasmuch as the instructions warranted the jury in deducting, not only necessaries, but the cost of luxuries, from the value of the life of the husband, the rule of damages was quite as favorable to the company as that suggested in Railroad Co. v. Rouse, 77 Ga. 393, 3 S. E. Rep. 307, if not more favorable.

10. The fact that the husband killed by the running of the company's locomotive was one of the employés of the company would not preclude his widow from recovering damages, though he may have been in some degree negligent, the homicide occurring on a public street, remote from the place at which the deceased rendered service to the company, and at a time when he was off duty, and had no concern with the business or affairs of the company.

11. The verdict is supported by the evidence.

(*Syllabus by the Court.*)

Error from city court of Savannah; HARDEN, Judge.

Chisholm & Erwin, for plaintiff in error. *Denmark & Adams, contra.*

BLECKLEY, C. J. The record makes the following questions on the admissibility of testimony: Was it competent to show that the engine which ran over the deceased was supplied with a hand-brake only, and that most or all other engines of the company had air-brakes? Was it admissible to show the speed of the engine while on the company's property, and approaching the street where the accident occurred? Was it admissible to show the habitual high speed of the same engine when run by the same engineer, for some time previously, at the same place where the accident occurred? Was it admissible to show that after the accident the engines of the company ran more slowly at that place? Was it admissible to show the habit of the engineer while running the same engine previously, at the same place, not to ring the bell? Was it admissible to prove what the company's master machinist had testified to on a previous trial? Was it admissible to prove that the deceased did not have expensive or extravagant habits; that he got less benefit from his wages than his wife derived from them; that her clothes and medical attention cost more than his; that she was sick very often, etc.?

1. The objection to the evidence touching brakes was that it was irrelevant, because no foundation for it was laid in the declaration. The declaration alleged that the engine was old and worn out, with brakes in bad condition, and not supplied with proper brakes. This, we think, was a sufficient basis for the evidence in question.

2. The speed of the train in approaching the place of accident, although at the time the speed was noticed by the witness the train was not upon the street, but upon the company's property, was not wholly irrelevant. The distance from the scene of the accident was not very considerable, and the engine was then upon the same journey which in its further progress resulted in the homicide. There is some little presumption that the speed of a train, when once shown, continues to be the same, for a short distance at least, until a change of speed appears from the testimony; and we do not know that this presumption is varied by the fact that the train passed in the mean time from the company's property to the street. As trains do not run alone, but have one or more persons upon them, it is generally in the power of the company to show a change of speed, if any in fact took place.

3. The habitual high speed of this same engine, when run previously by the same engineer, on the same street, was of doubtful admissibility. The authorities upon the question conflict. For the affirmative might be cited State v. Railroad Co., 58 N. H. 410; State v. Railroad Co., 52 N. H. 528; Shaber v. Railroad Co., 28 Minn. 103, 9 N. W. Rep. 575; Randall v. Telegraph Co., 54 Wis. 140, 11 N. W. Rep. 419; Craven v. Railroad Co., 72 Cal. 345, 13 Pac. Rep. 878; Henry v. Railroad Co., 50 Cal. 176; Sheldon v. Railroad Co., 14 N. Y. 218. For the negative, see Gahagan v. Railroad Co., 1 Allen, 187; Railroad Co. v. Lee, 60 Ill. 501; Railroad Co. v. Woodruff, 4 Md. 242; Parker v. Publishing Co., 69 Me. 173. Patt. Ry. Accident Law, 421, throws the weight of his opinion on this side. Upon so doubtful a question we think the court did not err in admitting the evidence. There are several cases in our Reports holding that doubtful evidence is to be admitted, rather than excluded. What has been said upon this point applies equally to evidence touching habitual failure to ring the bell.

4. There is much authority to the contrary, (see Patt. Ry. Accident Law, 421, 422,) but we think consistency with our own decisions requires us to hold that it was admissible to show that, after the accident, the engines of the company ran more slowly at the place of the accident than they did previously. The cause of this change of speed was a question for the jury. Railroad Co. v. Renz, 55 Ga. 126; Railroad Co. v. Gleason, 69 Ga. 200. The evidence was certainly of very slight value, but its admissibility did not depend upon what it proved, but upon its tendency.

5. As the master machinist of the company was, so far as appears, still in life, and might have been produced as a witness, it was certainly error to admit in evidence against the company what he had testified to on a previous trial of the case. We can find no possible reason for recognizing his declarations, whether made upon oath or not, as admissions by the company. Certainly the trial of an action for an alleged tort is no part of the *res gestæ* of the tort itself, and the general rule is that declarations of an agent are not to be attributed to the principal, unless they are a part of the *res gestæ*. But this testimony, taken in the light of all the facts of the case, was not of sufficient materiality to require a new trial because of its improper admission.

6. The same may be said touching the admission of evidence to prove that the deceased did not have expensive or extravagant hab-

Digitized by Google

its; that he got less benefit from his wages than his wife derived from them; that her clothes and medical attendance cost more than his; that she was sick very often, etc. While some or all of this testimony was perhaps inadmissible, according to the strict rules of law, it did not, under the charge of the court, so enter into the measure of damages as to prejudice the railway company. And in this respect the present case is distinguishable from Railroad Co. v. Rouse, 77 Ga. 393, 3 S. E. Rep. 307. In that case the court recognized an estimate made upon what would be required to support the wife and children, as an element in arriving at the amount of damages. No such standard was pointed to in this case.

7. Several exceptions were taken to the charge of the court. The whole charge is set out in the record, and, construing it altogether, we think it substantially stated the law of the case on the material points with fairness to both parties. Some objectionable passages appear, and did they stand alone, unmodified by other passages, they might be held erroneous. We see no good ground for a new trial in anything which the charge contains.

8. The complaint that the judge expressed an opinion upon the facts as to two or three matters is met by a statement in the charge to the effect that these matters were admitted or conceded. This statement should be taken as true, there being no verified contradiction of it in the bill of exceptions or elsewhere in the record. Brantly v. Huff, 62 Ga. 532.

9. This case having arisen prior to the act of 1887 forbidding any deduction from the value of the life on account of personal or other necessary expenses of the deceased, the rule for computing damages laid down in Railroad Co. v. Rouse, 77 Ga. 393, 3 S. E. Rep. 307, was applicable; and not only did the presiding judge give the railway company the full benefit of that rule, but went further, and treated luxuries which the deceased was accustomed to enjoy as being a subject-matter for deduction the same as necessary expenses. Certainly this was not only fair to the company, but liberal.

10. The instruction requested — that if Flanagan, at the time he received his injuries, was in the employ of the defendant, and, if he contributed to the injury by any negligence, his widow cannot recover — was properly refused; for the reason that Flanagan was not only not on duty as a servant of the company at the time he was killed, but was not at or near the scene of his duties. He was on the public street of Savannah, and occupied the footing, in every respect, with reference to the running of the company's trains at that place, of the general mass of the public. We think, therefore, that the rule of contributory negligence applicable to the public under like circumstances was applicable to him. Nor does this view militate in any degree with the case of Railroad Co. v. Henderson, 69 Ga. 715, or any of the cases therein cited.

11. It is not clear to us that the damages awarded by the jury were excessive, or that the verdict was contrary to evidence or the law. We think the evidence made a somewhat doubtful case for recovery, but, the jury and the presiding judge having been satisfied with it, we see no cause for reversing their decision. Judgment affirmed.

(86 Va. 19)

RICHMOND & D. R. CO. v. NOELL *et al.*

(*Supreme Court of Appeals of Virginia.* April 11, 1889.)

RAILROAD COMPANIES—STOCK-KILLING.

1. In an action against a railway company for wrongfully obstructing a street with an engine and cars, whereby certain horses and mules of plaintiffs were frightened, and caused, as is alleged, to run on the track, and were killed by defendant's trains, it is error to charge the jury, that if defendant obstructed the street, except for the purpose of loading or unloading passengers, and that such obstruction was the cause of the animals being turned onto the track, "whereby the injury complained of was sustained, they must find for plaintiffs," unless plaintiffs could have prevented them from "reaching said point of crossing" by reasonable diligence, as it is thereby assumed that the killing necessarily resulted from the stock being turned upon the track, and for the further reason that it does not require as a condition precedent to recovery that plaintiffs should have used reasonable diligence to secure the animals after they passed the crossing, and went upon the track.

2. A railroad company is liable for stock killed under such circumstances by its negligence, though such negligence was ordinary, and not gross.

Error to corporation court of Danville; JOHN D. BLACKWELL, Judge.

Trespass on the case by J. R. Noell and Thomas Starling, partners trading as Noell & Starling, against the Richmond & Danville Railroad Company, for the negligent killing of plaintiffs' horse and mules. Verdict and judgment for plaintiffs for $1,260, and defendant brings error.

Staples & Munford and *Berkley & Harrison*, for plaintiff in error. *Guy & Gilliam* and *A. J. Montague*, for defendants in error.

LACY, J. This is a writ of error to a judgment of the hustings court of the city of Danville, rendered at its April term, 1888. The action was trespass for killing one horse and six mules, the property of the defendants in error, upon the track of the railroad of the plaintiff in error. On the night of December 25, 1887, the mules and horse in question were unloaded at the depot of the plaintiff in error, known as the "Virginia Midland Railroad Depot," along with others, (42 in all,) on the north side of the Dan river; the city of Danville and the depot of the Richmond & Danville Railroad being on the south side of the said river. There were no cattle-pens at this depot, but the stock was all safely unloaded without accident. The defendants in error were not able, however, or did not succeed in getting a bridle on one of the two horses brought with the mules. The

Digitized by Google

drove of 40 mules, some of them unbroken, and the one loose horse, were started towards the stable in Danville, following a horse upon which a servant rode and led the horse which had been bridled. The drove passed safely over the bridge into Danville, the scene being lighted with electric lights, and on the south side of the river the bridge abutted on two streets, Main street and Bridge street. The servant and the lead horse passed on up Main street, and some of the mules followed after, but the loose horse and some of the mules started down Bridge street. An assistant of the defendants in error, well mounted and an expert horseman, dashed at full speed down this last-named street and attempted to head off the loose horse, now running wildly. These passed into Craghead street, about 18 mules following. Down this street a short distance is the Richmond & Danville depot, situated at the point where this street crosses the Richmond & Danville Railroad, and here a shifting-engine was standing with some empty cars, partly but not entirely obstructing Craghead street; these cars being gotten together to make up a train northward for Richmond, upon the arrival of the passenger train from the south, now shortly to arrive. The loose horse hesitated here, and the pursuing assistant horseman came along-side with whip and lash, and attempted to capture, and then to turn him around; but the horse escaped, and, passing by the front of the engine standing there, dashed off up the railroad track, closely pursued by the mounted man, and the mules following. The horseman shortly turned from his pursuit of the horse, and arrested 11 of these mules, and drove them back to the stable of their owners. Six of the mules, however, followed the loose horse up the track, down which then shortly came a passenger train, running down grade, at a great rate of speed, and they were all killed. The passenger train came in at 1:57 A. M., and a freight train came in at 5 A. M. The stock was not seen between these hours by the owners nor by others, except that the freight train operatives report the killing of stock,—one horse and one mule,—whereas the passenger train operatives make no such report, and stoutly deny it. It is, however, claimed by the defendants in error that the passenger train did the killing, because their witnesses testify that there was snow on the ground, and they did not see where the animals left the track; but it was snowing the first part of the night, and this may have obscured the tracks, and upon this point there is no special finding by the jury, and it does not appear to be very material whether one or both of these trains did the killing, as both have the same owner, there being uncontradicted evidence that each train killed some of the animals; but it is admitted that the owners of these mules and their servants, after following them up the track for some distance, turned back and left them to their fate, went to bed, and did not look for them until late next day, after both trains had come down the road, and found them all dead or dying.

Upon the trial in the hustings court the court gave certain instructions and refused others asked for by the plaintiffs, and gave others not asked for by either party, and the defendant excepted. And the defendant asked for seven instructions, which the court gave, striking out the word "gross" in the third and fifth instructions before the word "negligence," so as to instruct the jury that the plaintiffs, under the stated circumstances, could not recover unless the defendant had been guilty of negligence, refusing to excuse except for gross negligence, and holding it responsible for negligence simply, and the defendant again excepted. The jury rendered a verdict for the plaintiffs for the damages asked for, and the defendant moved the court to set aside the verdict and grant it a new trial, which motion the court overruled, and the defendant again excepted; and, judgment being rendered in accordance with the verdict, the defendant applied for a writ of error to this court, which was awarded.

At the trial the court gave the following instruction in lieu of the sixth instruction asked for by the plaintiffs: "The jury are instructed that if they believe from the evidence that the defendant company obstructed Craghead street by the placing of its engines, coaches, or cars across or upon said street at the point it crossed the railway, and that the placing of the same at the point of crossing was not for the purpose of loading or unloading passengers, and that such obstruction was the cause of the horse and mules in question being turned on and upon the road-bed of the defendant, whereby the injury complained of was sustained, they must find for the plaintiffs, unless they also believe that the plaintiffs, by the exercise of proper and reasonable care and diligence could have prevented the escape of said animals from their control, or could have stopped them, or in some way have prevented them from reaching said point of crossing, in which event they should find for the defendant;" the substance of which is that if the stock reached the obstructed crossing without the negligence of the plaintiffs, then if the engine turned or caused the mules to turn up the railroad track, then the jury should find for the plaintiffs, assuming as matter of inference that the injury was caused by the obstruction, whereas the same could only be established by proof. The obstruction of the street was unlawful unless the train was standing to load or unload passengers, and unless a passway was left open, (Acts 1883–84, p. 499,) and the railroad company was liable to fine and for such damages as should be caused to any person by the violation of this statute, (Code Va. § 2900;) but these damages must be proved, not inferred. It did not follow, as matter of law, that the injury complained of was caused by the stock

Digitized by Google

being turned up the railroad track, although it might have been so caused as matter of fact, and might have been believed to be so by the jury upon the evidence. It should therefore have been left to the jury to find the fact from the evidence whether the injury did so result from the turning of the stock from the street to the road-bed, as it might have resulted inevitably if a train in rapid motion had been then and there present, or if a precipice or open bridge had been proximate; and so it might have resulted, although none of these were imminent, if in fact such dangers had unavoidably thereafter supervened as matter of fact; while, on the other hand, it might not so have resulted if the plaintiffs and their servants had, by due diligence, rescued the stock from the threatened danger, (as they did actually rescue 17 and bring them off in safety.) The plaintiffs were not excused from making every effort to bring the stock back because the engine had obstructed the street. These mules and horses were runaway and escaped animals before they came to the crossing in question. The horses were rushing at full speed, and and the mules following close behind. They were not going towards, but rapidly away from, their stables. They were strange mules, in a strange city. They had never been to their stable, and were as likely to go one way as another in their fright and excitement, and some did go down the railroad and were unhurt, as some went up the railroad and were killed. Whether the stock in question were killed by being turned up the railroad track or not was a question of fact. They might have been turned up the railroad track, and still not have been killed thereby; they might have turned up the railroad track, and not have been injured at all; and they might have been turned up the railroad track, and injured by some agency to which this circumstance bore no casual relation whatever. It must be considered erroneous, therefore, for the court to instruct the jury that they were injured by being turned up the railroad; and that, if the railroad company did this, then they must find for the plaintiffs, regardless of the consideration whether the plaintiffs could by due and ordinary diligence have reclaimed them unhurt, and to cut off every extenuation, except such as preceded their being so turned up the railroad track. It is a fundamental maxim that the court responds to questions of law, and the jury to questions of fact. The court must decide on the admissibility of evidence, that being a question of law; but not as to its weight, after it is admitted, that being a question of fact; and the decided cases, says Mr. Conway Robinson, evince a zealous care to watch over and protect the legitimate powers of a jury. They show that the court must be very careful not to overstep the line which separates law from fact. They establish the doctrine that when the evidence is parol any opinion as to the weight, effect, or sufficiency of the evidence submitted to the jury, any assumption of a fact as proved, will be an invasion of the province of the jury. 1 Rob. Pr. 338; Cornett v. Rhudy, 80 Va. 710; McDowell v. Crawford, 11 Grat. 402; Bart. Law Pr. 214; Baring v. Reeder, 1 Hen. & M. 174; Moore v. Chapman, 3 Hen. & M. 266; Whitacre v. M'Ilhaney, 4 Munf. 310; McRae v. Scott, 4 Rand. (Va.) 463; Davis v. Miller, 14 Grat. 1; Hopkins v. Richardson, 9 Grat. 486; For this error the judgment must be reversed, and it is therefore not proper now to consider the question arising upon the motion to set aside the verdict as contrary to the law and the evidence, as upon the new trial which may be had the evidence may not be the same, and this question must depend upon what shall be then offered in evidence.

It may not be out of place, however, to observe that we have not discovered any other error in the instructions as given by the court, and the omission of the word "gross," as above stated, before the word "negligence," so as to hold the railroad liable for ordinary negligence towards stock on its track without the negligence or default of the owner, was not erroneous. Trout v. Railroad Co., 23 Grat. 619, and cases cited; Railroad Co. v. Griffin, 31 Ill. 303; Battle v. Railroad Co., 66 N. C. 343; Sneesby v. Railroad Co., L. R. 9 Q. B. 263, on appeal, 1 Q. B. Div. 42; Needham v. Railroad Co., 37 Cal. 410; Railroad Co. v. McBrown, 46 Ind. 229; 1 Thomp. Neg. 508, § 11; and other cited cases. For the reasons stated the judgment complained of must be reversed and annulled, and the cause remanded for a new trial to be had therein in the said hustings court of Danville city.

(86 Va. 40)

Ex parte MARX.

(*Supreme Court of Appeals of Virginia.* April 18, 1889.)

SABBATH-BREAKING — HABEAS CORPUS — TRIAL BY JURY.

1. Code Va. § 3799, provides that "if a person on a Sabbath day be found laboring at any trade or calling, or employ his apprentices or servants in labor or other business, except household or other work of necessity or charity, he shall forfeit two dollars for each offense." Section 2939 provides that any claim to a fine not exceeding $20, which would be recoverable by an action at law, shall be cognizable by a justice; the proceeding to be by civil warrant, as in the case of other small claims therein enumerated. Section 717 provides that, "when any fine is imposed by a justice, he may commit the defendant to jail until the fine and costs are paid, or until the costs are paid, where there is no fine, but he shall not issue any execution therefor." *Held*, that the fine prescribed for violation of the Sabbath is recoverable before a justice, and by a civil warrant.

2. Where the justice has jurisdiction, and the case has been conducted in strict conformity with the established rules of procedure in such cases, the sufficiency of the evidence upon which the judgment is based cannot be inquired into on *habeas corpus*.

3. The provision of Code, § 3035, that affidavits taken on reasonable notice may be read, in the discretion of the court or judge, in *habeas corpus* proceedings, refers only to such affidavits as are introduced to show illegality, and not mere irregularity, in the detention of the prisoner; and it does not authorize a review of the sufficiency of the evidence.

Digitized by Google

4. Where the statute provides that a defendant who is adjudged to pay a fine may be committed until the fine is paid, but prescribes no particular length of imprisonment, a commitment to jail "for the term of one year, unless the said fine be sooner paid," etc., is unwarranted, and the prisoner will be discharged on *habeas corpus*.

5. The constitutional right of trial by jury does not extend to the petty offense of laboring on the Sabbath, punishable by a small fine, and cognizable by a justice.

Habeas corpus.

Courtney & Patterson, for petitioner. *R. C. Baiston* and *R. G. Bickford*, for respondent.

LEWIS, P. In December, 1888, a judgment for a fine of two dollars and costs was rendered by STEPHEN WEST, a justice of the peace of Warwick county, against the petitioner, Oscar Marx, a Jew, for unlawfully carrying on his business as a retail merchant on a Sabbath day. Upon the rendition of the judgment the petitioner expressed to the justice a determination not to pay it, whereupon he was committed by the justice to the jail of the said county. The *mittimus* commands the jailer to receive the said Marx into his jail, "and there him safely keep for the term of one year, unless the said sum shall be sooner paid, or until he be otherwise discharged by due course of law." The petitioner thereupon, by his counsel, applied to this court for a writ of *habeas corpus*, which was awarded, and to which return has been made, setting forth in detail the facts just mentioned. He insists that he is illegally restrained of his liberty on three grounds: (1) Because the justice by whom the judgment was rendered had no jurisdiction to proceed against him, and therefore that the proceedings were *coram non judice* and void; (2) because the conviction is not warranted by the evidence; and (3) because, even if the justice had jurisdiction of the case, the commitment is void, because it transcends the power of the justice.

1. Section 3799 of the Code provides that "if a person on a Sabbath day be found laboring at any trade or calling, or employ his apprentices or servants in labor or other business, except in household or other work of necessity or charity, he shall forfeit two dollars for each offense; every day any servant or apprentice is so employed constituting a distinct offense." The section immediately following, however, excepts from the operation of the law "any person who conscientiously believes that the seventh day of the week ought to be observed as a Sabbath, and actually refrains from all secular business and labor on that day: provided, he does not compel an apprentice or servant not of his belief to do secular work or business on a Sunday, and does not on that day disturb any other person." The word "forfeit" here used is synonymous with "fine." Section 745. And the question, therefore, in this connection is, how is such fine to be enforced or collected, if it is collectable by judicial process at all?

Section 712 enacts that "where any statute imposes a fine, unless it be otherwise expressly provided or would be inconsistent with the manifest intention of the general assembly, it shall be to the commonwealth, and recoverable by presentment, indictment, or information. Where a fine without corporal punishment is prescribed the same may be recovered, if limited to an amount not exceeding twenty dollars, by warrant, and if not so limited, by action of debt, or action on the case, or by motion. The proceeding shall be in the name of the commonwealth." It is also provided by section 2939, which relates to "warrants for small claims," that any claim to a fine not exceeding twenty dollars, which would be recoverable by an action at law, shall be cognizable by a justice, the proceeding to be by civil warrant, as in the case of other small claims enumerated in the same section. And by section 717 it is enacted that, "when any fine is imposed by a justice, he may commit the defendant to jail until the fine and costs are paid, or until the costs are paid, where there is no fine, but he shall not issue any execution therefor." And this provision must be construed as giving the only means for carrying into effect a judgment of a justice for a fine in any case, civil or criminal. In other words, what would seem to be an implied authority to issue a *fi. fa.* upon a judgment for a fine under section 2948, relating to executions on judgments for small claims, is controlled by the express prohibition contained in section 717, which applies to all cases in which any fine is imposed by a justice; the term "impose" applying as well to the rendition of a judgment for a fine in a civil as in a criminal case. By the act of March 14, 1878, (Acts 1877–78, p. 377,) a justice was empowered in certain cases to issue an execution of *fi. fa.* or a *capias pro fine* for fines imposed by him, but that provision has been repealed.

It is thus apparent that not only is the statutory fine prescribed for a violation of the Sabbath recoverable before a justice, but there are in fact two remedies for such recovery. The first is by warrant of arrest, or a criminal prosecution; for the rule at common law is that, where a statute gives a justice jurisdiction over an offense, it impliedly gives him power to apprehend any person charged with such offense. Bac. Abr. tit. "Justices of Peace," E 5. And the second is by a civil warrant. The latter remedy was pursued in the present case, the proceeding having been commenced by a summons, in the form of an ordinary warrant in civil cases, and not by warrant of arrest; so that much of the argument, as to the validity of a conviction in any criminal case where the right of a jury trial is denied the defendant, is not applicable to the case before us. The warrant also set forth with technical precision the charge upon which the proceeding was based; that is to say, that the defendant, on a certain Sabbath day, did labor at his trade and calling, as a retail merchant,

Digitized by Google

etc., which was neither a work of necessity nor charity, etc.,—thus following the rule of pleading a statute, which is that if there is an exception in the enacting clause the party pleading must show that his adversary is not within the exception; but if there be an exception in a subsequent clause or section, or a subsequent statute, that is matter of defense, and is to be shown by the other party. 1 Chit. Pl. 223; 1 Bish. Crim. Proc. § 378. No point, however, is made upon the form of the warrant.

2. The case, therefore, was not only within the jurisdiction of the justice, but it was brought and conducted in strict conformity with the established rules of procedure in such cases, and hence the petitioner's second ground of objection—namely, that the conviction is not warranted by the evidence—cannot be maintained. The writ of *habeas corpus* is not a writ of error. It deals not with mere errors or irregularities, but only with such radical defects as render a proceeding absolutely void. It brings up the body of the prisoner, with the cause of his commitment, and the court can inquire into the sufficiency of that cause. But if he be detained in prison by virtue of a judgment of a court of competent jurisdiction, that judgment is in itself sufficient cause. An imprisonment under a judgment cannot be unlawful unless that judgment be an absolute nullity, and it is not a nullity if the court or magistrate which rendered it had jurisdiction to render it. Ex parte Watkins, 3 Pet. 193; Ex parte Rollins, 80 Va. 314.

The rule is very clearly stated in Ex parte Parks, 93 U. S. 18, as follows: "Where the prisoner is in execution upon a conviction, the writ ought not to be issued, or, if issued, the prisoner should at once be remanded, if the court below had jurisdiction of the offense, and did not act beyond the powers conferred upon it. The court will look into the proceedings so far as to determine this question. If it finds that the court below has transcended its powers, it will grant the writ and discharge the prisoner, even after judgment. But if the court had jurisdiction and power to convict and sentence, the writ cannot issue to correct a mere error;" citing Ex parte Watkins, supra; Ex parte Kearney, 7 Wheat. 38; Ex parte Wells, 18 How. 307; Ex parte Lange, 18 Wall. 163. See, also, Ex parte Siebold, 100 U. S. 371; In re Ayers, 123 U. S. 443, 8 Sup. Ct. Rep. 164, and cases cited. We are not, therefore, to inquire in the present case as to the correctness of the conclusion drawn by the justice from the evidence before him. In other words, whether the defendant, in point of fact, carried on his business on a Sabbath day, as charged in the warrant, or what was his belief in respect to the observance of a Sabbath, or whether, on any ground, his case came within the exception in the statute, were questions for the justice to pass upon, and hence are not to be re-examined here. The conviction is not void, and, not being void, is conclusive in this collateral proceeding; and the rule which gives it this effect is, as was declared by Chief Justice GIBSON in a *habeas corpus* case in the supreme court of Pennsylvania, absolutely necessary to prevent judicial proceedings from running into a state of incurable disorder. Com. v. Lecky, 1 Watts, 66.

In the celebrated case of Crepps v. Durden, Cowp. 640, an action of trespass against a justice was maintained before Lord MANSFIELD on the ground that in the proceeding complained of—which was for an alleged violation of the Sabbath—the defendant had acted without jurisdiction; that is to say, he imposed several penalties upon the plaintiff for a violation of the statute on the same day, and this was held to be illegal. But the law is well settled that a conviction by a magistrate, who has jurisdiction over the subject-matter, is conclusive evidence of the facts stated in it, when collaterally assailed. 1 Smith, Lead. Cas. 1079, notes to Crepps v. Durden. In Cave v. Mountain, 1 Man. & G. 257, the rule was declared to be this: "That if a magistrate commit a party charged before him in a case where he has no jurisdiction he is liable to an action of trespass. But if the charge be of an offense over which, if the offense charged be true in fact, the magistrate has jurisdiction, the magistrate's jurisdiction cannot be made to depend upon the truth or falsehood of the facts, or upon the evidence being sufficient or insufficient to establish the *corpus delicti* brought under investigation." The rule as thus expressed was quoted with approval by Lord Chief Justice DENMAN in the subsequent case of Reg. v. Bolton, 1 Adol. & E. (N. S.) 66, whose language, in delivering judgment, is peculiarly applicable to the present case. He said: "The affidavits, being before us, were used on the argument, and much was said of the unreasonableness of the conclusion drawn by the magistrates, and of the hardship on the defendant if we would not review it, there being no appeal to the sessions. We forbear to express any opinion on that which is not before us, namely, the propriety of the conclusion drawn from the evidence by the magistrates. They, and they alone, were the competent authority to draw it, and we must not constitue ourselves into a court of appeal where the statute does not make us such, because it has constituted no other." And to the same effect are numerous authorities.

Nor is the rule affected by that provision of the Code relating to the writ of *habeas corpus*, contained in section 3035, to the effect that affidavits taken on reasonable notice may be read in the discretion of the court or judge. The affidavits here referred to are such as are introduced to show illegality, and not mere irregularity, in the detention of the prisoner. The legislature never intended to give authority to this or to any other court to review upon affidavits on *habeas corpus* the judgment of another court for the purpose of

Digitized by Google

correcting mere errors in that judgment. The solemn judgments of the courts of the commonwealth are not to be collaterally set at naught in that way; and a judgment of a justice of the peace, whose jurisdiction over the case appears, is as secure from collateral attack as is a judgment of a court of general jurisdiction. Both in this regard stand upon the same footing; the only difference being that in respect to the former the jurisdiction must affirmatively appear, whereas in the latter case jurisdiction is presumed. Freem. Judgm. § 524; Hurd, Hab. Corp. 367; Comstock v. Crawford, 3 Wall. 396.

3. We are of the opinion, however, that the third point made by the petitioner is a good one; that is to say, the commitment is defective. The Code provides that a defendant who is adjudged to pay a fine may be committed until the fine is paid, but prescribes no particular term of imprisonment. The commitment, however, in the present case commands the petitioner to be kept in jail for a term of one year, unless the fine be sooner paid, etc. This was such a departure from the terms of the statute as to render the commitment invalid. If it be suggested that a commitment for a year, unless the fine be sooner paid, is not less favorable to a defendant than a general commitment until payment be made, and is therefore not to his prejudice, the answer is that the question is not to be determined with reference to any consideration of that sort, but according to the letter of the statute alone. See Jones' Case, 20 Grat. 848. The authority of the justice in such a case is derived exclusively from the statute, and must therefore be strictly pursued, else the commitment will not be valid. It is laid down in a work of high authority that, inasmuch as the power of a justice to convict an offender in a summary way without a trial by jury is in restraint of the common law, the special power given by the statute must be strictly pursued; otherwise the common law will break in upon him, and level all his proceedings. 1 Burn, J. P., tit. "Conviction." And the rule, of course, applies to the commitment. 6 Rob. Pr. 641. The petitioner is therefore entitled to be discharged from custody under the commitment of the justice, but an order will be entered commanding the officer in whose custody he is to again take him into custody, and forthwith carry him before the justice by whom he was committed, to be further dealt with according to law. Authority for such procedure, if authority were needed, may be found in Young's Case, 1 Rob. (Va.) 744.

It is proper, however, to add that we do not concur in the view urged by counsel for petitioner that, inasmuch as no provision is made for a jury trial before a justice of the peace, section 717 of the Code, authorizing a commitment for a fine imposed by a justice, is unconstitutional. The proceeding in question, as already said, was in its nature not criminal but civil. The commitment is not a part of the punishment annexed to the offense, but is a means provided for carrying the judgment into effect after the trial is over. And even if the nature of the proceeding were otherwise the result would be the same. The provision of the constitution relied on, namely, that "in all capital or criminal prosecutions a man hath a right * * * to a speedy trial by an impartial jury," is not to be construed as extending any more than restricting the right of trial by jury as it existed at the time the constitution was adopted. It is the right as known and enjoyed by the people of the state at that time that is preserved and guarantied by the constitution. And we know that Sabbath-breaking and a great variety of petty offenses of the same class were not only cognizable by a justice at the time our constitution was adopted, but for centuries before. Blackstone, whose Commentaries were published before the Revolution, and whose partiality for the common-law system of trial by jury is displayed throughout his great work, devotes a whole chapter to the subject of summary convictions, in the course of which he says: "Another branch of summary proceedings is that before justices of the peace, in order to inflict divers petty pecuniary mulcts and corporal penalties denounced by act of parliament for many disorderly offenses, such as common swearing, drunkenness, vagrancy, idleness, and a vast variety of others, for which I must refer the student to the justice books formerly cited," etc. 4 Bl. Comm. 280. And in Burn's Justice, referred to by Blackstone, an almost infinite number of such offenses are mentioned, and forms given for their prosecution; among them being the offense of publicly crying, showing forth, or exposing to sale any goods, wares, or merchandise (with certain exceptions) on the Lord's day, for which the offender, upon conviction before a justice, was required to pay a fine, and in default of such payment it was directed by the statute that he be ordered to be publicly set in the stocks. 3 Burn, J. P., tit. "Lord's Day." See, also, Bac. Abr. tit. "Justices of Peace" E; Cooley, Const. Lim. 410, note; Proff Jury, § 95. Pomeroy in his note to Sedgwick on the Construction of Statutory and Constitutional Law, at page 487, well says: "It is the right of trial by jury which exists and is preserved, and what that right is is a purely historical question,—a fact to be ascertained like any other social, legal, or political fact. As a constitution speaks from the time of its adoption, the fact of the right to jury trial, which is ascertained to have existed at that time, must necessarily determine the meaning of the clause which recognizes and preserves that right." The adjudged cases to the same effect are numerous and uniform. Many of them are collected by the learned annotator of the American Decisions (Mr. Freeman) in his note to the case of Steam-Boat Co. v. Roberts, 48 Amer. Dec., at page 186, to which we refer. The subject was considered by the supreme court of the United States in the recent case of Callan v. Wilson, 127 U. S. 540,

Digitized by Google

8 Sup. Ct. Rep. 1301, and while it was there held that the crime of conspiracy, such as was charged against the defendant in that case, was not of a class of petty or minor offenses triable without a jury, consistently with the constitution, in the police court of Washington, in the District of Columbia, yet it was conceded, in the opinion of the court, that there is a class of minor offenses which are so triable; and many of the cases so decided were cited, including Byers v. Com., 42 Pa. St. 89, and State v. Glenn, 54 Md. 572. It was also held in the same case that, where a party is entitled to be tried by a jury at all, he is entitled to be so tried in the first instance, and that a right of appeal to a higher court, in case of conviction, where he is accorded a jury trial, does not meet the requirements of the constitution. The question is an important one, and there are decisions the other way; but, as it does not arise in the present case, we express no opinion upon it. An order will be entered in conformity with this opinion.

(86 Va. 63)

UTTERBACK *et al. v.* MEHLINGER *et al.*

(*Supreme Court of Appeals of Virginia.* April 18, 1889.)

JUDICIAL SALES—CONFIRMATION.

After the commissioner's report ascertaining liens had been confirmed without exception, and a sale ordered to satisfy the same, a further account of outstanding liens was directed. The report of the sale, afterwards made, showed that the land sold for an unusually high price, and was confirmed without objection from any creditor, but no distribution was ordered. The amount of liens reported greatly exceeded the price for which the land sold. *Held*, that the sale was properly confirmed without a further account of liens.

G. D. Gray and *Brooke & Scott*, for appellants. *J. F. Rixey* and *W. L. Jeffries*, for appellees.

FAUNTLEROY, J. This is an appeal from a decree of the circuit court of Culpeper county, entered on the 6th day of June, 1888, in a chancery suit therein pending, in which E. Mehlinger and others are complainants and G. A. Utterback, E. G. Utterback, A. V. Utterback, and S. E. Utterback, and George T. Freeman, trustee, are defendants. The suit was instituted by the judgment creditors of the said Utterbacks to subject the real estate of the said judgment debtors to the payment of their said judgments. At the August rules, 1886, the complainants filed their bill, and at the September term, 1886, a decree was entered reciting that the process in the suit had been duly served upon all the defendants, taking the bill as confessed as to all, and ordering an account of liens, amounts, and priorities, the fee-simple and annual value of the lands, the relations of principals and sureties in the said judgments, and the order in which the lands of the defendants should be subjected to the payment of said judgments. In September, 1887, nearly one year after the entering of the decree ordering the account as aforesaid, the master returned his report, which was confirmed September 12, 1887, without exception. The said report stated that the land (239½ acres) was assessed at the valuation of $1,914, and that the judgment liens binding upon it amounted to $4,450.27; whereupon the court, reciting its opinion that the whole of the 239½ acres would have to be sold, appointed the counsel for the creditors in the suit and the counsel for the judgment debtors as commissioners to execute the decree for sale. At a subsequent day of the same term a decree was entered stating that it was suggested to the court that there were other judgments against G. A. Utterback, and directing a further account of any outstanding liens against the land of G. A. Utterback. The commissioners of sale reported to the court that, after advertising the time, place, and terms of sale, as required by the decree of the court, they sold at public auction, in front of the court-house door, on March 10, 1888, the 239½ acres of land to W. E. Hackley at $13.25 per acre; that the purchaser had complied with the terms of sale; and that the said land had been assessed at $8 per acre; and they recommended the confirmation of the sale. At the June term, 1888, the court, reciting in its decree that the sale had been regularly made, and for a high and unusual price, more than 50 per cent. over its assessed value, and that it was necessary to sell the whole of the 239½ acres of land, confirmed the sale, but did not dispose of the proceeds. From this decree of confirmation of sale these judgment debtors have taken this appeal.

No creditor is complaining. The judgment debtors allege as error that some of the papers had been lost, but they do not allege that the land did not sell for a fair price, or that it was unnecessary to sell the whole of the land. The record shows that the court had before it all the papers necessary in passing upon the confirmation of sale,—its former decrees, the master commissioner's report of liens, the value of the land, etc., and the report of sale. It was unnecessary to have the lost papers, or wait until they could be set up, before passing upon the sale. The purchaser insisted that the court should either confirm the sale or release him, and the land had been sold for 50 per cent. above its assessment, and for a higher price than it would probably bring at a future day. The court did nothing more than it was authorized to do, so far as the lost papers were concerned, by Code 1887, § 3376. Another ground of error alleged is that the commissioners of sale made the sale, and the court confirmed it, before the order of the court, made September 14, 1887, directing a "further account of any outstanding liens against the land of the said G. A. Utterback" had been executed. That order has never been executed so far as this record shows, and, while it was clearly to the interest of the judgment debtors to hold on to and enjoy the land, it was the right and interest of the

Digitized by Google

judgment creditors to have the sale confirmed at the high and extraordinary price which it had brought at a sale regularly made under a confirmed report of liens, to which there were no exceptions, and which was not recommitted. The land was sold in March, 1888, and while it is all that the creditors can get from the appellants, whose interest it is to protract this litigation as long as they can possess and enjoy the land, it is a matter of utter indifference to them how greatly the land shall depreciate in value. The creditors all ask that the sale shall be confirmed, and the court certifies that the land brought a high price, and the judgment debtors make no claim or pretense that the land would ever bring as much again. Indeed, the record shows that the appellants attended the sale, and, by bidding, run the land up upon the purchaser till they stopped bidding upon the advice and admonition of their friends that the land was selling for more than its value. It was said by this court in Effinger v. Kenney, 79 Va. 553: "We are satisfied from the evidence that the land was sold for a fair price. No advanced bid was offered, no creditor is complaining, and there is nothing in the record to warrant the belief that, if the land were again offered for sale, it would command a larger price." In the case of Trimble v. Herold, 20 W. Va., 611, the court says: "But it is also insisted that the report of sale ought not to have been confirmed, and that the sale should have been set aside, because the amount and priorities of the liens were not fixed when the sale was ordered. * * * There is nothing in this record to show that Harold was injured in the slightest degree by the error in the decree ordering the sale. There is no evidence that the property was sold for a dollar less than it otherwise would have sold for if such error had not been committed." And the court affirmed the decision of the lower court confirming the sale. The sale in the case under review was made in pursuance of a decree of the court confirming a report of liens and priorities, and the decree complained of does not dispose of the proceeds of sale, but only confirms a sale of the land for a high price, which was regularly made under its order, and the proceeds of sale do not pay much more than one half of the regularly ascertained and admitted and reported judgment debts for which the land was decreed to be sold. There is nothing in the proceedings which could by any possibility be prejudicial to the rights of the appellants, and the decree appealed from is without error, and it is affirmed.

(86 Va. 51)

JAMESON *v.* MAJOR'S ADM'R *et al.*

(*Supreme Court of Appeals of Virginia.* April 18, 1889.)

WILLS—CONSTRUCTION—APPEAL.

1. Testator bequeathed money in trust for his daughter E. for life, "and after her death" to be equally divided among "her surviving children and the issue of such as may be dead, such issue taking *per stirpes*, and not *per capita*," etc. E. survived testator, and left issue. One of her sons died during her life-time, and after testator's death, and left one daughter who also died during E.'s life-time, without issue. *Held*, that the vesting of the remainder in the children of E. or their issue depended on their surviving, not E., but the testator, and therefore the administratrix of the granddaughter of E. mentioned was entitled to share in said legacy, as under the will the issue of E.'s children took, not by substitution to the rights of their deceased parent, but as original legatees.

2. A decree on a bill for the settlement of a testator's estate, the construction of the will, and the payment of a legacy claimed thereunder, which adjudges the complainant entitled to a fixed sum as such legacy under the construction given the will, and directs future proceedings in the cause to conform to the principles therein expressed, the cause remaining in court for the collection of funds and the payment of the legacies, is not a final decree, as it grants no relief and leaves something still to be done by the court; and though it may be appealed from under Code Va. § 3454, allowing an appeal from a decree adjudicating the principles of a cause as well as from a final decree, the party aggrieved may at his option defer his appeal until the final decree, from the rendition of which the statute of limitations begins to run.

FAUNTLEROY, J., dissenting.

Appeal from circuit court, Culpeper county.

Petition filed by Kate Jameson, as administratrix, etc., of the estate of Eliza Corbin Jameson, in certain chancery causes pending in said court against the administrator *d. b. n. c. t. a.* of William Major, deceased, and others, for the construction of decedent's will, and for other relief. Decree in her favor, and Philip L. Jameson appeals.

Green & Miller, *G. D. Gray*, and *J. W. Bell*, for appellant. *J. C. Gibson* and *A. McD. Green*, for appellee.

LACY, J. This is an appeal from three decrees of the circuit court of Culpeper county, rendered respectively on the 2d day of April, 1883, the 17th of September, 1887, and the 4th of June, 1888. The case is as follows: William Major, the elder, died in 1848, having first made and published his last will and testament, as to the fourth clause of which this controversy has arisen, by which he made provision for his daughter, Elizabeth T. C. Jameson, for her life, and, after her death, for her surviving children and the issue of such as might be dead. The life-tenant died in 1871, and in 1883 the appellee, Kate Jameson, filed her petition in the chancery cause then pending in the circuit court of Culpeper for the settlement of William Major's estate, the object of which petition was to have a proper construction of the said fourth clause of his will. As much of this clause as is necessary to be stated is as follows: "*4th Clause.* I give to my executors hereinafter named, or to that one who for the time being shall qualify and act as such, the sum of six thousand dollars, in trust for the sole and separate use of my daughter, Elizabeth T. C. Jameson, wife of John Jameson, for and during her life, and after her death the same is to be equally divided amongst her surviving children, and the issue of such as may be dead, such issue taking *per stirpes*,

Digitized by Google

and not *per capita*," etc. The admitted facts are that "William Major, Sr., died in the year 1848; Elizabeth T. C. Jameson died in the year 1871. At the death of William Major, Sr., Corbin D. Jameson, a son of Elizabeth T. C. Jameson, was living. Corbin D. Jameson, died in 1864, leaving a child, Eliza Corbin Jameson, surviving him, who died in 1865." The said Elizabeth T. C. Jameson had four children: Corbin D. Jameson, (who married the said petitioner, Kate Jameson,) John W. Jameson, (who survived his mother, and died without issue and intestate,) Eliza Jameson, (who married J. J. Porter, and died in 1859, leaving no child,) and Philip L. Jameson, the appellant. In her said petition Kate Jameson claimed to be entitled to one-third of the said legacy of $6,000, as administratrix and distributee of her said child, Eliza Corbin Jameson. By the decree of April 2, 1883, she was declared to be entitled to one-third of the said legacy, with interest from the date of the death of the said life-tenant; the same adjudged to be the true construction of the said fourth clause, and all future proceedings in the clause were directed to be in accordance with said construction. In March, 1886, Philip L. Jameson filed his petition in said cause for a rehearing of the said decree of April, 1883. On the 17th of September, 1887, the prayer of this petition was denied and the petition dismissed; and on the 4th of June, 1888, a decree was rendered directing the receiver to collect certain funds in the cause, and pay over to Kate Jameson the said one-third part of the said $6,000, whereupon the appellant applied for and obtained an appeal to this court.

The first question to be here determined arises upon the motion of the appellee, Kate Jameson, to dismiss the appeal as improvidently awarded, upon the ground that the decree of the 2d of April, 1883, was a final decree as to the matter in hand, and, two years having elapsed before an appeal was applied for, the statute of limitations barred the appeal. This question presents neither novelty nor difficulty. As was said by STAPLES, J., in Ryan v. McLeod, 32 Grat. 376: "According to the uniform decisions of this court, a decree which disposes of the whole subject gives all the relief that is contemplated, and leaves nothing to be done by the court, is only to be regarded as final. Vanmeter's Ex'rs v. Vanmeters, 3 Grat. 142; Harvey v. Branson, 1 Leigh, 108. On the other hand, every decree which leaves anything in the cause to be done by the court is interlocutory as between the parties remaining in the court." In the language of Judge BALDWIN in Cocke v. Gilpin, 1 Rob. (Va.) 20: "When the further action of the court in the cause is necessary to give completely the relief contemplated, there the decree upon which the question arises is to be regarded, not as final, but interlocutory." The rule laid down in Cocke v. Gilpin has been repeatedly recognized by this court, and is now the established doctrine. Fleming v. Bolling, 8 Grat. 292; Ambrouse's Heirs v. Keller, 22 Grat. 769, 774; Rawlings v. Rawlings, 75 Va. 76; Elder v. Harris, Id. 68; Battaile v. Hospital, 76 Va. 63; Pace v. Ficklin, Id. 292; Johnson v. Anderson, Id. 766; Wright v. Strother, Id. 857; Miller v. Cook, 77 Va. 806; Trust Co. v. Foster, 78 Va. 413; Cralle v. Cralle, 81 Va. 773; Jones v. Turner, Id. 709; Parker v. Logan, 82 Va. 376. An appeal will lie to this court from a decree adjudicating the principles of a cause, although the same may not be a final decree, (section 3454, Code Va.;) and an appeal also lies from a final decree. So that a party may appeal at once from a decree settling the principles in a cause against him, or he may, at his option, await the final decree in the cause, and then appeal. There is no limitation upon the time wherein an appeal will lie from an interlocutory decree settling the principles of the cause, such running only as against the final decree, the statute providing under the law now in force that "no petition shall be presented for an appeal from * * * any final * * * decree, * * * which shall have been rendered more than one year before the petition is presented." Section 3455, Code Va. The decree of April 2, 1883, was a decree which adjudicated the principles of the cause, and from it, as such interlocutory decree adjudicating the principles of the cause, the appellant might have appealed, but he was not barred by his failure to do so until the final decree had been rendered in the cause. By the said decree of April 2, 1883, no relief was granted; no money decreed to be paid. Something was left for the court to do, and that was to decree the relief prayed for, and that was not done until the 4th of June, 1888, and the appeal was allowed in September following, and was within the statute, which at that time was two years. Code 1873, § 17, c. 178. The motion to dismiss the appeal must therefore be overruled.

The error assigned by the appellant to the decree of April, 1883, is that the circuit court erred in its construction of the fourth clause of the will of William Major, Sr., in decreeing that Kate Jameson, as administratrix of her said child, became entitled to one-third part of said legacy of $6,000, with interest from the date of the death of Elizabeth T. C. Jameson, and he insists that the rule which reads a gift to survivors simply, as applying to objects living at the death of the testator, is confined to those cases in which there is no other period to which survivorship can be referred, and that, where such gift is preceded by a life or other prior interest, it takes effect in favor of those who survive the period of distribution, and of those only, (citing 3 Jarm. Wills, 5th Amer. Ed. 588; Van Tilburgh v. Hollinshead, 14 N. J. Eq. 32; Williamson v. Chamberlain, 10 N. J. Eq. 373; Slack v. Bird, 23 N. J. Eq. 238; Hill v. Bank, 45 N. H. 270; Sinton v. Boyd, 19 Ohio St. 30; Blatchford v. Newberry, 99 Ill. 77;) that when a testator uses the words "my surviving children,"

Digitized by Google

the court should determine that he meant to refer to those surviving him; but when he refers to the surviving children of another, he should be held to refer to those only who survive such other. This question is one of intention, and the cardinal rule is to collect the intention of the testator from the whole will taken together, without regard to anything technical, and, if the intent be lawful, —that is, does not create perpetuities or violate any rule of law, — then the courts will give it effect. Words of survivorship, in cases where these come in question, are to be referred to the period of the death of the testator, unless some contrary intent appears. Randolph v. Wright, 81 Va. 611, 612; Hansford v. Elliott, 9 Leigh, 79–94; Newton v. Ayscough, 19 Ves. 536; 2 Jarm. Wills, 736, 738, 740, 741; Taaffe v. Conmee, 10 H. L. Cas. 78; Stone v. Lewis, 5 S. E. Rep. 282. The bequest "to my daughter for and during her life, and after her death the same to be equally divided among her surviving children," standing alone, provides for the children of the life-tenant, and for them only who survive their mother. But the words "and the issue of such as may be dead, such issue taking *per stirpes* and not *per capita*," raise a question of some difficulty, and the precise question appears to have been decided not always uniformly. When the payment of a legacy is postponed to a period subsequent to the decease of the testator, if futurity is annexed to the substance of the gift, the vesting is suspended, but, if it appears to relate to the time of payment only, it vests *instanter*. If the bequest is to a person at the age of 21 years, or at the end of a definite period after the death of the testator, or is made contingent upon the happening of some future event at the death of the life-tenant before the death of the legatee, the vesting, not the payment merely, is deferred; and, consequently, when the legatee dies before the period ends, or the contingency happens, the legacy fails. It would be otherwise, obviously, if the legacy should be given in the first instance to the legatee, and then payment postponed; and when the question arises upon the construction of a clause substituting the children of legatees who die before the period of distribution and enjoyment, if there are express provisions requiring the children thus substituted to survive in like manner such period or event, the rule would be the same as to them. But that is not this case. Here we have no express requisition that the children thus substituted shall survive such period; and the question is whether the substituted gift is by necessary intendment to be construed as applying only to such issue as may happen to be living at such period, or whether the issue surviving the parent are absolutely entitled,—in other words, whether the gift to the issue is by implication subject to the same contingency of survivorship as the gift to the parents.

Before any adjudication upon this, Mr. Jarman says the prevalent notion seems to have been that in such cases it was not allowable to ingraft on the gift to the issue an implied qualification, in order to assimilate their interest to that of their parents; Vice Chancellor WOOD observing in Re Wildman's Trusts, 1 Johns. & H. 302, which was approved by TURNER, L. J., in Re Pell's Trust, 3 De Gex, F. & J. 293: "It is said there is no satisfactory reason why a condition of survivorship should attach to a parent, and not to a child,—a remark with which I cannot altogether agree, for there is a very considerable difference in their positions. It is intelligible that a gift to children should be limited to those who survive the tenant for life, there being a gift over to their issue; but, in the case of issue, why a share should be distributed among surviving issue, giving nothing to the representatives of those who may be dead, is not so clear. If all are to participate, any of them, in making arrangements on marriage or otherwise, may rely upon this: that should he die before the share falls in, his family will take it. This observation does not apply to the case of children under a condition that they must survive the tenant for life, with substituted gifts to issue, because, notwithstanding the condition of survivorship, their families are provided for. On the construction which would limit the issue entitled to those who survive the tenant for life, the objects of the testator's bounty are placed in a position which is not such as the testator would desire. To these considerations must be added the inclination of the court to avoid the suspense of shares, as far as can be done consistently with the expressed intention."

These considerations have often been held to outweigh the authority of contrary decisions, and it is now settled that children are not by implication required to survive the period of distribution as expressed with regard to their parents, in whose place they stand, whether the gift to the issue be original, as when it is to such of a class of legatees as survive the period of distribution and the issue of such as are then dead, or strictly substitutional,—that is, divesting a previous vested gift to the parent. In the late case of Martin v. Holgate, L. R. 1 H. L. 175, decided in the House of Lords in 1866, the Lord Chancellor (Lord CRANWORTH) said: "There has been a conflict of decisions on this question, and I do not hesitate to say that in the course of the argument, and even since, my mind has from time to time considerably fluctuated. I have come to the conclusion that the appellant is right." The decision by the master of the rolls is reported in 34 Beav. 79, (Holgate v. Jennings.) The testator by his will gave the "rest, residue, and remainder of my estate and effects, in trust, to pay over the annual proceeds thereof to my said dear wife, for and during the term of her natural life, and from and immediately after her decease to distribute and divide the whole of my said residuary estate amongst such of

Digitized by Google

my said four nephews and two nieces [naming them] as shall be living at the time of her decease, in equal shares; but, if any or either of them should then be dead, leaving issue, then it is my will and meaning that such issue shall be entitled to their father's and mother's share, but in equal proportions." What happened was this: The wife survived her husband, and at the death of the testator all these four nephews and nieces were living. Two of the nephews died during the life-time of the tenant for life, without leaving issue. Another of them, Edward Jennings Martin, died during the life-time of the widow, leaving a daughter, Augusta Mary Martin, who afterwards died an infant, also in the life-time of the testator's widow. So that, at the death of the widow, only one nephew and two nieces were living. The master of the rolls decided that the property became divisible into three parts, and went to the surviving nephew and two nieces; to which the representatives of Augusta Mary Martin excepted and appealed. The decision of the master of the rolls was sustained by the authority of Lord LANGDALE in Bennett v. Merriman, 6 Beav. 360, and Vice-Chancellor KNIGHT BRUCE in Macgregor v. Macgregor, 2 Colly. 192, and in Kirkman's Trusts, 3 De Gex & J. 558. But in favor of the contrary construction—that which gave to the child a vested interest at its birth—was the authority of the late Vice-Chancellor SHADWELL in Lyon v. Coward, 15 Sim. 287; of the late Vice-Chancellor PARKER in Barker v. Barker, 5 De Gex & S. 753; of Vice-Chancellor STUART and Lord Justice TURNER. And the Lord Chancellor was of the opinion, and it was so decided by the house of lords, that Augusta Mary Martin took a vested interest in one-fourth of the residuary estate of the testator. The case was regarded, however, as one of so great nicety that the costs were decreed out of the testator's estate, the word "issue" being construed to mean children, and the gift to the children was held not to be substitutional, but an original gift; Lord CHELMSFORD observing: "It is not to nephews and nieces absolutely, and, in the event of their dying in the life-time of the tenant for life, then to their children, but to such of the nephews and nieces as shall be living at the death of the tenant for life, and to the children of such of them as shall then be dead, leaving children. The shares which the children are to take could never have vested in their parents, because it is only in the event of the parents not having become entitled to them that they are given to the children. This distinction between original and substitutional gifts may furnish some aid to the construction of the will. Where a gift is substitutional it may much more easily be presumed that a contingency on which the original gift depends is intended to be applied to the gift which comes in its place than in the case of two original and independent gifts." The case of Austin's Adm'r v. Bristol, 40 Conn. 120, is a case somewhat similar to the one at bar; the grandchild in that case surviving the father, (who predeceased the testator,) and then died before the tenant for life. In that case it was held that the grandchild took an immediate vested interest under the will, and that her administrator was entitled, after the death of the widow, to one-fifth of the estate; citing Martin v. Holgate, supra, and the subsequent case of In re Orton's Trust, reported in L. R. 3 Eq. 375. And the case was decided upon the weight of authority, the judges expressing some hesitation in the matter.

We see no defect in the reason of the rule that if futurity is attached to a gift, which postpones the substance of the gift, the vesting is suspended, because the will so provides, and the intention of the testator must be given effect; but if futurity is not expressly attached to the substance of the gift, it is by presumption only that it can be so annexed, and there is no reason to presume it in the case of one gift because it is annexed to another independent gift, and it is more reasonable to presume that the testator expressed his intention than that it was omitted. The taking of the children is expressly postponed to the death of their mother, and the gift is then to such as survive her; but the gift is simply to the issue of such as may be dead, this being a gift to the issue, not of what the father took under the will, but of what he could not take, and because he could not take it under the contingency; and the issue took, not by substitution, but an original gift, to which no condition of survivorship of the life-tenant is annexed by the testator. The decrees of the circuit court appealed from so deciding, we think they are right, and they must be affirmed.

LEWIS, P., and HINTON, J., concurring. RICHARDSON, J., absent. FAUNTLEROY, J., dissents.

---

102 N. C. 477

GOODMAN *et al.* v. SAPP *et al.*

(*Supreme Court of North Carolina.* April 15, 1889.)

PARTITION—JURISDICTION—EVIDENCE—INSANITY—TRIAL.

1. Under the policy of Code Civil Proc. N. C., that all matters of controversy growing out of the same transaction, or concerning the same subject, between all the parties having an interest therein, be disposed of in one action, a proceeding for partition, commenced before the clerk of the superior court, should not be dismissed, where defendant alleges himself to be sole owner. The superior court has jurisdiction thereof.

2. Where witness has testified without objection that grantor's mind was very weak, and that she did not know "what she was about in making the deed," it is not error to allow him to testify that "she was no more competent to make a deed two weeks after date of the deed than she was before."

3. It is within the discretion of the court to permit counsel in the argument to state that the adverse party, who was not sworn, was in court, and had the right to contradict certain testimony, and did not avail himself of the opportunity.

Digitized by Google

Appeal from superior court, Cabarrus county; BROWN, Judge.

Special proceeding by J. P. Goodman and others against T. H. Sapp and others. Defendants appeal.

W. J. Montgomery, for appellants. *Lee S. Overman* and *Paul B. Means*, for appellees.

DAVIS, J. This was a special proceeding commenced before the clerk of the superior court of Cabarrus county for sale of land for partition, and heard before BROWN, J., at January term, 1889, of the superior court in term, upon issues presented by the complaint and answer. The complaint alleges that Katie Safrit died in 1882, seised and possessed of the land in controversy, and that the plaintiffs and defendants (other than Peter Cruse) are her heirs at law, upon whom the said real estate descended, and that Peter Cruse claims title in fee under a pretended deed from Thomas H. Sapp to a portion of the land described. The defendants Thomas H. Sapp and Sarah, his wife, answer, denying all the allegations of the complaint, and alleging that the defendant Sarah Sapp is the sole owner in fee of said land, except a portion named, which they say is owned by their co-defendant, Cruse. The defendant Cruse answers, and claims to be the sole owner in fee of the portion of said land described in his answer. Upon the trial before his honor, the defendants moved to dismiss the action, "upon the ground that it was apparent upon the pleadings that the clerk did not have jurisdiction." "His honor intimated that the clerk did not have jurisdiction of the matter in controversy between the plaintiffs and the defendant Cruse, whereupon the action was dismissed as to the defendant Cruse, and the land claimed by him," and his honor held that the court had jurisdiction as to the other defendants. The defendants excepted. Whether his honor erred in ruling that the clerk had no jurisdiction as to the defendant Cruse we are not called upon to determine. The plaintiffs did not appeal.

We think it clear that the court had jurisdiction as to the other defendants. McBryde v. Patterson, 73 N. C. 478. Whatever may be the construction to be placed upon chapter 276 of the Acts of 1887, the action ought not to have been dismissed, and there was no error in his honor's ruling of which the defendants can complain. This disposes of the first exception.

"It was admitted upon the trial that Katie Safrit was at one time the owner of the land in dispute, and that she died the owner thereof, unless she had conveyed the land to one George Safrit, under whom the defendant Sarah Sapp claimed. It was further admitted that the heirs at law of Katie Safrit were correctly stated in the complaint." The following issues were submitted: "(1) Is the defendant Sarah Sapp sole seised of the whole of the land described? (2) Is the defendant Sarah Sapp the owner of George Safrit's share or interest?" The defendants offered in evidence a deed from Katie Safrit to George Safrit dated August 25, 1873, and a deed from George Safrit to Sarah Sapp dated September 2, 1873, conveying the land in controversy. The consideration in both deeds was stated to be $500. Many witnesses were examined on both sides, and the evidence is sent up with the record. That on the part of the plaintiffs tended to show that Katie Safrit was an old woman, of very weak mind; that she was incapable of understanding, attending to, or transacting any business; that she could not understand a deed; and one of the witnesses speaks of her as "idiotic." The evidence also tended to show that the land was worth $3,000. George W. Safrit testified, among other things, as follows: "Sapp got after me to get mother [Katie Safrit] to come and live with him. Said he would give me a horse to get mother away from Goodman's. I got the horse, and mother came to Sapp's to live. She lived there a couple of weeks or better before the deed was made. * * * I never made any deed to Sarah Sapp. Thomas Sapp and witness went to Sol. Fisher's to get the deed written. Sapp offered $500 if I would make him a deed. We got on a spree, and went up to Roseman's. Here I suppose he got me to sign something else. I don't know what I did there, nor when I signed it. Sapp gave me liquor, and insisted on my drinking. If I signed a deed, I don't remember it." He also said: "Sapp never paid me anything." George Shank testified that he was at Roseman's; that Sapp and Safrit asked Roseman to write for them; that he wrote some, and asked to whom the deed was to be made. Sapp said: "To Sarah Sapp, of course." "Did not see the deed signed. Safrit acted curious; had been drinking," etc. T. J. Safrit testified that he was a son of Katie Safrit. Saw her at Sapp's and at Goodman's. "Sapp got at me to get the old man and old lady to assign over the land for life to him and me. He wrote the instrument, [handed witness,] and got me to get mother to sign it, and instead of putting my name in he put his own." This witness was allowed to testify, after objection: "She [Katie Safrit] was no more competent to make a deed two weeks after date of the deed than she was before." This constitued the defendant's second exception. The witness had testified without objection that her mind was very weak, and that she did not know what she "was about, in making the deed." We can see no force in the objection. The testimony of the witnesses for the defendant tended to show that Katie Safrit had capacity to make a deed. S. Fisher testified that he knew Katie Safrit. "Think she had sense enough to make a deed, if explained to her. Never saw her do anything foolish. I wrote deed from Mrs. Safrit to George. Thomas Sapp and George got me to do it," etc.

"The plaintiffs' counsel, in his argument to the jury, stated that Sapp, the defendant, had procured the deed from George Safrit

Digitized by Google

without paying anything for it; that from the recital in the deed he had obtained a $3,000 tract of land for $500; that from the evidence of Safrit it was proven that Sapp got him drunk, and procured the deed from him when he did not know what he was about. Sapp was in court, and had the right to contradict Safrit if that was not the truth, and he did not avail himself of the opportunity and right to contradict him. In the midst of this argument made by the plaintiff's counsel defendants objected that counsel had no right to comment on the fact that the defendant was in court, and failed to avail himself of his right to contradict the statements set forth. Court overruled the objection, and permitted the counsel for plaintiff to argue that Sapp was in court, and had the right to contradict George Safrit, if Safrit had not told the truth, and did not avail himself of his rights. Defendant excepted." This constitutes the defendants' third exception. The power and the duty of the court to check counsel when abusing his privilege in commenting on witnesses and their testimony, and on the conduct of parties to the action, is clearly settled by many decisions. Very soon after the change by statute allowing parties to actions to testify it was adjudged that the mere fact that a party, plaintiff or defendant, did not testify in his own behalf was not the proper subject of comment. In Devries v. Phillips, 63 N. C. 53, the court was asked to charge the jury "that, inasmuch as the defendant was a competent witness, the fact that he did not offer himself as a witness in his own behalf authorized the jury to presume the facts against him. His honor declined to give the instruction, but charged the jury that they might consider the circumstance, and give to it what weight they thought proper," etc. In commenting on this ruling Judge READE said: "It is true, as a rule of evidence, that where, in the investigation of a case, facts are proved against a party which it is apparent he might explain, and he withholds the explanation, the facts are to be taken most strongly against him. * * * We conclude that the fact that the party does or that he does not offer himself as a witness, standing alone, allows the jury to presume nothing for or against him, and can only be the subject of comment as to its propriety or necessity in any given case, according to the circumstances, as the introduction or non-introduction of any other witness might be commented on." In Gragg v. Wagner, 77 N. C. 246, but three persons were present at the bargain and execution of the deed in controversy,—the plaintiff, the draughtsman, and the defendant. The two former were examined on behalf of the plaintiff. The defendant was not present, but was in the state of Oregon, and it was not alleged that he knew facts other and different, in connection with the execution of the deed, from those testified to by the witnesses present, and counsel was not permitted to comment upon the fact that he had not offered himself as a witness. The court said: "It is the privilege, but not the duty, of a party to an action to offer himself as a witness in his own behalf, and he is not the proper subject for unfriendly criticism because he declines to exercise a privilege conferred upon him for his own benefit merely. The fact is not the subject of comment at all; certainly not unless under very peculiar circumstances, which must be necessarily passed upon by the judge presiding at the trial as a matter of sound discretion. Only an abuse of that legal discretion is reviewable here." Peebles v. Horton, 64 N. C. 374; State v. Williams, 65 N. C. 506; Jenkins v. Ore Co., Id. 563; State v. Bryan, 89 N. C. 534; State v. Sugg, Id. 527; Guy v. Manuel, Id. 83; State v. Rogers, 94 N. C. 860; and Chambers v. Greenwood, 68 N. C. 278; and numerous other authorities,—settle the general principle that the extent to which counsel may comment upon witnesses and parties "must be left ordinarily to the sound discretion of the judge who tries the cause, and this court will not review his discretion unless it is apparent that the impropriety of counsel was gross, and calculated to prejudice the jury." It is said by Judge READE in Chambers v. Greenwood, supra: "The mere manner of conducting the trial below is and ought to be so much within the discretion of the presiding judge that an alleged irregularity must be palpable, and the consequences important, to induce us to interfere." And this is said in citing and approving Devries v. Phillips, where it is said that his introduction or non-introduction should be the subject of comment only as the introduction or non-introduction of other witnesses might be. We think this is the necessary result of the change made by section 1350 of the Code. It will be noted that there is a difference between section 1352, which relates to civil actions, and section 1353, which relates to criminal actions. In the latter it is expressly declared that a failure of the defendant to testify "shall not create any presumption against him." The reason for the difference readily suggests itself. The doctrine laid down is not in conflict with Wilson v. White, 80 N. C. 284; Greenlee v. Greenlee, 93 N. C. 278; Kerchner v. McRae, 80 N. C. 219; or Blackwell v. McElwee, 96 N. C. 71, 1 S. E. Rep. 676. If the defendant in the present case had had any witness present who was cognizant of and could have contradicted the damaging facts testified to, and failed to introduce such witness, we think it would have been the subject of proper comment; and the ruling of his honor in this respect does not entitle the defendants to a new trial.

The next exception is "because his honor in his charge recapitulated the evidence merely, and did not state it in its legal bearing upon the issue submitted to the jury." The charge of his honor is set out in full and at length. A careful examination of it will show that the exception is without any foun-

Digitized by Google

dation. It is a clear statement of the law as applicable to the evidence, and we deem it unnecessary to reproduce it here.

The last exception is to the following special instruction given by his honor, the ground of exception being "because there is no evidence that Thomas H. Sapp procured Katie Safrit to make the deed to George Safrit": "I am requested to charge you that if the jury believe from the evidence that Katie Safrit was weak in mind, from old age, so as not to understand and know what she was doing, and while in that condition Thos. H. Sapp procurred Katie Safrit to execute a deed to George Safrit for a tract of land worth $3,000, for a consideration of $500, with the intention of shortly thereafter procuring a deed from George to his own wife, Sarah, such transaction is void. I so charge you, and if you so believe you must answer first issue, 'No.'" The evidence is not reproduced by us in full, but so much of it only as is sufficient to show that his honor was fully warranted in giving the charge complained of. There is no error.

(102 N. C. 532)

GORDON *et al. v.* AVERY *et al.*

(*Supreme Court of North Carolina.* April 22, 1889.)

STATUTE OF FRAUDS—VENDOR AND VENDEE—MORTGAGES—TRIAL.

1. On one side of a sheet of note paper a piece of land was described by metes and bounds, one of the latter being the R. road. Following this was a blank space, after which was written and signed a receipt from C. of a certain sum "in part payment on a lot on R. road." On the opposite side of the paper was a promissory note by C. to pay the person whose name was signed to the receipt a certain sum on a lot "on the R. road." After this were the words: "Balance due, $20, at 8 per cent. interest." *Held* a sufficient memorandum of a contract for the sale of the land described.

2. The vendor not having availed of the statute, but having recognized and acted on the contract, and, at the request of the vendee, conveyed the land to defendant, and defendant having paid part of the price, the vendee's mortgagee acquired the right to the land for the purpose of the mortgage, subject to the vendor's right to the balance of the price.

3. Defendant, having had notice of the mortgage when he took title and paid the price or part of it, holds for the purposes of the mortgage subject to so much of the price as he paid, unless his right to the land antedates the mortgage.

4. But, if the vendee abandoned the contract and consented that defendant pay for the land and take title before the mortgage was given, the mortgage conveyed nothing.

5. In a suit to foreclose the mortgage, defendant having alleged and plaintiff having denied facts giving him such prior right, the issue should be tried.

6. A mortgage by parol or otherwise, not registered, given to defendant to secure the vendee's indebtedness to him, would not prejudice the subsequent mortgagee whose mortgage is registered, though defendant would be entitled to subrogation to the rights of the vendor to the extent of the price paid by him.

Appeal from superior court, Burke county; ARMFIELD, Judge.

Mortgage foreclosure by Theodore Gordon and others against M. C. Avery, Austin Collett and wife, and Rufus Avery. Defendants appeal.

C. M. Busbee, Batchelor & Devereux, and *J. T. Perkins,* for appellants. *S. J. Ervin,* for appellee.

MERRIMON, J. The following is a copy of the material parts of the case settled on appeal:

"Plaintiffs bring suit for the foreclosure of a mortgage dated the 21st of July, 1887, to secure the sum of $253.90, a part of which sum, to-wit, $129, had been secured by a former mortgage, dated the 30th day of October, 1885. That said mortgages were given by the defendant Austin Collett, who claimed an interest in the land therein described under the following writings: 'Collett boundary. Beginning at a stake on Grant's corner, and running north with the Rocky Ford road to Tate's line; then west with Tate's line 18 poles, to a stake in Tate's line; then southward to Grant's black oak, and then with said line to beginning; containing 1¼ acres more or less.' On the same piece of paper on same side, is the following: 'Received of Austin Collett $33 in part payment on a lot on Rocky Ford road, October 27th, 1885. M. C. AVERY.' On the opposite side of the same piece of paper is the following: 'Austin Collett, promise to pay Mrs. M. C. Avery 53 dollars on a lot adjoining W. Grant's, on the Rocky Ford road, by the 1st of March, 1886. [Signed] AUSTIN COLLETT. Balance due, $20, at 8 per cent. interest.' It further appears from the complaint that at the time said mortgages were executed by said Collett the legal title to said land was in the defendant M. C. Avery.

"Defendant M. C. Avery demurs to the complaint, and, among other causes of demurrer, sets up the statute of frauds. His honor sustains the demurrer as to her, but does not dismiss the action. Defendants except. Defendant Rufus Avery demurs *ore tenus* for the causes assigned in the demurrer of M. C. Avery. Demurrer overruled, and defendants except. Defendant Rufus Avery answers, and sets up the statute of frauds, and further, that the said Austin Collett was justly indebted to him, and had given him his note on the 1st of April, 1885, for the sum of $150, same being seven months prior to plaintiffs' first mortgage, and more than two years before the second mortgage, and that said indebtedness has been greatly increased since that time by his letting said defendant have money and goods. Defendant Rufus Avery further pleaded that he had paid the purchase money. His honor held that the statute of frauds had no application, by reason of the admission in the answer. Defendants excepted.

"The following issue was submitted to the jury: 'Did defendant Rufus Avery become bound for the purchase money of the land prior to the execution of plaintiffs' mortgage?' The defendant Rufus Avery testified that he paid to M. C. Avery the purchase

Digitized by Google

money of the land under the following circumstances: That he had, as agent of M. C. Avery, made a parol contract with Austin Collett to sell him the land, but with the express understanding that if the purchase money, amounting to $50 and interest, was not paid by the 1st of March, 1888, then said contract was to be void, and said Collett was to forfeit his improvements. That said Collett was not able to pay at the time appointed, and told witness if he would satisfy M. C. Avery for the purchase money, and give him a little more time, he would give him his note for $150, and the land should stand good for it, and, if not paid by the year 1888, that he should have the said land. That, on the strength of this assurance, witness did satisfy M. C. Avery by paying the purchase money, and, Collett having failed to pay by 1888, under Collett's direction M. C. Avery made him a deed for a part of the land, the other having been sold to one S. J. Ervin, and thereupon his honor withdrew the issue which he had at first submitted, and substituted the following 'Is the lien of plaintiffs' mortgage on the land in question superior to the rights and equities of defendant Rufus Avery, as set up in the answer? What amount is defendant Collett indebted to plaintiffs?' Defendants excepted to the withdrawing of the isssue first submitted and the submission of the last two to the jury. There was no evidence offered by plaintiffs to show that the receipt for $33 was for the same land as that included in 'Collett's boundary,' or that it was for any land, the word 'lot' only being used in said receipt. And thereupon his honor instructed the jury that upon the evidence—taking the evidence of Rufus Avery to be true—they must find the issue as to the superiority of the lien in favor of plaintiffs. To which instructions defendants excepted.

"On judgment being rendered, defendants appeal to the supreme court."

The appellants contend that the plaintiffs obtained no title to the land in question, nor any interest therein by the deed of mortgage under which they claim, executed to them by the appellants Collett and wife, because the latter had no title to, nor any interest in, that land that they could convey; that the husband, Collett, had but a parol contract with M. C. Avery, who had the title to it, whereby she contracted to convey the title to him when he should pay the purchase money he agreed to pay her for the same, and he had not paid such purchase money or any part thereof; and they pleaded that such parol contract was void under the statute of frauds, because no memorandum or note thereof was put in writing, and signed by M. C. Avery, or by some other person by her authorized to sign the same. The plaintiffs, on the contrary, contended that the writing set forth above, beginning with the words "Collett's boundary," and ending with the other words, "Balance due, $20.00, at 8 per cent. interest," constitute a sufficient memorandum or note in writing of the parol contract mentioned to render it effectual in contemplation of the statute; and we are of the opinion that it is sufficient. The memorandum in writing, referred to, is all on a half sheet of ordinary commercial note paper, in the order as set forth above. Between the description of the land and the receipt, which are on the same side of the paper, is a blank space about two inches wide, and the promissory note and memorandum at the foot of it fill the upper half of the paper on the opposite page, beginning close to the top of it. The juxtaposition of the several parts of the writing, their nature, purpose, and meaning, as expressed, their reference to, and bearing upon each other as appears from express words and plain implication, all go to show that the land described is that mentioned and referred to in the receipt; and the terms thereon, "in part payment on a lot on Rocky Ford road," imply that Austin Collett, to whom the receipt was given, had contracted with M. C. Avery to purchase from her, and she with him to sell him, the land mentioned and described. The description certainly designated a piece or lot of land by metes and bounds containing one acre and one-quarter of an acre situate on the Rocky Ford road, capable of being identified by parol proof. The receipt near to such description on the same side of the half sheet of paper, refers to "a lot on Rocky Ford road," and by the strongest implication acknowledges a contract of sale of it to Austin Collett. The note immediately following the receipt, on the opposite side of the paper, made by him to M. C. Avery, recites that it was given "on [for] a lot adjoining W. Grant's on the Rocky Ford road." The several parts of the writing clearly refer to one and the same transaction, and must be construed together. It is evidence, and intended by the parties so to be, of a contract of sale of the lot of land specified by M. C. Avery to Austin Collett, and she, by signing the receipt, acknowledged and signed this contract in writing as certainly as if it had been formally drawn out and signed by her. Hence the references and recitals. The contract is informally and awkwardly expressed in the writing, but its nature, scope, and purpose clearly appear from it, and this is a sufficient compliance with the requirements of the statute. Mayer v. Adrian, 77 N. C. 83; Farmer v. Batts, 83 N. C. 387; Thornburg v. Masten, 88 N. C. 293.

It may be added that, if the contract in question were to be treated as not in writing, M. C. Avery, the person to be charged therewith, did not avail herself of the statute rendering such contracts void; she was not bound to do so; but she recognized and acted upon it, and at the request of Austin Collett conveyed the land to Rufus Avery. If, therefore, Austin Collett, under the contract of purchase, paid for the land, or paid any part of the purchase money, the plaintiffs, by their deed of mortgage, acquired the whole

Digitized by Google

of his interest in it; indeed, they acquired the right to have the land for the purposes of the mortgage, subject to the right of M. C. Avery to have the purchase money due to her for it. And so, also, if Rufus Avery, after the execution of the plaintiff's mortgage, at the request of Austin Collett paid the purchase money for the land, or any part of it, and took the title therefor, having notice of the mortgage, as he must have had, as it was registered, then he took the title for the plaintiffs for the purposes of their mortgage, the land being charged with so much of the purchase money as he paid. Indeed, he, in that case, sustained the same relation to the plaintiffs as did M. C. Avery before she conveyed the title to the land to him. By virtue of her contract with Collett, and the mortgage made by him to the plaintiffs, she held the land for them, subject to the payment of the purchase money due her. Rufus Avery, having obtained the title with notice of the plaintiffs' right, so holds the land for the like purposes, unless, as he alleges, his right to the land antedates the mortgage of the plaintiffs.

In his answer, Rufus Avery expressly alleges that Austin Collett, a long while before he executed the mortgage to the plaintiffs, abandoned his parol contract of purchase of the land, and consented to allow him to pay for it and take the title, and there was some evidence produced on the trial tending to prove this allegation. Collett might thus abandon his executory contract, or transfer it to another. We can see no reason why he could not. The contract to convey was not a conveyance of the title to the land, and might be abandoned. If the allegation just mentioned were true, then Collett conveyed nothing by his deed of mortgage to the plaintiffs, because he had nothing to convey, not even an equity. The plaintiffs, in their reply, expressly deny the allegation of the answer just mentioned, and thus a material issue of fact was raised by the pleadings. The appellants did not waive the trial of this issue, nor did the court submit it to the jury.

Perhaps the issue which was at first submitted to the jury, and afterwards, in the course of the trial, withdrawn, might have been sufficient, though it was scarcely pertinent. The court, however, the appellants objecting, withdrew it entirely, and submitted another, not at all that raised by the pleadings. The issue raised was material and important, and should have been tried. All the material issues must be tried, unless waived, and it is error not to try them. Porter v. Railroad Co., 97 N. C. 66, 2 S. E. Rep. 581; Davidson v. Gifford, 100 N. C. 18, 6 S. E. Rep. 718. It seems that the court was of the opinion that Rufus Avery had rights and equities in conflict with the same of the plaintiffs. How this was, is not clearly disclosed by the record before us. If Collett owed him before he made the mortgage to the plaintiffs, and gave him a mortgage by parol or otherwise of his interest in the land he so contracted to purchase, to secure such indebtedness, this could not prejudice the rights of the plaintiffs as mortgagees because such mortgage was not registered; at most, he could only be entitled to have so much of the purchase money and the interest thereon as he paid to M. C. Avery. To that extent he might be subrogated to the latter's rights and lien for such part of the purchase money as he paid. Beyond, so far as appears, he would be on no better footing than any other creditor who had a senior unregistered mortgage. There is error such as entitles the appellants to a new trial. To the end they may have the same, let this opinion be certified to the superior court. It is so ordered.

(102 N. C. 487)

WALKER *et al.* *v.* SCOTT *et al.*

(*Supreme Court of North Carolina.* April 24, 1884.)

APPEAL—PROCEDURE—RULES OF COURT.

1. An appeal will not be dismissed for the failure of the appellant to serve a case stated on appeal upon the appellee. If there are no assignments of error, or if no errors appear in the record proper, a motion to affirm is the proper procedure.

2. The case stated or settled on appeal passes into and becomes part of the case in the court below, and it comes up as a part of the record. The supreme court has no authority to make, alter, or modify it, or to determine whether it was duly filed. All motions and orders in respect to it must be made in the court below.

3. Under a rule of court requiring the record to be printed, it is sufficient if it be printed, by the time the case is called for argument.

4. Supreme court N. C., rule 2, § 8, providing that "if an appellant shall fail to file the transcript of the record of his appeal within the time he might do so, so that the appeal shall stand for argument at the term to which it is taken, the appellee may move * * * to dismiss the same, * * * and his motion shall be allowed, unless reasonable excuse for such failure shall be shown within such time as the court may direct, in which case the court may deny the motion and allow a continuance," is designed to prevent appellants from delaying the decision of their appeals, and will be enforced as its importance demands.

Appeal from superior court, Cherokee county.

Motion to dismiss appeal.

J. W. & R. L. Cooper, for appellants. *Jones & Shuford*, for appellees.

MERRIMON, J. At the present term the appellees moved to dismiss this appeal upon the grounds, first, that the appellants failed to serve any case stated on appeal upon them or their counsel. The motion cannot be allowed for this cause. What purports to be such statement appears in the transcript of the record, but, if this were not so, the absence of it would not be ground for sustaining the motion, because it is not essential to the appeal. It may be that there are assignments of error in the record, and errors may appear in the record proper, so that a statement of the case on appeal may not be necessary. The proper motion, in the absence of errors appearing in the record or properly assigned, is to affirm the judgment. Manufacturing Co. v. Simmons, 97 N. C. 89, 1 S.

Digitized by Google

E. Rep. 923. The appellees, in support of this ground of their motion, offered affidavits to prove that what purports in the transcript of the record to be the case stated on appeal, duly served on their counsel, was never in fact served on themselves or their counsel, and they asked this court to hear the evidence, find the facts, and make appropriate orders striking the statement from the record. This application is a misapprehension of the proper course of procedure in such case. The motion should be made in the court below to strike from the files there such statements as having been improperly filed with the clerk, as allowed in proper cases by the statute, (Code, § 551,) and direct the clerk to take no further notice of it. The case stated or settled on appeal passes into and becomes part of the case in the court below, and it comes to this court as part of the record. This court has no authority to make, alter, or modify it in any material aspect, or to determine that it was or was not duly filed. It is therefore appropriate and proper, indeed, necessary, that the court below should hear all motions, and make all proper orders in respect to it. A motion here, if need be, to stay the hearing of the appeal until such motion could be made, heard, and determined in that court, might be appropriate.

The second ground of the motion, and the counter-motion of the appellants for the writ of *certiorari*, will not be disposed of for the present, for the reason that it may not be necessary to consider them at all. The third ground of the motion assigned is that the record has not been printed as required by the rule applicable. It seems that what purports to be the case stated on appeal has been printed. But, moreover, the appeal does not stand for argument at this term, and, if the record shall be printed by the time it shall be called for argument, that will be sufficient. Witt v. Long, 93 N. C. 388.

It appears that the appeal was taken at the last fall term of the superior court of the county of Cherokee, to this court at its present term, but the appellants failed to file a transcript of the record of their appeal here, within the first eight days of the term, or before the entering on the call of cases from the judicial district to which the case belongs, as required by rule 2, § 7; but such transcript was filed after such call began. That the transcript of the record was not filed within the time prescribed by the rule as above indicated, so that the appeal would stand for argument at the present term, is assigned as a fourth ground of the appellees' motion to dismiss it. Rule 2, § 8, among other things, provides that "if an appellant shall fail to file the transcript of the record of his appeal within the time he might do so, so that the appeal shall stand for argument at the term to which it is taken, the appellee may move, during the week assigned to the district, to dismiss the same as above provided, and his motion shall be allowed, unless reasonable excuse for such failure shall be shown, within such time as the court may direct; in which case the court may deny the motion, and allow a continuance." The purpose of this rule is remedial and salutary. It is intended by it to prevent appellants from delaying the filing of the transcripts of the records of their appeals until just late enough in the term, as has sometimes been done, to get a continuance, and thus delay justice, frequently to the prejudice of the appellees. Such delay cannot be allowed, unless reasonable excuse for it shall be shown, if the appellee sees fit to avail himself of the rule, as the appellees do in this case. The rule is serious and important, and must be observed. The impression seems to prevail to some extent that the rules of practice prescribed by this court are merely directory; that they may be ignored, disregarded, and suspended almost as of course. This is a serious mistake. The court has ample authority to make them. Const. art. 4, § 12; Code § 961; Rencher v. Anderson, 93 N. C. 105; Barnes v. Easton, 98 N. C. 116, 3 S. E. Rep. 744. They are deemed essential to the protection of the rights of litigants, and the due administration of justice. They have force, and the court will certainly see that they have effect, and are duly observed, whenever they properly apply. Apparently, the appellants in this case have failed to observe the rule invoked by the appellees. They have not shown reasonable or any excuse for such failure, but they insist that they can do so, and that, under the rule, they are entitled to have opportunity to show such reasonable excuse, and ask the court to grant the same. We are of opinion that they are so entitled, and accordingly it is now ordered (by consent of the parties as to the time) that they have leave to show such excuse on the first Monday of the next term of this court. The further consideration of the motion to dismiss the appeal will be deferred until that time. It is so ordered.

(103 N. C. 379)

STATE v. McMAHAN.

(*Supreme Court of North Carolina.* April 23, 1889.)

JUSTIFIABLE HOMICIDE.

One who had acted as constable for six or eight years, and had often arrested defendant, arrested him again on two warrants, and defendant submitted without resistance, acknowledging himself a prisoner. The officer soon attempted to disarm defendant, and called on a by-stander to assist him, as authorized by Code N. C. § 1125. Defendant resisted, and shot and killed the by-stander, when he attempted to assist. The officer had recently been re-elected, and had taken the oath of office. *Held*, that defendant could be convicted of murder, whether or not the officer had fully qualified.

Kope Elias and *Jones & Shuford*, for appellant. *The Attorney General*, for the State.

DAVIS, J. The prisoner was indicted for the murder of one Buchanan, in the county of Jackson, and the cause, upon motion of the prisoner, was removed for trial to the superior court of the county of Macon,

Digitized by Google

and tried before BOYKIN, J., at fall term, 1888, of said court. The following is the statement of the case on appeal: "It was admitted by the prisoner that Buchanan's death resulted from a pistol-shot wound inflicted by him. One Lackey had in his hands two certain warrants, charging certain misdemeanors, and commanding him to arrest and hold the prisoner, McMahan, to answer before a justice of the peace for the commission of certain alleged offenses. The said Lackey had acted as constable for six or eight years, there being no other constable in that township, and had arrested the prisoner several times on other occasions. The prisoner had never disputed his authority to arrest him, and carry him before the court. Lackey had been regularly elected constable for the time above mentioned. He was duly elected at the election next preceding the shooting. Then he had filed his bond before the clerk of the superior court, as he testified, and the oath of office was administered by him. Before, at the other times of his supposed induction into office, he had qualified before a justice of the peace. He had arrested the prisoner about two weeks before the shooting. The prisoner knew that Lackey had acted as constable for a long time. At the time of the arrest upon the two warrants above mentioned the prisoner did not question his authority, but submitted and acknowledged himself a prisoner immediately after said arrest. The said Lackey was informed that the prisoner, McMahan, was armed with a pistol. He inquired if this was true. Prisoner responded, 'No.' Lackey said he had been credibly informed that he (the prisoner) did have a pistol concealed in his hip pocket. The prisoner reiterated his denial. Lackey responded that, under the circumstances, he considered it his duty to search and disarm him, if he was so armed. The prisoner arose from his chair, (the parties being at the time on the porch of a certain house,) placed his chair between him and Lackey, and proceeded to walk off backwards towards the balustrade of the porch. The said Lackey ordered him to halt, and started in pursuit. The prisoner continued to walk towards the railing. Just as he had placed one leg over the railing, and was in the act of raising the other, Lackey seized him, and called on the deceased, Buchanan, to assist him. Buchanan was then standing in the porch. He approached, and seized the prisoner by the arm. The prisoner immediately drew his pistol, and shot the deceased. The prisoner requested the court to charge the jury that Lackey was not a lawful officer, and was not authorized to make the arrest of the prisoner, and that the deceased was in no better position than Lackey in respect of seizing and undertaking to disarm the prisoner, and in no view of the case could the prisoner be convicted of murder. He further asked the court to instruct the jury that neither the said Lackey nor the deceased had any authority, under the circumstances of the case, to disarm the prisoner. The court declined both requests, and instructed the jury that if they believed the evidence Lackey was an acting officer authorized to execute the warrants referred to, and that the deceased was required to respond to his demand for assistance, and was entitled to the same protection and immunity with which Lackey was invested; also that Lackey was authorized to prevent the escape of the prisoner after his arrest; that he was clothed with the power to require the act of the deceased: that, if prudence dictated it, he had the legal power to disarm the prisoner without exercise of unnecessary force; and that the officer was constituted the judge of the necessity of disarming the prisoner; and that his action in this respect would be upheld by the law, unless he acted arbitrarily and oppressively. There was a verdict of guilty, judgment, and appeal."

Two exceptions appear in the record: (1) The first is to the refusal to instruct the jury that Lackey was not a lawful officer, was not authorized to make the arrest, and that the deceased was in no better position than Lackey, and in no event could the prisoner be convicted of murder. (2) The second is to the refusal to instruct the jury that neither Lackey nor the deceased, under the circumstances, had any authority to disarm the prisoner. The two exceptions may be considered together. We think it sufficiently appeared that Lackey was an officer, duly qualified; but, whether this be so or not, he was known to be acting as such, and "evidence that a person acted as a public officer, and that he was known as such, is *prima facie* evidence of his official character without producing his commission or appointment." Such an officer is presumed to have been duly qualified; and this, whether in a "civil or criminal action." Tatom v. White, 95 N. C. 458; State v. Speaks, Id. 689; State v. McEntyre, 3 Ired. 171; State v. Curtis, 1 Hayw. 171. The law confers upon an officer, charged with the execution of process, all the powers necessary for the effectual execution of such process, and the officer must be the judge as to what is necessary. State v. Stalcup, 2 Ired. 50; State v. McNinch, 90 N. C. 695, and cases there cited. Of course, he must act in good faith, and cannot, under the pretense of duty and necessity, gratify his malice, or exercise wanton and unnecessary severity. State v. Stalcup, supra; State v. Bland, 97 N. C. 442, 2 S. E. Rep. 460; Braddy v. Hodges, 99 N. C. 319, 5 S. E. Rep. 17. It is the duty of those present, when necessary and called upon, to aid the officer, and the protection extended to the officer extends to persons so aiding. Code, § 1125; State v. James, 80 N. C. 370. A simple reference to the facts will show that the prisoner should have been disarmed, and it was his ill fortune, as well as that of the deceased, that he was not disarmed before the fatal shot. There was no error in the ruling of his honor.

Digitized by Google

(103 N. C. 261)

LYLE v. SILER.

(*Supreme Court of North Carolina.* April 22, 1889.)

VOLUNTARY PAYMENT—APPEAL—RECORD—ADMINISTRATORS—APPOINTMENT.

1. An overpayment made after the settlement of the estate by an executor to a legatee under the mistaken impression that the will authorized it, is not a voluntary payment, and may be recovered.
2. If the record recites that an order of publication was made on affidavit, and the publisher's affidavit shows due publication, alleged defects in the order and the affidavit on which it was issued will not be noticed on appeal if the transcript does not contain copies of them, as their regularity will be presumed.
3. Where the widow of a testator is a non-resident of the state, and for many years neglects to apply for letters of administration *c. t. a.* the appointment of another person as administrator is not void and his authority cannot be attacked in an action brought by him officially.

Appeal from superior court, Macon county; JAMES C. MACRAE, Judge.

Petition by J. M. Lyle, administrator, etc., *c. t. a.* of D. W. Siler, deceased, against Martha J. Siler, widow and devisee of said D. W. Siler, to sell land of said decedent to pay debts. Judgment for plaintiff, and defendant appeals.

Chas. A. Moore, for appellant. *T. F. Davidson*, for appellee.

MERRIMON, J. This is a petition to obtain a license to sell land to make assets to pay debts of a testator. The pleadings raised issues of fact. The following is a copy of the material parts of the case settled on appeal: "The petitioner put in evidence the will of Jacob Siler, with the probate and qualification of this plaintiff, J. M. Lyle, and of T. H. Siler as executors thereof. The following facts are admitted: That plaintiff, J. M. Lyle, as executor of Jacob Siler, deceased, on the 16th of August, 1883, by mistake overpaid to D. W. Siler, who was one of the legatees under the will of Jacob Siler, the sum of $92.87 as his share under said will; that said D. W. Siler lived out of this state since 1870, and died in December, 1883; that a final settlement was made by the executor of the estate of Jacob Siler on the 16th of August, 1883; that plaintiff on the 13th day of December, 1887, took out letters of administration on the estate of D. W. Siler, deceased, with the will annexed, no letters testamentary having been issued in this state before that time; that Martha J. Siler, the defendant, is the widow and devisee under the will of D. W. Siler, and lives in Washington Territory. The defendant contended that the granting of letters of administration to the plaintiff was void, for the reason that defendant had not waived her right to take out letters. Defendant further contended that on the evidence the plaintiff had shown no debt against the estate of D. W. Siler; that the overpayment to said Siler by the executor was an officious act, and that plaintiff was not entitled to recover it. The court refused to instruct the jury to the above effect, and defendant excepted." There was a verdict and judgment for the plaintiffs, and the defendant, having excepted, appealed to this court.

The record in this case is not as full and satisfactory as it might and should be, and it fails to raise questions that it seems the appellant intended to present. The presumption is in favor of the regularity and correctness of the rulings, orders, and judgment of the court, it being one of general jurisdiction, and the burden is on the appellant to show error. It is her laches or misfortune if she fails to do so when she can. We must accept and act upon the record as it comes to us. It is not our province to assign or perfect the assignment of errors. Spillman v. Williams, 91 N. C. 483, and the cases there cited. The sheriff returned the summons unexecuted, because the defendant (the appellant) could not be found. It appeared that he was a non-resident of this state, and there was service of the summons by publication. Counsel for the defendant made a special appearance, and moved to dismiss the proceeding "for the reason that the affidavit upon which the motion for an order of publication is made, is defective." The court denied the motion, and this is assigned as error. Neither the affidavit nor the substance of it is set forth in the record, nor is it stated wherein it is alleged to be defective. It appears by the record that upon affidavit the plaintiff obtained an order of publication, and by the affidavit of the publisher of the newspaper that it was published, and thus there was service of the summons. The presumption, in the absence of anything appearing to the contrary, except mere suggestion, is that the affidavit and order of publication were sufficient, and the service by publication was properly made. If the affidavit was defective, the appellant should have set it forth in his assignments of error, and specified therein the particular defects insisted upon.

The appellant contends that the letters of administration granted to the plaintiff were void, for the reason that she, being the surviving widow of the testator, had not waived her right to take such letters. This contention is without force. It does not appear that she was named in the will as executrix thereof, or that any executor was appointed. It does appear that she was a non-resident of the state, and that for a long while—several years—she had failed to apply to be allowed to have such letters. Therefore the appointment of the plaintiff to be such administrator was not void; at most it was only voidable; and the objection that he had not been regularly appointed could not be successfully made in this proceeding. Steps should be taken in a direct proceeding for the purpose to remove him, to the end the proper person might be appointed. Garrison v. Cox, 95 N. C. 353, and the cases there cited. It would be otherwise, however, if the appointment had been absolutely void, and this appeared. Indeed, when the appointment was so void, the de-

Digitized by Google

fendant might avail himself of the plea of *ne unques executor*. The appellant further contended that the plaintiff's claim was not a valid debt against the estate of his testator, upon the ground that the overpayment mentioned to his testator "was an officious act." It was not contended that such overpayment was occasioned by a mistake of law, or that the plaintiff was not entitled to be paid the sum of money paid by mistake on any other ground than that it was paid officiously. It was admitted that it was "by mistake overpaid to D. W. Siler, [the plaintiff's testator,] who was one of the legatees," etc. That there was mistake and overpayments of money supposed to be due to the legatee, implies that such payment was not voluntary or officious. It was so paid because the parties supposed that it was due to the testator as part of his legacy, when in fact it was not. Moreover, it was so paid after the final settlement of the estate from which the legacy was due to the plaintiff's testator. It was admitted, certainly by implication, that the plaintiff should be paid as he claims, if the overpayment was not voluntary. Pool v. Allen, 7 Ired. 120; Newell v. March, 8 Ired. 441; Adams v. Reeves, 68 N. C. 134; Commissioners v. Commissioners, 75 N. C. 240. This is not like the case when an executor or administrator carelessly, negligently, and voluntarily, and without reasonable inquiry, pays legacies or distributive shares before the estate is settled, and afterwards finds that he has overpaid the legatee or distributee, and seeks to recover the sums overpaid. In such cases he cannot recover unless he can show reasonable diligence on his part in ascertaining the condition of the estate and special circumstances that reasonably misled him in making such payments. This is so because it is the duty of the executor or administrator to conduct and close the administration of the estate according to law, and it would be unjust and vexatious to mislead and embarrass the legatee or distributee by paying his legacy or share, and afterwards, he being in no fault, compelling him to repay what had been so paid to him. Marsh v. Scarboro, 2 Dev Eq. 551; Donnell v. Cooke, 63 N. C. 227; Bumpass v. Chambers, 77 N. C. 357 Judgment affirmed.

(103 N. C. 109)

WOODARD *et al.* v. BLUE *et al.*

(*Supreme Court of North Carolina.* April 22, 1889.)

DESCENT AND DISTRIBUTION—NEGROES—EVIDENCE—WITNESS—CONSTITUTIONAL LAW.

1. Act N. C. Feb. 1879, declaring that "the children of colored parents," born before January 1, 1868, of persons living together as husband and wife, are legitimate children of such parents, with all the rights of heirs and next of kin, applies to the children of all colored parents, whether slaves or free, and whether the parents were incapable of entering into the marriage relation by virtue of positive law or their *status* as slaves.

2. But both cohabitation subsisting at the birth of the child and paternity of the person under whom the property is claimed are essential to the right of inheritance. Cohabitation alone, though it furnishes presumptive evidence of paternity, is not conclusive, where no valid marriage between the parents could have been contracted.

3. Where the mother testifies that the child was born during her cohabitation with decedent, and there is evidence that at the time of the birth of the child the mother and decedent were not so cohabiting, and their relations ceased soon afterwards, the question of paternity is for the jury.

4. In such case, evidence of the declarations of the mother, that decedent was not the parent of the child, should be admitted at least to impeach the credit of the mother; she having been previously questioned in relation to such declarations.

5. The act being but a change in the law of descent, operative in the future only, is constitutional.

Appeal from superior court, Burke county; ARMFIELD, Judge.

Action by Durant Woodard and Emily, his wife, and Mourning Criss, against David Blue and others. Defendants appeal.

S. J. Ervin and *I. T. Avery*, for appellees. *J. T. Perkins*, for appellants.

SMITH, C. J. The plaintiff Emily, wife of the plaintiff Durant Woodard, claiming to be the daughter and sole heir at law of Underzine Pelot, and the other plaintiff, Mourning Criss, claiming to be his surviving widow, sue the defendants, who are in possession of the several tracts of land mentioned and described in the complaint, to establish their title to and to recover the same, with damages for the withholding. The defendants admit that the intestate owned said lands at the time of his death, and their holding under Tom Walton and certain others named, to whom, as his rightful heirs, the same descended,—of all the said tracts except that described as No. 2, as to which certain equities are set up in behalf of said Tom Walton, growing out of his furnishing a part of the purchase money therefor, and the intestate's agreement, as alleged, to have the title conveyed to them jointly. Thereupon issues were made up and submitted to the jury, which, with their respective responses, are as follows: "(1) Is the plaintiff Mourning Criss the widow of Underzine Pelot, and entitled to dower in the lands in controversy? *Answer*. No. (2) Is the plaintiff Emily Woodard, wife of Durant Woodard, the only heir at law of the said Underzine Pelot? *A.* Yes. (3) Is the said Mourning Criss, as widow of Underzine Pelot, and Emily Woodard, as his only heir at law, entitled to the possession of the lands described in the complaint? *A.* Not Mourning Criss, but Emily Woodard, is."

The said Mourning Criss, examined at the trial on behalf of the plaintiffs, testified to her marriage with the deceased before a justice of the peace about 10 years before the war, he then being a slave, and herself the offspring of a white mother; their cohabitation as such for a period during which three children were born, of whom one was the plaintiff Emily; and its discontinuance since the termination of the war, though the said Underzine lived until a year or two before the institution of the present suit, when he died. During the cross-examination the de

Digitized by Google

fendants put this question to the witness: "Have you not repeatedly told Tom Walton, a slave brother of Underzine, and belonging with him to the same owner, and living in the same family at the time when Emily was born, that Emily was not Underzine's child?" On objection of plaintiffs, the inquiry was disallowed, except to impeach the witness, and defendants excepted.

The defendants insisted that the marriage being between a white woman and a slave was void in law, and such intermarriage between a free person of color and a slave is expressly forbidden by statute, (Rev. St. c. 111, § 77;) nor is it protected by the amendatory act of January 9, 1845, (Acts 1844–45, c. 85,) which allows such intermarriage, when entered into with the owner's consent, previous to the passage of the act. The court expressing an opinion that the act of 1879 covered the present case, and has the effect of rendering all children born in slavery, where the parties were living as man and wife, capable of inheriting, but reserving a decision upon the point, the defendants proceeded to call their witnesses and develop their testimony. Tom Walton, being sworn, testified as follows: "Underzine and Mourning were regarded as man and wife when they went to Tennessee to the farm whereon witness worked with them, and where they remained four or five years, during which time Emily was born. Mourning stayed sometimes at the house where Underzine stayed, and sometimes at the 'big house;' he being a field-hand, and she a house-servant. They did not live as man and wife while there," Defendants offered to prove a general reputation in the family that the *feme* plaintiff was not Underzine's child, but that another person was her father. The evidence was held to be incompetent, if the parties were then cohabiting, and to this ruling the defendants excepted. Defendants then proposed to show that both Underzine and Mourning each had repeatedly declared that the former was not the father of said Emily, and that, though living in the same family, there had been no actual sexual connection of which she could be the fruit, and her actual father was the man with whom they lived, and who had been the owner of Underzine while a slave; that the parties left Tennessee after the close of the war, and settled in Burke county, living about 8 miles apart, where they remained until his death, —he meanwhile having no connection whatever with Mourning and her daughter, and, from his emancipation, at all times, repudiating and disowning any relation to either. The court, ruling the offered evidence irrelevant and incompetent, stated that the jury would be directed to find upon the issues in response to the first, "No;" to the second, "Yes;" to the third, "No, as to Mourning;" "Yes, as to Emily and Durant, if the parties were married, and were living together and cohabiting as man and wife when the plaintiff Emily was begotten and born." In deference to this intimation defendant's counsel said they could not resist a verdict, and it was rendered accordingly, and from the judgment they appealed.

At the time when the alleged marriage was contracted, Underzine was a negro slave, and Mourning the daughter of a white woman, and, if not herself white, necessarily of mixed blood, and, whether one or the other, equally disabled by positive law to enter into a contract of marriage with a slave. By an act passed in 1741, it is declared that if any white man or woman, being free, shall intermarry with an Indian, negro, mustee, or mulatto man or woman, or any person of mixed blood to the third generation, bond or free, such person shall forfeit and pay to the use of the county $100, and a penalty is imposed upon any minister or justice of the peace who knowingly shall presume to marry such. Rev. St. c. 71, §§ 5, 6. The act of 1838 declares all marriages entered into since January 8, 1839, or thereafter entered into, "between a white person and a free negro or free person of color, to the third generation, shall be void." Rev. Code, c. 68, § 7. This latter enactment does not extend as far as that which prohibits, and annexes a penalty to, the act of intermarrying of a white with a person of color. The restraint thus limited became inapplicable to the case of a white person marrying a slave, because there was in the latter an incapacity arising from the *status* of the slave to make such contract, and it was *ipso facto* without any statute making it so void. In like manner the intermarriage of a free negro and slave was prohibited by the act of 1830, (Rev. St. c. 111, § 77,) an offense for which the free person of color was subject to indictment, unless the same was with the consent of the owner of the slave, under the amendment of 1844, (Rev. Code, c. 107,) given to a marriage which took place previous to November 1, 1844. This legislation continued in force during the existence of slavery, no marriage being recognized as binding when had between slaves, and inhibited by positive law when had between white and free persons of color who are within the specified degrees, and between the latter and slaves, and thus in pursuance of a general public policy growing out of the slavery of a part of the population owned by masters. It still prevails and inhibits the intermarriage of white and free persons of color into which the slave population has been immerged. Code, § 1810. This interdict is still in force, and held not to be repugnant to the constitution of the United States, or legislation under it, in State v. Hairston, 63 N. C. 451, though the relation if legally created elsewhere is recognized as a valid subsisting relation when the parties come into this state from that of their former residence. State v. Ross, 76 N. C. 242. But its validity is not recognized when parties having their domicile here, to evade our laws, go to a state which allows such marriage, with intent to return, and who do return,

Digitized by Google

and keep up their domicile. State v. Kennedy, Id. 251.

As no provision was made by law giving sanction to the marriage relation formed between slaves, while there was no absolute restriction put upon free persons of color, and they could intermarry with one another while they could not with white persons or slaves, it became necessary to provide by law for the legalizing of marriages between slaves who could not enter into any marriage contract, and the general assembly passed the act of March 10, 1866. The fifth section, which alone bears upon the present inquiry, legalizes a cohabitation among those who were lately slaves, when still continued, and validates the relation as a marriage from its commencement; and, to give the act full force, directs the parties to go before the clerk or a justice, in acknowledgment of assent, and to state the time when it began. This enactment has been considered at the present term in Branch v. Walker, 8 S. E. Rep. 896, and obviously imparts our sanction to the cohabitation alleged in the present case. The act of February, 1879, adds to the canons of descent, and is in these words: "The children of colored parents, born at any time before the 1st day of January, 1868, of persons living together as husband and wife, are hereby declared legitimate children of such parents, or either one of them, with all the rights of heirs at law and next of kin with respect to the estate or estates, of any such parents, or either one of them." The interpretation put upon the broad and comprehensive terms of the statute as embracing the issue of all colored persons while living as husband and wife, as well when forbidden as permitted by law, determined the ruling of the judge in support of the claim of the plaintiff Emily as heir at law of the intestate, Underzine, to the lands left by him. In general words, literally understood, the act does include the children of all colored parents, as well those who were always free as those who were formerly slaves, (for they all now belong to the one and same class,) and its legal effect would be to bestow an inheriting capacity upon all whose parents were thus cohabiting, irrespective of the lawfulness of the relation, and thus sustain the ruling of the court in applying its remedial provisions to the case before us,

It admits of serious doubt whether the statute, in seeking to remove an anomalous condition of the colored race growing out of the emancipation of the slave population, intended to ignore the unlawful sexual intercourse so habitually maintained as to assume the form of marriage, and become a cohabitation among the free colored race to whose lawful intermarriage no impediment, not common to all, was interposed, and thus place the offspring of a forbidden upon an equal footing with the offspring of a lawful union, in giving the right of succession to an intestate father's estate. The special purpose of the legislation seems to have been to provide against the evil of the universal illegitimacy of slave children consequent upon the absence of any authority for their parents, during their servitude, to enter into lawful matrimonial relations, and this is developed in the early enactment of 1866. But the act of 1879, in unrestricted words, bestows a right to succeed to a deceased parent's estate, not disposed of by will, upon "the children of colored persons" born before January, 1868, without exception or qualification, and we do not see how, by construction, any words restricting its operation can be interpolated. Its efficacy, however, depends upon two essential conditions,—a cohabitation subsisting at the birth of the child, and the paternity of the party from whom the property claimed is derived. The cohabiting does not alone confer legitimacy, though it furnishes presumptive evidence that the child is the issue of the persons, thus living, and indicating their relations, but the presumed fact is open to disproof, and to be determined, as are other facts, upon the force of the evidence adduced which may be sufficient to overcome the presumption. To repel the inference of paternity drawn from the mere fact of cohabitation, the same stringent rules do not prevail as in cases of established legal marriage, when, to bastardize the issue, there must be full affirmative repelling proof, such as impotency, non-access, and the like, or the presumption of legitimacy will stand. 1 Greenl. Ev. § 28; Abb. Tri. Ev. 88. The question of the real, as distinct from the inferred, paternity of the plaintiff Emily involves a fact as essential to the support of her claim as cohabitation itself; and, while the one may be deduced from the other, nothing else appearing, is susceptible of disproof, and, when any has been offered, must be left to the jury to pass upon.

In the trial, Mourning, the mother, swore that during the cohabitation the plaintiff Emily and two other children were born, (in what order of time is not stated,) and that Underzine and herself "had never lived together since the war, that is, from 1865 up to his death, a year or so before the issuing of the summons, in June, 1888,—a period of more than 20 years. The defendants' opposing evidence, that the parties, though upon the same farm, "did not live as man and wife" when Emily was born, and all the evidence concurs in showing that the relations ceased after their return to this state. Here there was conflicting evidence of the existence of the cohabitation, previously kept up, after the removal to Tennessee, and the time of its discontinuance, whether before or after the birth of Emily, left in doubt upon the testimony. Again, the defendants were not allowed to introduce evidence of the declarations often made, as well by Underzine as by Mourning, that he was not, while his master, in whose house Mourning served as a domestic, was, the father of Emily, and that such was the general reputation in the fam-

Digitized by Google

ily. The proposed testimony was declared to be incompetent, if the cohabiting then subsisted; thus, as we understand the ruling, holding the quantum and quality of the evidence sufficient to warrant the finding, the same as that required to prove illegitimacy of a child born in lawful wedlock. It does not appear that this testimony was admitted for any purpose, not even in contradiction of the testimony of Mourning, and to impair her credit, as was ruled when her declarations were called for upon her cross-examination. It may be that the declarations were not allowed as original evidence of the fact declared, in which ruling we cannot say there was error; but as the case is careful to state that a similar declaration sought to be brought out from the mother when under examination was held admissible to impeach her credit, and omits the qualification in passing upon the proof by other witnesses of similar declarations, we are not at liberty to annex a similar qualification to the ruling upon the evidence last offered. The rejected evidence was certainly competent as to the credit of the mother, and material, too, because her testimony is in direct conflict with that of Tom Walton upon the essential matter of the continuance of the cohabitation in Tennessee. This view is forcibly suggested by the course of defendant's counsel in making no resistance to the verdict, after the intimation of the opinion of the court when there had been developed so much opposing testimony to the fact upon which the legitimacy given by the statute depends. For these reasons we think the case was not fairly before the jury, with such directions as to the proofs as were needed to guide them to a correct verdict, and it must be set aside and a new trial granted. We do not see any want of authority in the general assembly to pass the act of 1879, which is but a change in the law of descent, and operating in the future only. Error.

(102 N. C. 105)

SIMMONS *v.* BALLARD.

(*Supreme Court of North Carolina.* April 22, 1889.)

MORTGAGES—LIMITATION OF ACTIONS.

Under Rev. Code N. C. c. 65, § 19, providing that the presumption of payment or abandonment of the right of redemption of mortgages shall arise within 10 years after forfeiture or last payment, or right of action accrued, the lapse of 10 years, during which neither party has possession, is not a bar, from a presumed abandonment, to the right to redeem. DAVIS, J., dissenting.

Appeal from superior court, Pitt county; MERRIMON, Judge.

Latham & Skinner and *C. M. Bernard*, for appellant.

SMITH, C. J. This action was begun on August 30, 1883, and the plaintiff alleges that on November 22, 1856, he borrowed of the defendant the sum of $75, and to secure the same executed to the defendant a deed of mortgage conveying a tract of land of about 184 acres, therein described, with condition of avoidance upon payment of said debt and interest on or before January 1, 1858. That previous to the last-mentioned day he made payments which reduced the debt to a sum less than $30, and in the year 1863 or 1864 tendered the residue, and demanded a reconveyance of the premises, which the defendant refused; and that there is a cloud resting upon the title. The prayer is for an account to be taken in order to ascertain what is due under the mortgage, and for a reconveyance to the plaintiff upon his payment thereof. The defendant, answering, admits the borrowing, and the making of the mortgage, as alleged, and says further: That there were other than the secured debts due him, of which he annexed a memorandum, and that sums of money have been paid him without any direction as to their application, and he has appropriated the moneys received to his unsecured debts outside of the mortgage; that during the late civil war, and near its close, the plaintiff offered to make payment in Confederate currency, then become well-nigh worthless, which was not accepted, but never tendered money of value; that when the mortgage was made there was on the premises a small piece of cleared land,—one or two acres,—of which the defendant took possession and cultivated it for several years, and until the fence fell into decay, and that since 1856 he has listed and paid taxes on the land as his own. The defendant relies as a defense to the action upon the statutory presumption of an abandonment of the right to redeem, and in bar of the action; and, if this be not available, that the plaintiff be required to pay, besides the residue of the mortgage debt, the taxes paid, with interest, and the entire outside indebtedness due by the plaintiff. After many continuances, the cause came on for trial at spring term, 1888, of Pitt superior court before a jury upon these issues: "(1) What sum, if any, is due from plaintiff to defendant? (2) Has the plaintiff abandoned his equity of redemption?" The evidence developed at the hearing on the part of the plaintiff—of which so much only is stated as bears upon the ruling brought up for review—was, in substance, that after the making of the mortgage, which contains no power of sale, he cultivated the cleared field of one or two acres, before the war, and was the last one who did so; that he left it and moved upon adjoining land, which his wife's father gave her to reside on, and tended it after his removal. It does not appear from this testimony that the land has been in possession of either party since. The only evidence of an appropriated payment on the mortgage debt is the defendant's acknowledgment, bearing date February 6, 1857, of $20 "in part payment of a right I hold on his property." At this stage of the case, and upon this showing, the court intimated to counsel an opinion that the facts proved were not sufficient to rebut the presumption of the abandonment of the equity of redemption, raised by section 19, c. 65, of the Revised

Digitized by Google

Code, which governed the case; whereupon counsel for the plaintiff, in submission thereto, suffered a nonsuit, and appealed.

The sole question presented by the record is whether the lapse of the statutory period of 10 years since the last occupation of the mortgaged land, there being no possession since by the defendant, is a bar, from a presumed abandonment, to the assertion of all equitable right to redeem. The court holds the affirmative, and in this, we think, there is error. The parties to a mortgage have each an equitable right therein, the mortgagor to redeem on payment of the debt secured, the mortgagee to foreclose if the debt, after default, is not paid; and these respective interests may be lost by inaction and delay. When the land is in the possession of neither, the title remains undisturbed as fixed in the deed of mortgage, and the statutory presumption does not arise to the prejudice of either. The mere lapse of time, unaccompanied by any possession, neither obstructs the right to redeem nor the right to foreclose, and, if a bar to one, so would it be to the other; and the neutralizing effect would be to leave the mortgage in its original force, with the legal incidents attaching thereto. Any other construction of the act would take away its efficiency as a measure of repose, if it did not render it meaningless and inoperative. Such is not its interpretation by the courts. Its true operation is to quiet a possession held by the mortgagee for the prescribed period of time adversely, and as his own, from the mortgagor's right to redeem, and in like manner a possession held by the mortgagor against the right of the mortgagee to foreclosure. In either case the statute comes in aid of the possession, and frees the title from the claim of the other party. The accompanying possession thus becomes an essential element in giving force to the statute, and exempting the estate from interference under the mortgage deed. The rule is thus laid down by Mr. Justice STORY in his work on Equity Jurisprudence, (vol. 2, § 1520:) "If the mortgagee has been in possession of the mortgaged estate for twenty years [reduced to ten under our statute] without acknowledging the existence of the mortgage, it will be presumed that the mortgage is foreclosed, and that he holds by an absolute title. If the mortgagor has been in possession of the mortgaged estate for the like space of time, without acknowledging the mortgage debt, it will be presumed to be paid." The obvious deduction from which is that no presumption, either in favor of the mortgagee or the mortgagor, arises when neither has had such possession. Adams, Eq. 115; 1 Madd. Ch. Pr. 519; 2 Daniell, Ch. Pr. 741, 742; Coop. Eq. Pl. 254. The doctrine is recognized by this court in cases that have come before it. In Roberts v. Welch, 8 Ired. Eq. 287, RUFFIN, C. J., referring to the rule in England, which denies redemption to the mortgagor after an adverse holding of possession for the prescribed period by the mortgagee, and the occasion of the enactment in this state, says: "As the mortgagor is shut out of redemption by the mortgagee's possession for twenty years, it was thought reasonable and convenient that the bar should be reciprocal on the mortgagee who did not act on his debt or mortgage until the debt was presumed to be satisfied by the lapse of twenty years." Following this exposition of the statute in requiring a possession to quiet the title, are the cases of Ray v. Pearce, 84 N. C. 485; Brown v. Becknall, 5 Jones, Eq. 423; Barnes v. Brown, 71 N. C. 507; Edwards v. Tipton, 85 N. C. 479. In the last case this language is used in the opinion: "The possession of the mortgagee, and his exercise of full ownership over the land for ten years after default, and without payment of any part of the secured debt, or claim to the land, raises, under the statutory rule, a presumption of the abandonment or release in some legal way of the right of redemption, as would a similar possession in the mortgagor presume the discharge of the debt and a reconveyance." The same principle is embodied, as before declared, in applying the presumption raised by the former statute, in the superseding statute of limitations, (Code, § 152, subsecs. 3, 4,) which restricts to 10 years after forfeiture the bringing an action to foreclose the mortgage against the mortgagor who has "been in possession," and the like period to an action to redeem when the mortgagee "shall have been in possession." And there is no limitation fixed, as before there was none, when there was no supporting possession.

Without further elaboration it must be declared that there is error in the record, and the judgment must be reversed and a new trial awarded.

DAVIS, J., (*dissenting.*) I think the ruling of his honor below was correct, and do not concur in the opinion reversing it. The right of the plaintiff to recover, both in the case stated and in this court, was put upon the ground that the statute of presumptions had been rebutted by his offer to pay and the refusal of the defendant to accept payment; and when, as the case states, "it was admitted by the plaintiff that he made no offer to redeem after the 1st of January, 1870, up to the bringing of this action," I think his honor was correct in holding that the statute was not rebutted. It is conceded that the present action is governed by chapter 65, § 19, Rev. Code. That section is as follows: "The presumption of payment or abandonment of the right of redemption of mortgages and of other equitable interests shall arise within ten years after the forfeiture of said mortgage, or last payment on the same, or the right of action shall have accrued on any equitable interest or claim, under the like rules as aforesaid." The forfeiture was more than 10 years before the action was brought; the last payment was more than 10 years before the action was brought; and the

Digitized by Google

right of action had accrued more than 10 years before the action was brought. The language of the statute seems to me plain, and to leave nothing to construction. "The law adjudges the possession to be constructively with the title. * * * When there is no actual occupation shown, the law carries the possession to the real title." Williams v. Wallace, 78 N. C. 356. "The constructive possession was in the mortgagee." Parker v. Banks, 79 N. C. 485. In the absence of actual possession, the title draws to it the possession. Deming v. Gainey, 95 N. C. 528. It will be conceded that in the present case the legal title was in the defendant, and I have been unable to find any case in our reports (and we are considering our own statute) in which it has been held that the fact that no one was in actual possession rebutted the statute, and I cannot see how it can be so held without disregarding its language. The statute of presumptions now gives place to the statute of limitations, and the action must be brought "within ten years after the right of action accrued," where the mortgagee has been in possession (the statute does not say "actual" possession) under section 152, subsec. 4 of the Code; and if, where no one is in the actual possession, the legal title does not draw to it the possession, as I think it does, then it clearly comes under section 158 of the Code, and the action must "be commenced within ten years after the cause of action shall have accrued;" and I can see no legislative intimation in conflict with the opinion above expressed; and, as the language of the statute seems to me free from doubt, I feel constrained to dissent.

(86 Va. 104)

FORE v. FOSTER'S ADM'R *et al.*

(*Supreme Court of Appeals of Virginia.* May 2, 1889.)

EQUITY—MISTAKE—LACHES—PARTIES.

1. On partition, part of the tract was set off to the survivor of the two equal owners, and the remainder, as belonging to the heirs of the deceased joint owner, was sold to complainant. Several years later it was discovered that the part set off to the surviving owner contained a large quantity in excess of his share, and that the part sold to complainant was proportionally deficient. *Held*, that the mistake was relievable as matter of original equity jurisdiction.

2. The right to relief being purely equitable, lapse of time cannot be set up as an absolute bar, and, a bill having been filed within a year after discovery of the mistake, the right to relief is not barred by laches.

3. The heirs having parted with all their land, and received the price, they are not necessary parties to the bill.

Appeal from circuit court, Halifax county.

Bill by W. H. Fore against N. T. Green, administrator, *c. t. a.* of Patrick H. Foster, deceased, and others. Demurrer to bill sustained, and complainant appeals.

Wood Bouldin, Jr., and *John W. Riely*, for appellant. *Henry Edmonds* and *W. W. Henry*, for appellees.

LACY, J. This is an appeal from a decree of the circuit court of Halifax county, rendered on the 17th day of April, 1888. The case is briefly as follows: Patrick H. Foster and Martha H. Foster, being joint and equal owners of a tract of land in Halifax county, containing 1,510 acres, and one-quarter of an acre. In 1873 Martha H. Foster died intestate, and without issue, and a suit was instituted by her heirs at law against the said Patrick H. Foster, who was her surviving husband, for partition of the said land. The land was divided by commissioners into two equal parts, each containing, as alleged, 755 acres, and assigned one part to Patrick H. Foster, and the other to the heirs of Martha H. Foster, deceased. At the April term, 1877, by decree in the cause, this division of the land was confirmed, and a sale ordered of the part allotted to the said heirs of Martha H. Foster, the lands being surveyed, and divided as stated by the county surveyor. The sale was made accordingly, and the appellant became the purchaser at the price of $8.10 per acre, and he fully paid for the same, and received a deed by the court's decree on the 7th day of July, 1880. In 1881, Patrick H. Foster died, and by proceedings under his will lands were divided which had fallen to him, and 400 acres allotted to a devisee under his will, and the residue, being surveyed, amounted to 525.43 acres; by which it appeared, in 1886, that the piece of land allotted to the said Patrick H. Foster contained 210 acres more than by first survey it was supposed to contain. And Fore then caused his land to be surveyed, and it was found to contain 543 acres, instead of 755. Fore then filed his bill against the devisees, legatees, and personal representatives of Patrick H. Foster, deceased, for the correction of the said mistake; his land having fallen short 212 acres by a mistake of the surveyor, and the other parcel containing by like mistake the said deficiency in excess of the just rights of the said Patrick H. Foster. The defendants demurred to the bill, and the court sustained the demurrer; whereupon the plaintiffs appealed to this court.

The decision of the circuit court is rested upon the ground that the bill of the plaintiff in this case was in the nature of a bill of review, and, seven years having elapsed since the final decree was made whereby the error was committed, the said bill of review came too late, and was barred by the statute of limitations. The bill in this case is an original bill, to correct a mistake of fact, and falls within the general rule that an act done or contract made under a mistake or ignorance of a material fact is voidable and reviewable in equity; and this rule applies, not only to cases where there has been a studied suppression or concealment of facts by the other side which would amount to a fraud, but also to many cases of innocent ignorance and mistake on both sides; and it is a material mistake, involving a large sum of money or a large tract of land, as it may be regarded. That equity is not lacking in jurisdiction to relieve in such a case is not contro-

Digitized by Google

verted here, but it is admitted on every hand that the mistake set forth above was one properly relievable in a court of equity; but it is claimed that, as this is a bill in the nature of a bill of review, the statute of limitations provided by law as to bills of review will apply as to this. But this view does not appear to be sustained by reason or authority. If discovered in time, the evidence which disclosed the error, being newly-discovered, would have been ground for bill of review. But it is also true that the mistake is relievable upon the ground above stated, as matter of original equity jurisdiction, and as such this suit is brought; and, as to the statute of limitations, in equity it is considered as much a bar as in a court of law to a demand for the recovery of which the jurisdictions of the two courts are concurrent; for, as is said, it would be absurd that for the same subject there should be different and conflicting rules in the two tribunals. But, as it respects mere equitable demands, length of time cannot be set up as an absolute bar; for in relation to them length of time operates as a bar, not *ex jure*, but as a fact showing acquiescence, and furnishing evidence that the claim has been adjusted.

Equity always refuses its aid to stale demands when the party has slept upon his rights and the other party may have lost his evidence. Nothing can call that court into activity but the concurrence of good faith and reasonable diligence. Where these are wanting, it is passive. Laches and neglect it always discourages, and it has always since the establishment of its jurisdiction had its limitation to suits recognizing the statute of limitations in its application to cases of a legal character, and according great weight to length of time in those which are merely equitable. In this case no neglect nor any degree of what can be termed laches appears. The bill was filed shortly after the mistake was discovered, within the year, and it could not be reasonably considered that it ought to have been filed before it was discovered. There are cases where the delay might be such as to cause a court of equity to refuse relief under well-understood principles, but there has been no such delay here; and that the error or mistake was one made in the course of legal proceedings does not alter the principles above stated as to the equitable jurisdiction. That court will interfere in cases of mistakes in judgments and other matters of record injurious to the rights of the parties. 1 Story, Eq. Jur. § 166; Jeremy, Eq. Jur. bk. 3, pt. 2, c. 4, § 5; 492; Barnesly v. Powel, 1 Ves. Sr. 119–284, 289; 2 Pom. Eq. Jur. 349; 1 Bart. Ch. Pr. 270; Anderson v. Woodford, 8 Leigh, 316. Authorities might be multiplied, but it is deemed unnecessary. The subject is familiar, and the authorities are numerous.

It is urged, as further ground for demurrer, that the bill is defective for want of proper and necessary parties, because the heirs at law of Martha H. Foster are not made parties. But it is clear from the foregoing statement of the case that no relief could be properly decreed against them. They parted with all of their land, and received the purchase money for the same upon principles and agreements not sought to be disturbed by this suit, and which cannot be changed upon any just principle. They have received only what they are entitled to. The parties against whom relief is asked, and against whom only relief can be asked, and against whom only it can be granted properly, are made parties, and they are the only proper parties. They have received, according to the statements of the bill, which are here admitted, 210 acres of land for which the appellant has paid, and which he purchased at $8.10 per acre, but which by mistake went to them or him under whom they claim, and which has now come to them; and, this being so, it is a just and proper ground for equitable relief, and the demurrer should have been overruled by the circuit court of Halifax county. The decree of the said court sustaining the said demurrer was erroneous, and must be reversed and annulled.

(86 Va. 92)

ELAM *et al.* v. COMMERCIAL BANK OF SUFFOLK.

(*Supreme Court of Appeals of Virginia.* April 29, 1889.)

ACTIONS ON BONDS—LIMITATION—PLEADING—MISCONDUCT OF JURY.

1. In an action on the bond of a bank cashier, where it appears that the cashier had misapplied an amount equal to the penalty of the bond within 10 years next preceding the commencement of the action, it is immaterial whether the period of limitation in such cases be 10 years or more.

2. A declaration in such action is not demurrable on the ground that the breaches assigned are too general, vague, and uncertain, where most of the books and papers which could shed light on the transactions had been destroyed, and all other information on the subject is in possession of defendants, and the breaches assigned are as specific as possible in such a case.

3. Where defendants have previously pleaded "conditions performed," it is proper for the court to refuse to allow them to plead *non damnificatus*, as the two pleas are equivalent.

4. Code Va. 1873, p. 558, § 61, c. 57, which treats of joint-stock companies, provides that "the officers and directors after the first year shall be such as may be prescribed by the by-laws, and shall be appointed or removed as said by-laws may provide;" chapter 57, § 16, and chapter 59, § 8, provide that the cashiers therein referred to shall hold during the pleasure of the respective boards. *Held*, that the bond of a cashier of a bank which has no by-law changing the office of cashier to an annual one, such bond not being limited in duration by its terms, creates a continuing obligation, though the cashier is annually re-elected, especially where the sureties, who are also directors of the bank, do not require a new bond on such re-election.

5. Evidence of jurors is inadmissible to impeach their verdict.

Error to circuit court, Nansemond county; C. W. HILL, Judge.

Action by the Commercial Bank of Suffolk against Thomas G. Elam, Algernon S. Darden, and Joseph P. Webb. The declaration was demurred to on the ground that it

Digitized by Google

was too vague, general, and uncertain, but the demurrer was overruled. Judgment for plaintiff, and defendants bring error.

John Lyon and *John H. Wright*, for plaintiffs in error. *Robert R. Prentis* and *Ellis & Kerr*, for defendant in error.

HINTON, J. This is an action to recover the penalty of a bond given to secure the faithful performance by a cashier of a bank of discount and deposit of the duties of his office. The Commercial Bank of Suffolk was chartered by the judge of the circuit court of Nansemond county on the 3d day of January, 1873, with John R. Kilby as president, and Theodore S. Garnett, Jr., as cashier. On the 17th day of April, 1873, the said Garnett having resigned the position, Thomas G. Elam was elected by the board of directors cashier of said bank, and on the 10th day of July, 1873, he executed the bond upon which this suit is now brought, with Algernon S. Darden and Joseph P. Webb as his sureties. From the date of the execution and delivery of this bond until the suspension of the bank on the 1st day of August, 1885, he continued to hold the office of cashier, being annually re-elected, though he gave no new bond. During all this period his sureties were directors. On the 1st day of August, as we have said, the bank closed its doors, and on the 4th day of August, 1885, made an assignment of its assets to Sydney T. Ellis, trustee, for the benefit of its creditors. An examination of the books and assets of the bank was immediately had by an expert book-keeper, when it was discovered that there was a deficiency in the assets of the bank, unaccounted for by the cashier, amounting to nearly $24,000; and that, besides the failure of the cashier to account for this large sum, he had bought 45 shares of the capital stock of the bank, amounting in value to at least $5,000, in his own name and for his own benefit, with money belonging to the bank; and thereupon this action was instituted. Upon the trial the jury were satisfied by the testimony, as we have been by the evidence in record, that there had been a misapplication of more than $5,000 of the assets of the bank within less than 10 years prior to the filing of the declaration in the case, and they therefore found a verdict for $5.000, that being the penalty of the bond. The proof of these facts shows that the court did not err in refusing to set aside the verdict as contrary to the evidence, or in refusing to allow the defendants to plead the statute of limitations; for, if the misapplication of an amount equal to the penalty of the bond occurred within less than 10 years next preceding the institution of the suit, it is a matter of no consequence whether the statutory period of limitation applicable in cases of this character be 10 or 20 years. The judgment, however, is assailed upon other grounds, which we shall now proceed to notice.

And, first, it is argued that the demurrer to the declaration should have been sustained. But in this suggestion we cannot concur; for, in our judgment, the breaches are as specific as possible in a case where most of the books and papers which could shed light upon the transactions under investigation had been destroyed, and whatever information existed outside of these sources was in possession of the adverse party. In Allison v. Bank, 6 Rand. 204, the demurrer to a declaration in debt upon the bond of an accountant was overruled, although the declaration did not state in a single instance the time or place, names, or sums of money which had been misappropriated. In cases of this character, where the evidence must of necessity be general, and an attempt to state the breaches of the condition with exactness of detail will lead to great prolixity of pleading, some generality of statement in the interest of justice must be permitted. 3 Rob. Pr. 593; 4 Minor, Inst. 584–988.

The next objection is that the court erred in refusing to allow the defendants to file the plea of *non damnificatus*. But this objection is also untenable; for, as the authorities all state, the plea of *non damnificatus* is usually equivalent to "conditions performed." Therefore, the plea of "conditions performed" having been previously pleaded in the case, the defendants could not be prejudiced by the refusal of the court to allow them to file its equivalent. 4 Minor, Inst. 988, 1004; Archer v. Archer, 8 Grat. 539; McClure v. Erwin, 3 Cow. 332.

It is further urged, however, on behalf of the plaintiffs in error, that the bond in this case was an annual, and not a continuing, bond, and does not cover the breaches of condition charged in the declaration. To this we are also unable to assent. The bond in its terms has no limit as to duration, and is certainly broad enough to cover a continuing liability, and if it falls, as we think it does, within the purview of section 16, c. 57, and section 3 of chapter 59, of the Code of 1873, it is clearly a continuing obligation; for the cashiers referred to in those chapters hold during the pleasure of the respective boards. But it is insisted that, this being a charter granted by a judge of the circuit court, and not by the general assembly, the office and bond of Elam terminated with the end of the first year from the date of the incorporation. Is this so? The bond, as we have said, is broad enough to cover a continuing liability. There are no negative words in section 61, p. 558,[1] Code 1873, which says, "The officers and directors of any such company, after the first year, shall be such as may be prescribed by the by-laws, and shall be appointed or removed as said by-laws may provide;" and it seems patent, unless we are to charge these sureties, who were also directors, with a gross violation of duty in not

[1] Part of chapter 57 which treats of joint-stock companies generally, and the power of circuit courts over them.

Digitized by Google

demanding a new bond, that they must have construed the bond as continuing. Under these circumstances, there being no proof upon which the jury placed any reliance that there was any by-law changing the office of cashier from a continuing to an annual office, we think the bond must be construed to be a continuing obligation; for, says Judge SHAW, in a case somewhat similar to this, the election of a cashier to an office which he already holds, and would hold without election, must be regarded as a manifestation of their will and intent that he should hold for another year. Bank v. Root, 2 Metc. 539; Murfree, Off. Bonds, § 632; Thomp. Liab. Off. § 9, p. 513; Bank v. Rogers, 7 N. H. 31; Bank v. Chickering, 3 Pick. 335.

As to the objection that there was misconduct on the part of the jury, we think there is nothing in it. "In general," says Mr. Minor, "it has come to be the established doctrine that jurors are inadmissible for the purpose of impeaching their verdict;" and, upon a careful examination of all that has been alleged against certain members of the jury, we can perceive nothing which should take this case without the operation of the general rule. Wynne v. Newman, 75 Va. 815; Whitehurst v. Com., 79 Va. 561; Thompson's Case, 8 Grat. 650; Moses v. Cromwell, 78 Va. 675; 4 Minor, Inst. p. 761. For these reasons the judgment of the circuit court is right, and must be affirmed.

(86 Va. 75)

FORD v. EUKER.

(*Supreme Court of Appeals of Virginia.* April 25, 1889.)

SPECIFIC PERFORMANCE.

1. Plaintiff agreed to buy and defendant to sell a certain lot, and afterwards they agreed that the lot and another should be sold by defendant to plaintiff's son at a different price with the right to a reconveyance to defendant of the second lot, within a given time. *Held*, that the first contract was waived, and specific performance could not be decreed.

2. Defendant's wife having refused her assent to the sale, defendant refused to proceed further. Plaintiff then sued for damages, and, after nearly two years, and after the land had increased in value, and improvements had been made thereon, sued for specific performance, offering to take a deed subject to the contingent dower rights of defendant's wife. *Held*, that the right to specific performance was waived.

3. It not appearing that plaintiff's son was in any way bound, specific performance for his benefit could not be demanded.

John S. Wise and *Joseph Christian*, for appellant. *Meredith & Cocke*, for appellee.

LACY, J. This is an appeal from a decree of the chancery court of the city of Richmond, rendered on the 9th day of June, 1888. The suit was instituted by the appellant to compel specific performance by the appellee of a contract dated August 15, 1884, for the sale of a lot of land. On the 11th of August Ford offered to buy of the appellee, Euker, 60 feet on Broad street, between Seventh and Eighth streets, running back 136½ feet, at $200 per front foot, to be paid for by the assumption of a debt secured thereon of $12,000. On the 15th of August Euker accepted the offer in writing. A few days afterwards, by a writing, not dated, the same contracting parties made another more formal agreement as to this lot of 60 front feet and 20 more front feet adjoining, by which it was mutually agreed that the first lot, the subject of the first agreement, and the other lot adjoining, of 20 feet, should be sold by Euker to A. J. Ford, Jr., the son of the appellant, Ford, at a different price, and the right was reserved to Euker until the 1st day of July, 1889, to pay to Ford $1,333.34, and to have a reconveyance of the 20-foot lot by Ford to him. Euker's wife, not having been consulted, being absent, upon her return to the city refused her consent to the agreement, and Euker declined to proceed further in the matter, and in March, 1885, the appellant instituted an action at law for damages against Euker. This suit was not tried, and in December, 1886, the property mentioned in the agreement having greatly increased in value, —stated in the evidence at $3,000,—the appellant filed his bill for specific performance of the contract of August 15, 1884, for the benefit and at the costs of A. J. Ford, Jr., and offered to accept a decree for a deed from Euker, subject to the contingent right of dower of Mrs. Euker, and to dismiss his common-law suit. Euker answered that, after the lapse of 21 months, and after the institution of an action for damages, and after the land had greatly increased in value, and after he had erected valuable improvements on the property, and expended large sums in furnishing the buildings, and had paid $2,000 in interest on the lien and in taxes on the land, Ford could not, under such changed circumstances, occurring during his delay, now equitably demand specific performance of the contract, and must look for redress alone to his action for damages. Depositions were taken in the cause, and at the hearing the chancery court dismissed the bill and Ford appealed.

This decree, under the circumstances, was plainly right. In the first place, Ford could not be entertained in a suit to enforce the contract of the 15th of August, he having procured and become a party to another agreement a few days afterwards, by which it was agreed that this land should be conveyed to another person. The vendee was changed, the tract or parcel of land was changed, the purchase price was changed; and the vendee in the first agreement agreed to all these changes by signing the second contract. By the second contract the rights of Ford under the first were waived, yet the suit was brought on the first contract in the name of the vendee in the second contract. Neither A. J. Ford nor any other person could require specific performance of the contract of August 15, 1884, it having been renounced by the parties thereto. In the next place, when Euker refused or was unable to fully perform the contract because of his

Digitized by Google

wife's refusal to unite in the deed. Ford did not at once seek the specific enforcement of the same, did not offer, as now, to waive the wife's signature, but instituted an action for damages, and, after the value of the property had been greatly enhanced by time and a rising market, and valuable improvements put upon the same, changed his demands to suit the changed circumstances, and, in view of these, asked a specific execution by the vendor, not of the contract as made with him, nor as made with A. J. Ford, Jr., but, releasing the 20-foot lot, because of the option until July 1, 1889, reserved by Euker, sought specific execution as to the 60-foot lot only. It does not appear that Ford ever offered to pay the purchase price in discharge of the lien, or that he ever, in the name of A. J. Ford, Jr., offered or manifested any anxiety in the subject until the circumstances had all changed. And, moreover, it does not appear upon what principle Euker could have compelled A. J. Ford, Jr., to perform on his part, the act of executing the contract by A. J. Ford, Jr., or by his agent or attorney or other person for him, having been entirely omitted. A. J. Ford, Sr., signed and so consented that the contract might be made with another, and his own contract for the same land canceled, but any execution on the part of A. J. Ford, Jr., seems to have been regarded as wholly immaterial. If Euker had sought to compel specific performance of this contract, he could have compelled nothing as against the vendee, because he had agreed to nothing, either directly or indirectly, the contract not being executed by him, nor by any agent for him. If Euker had so sought to compel A. J. Ford to perform, he would have been without remedy, because, by its terms, the contract was not with him. But if A. J. Ford could be considered as identical with A. J. Ford, Jr., or if he could be held to be the authorized agent of A. J. Ford, Jr., neither of which is claimed, still the decree of the chancery court was right. Specific performance cannot be considered as a matter of right in either party. It does not proceed *ex debito justitiæ*, but is a matter of sound and reasonable discretion, which governs itself by general rules and principles, but withholds or grants relief according to the circumstances of each particular case where these general rules and principles will not furnish any exact measure of justice between the parties. All applications to the court to decree specific performance must depend upon the circumstances of the case, governed by the established principles of the court. The contract must be clear and distinct. It must be mutual. If specific performance would work injustice, a party will be left to his action for damages. It is indeed generally essential that the party seeking a specific performance should not himself have been backward; that he should not have held off until circumstances may have changed, or kept himself aloof so as to enforce or to abandon the contract as events might prove most advantageous. As Mr. Sugden says: "A party who seeks specific performance must show himself ready, desirous, prompt, and eager." Sugd. 279. If A. J. Ford, Jr., was not bound to buy, was Euker bound to convey? Can there be a contract without mutual obligation? Can there be an agreement between two parties which binds one of them absolutely, and the other only at his pleasure? 1 Madd. Ch. Pr. 423. Indeed, as equity is never bound to give this relief, so it never will unless the justice of the case, as drawn from all its facts, demands it. Whatever his merits originally, a plaintiff may disentitle himself to relief by an unreasonable and injurious delay in filing his bill. 3 Pars. Cont. 416; Watson v. Reid, 1 Russ. & M. 236; Heaphy v. Hill, 2 Sim. & S. 29; St. John v. Benedict, 6 Johns. Ch. 112; Jones v. Roberts, 3 Hen. & M. 436; Vail v. Nelson, 4 Rand. 478; 2 Lomax, Dig. 72, 100; 2 Minor, Inst. 808, 809; Garnett v. Macon, 6 Call, 333, 334; Richardson v. Baker, 5 Call, 514; Cringan v. Nicolson, 1 Hen. & M. 429; Alley v. Deschamps, 13 Ves. 225; Pigg v. Corder, 12 Leigh, 69; Anthony v. Leftwich, 3 Rand. 245; Bryan v. Lofftus, 1 Rob. (Va.) 12; Bowles v. Woodson, 6 Grat. 79. There is no just ground upon which, under the circumstances of this case, a decree for specific performance could have been rendered against the appellee, and the decree dismissing the bill was plainly right, and will be affirmed.

(86 Va. 71)

PITTS v. SPOTTS *et al.*

(*Supreme Court of Appeals of Virginia.* April 25, 1889.)

JUDGMENT—LIEN—PARTNERSHIP—APPEAL.

1. A judgment against partners for a firm liability is a lien against their individual real estate, and has preference over an unsecured debt of one of them in the administration of his assets after his decease.

2. Such a judgment, confessed in an action against both partners, first by one partner, and afterwards, during the same term, by the other, is valid, as against the latter; the cause of action not being merged by the rendition of the first judgment.

3. The judgment creditor having a lien, as well on the separate estate of the surviving, as on that of the deceased, partner, while the unsecured creditor mentioned has no other resource except the estate of the latter, there being no partnership assets, equity will marshal the assets in favor of the unsecured creditor, so as to require the judgment creditor to first exhaust the estate of the survivor before resorting to that of the deceased partner.

4. The deceased partner's land being worth less than $500, while the judgment is for more than that sum, an appeal by the judgment creditor may be taken to the supreme court of appeals from a decree giving the unsecured claim preference over the judgment in the proceeds of the land, as the "amount in controversy" is, as to the judgment creditor, the amount of the judgment.

Appeal from circuit court, King and Queen county.

Bill by John G. Spotts and John L. Gibson, merchants lately trading as partners under the firm name of Spotts & Gibson, against

Digitized by Google

W. T. Haynes, sheriff of said county, and, as such, administrator, etc., of W. C. Gayle, deceased, and the widow and children of said Gayle, to subject the land of said intestate to the payment of his debts. John W. Pitts became a party thereto, and his claim, a judgment recovered against said Gayle and one Bowden, as partners, was allowed, but postponed to that of Spotts & Gibson, the complainants. A chancery cause of Parrish against said Bowden and others, the object of which was to subject the land of Bowden to the payment of liens thereon, was heard with this cause, and one decree rendered in both, from which said Pitts appeals.

H. R. Pollard, for appellant. *T. P. Bagby* and *R. L. Henley*, for appellees.

LEWIS, P. The principal question in this case is whether the judgment of the appellant against Bowden & Gayle, late merchants and partners, on a partnership contract, is entitled to priority in the administration of the separate assets of Gayle's estate over the unsecured claim of the appellees, Spotts & Gibson, who are separate creditors of the said Gayle. The commissioner to whom the cause was referred reported the judgment as the first lien on the real estate, but an exception to the report, taken by the appellees, was sustained by the decree complained of. We think the decree is in this particular erroneous. The appellant having obtained a lien by his judgment, and the appellees being only open-account creditors, he is entitled to the benefit of that lien, and ought not to be deprived of it. The case of Straus v. Kerngood, 21 Grat. 584, is, upon this point, a decisive authority. It appears that the judgment was recovered in October, 1883, in a joint action against the partners, in which judgment was confessed by Bowden, and afterwards, during the same term, judgment was rendered against Gayle; and in the argument here it was contended by counsel for appellees that, by the confession of judgment by Bowden, the cause of action was merged, and therefore that the judgment subsequently rendered against Gayle is of no binding effect. This argument proceeds from a misapprehension of the rule relied on. That rule is that a judgment against one of several partners, where there is a joint liability, merges the original cause of action, and is a bar to another suit against the remaining parties. Mason v. Eldred, 6 Wall. 231. But that is not this case. Here the action was against the partners jointly, and the fact that judgment in the action was confessed by one of the defendants does not affect the validity of the judgment subsequently rendered against the other.

There appear to be no social assets to be administered, but it is inferable from the record that the surviving partner, Bowden, is possessed of property out of which the judgment in question can probably be made. At all events, enough appears to show that the case is a proper one for the application of the doctrine of marshaling assets, and therefore, although the appellant's judgment is a valid lien on the separate estate of Gayle, now deceased, which consists of a small tract of land, the value of which is not sufficient to pay the judgment and the claim of Spotts & Gibson also, yet the appellant ought to be required to resort to the estate of Bowden for the satisfaction of his judgment in the first instance, as that course is necessary for the satisfaction of the claims asserted in this suit. Such a course cannot operate to the prejudice of the appellant, since a suit is now pending in the court below to subject the real estate of the said Bowden to the satisfaction of the liens thereon, in which the judgment in question has been reported, and which suit was heard with this.

In Shultz v. Hansbrough, 33 Grat. 567, Judge BURKS, speaking for the court, said: "It is a rule in equity, said to be well established in this country, that where one has a lien upon two funds, and another a posterior lien upon only one of them, the former will be compelled first to exhaust the subject of his exclusive lien, and will be permitted to resort to the other only for the deficiency;" though the rule, he added, is generally applied only in cases where, to compel a resort to the singly charged fund, would not be productive of additional risk or injury to the double creditor.

The objection to the jurisdiction of this court, which was made in the argument by the appellees, cannot be sustained. The judgment of the appellant is, and was when recovered, for more than $500, and that is "the matter in controversy,"—the essence and substance of the decree by the payment of which the estate of Gayle may be discharged; and hence that is the test of our jurisdiction, although the value of the land sought to be subjected is of less value than $500. The suit was not brought to recover the land, nor are "the title or boundaries" of land involved in the controversy. The pecuniary demand asserted is the matter for which the suit was brought, and, as was said by the court in Fink v. Denny, 75 Va. 663, the general rule is that the amount claimed by the plaintiff in the lower court determines the jurisdiction here, when he is the appellant. And this is emphatically so in the present case, since, as we have seen, the very existence of the judgment, so far as the estate of Gayle is concerned, is controverted by the appellees. The amount of the judgment, then, determines the jurisdiction, and not the value, of the land sought to be subjected, nor the difference between the judgment and the claim of the appellees, Spotts & Gibson, which is less than $500. Umbarger v. Watts, 25 Grat. 167; Hawkins v. Gresham, 6 S. E. Rep. 472, and cases cited. The decree will therefore be reversed in the particular mentioned, and an order entered in conformity with this opinion.

Digitized by Google

(86 Va. 81)

JONES' EX'R *et al.* v. BOND'S ADM'R *et al.*

(*Supreme Court of Appeals of Virginia.* April 26, 1889.)

EQUITY—ESTOPPEL.

1. Complainant agreed to convey certain land, the vendees agreeing to give three bonds, with security, for part of the price. Defendants agreed with the vendees to become sureties on the bonds, but on condition that the vendees should secure them by a deed of trust on the land. The bonds were signed and sealed by the vendees and defendants, and were deposited with a third person until complainant's deed to the vendees and the deed of trust by the vendees should be executed. The vendees were let into possession, but complainant gave no deed, and the vendees no deed of trust, and the bonds remained with the depositary. The vendee who had acquired the rights of his co-vendee having died insolvent, complainant filed a bill requiring defendants to answer whether the bonds were delivered or not; that the surviving vendee say whether or not he was willing to comply with the contract, and, if not willing, complainant asked for a rescission. Defendants answered, denying delivery. *Held*, that complainant could not thereafter maintain an action at law on the bonds, and still less could he maintain both the action at law and the chancery suit, though he amended the bill by charging that the allegations of the original bill were erroneous; all the evidence sustaining the denial of delivery of the bonds.

2. Defendants are not estopped by an agreement that, in the event of complainants filing a bill for rescission, they would not avail themselves of any allegation that the bonds had not been delivered, where the bill, unknown to them, had been previously filed.

Appeal from circuit court, Orange county.

Bill by John Bond against James L. Robinson, sheriff, and administrator of John Hansford, deceased, and others. By the agreement of November 17, 1862, between defendants Philip B. Jones, B. F. Nalle, John H. Lee, J. J. Halsey, of the one part, and John Bond of the other, Jones, Nalle, Lee, and Halsey agreed, "that, in the event of his [Bond's] making an effort to have the contract rescinded, by filing a bill and obtaining an injunction, alleging therein that the said contract was not executed, they" would "not avail themselves of any allegation of said Bond that the said bonds were not delivered. * * *" Bond and defendants Jones, Lee, and Graves having died, their representatives were substituted. Defendants appeal.

A. R. Blakey and *W. J. Robertson*, for appellants. *J. G. & W. W. Field*, for appellee.

FAUNTLEROY, J. This cause comes up on an appeal from two decrees of the circuit court of Orange county, rendered, one on the 4th day of February, 1882, and the other on the 4th day of May, 1885. It appears by the record presented with appellants' petition that on the 1st day of January, 1861, John Bond entered into a written contract, under seal, with John Hansford and John W. Newman, by which Bond, in consideration of the covenants of the said Hansford & Newman, covenanted with them to sell and convey to them, by clear and unincumbered title, a tract of land of about 229 acres, in Orange county, Va., and all the timber of white oak and pine on another and adjoining tract of about 600 acres, which Bond had sold to one William Cave, but on which he had reserved from the sale said timber suitable for building purposes, and for cross-ties and bridge timber; also all the cross-ties then cut and lying in the woods on either of the said tracks; also a steam saw-mill then on the 600-acre tract, with all the fixtures annexed to said mill, and all the privileges attached and reserved by the contract with Cave; and to make title to the said property, for which Bond covenanted to accept and receive from said Hansford & Newman one-fourth of the gross earnings of the said saw-mill, as fast as they should be realized, until the sum of $3,000 (one-half of the entire purchase money for the aforesaid property) should be paid, and for the residue, $3,000, to take the bonds of said Hansford & Newman, with satisfactory security, for $1,000 each, payable to said Bond in three, four, and five years from January 1, 1861, with interest from that date. Hansford & Newman applied to Richard M. Graves, John H. Lee, Benjamin F. Nalle, Philip B. Jones, and Joseph J. Halsey, citizens of Orange county, of known responsibility, to become their sureties in the said three bonds of $1,000 each for the deferred installments of the contract price as stipulated with Bond, and the said Graves, Lee, Nalle, Jones, and Halsey consented, and agreed with Hansford & Newman to become their sureties in the said bonds, on the express condition that Hansford & Newman would fully secure and indemnify them by a deed of trust on the land and other property embraced in said contract with Bond, and to be conveyed to them by Bond. Said Joseph J. Halsey, a lawyer resident at Orange Court-House, accordingly drew up the said contract of agreement between Hansford & Newman, so to become their sureties on the consideration aforesaid, and a deed of bargain and sale to be executed by Bond and his wife, conveying the said 229 acres of land, and the saw-mill and timber, and other personalty, to Hansford & Newman, in pursuance of their said contract with Bond; a deed of trust to be executed by said Hansford and his wife, and by said Newman and his wife, conveying the said 229 acres of land and the other property so to be conveyed by Bond and wife to said Hansford & Newman, in trust to Lewis B. Williams, trustee, to indemnify and secure the said Graves, Lee, Nalle, Jones, and Halsey as sureties on the said three bonds of Hansford & Newman to Bond for $1,000 each. Blank certificates of examination and acknowledgment, in due form, by the parties, husbands and wives, were appended to the drafts of the said deeds, and the three said bonds, for $1,000 each, payable to John Bond, at three, four, and five years from January 1, 1861, with interest, were also drawn at the same time; all the said papers, as one simultaneous transaction, of the date of January 1, 1861. The said three $1,000 bonds were signed and sealed by Hansford & Newman, and by Graves, Lee, Nalle, Jones, and Halsey as sureties, but they were not handed to Bond,

Digitized by Google

nor to Hansford & Newman, but they, and all of the said papers,—the contract, the drafts of the deed, and deed of trust, and the bonds,—were left in the hands of Lewis B. Williams, as a mutual friend, until the said deed of bargain and sale from Bond and wife to Hansford & Newman, and the deed of trust from Hansford & Newman to Lewis B. Williams, trustee, to indemnify Graves, Lee, Nalle, Jones, and Halsey, should be executed by Bond and wife, and by Hansford and Newman and their wives, respectively. Neither of the said deeds were ever executed by any party, and all the aforesaid papers remained in the hands of the said Lewis B. Williams, mutual friend; and Bond, without having made his deed of bargain and sale, and without receiving the said three $1,000 bonds, put Hansford & Newman in possession of the 229 acres of land, with the saw-mill and other property named in the contract with Hansford & Newman, and they proceeded to cut and sell the lumber, ties, etc., from the land, and paid to Bond $900, the one-fourth of the gross earnings.

Newman sold out his interest to Hansford, after which, in the spring of 1862, Hansford died intestate and indebted. His estate was committed to James L. Robinson, sheriff of Orange county, for administration, who was proceeding to sell the saw-mill, lumber, ties, etc., as parts of Hansford's general assets, to meet his general debts, when John Bond, apprehensive that Hansford had died insolvent, and that if the mill, lumber, ties, and other property were administered as general assets he (Bond) would not realize from the estate more than 40 per cent. of his claim against him, filed his original bill in the circuit court of Orange county as sole complainant against Newman, Robinson, sheriff, administrator of Hansford, Graves, Lee, Nalle, Jones, and Halsey, as defendants. In this bill (which was prepared and signed by Lewis B. Williams, as his attorney, the depositary of the papers, and mutual friend aforesaid) Bond sets out the contract of January 1, 1861. He avers and exhibits with his bill the unexecuted drafts of the deeds of bargain and sale, and of the deed of trust to indemnify the securities in the said three $1,000 bonds, which said bonds he avers were placed, together with the said unexecuted deeds and other papers, in the hands of a third party, (Lewis B. Williams,) until the parties and their respective wives should execute and deliver the said deeds. Bond further sets out in this bill that Hansford & Newman took possession of the property contracted to be sold and conveyed to them, and proceeded to cut and sell the timber, etc., and had paid him $900 out of the proceeds; that Newman had sold out, and Hansford had died. Bond avers and charges that the said sureties allege that the said three $1,000 bonds were never delivered, and that it was distinctly agreed between them and Hansford & Newman, at the time of signing them, and as a condition of signing them, that they were not to be used until and unless the said deeds had been executed, acknowledged, and admitted to record. He charges that Hansford & Newman had never complied with their contract, and that the sale by Robinson, sheriff, would injure him, (Bond;) and that Hansford's estate is insolvent. He avers that he had never received the bonds, and that the party who holds them does not believe that he has any authority to surrender them, as there is a question whether or not they were ever delivered. He says that he is without remedy, save in equity; and he requires Graves, Lee, Nalle, Jones, and Halsey, the sureties in the said bonds, to answer on their several oaths, as if specifically charged, and they interrogated, and be compelled to say "whether the bonds were delivered or not;" that defendant Newman answer, and say whether or not he is willing to comply with the contract, as surviving partner of Hansford & Newman; and, if he be not willing, then that the court would rescind and set aside the contract of January 1, 1861, and ascertain and decree due compensation to him (complainant, Bond) for the use of the saw-mill, and for the timber, ties, etc., sold from the land; and he prays that the said Robinson, sheriff, administrator, be enjoined from selling, or be required to sell, and the proceeds to be held subject to the order of the court, to which sale he, complainant, would consent. The contract of January 1, 1861, and the unexecuted deeds, are filed as exhibits, and are made parts of complainant's bill and case.

The bill was sworn to, and the injunction was granted November 17, 1862, and was perfected by an injunction bond. The authenticated record shows that this original bill was filed on the 3d day of November, 1862, and it was prepared and signed by Lewis B. Williams, who was the depositary of the papers, and the "third party" named in it, and it was sworn to by Bond. Robinson, sheriff, administrator, under a decree of the circuit court of Orange county of October 1, 1863, sold the saw-mill, lumber, cross-ties, etc., and returned a sale list, amounting to $3,017.92, and the sale notes therefor, with his report. There were no proceedings had beyond this until 1866, because, no doubt, of the prevalence of flagrant war; but on the 3d of May, 1866, the sureties Lee, Jones, Nalle, and Halsey filed their answers on oath, fully responsive to the original bill, and fully and squarely denying that their said bonds were delivered, or to be delivered, until the deeds were executed; and averring that the said bonds, with the other papers, were put in the hands of Lewis B. Williams, to await the full execution of the said deeds, —all of which the said Bond well knew; and they pray that the said bonds may be given up to be canceled. Graves, the other surety, being dead, his executor was made a party, who answered to like effect.

On the 29th of August, 1866, Bond, by Lewis B. Williams, his attorney, brought

Digitized by Google

his action of debt at common law, against Newman, Lee, Jones, Nalle, and Halsey, as survivors of themselves and Hansford and Graves on the said three bonds, which suit at law still remains, and Bond still urged on his suit at law and his chancery suit. In October, 1867, the circuit court ordered Robinson to collect the sale notes, and to deposit to the credit of the cause.

In 1868, John Bond filed his amended bill, stating his having filed his said original bill on November 3, 1862, and charging that he had done so at the solicitations of the said sureties, and for their benefit. He charged that he had sworn to the original bill in ignorance and by mistake, and that the said bill was wrong; and he asked that it be amended or corrected according to his amended bill. This amended bill was answered by all the defendants, whose answers are responsive and squarely deny the allegations.

J. W. Newman's deposition was taken by Bond, and his testimony sustains the original bill, and the answers of the sureties to both the original bill and the amended bill. On the 28th of April, 1876, Graves' executor and other sureties filed their cross-bill, denying Bond's right to proceed at common law when by his bill the chancery court had jurisdiction, and praying that he be enjoined from proceeding further with his common-law suit; which injunction was granted 28th of April, 1876, and bond given. Bond's executor demurred to this cross-bill, and in vacation, February 4, 1882, the judge of the circuit court of Orange county decreed that the complainant, Bond, might have his election between his suit at law and his suit in chancery; and that, if he should elect to prosecute his chancery suit, the injunction against his proceeding at common law should be perpetuated. After this Bond's executor answered the cross-bill. On the 5th of October, 1882, Bond's executor elected to proceed with his suit at law, on the terms of the vacation order, subject to such modifications as the court might make on a hearing of a petition of Bond's said executor. Leave was given to file petition for rehearing the vacation order, which petition was filed in May, 1883, and answered by Jones' executor. In May, 1884, the court ordered sale of the land by commissioners; and on the 7th of May, 1885, the court modified its vacation order of 4th February, 1882, now deciding that the jury, under instructions from the court, shall judge of the weight of evidence of the bills and other papers to be read on the trial. This vacation order of February 4, 1882, and this decree of the 7th of May, 1885, are the two decrees complained of by this appeal.

The circuit court erred in both of the said decrees. It should have perpetuated the injunction, and have ordered that the action of debt be dismissed, with costs against the plaintiff. John Bond had no contract with any one except Hansford & Newman, and with them he covenanted to convey to them the 229-acre tract, and the timber, etc., with a clear and unincumbered title. They contracted to pay him $6,000,—one-half by turning over to him one-fourth of the gross earnings of the saw-mill, and for the other half ($3,000) they were to pay him in money, in installments of $1,000, in three, four, and five years from January 1, 1861, for which they were to give to him their bonds, with satisfactory security. They succeeded so far as to get the promise of Graves, Lee, Nalle, Jones, and Halsey to become their securities upon their said bonds, but only on the express condition that they (Hansford & Newman) would fully secure and indemnify them by a deed of trust on the 229-acre tract of land, saw-mill, timber, and other property which said Bond was to convey to them. Graves and the other said securities showed their good faith, by signing the said three $1,000 bonds, but they never put them in the hands of even Hansford & Newman, and they were never in Bond's hands, nor was he ever entitled to claim them. He had no contract with Graves, Lee, Nalle, Jones, and Halsey, and they never promised him that they would be securities. There was no privity between him and them, and Hansford & Newman never contracted with him as to whom they would get to become securities. Graves, Lee, Nalle, Jones, and Halsey knew that Hansford & Newman could not comply with their engagement to them until Bond should comply with his contract to convey the 229-acre tract; and they had a deed of bargain and sale drafted for Bond and wife to execute such as would give to Hansford & Newman a clear and unincumbered title to the property, which he was to convey by a deed of trust for their indemnity; and they had also drafted a deed of trust to be executed by Hansford & Newman, and their wives, conveying to Lewis B. Williams the property which Bond and wife should convey as they had covenanted to do. This deed of trust could not be executed until Bond and wife should execute their deed of bargain and sale. The drafts for the said deeds and the three bonds were all deposited with Lewis B. Williams, as mutual friend, to await, first, the execution of Bond's deed, and, next, the execution of the deed of trust by Hansford & Newman, and the acknowledgment of both of them, when, and not till then, the deeds were to be delivered, and the bonds were to be handed over to Hansford & Newman, and by them to Bond. Bond wholly failed to execute the deed of bargain and sale, and the bonds were for this reason never delivered to either Hansford & Newman or to Bond, who never acquired any right to them. He went outside of his contract with Hansford & Newman, and of his own option and risk he put them in possession of the land, retained the title in violation of his contract to convey, and he has no claim, in law, equity, or good morals, on Graves, Lee, Nalle, Jones, and Halsey. He called upon them specifically and imperatively to answer his bill, and to say on oath whether the bonds were ever

Digitized by Google

delivered, and this they did. After eliciting their answer he could not dismiss. The court had jurisdiction in chancery, and he could not resort to his suit at law; still less could he carry on a double-barreled litigation, both in chancery and at common law. The bill and answers close the case. The answers are responsive, and fully and positively deny the delivery of the bonds, and there is not a shadow or vestige of evidence to contradict the denial; and all the circumstances —the failure of Bond, the unexecuted deeds of bargain and sale, and of trust, the explicit testimony of Newman, Bond's own witness, and the allegations of the original bill—sustain the answers.

There is an attempt to parry the force and effect of the original bill, and it is claimed that the sureties are estopped from availing themselves of any allegations in the original bill as evidence, because four of them signed the paper dated the 17th of November, 1862. Bond obtained that paper upon concealment and false pretense on the 17th of November, 1862, not informing them that he had then already, two weeks before, filed his bill, and begun the procedure on his own account. It was an evident effort to entrap them; but, even if it be obligatory upon them under the circumstances, it does not estop them from any defense which then existed, and the defense by the original bill did then exist, and had existed, for two weeks, and they were, as the record shows, then full handed, with proof that the bonds had never been delivered, and that Bond had never fulfilled the terms and conditions which could give him any right to claim their delivery. But Bond, by his amended bill, forced them to answer under oath specifically and pointedly whether the bonds had ever been delivered; and this they did answer upon their own knowledge *a priori*, and wholly without referring to or relying upon Bond's allegations in his original bill. But the amended bill is wholly incredible and unsupported, and denied by the answers. The cross-bill was unnecessary, but it does not alter the case.

There was no need or case for an issue out of chancery. The bills called on the appellants for answers on oath on a specific question. The answers are responsive and conclusive, and all the evidence and all the circumstances corroborate and sustain the denial in the answers that the bonds were ever delivered. The court should have so decreed, and have dismissed the complainant's bills against the appellants, and have ordered the bonds to be canceled.

The decrees complained of must be reversed and annulled, and the cause will be remanded to the circuit court for further proceedings to determine the rights and equities between the parties to the contract between Bond and Hansford & Newman, and for the proper ascertainment and settlement of accounts before a master commissioner, and disposition of the proceeds of the sale of the property which has been sold under the orders of the said circuit court. Decrees reversed, with costs in favor of appellants.

(86 Va. 97)

EASTERN ICE CO. *v.* KING.

(*Supreme Court of Appeals of Virginia.* May 2, 1889.)

SALE—WARRANTY—MEASURE OF DAMAGES.

1. The defendant agreed to sell to plaintiff a certain quantity of ice of the "best quality harvested in Penobscot river" during certain years. It was further stipulated that the defendant should be released from its obligations if by reason of the elements it should be impossible to harvest the ice by reasonable effort from the fields controlled by the defendant. *Held*, in an action by plaintiff for a breach of the contract in not delivering ice of the quality stipulated, where it appeared that a part of the ice harvested by the defendant was of excellent quality, while a part was very poor, and that a part of the ice delivered to plaintiff was of the inferior quality, that a verdict for the defendant should be set aside. The furnishing of an average quality of ice, or "just as it ran," was not a compliance with the contract.
2. Plaintiff was not estopped from claiming damages for such breach because he gave no notice to the defendant of his claim.
3. The measure of damages in such case was the difference between the value at the place where the ice was to be delivered of the best ice harvested by the defendant and the value of the ice actually delivered.

Error to circuit court of city of Richmond.

McGuire & Ellett, for plaintiff in error. *Edgar Allan* and *J. Samuel Parrish*, for defendant in error.

LEWIS, P. This was an action in the circuit court of the city of Richmond, wherein Jane King, the defendant in error here, was plaintiff, and the Eastern Ice Company, a corporation chartered and doing business under the laws of the state of Maine, was defendant. The action was brought to recover damages for an alleged breach of a certain contract dated June 17, 1886, whereby the defendant company sold to the plaintiff 15,000 tons of Penobscot river ice of the "best quality harvested on Penobscot river" during each year of the continuation of the contract, which was to run for five years, 3,000 tons to be delivered each year. There was a provision, however, in the contract, in these words: "It is further agreed that the said Eastern Ice Co. may be released of its obligation of delivering the said ice in the event of destruction of its housed ice by the elements, or if it be impossible to harvest the same by reasonable effort from the fields controlled by the said Eastern Ice Company." The breach alleged in the declaration was that the defendant company, during the year 1886, did not deliver to the plaintiff 3,000 tons of ice of the quality stipulated for, but, on the contrary, delivered ice of a very inferior quality, "consisting largely of compressed snow, and very dirty," by reason whereof the plaintiff was greatly damaged, etc. There were two trials in the court below. At the first trial there was a verdict for the defendant, which, on the motion of the plaintiff, was set aside

Digitized by Google

as being contrary to the evidence, whereupon the defendant excepted. At the second the jury returned a verdict for the plaintiff for $1,300 damages, upon which judgment was entered, whereupon the defendant obtained a writ of error and *supersedeas*.

In this posture of the case, we must, in reviewing the alleged errors in the rulings of the court below, look to the proceedings on the first trial, and if there be error in the action of the court in setting aside the verdict rendered for the defendant it will be our duty to set aside all the subsequent proceedings, and render such judgment as the court below ought to have rendered; that is to say, enter judgment on the verdict for the defendant. Muse v. Stern, 82 Va. 33; Jones v. Cotton Mills, Id. 140; Tucker v. Sandidge, 8 S. E. Rep. 650. An important change, however, in the rule of decision of the appellate court in such cases has been effected by the new Code, which enacts that where, as in the present case, the evidence (not the facts) is certified, the case shall be considered as on a demurrer to the evidence by the party excepting. Code, § 3484. And this rule, as we have heretofore held, applies to judgments rendered as well before as since the Code took effect. Sutton v. Com., 7 S. E. Rep. 327; Improvement Co. v. Smith's Adm'r, Id. 369. Therefore, instead of looking to the whole evidence at the first trial, according to the rule laid down in Muse v. Stern, we must consider the case under the statutory rule as upon a demurrer to the evidence by the defendant, (the plaintiff in error here,) notwithstanding the first verdict was rendered in its favor, for so the law is written; and, viewing the case in this light, the judgment must be affirmed. There is no doubt, we think, that according to the true construction of the contract the defendant company was not bound to furnish the plaintiff the best ice harvested on the Penobscot river, but the best that by reasonable effort could be harvested from the fields controlled by it on the said river, and such was the construction put upon the contract by the circuit court. This is clear upon the face of the contract, and is besides in accordance with the construction put upon it by the plaintiff herself, for in a letter addressed by her to the defendant company on the 28th of July, 1886, she wrote: "My contract calls for the best ice harvested on fields of Eastern Ice Co. on the Penobscot river;" and this would be decisive of the matter, even if the language of the contract were doubtful, as it also accords with the construction given to it by the defendant. Chicago v. Sheldon, 9 Wall. 50–54; Knopf v. Railroad Co., 8 S. E. Rep. 787. But the evidence shows that the best ice harvested by the defendant company on its said fields was not delivered by it to the plaintiff, or at least only a small portion of the ice it delivered was of that quality. The greater portion of it was of very inferior quality. Much of it was "anchor ice," and a part of it "little better than scrap ice," and some of it was not marketable at all. Indeed, we think the case in this particular is established for the plaintiff by the defendant's own evidence; for it is admitted by the president of the company, who testified as a witness before the jury, that the ice delivered to the plaintiff was not of the best quality, but he insisted that it was of average quality, and this, he seemed to suppose, was a compliance with the contract of the company with the plaintiff. He says the ice was cut from the river, and run into the ice-houses, from which it was shipped to the plaintiff, "just as it ran;" and that the same quality of ice was shipped to the plaintiff that was shipped to every other customer of the defendant during the year 1886. He also says: "We considered that we had only one quality of ice, and every customer's vessel was loaded in its turn." Yet he admits, while saying that the ice harvest of 1886 was a very poor one, that a part of the ice harvested by his company that year was of excellent quality; and so it was, for the evidence shows that the cargo shipped to the plaintiff by the vessel called the "Annie Lord," containing 421 tons, was of that quality, and so also was a part of the cargo shipped by another vessel. There is no doubt that all the vessels were loaded in their turn from the defendant's ice-houses, and that each received the ice as it ran, and this undoubtedly would have been a fulfillment of the contract with the plaintiff if that contract had called for ice good, bad, or indifferent; but as it did not, and as it calls for the best ice harvested by the defendant, the furnishing of an average quality was not a compliance with its terms. We think, therefore, without going into a further review of the evidence, which is voluminous, that the first verdict rendered by the jury was not warranted by the evidence, and that it was rightly set aside.

It also follows from what has been said that the circuit court did not err in refusing to give to the jury the following instruction: "Said contract must be reasonably construed, and if the jury believe that the said company furnished the best quality of ice, not picking out special lots, but as the ice ran, and such as it was furnishing to all its customers, that is a compliance with said contract, and the jury should find for the defendant." If taking the ice as it ran did not result in furnishing the best quality harvested by the defendant,—as we have seen it did not,—then the instruction was wrong, and was properly refused. Nor were the rights of the plaintiff under her plain and specific contract with the defendant to be determined by the defendant's course of dealing with its other customers, whose contracts may have been very different. She has the right to stand upon her own contract, and if, in order to furnish the best quality of ice, or, in other words, to comply with that contract, it was necessary for the defendant to "pick out special lots," it was its duty to have done so. The plaintiff contracted, not for average ice, but for the best, and she was entitled to get it.

Digitized by Google

Complaint is also made of the refusal of the circuit court to give to the jury the following instruction: "That it was the duty of the plaintiff to have claimed damages, and to have rejected cargoes within a reasonable time after they arrived; and if the jury believe that the plaintiff did fail to make such claims or reject such cargoes within a reasonable time, and that the defendant was injured thereby, then by laches on the part of the plaintiff she would be estopped from now asserting a claim for such damage." This instruction does not state the law correctly, and was properly refused. The true rule is that where goods delivered to the buyer are inferior in quality to that which was warranted by the vendor, the buyer may bring an action for the breach of the warranty immediately, without returning the goods, or giving any notice to the seller, though it has been held that the failure either to return the goods or to notify the vendor of the defect in quality raises a presumption that the complaint of defective quality is not well founded. Vincent v. Leland, 100 Mass. 432; Fisk v. Tank, 12 Wis. 276; Day v. Pool, 52 N. Y. 416; 2 Benj. Sales, (6th Amer. Ed.) § 1354.

The objection that the verdict at the last trial was not warranted by the evidence is also untenable. The plaintiff's evidence shows that of the ice shipped by the defendant company to the plaintiff in 1886 about 800 tons, or nearly one-third, was utterly worthless, and had to be thrown away; and that, if the ice thus thrown away had been of the quality contracted for, it would have netted the plaintiff at least $1,200. In other words, the difference in this city between the value of the ice thrown away, which was nothing, and the value of the same quantity of the best quality of ice harvested by the defendant company from the fields controlled by it on the Penobscot river in 1886, was not less than $1,200; and in addition to this the evidence shows that on account of the inferior quality of much of the ice actually sold by the plaintiff, she was obliged to make discounts to her customers,—in some instances amounting to as much as from $25 to $30 per month. The court at the trial instructed the jury that, if they should find for the plaintiff, the measure of damages was the difference between the value in Richmond of the best ice above mentioned and the ice actually received by the plaintiff at the time the cargoes were shipped after the 17th of June, 1886, and this is the true rule. In Wood's Mayne, Dam. § 224, the rule is thus stated: "Where the article has not been returned, the measure of damage will be the difference between its value with the defect warranted against, and the value which it would have borne without that defect. It was formerly laid down that the measure would be the difference between the contract price, and that for which it would sell with its defect. But the rule in England is now settled, as stated above, and the doctrine in America is the same." See, also, Thornton v. Thompson, 4 Grat. 121. There is no error in the judgment of the circuit court, and the same must be affirmed.

(86 Va. 117)

YATES v. LAW.

(*Supreme Court of Appeals of Virginia.* May 2, 1889.)

FRAUDULENT CONVEYANCES—HUSBAND AND WIFE.

1. A lease, procured by a husband "as agent" for his wife, will be presumed and held voluntary and fraudulent, not only as to his existing creditors, but also, where he is insolvent, as to any person having the right to have his property applied to the payment of his debts, unless those claiming under the lease can show affirmatively that it was acquired with funds not furnished by the husband, or with the wife's separate means; and this must be by proof independent of their own answers, where no discovery by way of evidence is sought of them.

2. The principal object of a bill being to have the profits of a lease collected and applied to the payment of certain decrees against complainant and the insolvent defendant, a prayer that the necessary accounts be taken to ascertain the rights of the parties under the lease, and that, after that has been done, the profits of the lease be applied to the payment of the decrees, and the balance disposed of according to the rights of the parties, does not render the bill multifarious.

3. Though the bill be defective for not making the creditors who obtained the decrees mentioned parties, such defect is amendable, and affords no ground for dismissing the bill.

Appeal from corporation court of Danville; JOHN D. BLACKWELL, Judge.

E. E. Bouldin and *John W. Riely*, for appellant. *Withers & Barksdale*, for appellee.

LEWIS, P. This is an appeal from a decree of the corporation court of the town of Danville. The record discloses the following facts: In 1878, W. T. Law obtained from one George Price a lease of a certain property for the period of 10 years, at an annual rent of $600, and the payment of all taxes assessed on the property, and took the lease to himself as "agent of P. B. Law, trustee for Sarah J. Law," who was the wife of W. T. Law. The property so leased was a warehouse in the town of Danville, used for the sale of tobacco, and much capital was necessary, and many employés were required for the conduct of the business. W. T. Law, after acquiring the lease, admitted Lewis A. Yates, the appellant's intestate, as a partner or a half owner, and some months afterwards they sublet the property at a considerable profit. Law & Yates for seven years thereafter jointly managed and controlled the lease, and equally shared and divided the profits between them. Yates died in February, 1885, and after his death Law refused to account any longer for Yates' part of the profits of the lease. Shortly before the latter's death, decrees were rendered by the said corporation court against Law and Yates for individual liabilities incurred by them as executors and trustees under the will of George Price, deceased. Law has failed to pay anything on account of these decrees, and has left the burden to be borne by Yates' estate. The present suit was brought by Yates' administrator for an account of the proceeds of the lease, and to have

Digitized by Google

the residue, after paying the rent due to Price's estate, applied, first, to the payment of the above-mentioned decrees, and one-half of the balance paid to Yates' estate. The bill charges that Law is insolvent, and that he has collected and appropriated to his own use the entire proceeds of the lease since Yates' death, and the prayer of the bill is for an injunction and the appointment of a receiver, and that the rents may be collected and properly applied under the direction of the court. W. T. Law, P. B. Law, trustee, and Sarah J. Law are made defendants to the suit, and upon the filing of the bill an injunction was awarded. The defendants answered, admitting the insolvency of W. T. Law, but claiming that the lease was the separate estate of the wife, Sarah J. Law. Depositions were taken, and when the cause came on to be heard the bill was dismissed by the decree complained of.

The application of a few well-settled and familiar principles to the case, as disclosed by the record, will suffice to show that this decree is erroneous. In a long line of cases, beginning with Blow v. Maynard, 2 Leigh, 29, this court has decided that although a post-nuptial settlement will be supported where it appears to have been made upon a fair contract for a valuable consideration, and in the execution of such a contract, yet, from the relative situation of the parties, and the convenient cover which such settlements afford a debtor to protect his property and impose upon the world, they are always watched with jealousy. Every such settlement, therefore, where the settlor is indebted, is, as against his existing creditors, presumed to be voluntary and fraudulent, and will be so declared, unless those claiming under it can show the contrary; and this must be done, if at all, by proof independent of their own answers, where no discovery by way of evidence is sought of them. College v. Powell, 12 Grat. 372; Price v. Thrash, 30 Grat. 523; Fink v. Denny, 75 Va. 663; Hatcher v. Crews, 78 Va. 465; Perry v. Ruby, 81 Va. 317; Witz v. Osburn, 83 Va. 227, 2 S. E. Rep. 33; Rixey v. Detrick, 6 S. E. Rep. 615. The present case, it is true, is not a case of a post-nuptial settlement, but the principle of the cases just mentioned largely applies to it. By the common law, marriage is an absolute gift to the husband of all the personal estate of which the wife is actually and beneficially possessed in her own right at the time of marriage, and such other personal estate as comes to her during coverture. And the principle embraces her earnings, or the products of her skill and labor, which the common law makes as absolutely the property of the husband as his own earnings. BURKS, J., in Campbell v. Bowles, 30 Grat. 652. Hence the presumption of law is—and that presumption is not affected by the married woman's act—that the husband is the owner of all the property of which the wife may be in possession, especially if they are living together as husband and wife; and to overcome this presumption she must show affirmatively that the property is her own, and that it was derived from a source other than her husband, and in good faith, if he be insolvent; otherwise a wide door would be opened to fraud.

In Seitz v. Mitchell, 94 U. S. 580, a case which went from the supreme court of the District of Columbia, the rule is thus stated: "Purchases of either real or personal property, made by the wife of an insolvent debtor during coverture, are justly regarded with suspicion, unless it clearly appears that the consideration was paid out of her separate estate. Such is the community of interest between husband and wife,—such purchases are so often made a cover for a debtor's property, so frequently resorted to for the purpose of withdrawing his property from the reach of his creditors, and preserving it for his own use, and they hold forth such temptations for fraud, that they require close scrutiny. In a contest between the creditors of the husband and the wife there is, and there should be, a presumption against her which she must overcome by affirmative proof." And after referring to a number of Pennsylvania cases, to the effect that in the case of a purchase by the wife after marriage the burden is upon her to prove distinctly that she paid for the property with funds not furnished by the husband, and that in the absence of such proof the presumption is a violent one that the husband furnished the means of payment, the court said: "All these decisions were made after the enactment of a statute giving to married women rights of property as against the husband and his creditors, at least as broad as any which exist in the District of Columbia. And similar decisions have been made in other states where like statutes have been enacted;" citing Switzer v. Valentine, 4 Duer, 96; Glann v. Younglove, 27 Barb. 480; Woodbeck v. Havens, 42 Barb. 66; Ryder v. Hulse, 24 N. Y. 372; Connors v. Connors, 4 Wis. 131; Elliott v. Bently, 17 Wis. 610; Edson v. Hayden, 20 Wis. 682; Duncan v. Roselle, 15 Iowa, 501; Cramer v. Reford, 17 N. J. Eq. 367 Nor is the operation of the rule confined to creditors of the husband. In Bradford's Appeal, 29 Pa. St. 513, it was applied in a contest between the next of kin and the widow of a deceased husband, although the estate was solvent; and it applies, we take it, in favor of any person who has the right to have the property of an insolvent husband applied to the payment of his honest debts. It therefore applies to the present case, and, with decisive effect, in favor of the appellant, who is remediless except in a court of equity. There is absolutely no proof that the lease in question was acquired with funds not furnished by the husband, or that the wife had any separate funds of her own whatever, nor is it even alleged in the answers that she had. The answers, indeed, do deny that the lease is the property of the husband, and aver that it is the separate property of the wife. But

Digitized by Google

this was not sufficient. To repel the presumption that it is the husband's property it was incumbent on the wife to distinctly aver, and to clearly prove, that it was purchased with her own separate means, or, at all events, that it was acquired by means other than her husband's. There was not even an attempt made to prove that she ever had any separate estate, or that she ever had any opportunity for obtaining money except from her husband; and the fair inference from the record is that neither she nor her alleged trustee ever heard of the lease before this controversy arose. It is certain that no trustee account has ever been settled and returned by him, and the answers admit that he has never had any management or control over the property, and that it has been managed and controlled exclusively by the husband, who has collected and appropriated the profits derived from it. The very form of the lease is calculated to excite suspicion, being made to W. T. Law, agent for P. B. Law, trustee for Sarah J. Law, the wife. And the evidence, in addition to this, shows clearly, we think, an attempt on the part of the said W. T. Law to defraud not only his creditors, but Yates' estate as well. Soon after Yates's death, he admitted the agreement to share with Yates in the lease, and did not deny its validity, but, on one pretext and another, put off a settlement, and finally attempted to repudiate the agreement altogether as being unauthorized and invalid, and to make his wife the beneficiary of his fraud. But such an effort will not be countenanced in a court of equity The agreement is valid and binding, and must be enforced. To hold otherwise, under the circumstances of this case, would, indeed, be making fraud, as was said in Seitz v. Mitchell, "both profitable and easy." We lay out of the case the averment in the answers that the agreement was upon conditions which have never been complied with by Yates, not only because it is affirmative matter, not supported by proof, but because the conduct of W. T. Law, in dividing with Yates the profits of the lease for seven years without question, negatives the idea that the agreement was conditional. Nor is the objection well founded that the bill is multifarious. The principal object of the bill is to have the profits of the lease collected and applied to the payment of the decrees against Law & Yates already mentioned; and, to accomplish this object, the prayer of the bill is that the necessary accounts be taken to ascertain the rights of the parties, and, after this has been done, that the profits of the lease be applied to the payment of the decrees, and the balance be disposed of according to the rights of the parties. These are clearly not such distinct and independent matters as render the bill multifarious. In Gaines v. Chew, 2 How. 619, it is said to be impossible to lay down any rule, universally applicable, as to what constitutes multifariousness; that the court must exercise a sound discretion, each case being governed by its own circumstances; that it is desirable to avoid a multiplicity of suits; and that, where there is no liability to injustice, the objection on the ground of multifariousness should not prevail. The decisions of this court to the same effect are numerous. One of the latest on the subject is Hill's Adm'r v. Hill, 79 Va. 592, in which case Judge HINTON, in delivering the opinion of the court, after quoting the remark of Lord COTTENHAM in Campbell v. Mackay, 1 Mylne & C. 603, that the court seems to have considered what was convenient in the particular circumstances, rather than to have attempted to lay down any absolute rule, said: "It would seem, therefore, that where the matters in controversy are not absolutely independent of each other, although distinct, and it will be more convenient to litigate and dispose of them in one suit, the objection on the ground of multifariousness should not prevail."

The bill, however, in the present case is defective for not making the creditors who obtained the decrees mentioned in the bill parties to the suit. But that is no ground for dismissing the bill. The appellant ought to have been permitted to amend the bill, and make the necessary parties, and he may yet be permitted to do so. The decree will therefore be reversed, and the cause remanded to the court below for such further proceedings to be had therein, not inconsistent with this opinion, as may be necessary in order to a final decree.

LACY, J., dissents.

(30 S. C. 328)

ROBBINS *et al.* v. SLATTERY.[1]

(*Supreme Court of South Carolina.* April 15, 1879.)

REPLEVIN—PRACTICE—VACATING JUDGMENTS.

1. Code Civ. Proc. § 301, (Rev. St. S. C. p. 640,) provides that, in an action for the recovery of personal property, if the property has been delivered to plaintiff, judgment for defendant shall be for the return of the property, or for its value if it cannot be returned *in specie*. *Held*, that a judgment for defendant simply for the recovery of a sum assessed by the jury as the value of the property is erroneous, though it appeared on the trial that the property had been so disposed of that its identity was lost.

2. A motion by the plaintiff to correct a judgment erroneous for the reason mentioned, may, under Rev. St. S. C. c. 105, § 2, be made within two years after its rendition, and circuit court rule 55, limiting the time within which a notice of a motion for a new trial may be made to ten days after the trial, has no application thereto.

Appeal from common pleas circuit court, Colleton county; THOMSON, Judge.

Action by Robbins, Boddington & Co. against James F. Slattery, to recover certain personal property. The property was delivered to plaintiff under the provisions of the Code. There was a verdict for defendant for $250, the value of the timber, and judgment was entered thereon. From this judgment, and an order refusing a new trial, defendant appeals. Code Civil Proc. § 301, provides

[1] Not officially reported. Cited in Lockhart v. Little, post, 511.

Digitized by Google

that in an action to recover possession of personal property judgment for the plaintiff shall be for the possession, if to be had, or the value and damages for its detention, and, if the property has been delivered to defendant, judgment for defendant may be for the return of the property, or its value in case a return cannot be had, and damages for withholding it. Rev. St. S. C. c. 105, § 2, is as follows: "In case a judgment or decree has been or hereafter shall be rendered by a court of common pleas, it shall be lawful for either party, plaintiff or defendant, to move before the presiding judge of the circuit in which said judgment was obtained to vacate or set aside said judgment, upon satisfactory proof being made to said judge that said judgment is erroneous, and ought to be set aside; and, upon such proof being made, the presiding judge is hereby authorized to vacate and set aside said judgment, and to order a trial *de novo:* provided that, except as to causes arising under the provisional government of South Carolina, no motion shall be entertained for a new trial in any cause unless the motion be made within two years after the judgment rendered."

W. J. Verdier, for appellants. *Henderson & Behre*, for respondent.

McIver, J. This was an action to recover the possession of certain personal property, which seems to have been taken from the possession of the defendant and delivered to the plaintiffs, under proper proceedings for that purpose authorized by the Code of Procedure. The defendant, in his answer, claimed judgment "for the return of the property taken from him by the sheriff, or its value," and also damages for the detention of the same. Upon the trial the verdict was for the defendant in the following form: "We find for the defendant two hundred and fifty dollars, the value of the timber,"—and judgment was entered in favor of defendant for that amount of money, and also for the amount of his costs and disbursements. The verdict was rendered on the 16th of March, 1878, and the judgment was entered on the 18th of the same month. On the 28th of March, 1878, notice was given by the plaintiffs that an application would be made to the judge who tried the case for a rule requiring the defendant to show cause at the next term of the court why the verdict and judgment should not be set aside upon the following grounds: "(1) That the verdict is for the value of the property, and not for the possession of the property, with an assessment for the value thereof; (2) that the judgment is for the recovery of the value of the property, and not in the alternative." On hearing this application the circuit judge refused the motion, and this is an appeal from his decision. Under the provisions of the Code, as contained in section 301, Rev. St., p. 640, we think, in a case like this, where the defendant claimed a return of the property in dispute, that the judgment should have been for the return of the property, or for its value in case a return could not be had, and that a judgment which in effect deprives the party of the right to return the property, and forces him to pay its value, was erroneous. This right he would have had under such a judgment as that contemplated by the Code, in a case of this kind. This seems to be the construction placed upon a similar provision of the New York Code, as will appear by the authorities cited in appellants' brief, and is evidently in accordance with the spirit as well as the letter of our Code. The fact testified to by one of the plaintiffs, that the property in dispute had been carried off, and so disposed of as to have lost its identity, cannot have the effect of altering the kind of judgment to which the party is entitled under the law.

It is contended that this motion came too late, notice of it not having been given within 10 days after the trial, as required by the fifty-fifth rule of practice for the circuit courts. But this was not a motion for a new trial under that rule, but it was an application to set aside an erroneous judgment under section 2, c. 105, Rev. St., p. 497, to which the rule referred to does not apply. The judgment of the circuit court must be set aside, and a new trial is ordered.

Willard, C. J., and Haskell, J., concur.

(30 S. C. 326)

Lockhart v. Little.

(*Supreme Court of South Carolina.* March 9, 1889.)

Claim and Delivery—Pleading.

A complaint in an action of claim and delivery, which describes the property as "one lot of seed cotton, about 6,000 pounds, twelve stacks of fodder, one load of corn, about fifteen bushels, of the total value of $250," is insufficient, and a demurrer to it should be sustained; nor is it aided by a verdict for plaintiff which follows the description contained in the petition, with the exception of the value.

Appeal from common pleas circuit court of Spartanburg county; Fraser, Judge.

J. E. Webster and *Duncan & Sanders*, for appellant. *J. A. Corry*, for respondent.

Simpson, C. J. The main questions in this case are: (1) Should a demurrer to the complaint, interposed on the ground that it did not state facts sufficient to constitute a cause of action, have been sustained, instead of overruled? (2) Should the verdict, which was for the plaintiff, have been set aside, because it did not conform to the statute in such cases? The action was technically an action of claim and delivery of personal property, and the complaint alleged the wrongful detention of the property in general terms, without a special and particular description thereof. For instance, it was described as "one lot of seed cotton, about six thousand pounds, twelve stacks of fodder, one load of corn, about fifteen bushels, of the total value of two hundred and fifty dollars;" and the

Digitized by Google

plaintiff demanded judgment for the recovery of said property, and for the sum of $250 damages. A demurrer was orally interposed at the trial, as suggested above, which being overruled, the case ultimately went to the jury, when a verdict was rendered for the plaintiff as follows: "We find for the plaintiff six thousand pounds of seed cotton, at $2.75 per hundred pounds; three thousand bundles of fodder, at $1.50 per hundred bundles; fifteen bushels of corn, at sixty-five cents per bushel,—the total value of the personal property so found to be due the plaintiff amounting to the sum of two hundred nineteen and 75-100 dollars." Upon which a judgment was entered as follows: "Therefore it is adjudged that the plaintiff recover of the defendant the possession of the personal property described in said verdict, to-wit: Six thousand pounds of seed cotton, three thousand bundles of fodder, and fifteen bushels of corn, or two hundred and nineteen and 75-100 dollars, the value thereof, in case a delivery cannot be had; and also that said plaintiff recover of the defendant her costs and disbursements in this action, amounting to forty-seven and 45-100 dollars." Actions of claim and delivery are based on title to the precise property sought to be recovered, and to determine this question the property should be described so as to be identified; otherwise there could be no delivery in the event of a verdict for the plaintiff. Such actions are never brought to recover, generally, so much personal property of a certain quantity or quality, and to be satisfied by a verdict for the recovery of property simply of the character mentioned, and of the quantity claimed; but the object is to recover special and particular property to which the plaintiff has title, and in case delivery cannot be had then for its value; and, unless the property is described so as to be identified, it would be impossible for the jury to assess its value, or to determine the question of title. We think that both the complaint and the verdict below were defective in failing to meet the requirements above. There is not even a description as to location, which possibly might have afforded the means of identification, if it had been stated; nor is there any other mark alleged by which the property claimed could be distinguished from other chattels of the same kind; and we do not see how the sheriff, should he attempt to enforce delivery, could seize any particular lot of cotton seed, corn, or fodder as having been adjudged the property of plaintiff. There is nothing to guide him, except quantity, which would be wholly unsatisfactory as a means of identification. The cases of Eason v. Miller, 18 S. C. 385, 386, and Robbins v. Slattery, ante, 510, are in point, and sustain the appeal. See, also, Thompson v. Lee, 19 S. C. 492. It is the judgment of this court that the judgment of the circuit court be reversed.

McIVER and McGOWAN, JJ., concur.

(30 S. C. 459)

BOMAR *et al.* v. ASHEVILLE & S. R. CO.

(*Supreme Court of South Carolina.* March 26, 1889.)

SECURITY FOR COSTS.

1. The objection that the statute and rule of court requiring a non-resident plaintiff to give security for costs are unconstitutional cannot be raised for the first time on appeal.
2. Under South Carolina circuit court rule 10, providing that an order for security for costs can be complied with only by giving an undertaking with sureties, witnessed and approved by the clerk, or by a deposit of money, and declaring that "no other security for costs shall be regarded as a compliance with the order," the individual note of plaintiff's attorney, payable to the clerk, is not valid security.
3. Parol evidence is not admissible to show that the note really represents a transaction by which the attorney borrowed the amount in money from the clerk, gave his note therefor, and then deposited the money itself as security.
4. An order requiring security to be entered within a prescribed time, and, on default, that plaintiff be nonsuited, is final, after the expiration of the time limited, and cannot be reviewed, modified, or reversed by the succeeding judge.
5. Code S. C. § 195, authorizing the court "to relieve a party from a judgment, order, or other proceeding taken against him through his mistake, inadvertence, surprise, or excusable neglect," does not authorize relief from an order for security for costs, where it does not appear that the order, or the failure to comply therewith, was the result of either mistake, inadvertence, surprise, or excusable neglect.

Appeal from common pleas circuit court of Spartanburg county; ALDRICH and KERSHAW, Judges.

Action by Martha Isabel Bomar and husband against the Asheville & Spartanburg Railroad Company, to recover damages for injuries alleged to have been sustained by *feme* plaintiff while a passenger on the defendant's road. Plaintiffs appeal from a judgment of nonsuit, entered for failure to comply with an order requiring security for costs.

Thomson, Nicholls & Moore, for appellants. *Duncan & Sanders* and *J. C. Haskell*, for respondent.

McIVER, J. On the 28th March, 1887, an order was granted by his honor, Judge ALDRICH, requiring the plaintiffs, who are and were then non-residents of the state, to enter into security for costs "by the first day of the next term of this court, and on failing to do so that they be nonsuited." It is stated in the "case" that, when this order was made, the right of the defendant to require security for costs was neither admitted nor denied, but the granting of the order was not resisted, upon the ground that the defendant had no right to require a non-resident to enter into security for the costs of an action instituted by him in the courts of this state. At October term, 1888, a motion was submitted by defendant to his honor, Judge KERSHAW, to dismiss the complaint, and for leave to enter up judgment of nonsuit, upon the ground that security for costs had not been entered as required by the former order of the court. At the hearing of this motion a note of J. S. R. Thomson, Esq., one of the

Digitized by Google

attorneys for the plaintiffs, was exhibited, of which the following is a copy, in which we have endeavored to preserve the interlineation and erasure as they appear in the original, to-wit:

"$130.00. Due F. M. Trimmier, clerk, one hundred and thirty dollars, on demand. ~~J. S. R. Thomson.~~ The same being given him in the matter of Mrs. Bomar *vs.* R. R., for his receipt to me for deposit for security for costs.

"23rd July, 1887. J. S. R. THOMSON."

On this note appears the following indorsement, in the handwriting of F. M. Trimmier, the then clerk:

"Mrs. Bomar *vs.* The A. & S. R. R. J. S. R. Thomson, note for costs.

"Filed July 23, 1887.

"F. M. TRIMMIER, Clerk."

At the same time a receipt, of which the following is a copy, was also exhibited, viz.

"Mrs. Bomar *vs.* R. R. Received of J. S. R. Thomson one hundred and thirty dollars, deposit fee in this case, in place of bond of costs in this case.

"23rd July, 1887.

"F. M. TRIMMIER, Clerk."

It also appeared from the affidavits submitted, which are set out in the case, that, before the note and receipt above copied were given, it had been determined by the clerk, with the acquiescence of all parties, that the sum of one hundred and thirty dollars would be a sufficient amount to be deposited as security for the costs; but it was admitted that defendant's counsel knew nothing of the alleged private arrangement between the clerk and one of the counsel for plaintiffs whereby the note and receipt above mentioned were given. It is stated in the affidavit of Mr. Thomson that, on the day the note was given, he said to the clerk "that he was ready and willing to make the deposit in behalf of the plaintiffs, but that, as a matter of convenience to himself, if the clerk was willing, he would give his individual obligation to Mr. Trimmier, individually, for the amount, and Mr. Trimmier, as clerk, give Mr. Thomson his receipt for the said sum as deposited with him. It was distinctly mentioned that it amounted to a loan of that amount by Mr. Trimmier individually to Mr. Thomson, and that on demand, if Mr Trimmier wished it, Mr. Thomson would pay off said note; and that if not demanded before close of suit, and if plaintiff should gain the case, the note should be returned to Mr. Thomson if not previously paid, and the receipt returned to Mr. Trimmier." It is further stated in this affidavit that "in giving this obligation Mr. Thomson drew it up without any reference to Mr. Trimmier being clerk of the court. Mr. Trimmier said that he would take it as an obligation to himself individually, but preferred, for his own convenience and recollection, to have some reference in it to the matter for which it was given; and at his request, after the due-bill was written and signed by Mr. Thomson, the word 'clerk' was interlined, Mr. Thomson's signature stricken out, the words from 'the same' to 'for costs,' inclusive, added, and the due-bill again signed by Mr. Thomson," as we have attempted to indicate in the copy hereinbefore set out. From the affidavit of T. R. Trimmier it appears that, when he took charge of the clerk's office, the note above referred to was "found filed with the undertakings for security for costs." In the affidavit of Mr. Sanders, one of the counsel for defendant, it is stated that when he learned that Mr. Thomson had given his note to F. M. Trimmier, clerk, as security for the costs of this case, he "immediately called the clerk's attention to this fact, and asked him if he regarded himself in any way as being responsible for the costs in this case, to which he replied that he did not; that he would file a piece of brown paper as his security for costs, if the plaintiff's attorney were to bring it, and request that it be so filed."

Judge KERSHAW held that the papers submitted to him—the order of Judge ALDRICH, the note, with its indorsement, and the receipt of the clerk—did not show a proper compliance with the order requiring security for costs, and in his remarks settling the case he says: "I paid very little attention to the statement of facts made, because I did not consider any personal contract between Mr. Thomson and Mr. Trimmier as capable of rendering such a transaction a compliance with said order." He therefore granted an order of nonsuit as asked for, and, upon the entry of judgment in accordance therewith, the plaintiffs gave notice of appeal from "said orders, rulings, and judgments" upon the several grounds set out in the record. These grounds raise substantially but three questions: (1) Whether there was error in granting the order requiring security for costs; (2) whether the order so requiring such security was properly complied with; (3) whether the plaintiffs should not still be allowed to give security for costs, if such security had not been properly given.

The first question involves the proposition that the rule of court, and the statute upon which it is based, are in conflict with the constitution of this state, as well as that of the United States. It seems to us that the plaintiffs are not in a position to make such a question. The proper time to raise it was when the original application was made to Judge ALDRICH for the order requiring the plaintiffs to enter security for costs upon the ground that they were non-residents of this state. But the question was not then raised, and, on the contrary, no objection on any ground was then interposed to the granting of the order, and after it was granted no exception was noted in the proper time. Nor does it appear that any such point was presented to Judge KERSHAW when the application was made for the final order. If the

Digitized by Google

point had been then raised, Judge KERSHAW would have been entirely justified in declining to review and reverse an order of his predecessor upon the ground of error of law therein. Until it was reversed by the proper authority he was bound to regard it as a valid order, and the only question which was before him, or could properly come before him, was whether its requirements had been complied with. See McCollum v. Massey, 2 Bailey, 606. As we have said, there was no exception taken to the order of Judge ALDRICH at the proper time, and there is now no notice of appeal, in terms, from that order; though, as the notice of appeal does say, "from which said orders, rulings, and judgment the plaintiff gave due notice of appeal," and the first ground imputes error in requiring security for costs, we may, by a liberal construction, which we are disposed to adopt, regard this as an attempt to appeal from the order of Judge ALDRICH upon the ground that the statute and rule of court under which it was granted are unconstitutional. Still this is an attempt to obtain from this court a reversal of an order and judgment of the circuit court upon a ground not raised or considered in that court, which the well-settled practice of this court forbids us from doing. Tompkins v. Railroad Co., 21 S. C. 420; Hyrne v. Erwin, 23 S. C. 226; Chamblee v. Tribble, Id. 70; McLure v. Melton, 24 S. C. 559. We must therefore decline to consider the constitutional question which the appellants seek to raise in this court for the first time, and we feel the more justified in doing so by the fact that the constitutionality of this law has for a great length of time, and in very numerous instances, been acquiesced in without question.

As to the second question, we agree with his honor, Judge KERSHAW, that the order requiring security for costs was not complied with in the manner required by law. As may be seen by the numerous cases scattered through the reports of this state, so many controversies were continually arising as to the proper mode of complying with an order requiring security for costs that the court of appeals as far back as 1834, in the case of Boyd v. Graham, 2 Hill, 558, deemed it necessary to prescribe a positive rule upon the subject, which will be found incorporated as rule 74 of the old court. Miller, Comp. p. 44. This rule has been incorporated as rule 10 in the circuit court rules now in force, and expressly provides that "no other security for costs shall be regarded as a compliance with the order," except that prescribed by said rule. Under that rule an order requiring security for costs can be complied with only in one of two ways: (1) By executing an undertaking in the form there prescribed, in which, by the act of 1839, incorporated as section 743 of the General Statutes, the signature of the surety should be witnessed by the clerk, and the sufficiency of the security approved by him; (2) by "depositing a sufficient sum of money with the clerk to pay the costs." By reference to the case of Willis v. Potter, 9 Rich. Law, 411, it will be seen how strictly the court of appeals construed the act of 1839 and rule 74, which are identical with our present statute and rule of court; for there it was held that an obligation indorsed on the declaration to become liable for the costs, witnessed by an attorney and not by the clerk of the court, was insufficent; and his honor, JUDGE MUNRO, in delivering the opinion of the court, used this strong language: "Unless an order requiring a party to enter security for costs be strictly complied with, in conformity with the requirements of the section of the act and the rule of court referred to, the party neglecting to comply must expect to take the consequences that were so properly visited by the circuit judge upon the plaintiffs in this case." Now, in the present case, there is no pretense that there was any attempt to comply with the order requiring security for costs, by giving the undertaking in the prescribed form, but the plaintiffs rely upon a compliance in the second mode allowed by the rule, viz., by depositing a sum of money sufficient to pay the costs. The only question, then, is whether such a sum of money was in fact deposited. It is conceded that no actual money was deposited, and therefore the inquiry is narrowed down to the question whether Mr. Thomson's note can be regarded as money. It is quite clear that the note of no person, however abundantly solvent, is regarded in law as money. It is nothing more than a promise to pay money, —an evidence of debt. It does not pass in the community as money. If it passes at all, it does so as a negotiable security, and not as money. Hence, although Mr. Thomson's note has been shown to be perfectly good, yet we do not think it can be regarded as money, the deposit of which alone would be a compliance with the order; for the rule is express that "no other security" shall be sufficient. In view of the express and positive requirement of the rule, and in face of the direct decision above cited, we do not see how it is possible for us to hold that the deposit of Mr. Thomson's note, though conceded to be perfectly good, was a compliance with the order requiring security for costs. We may add that, remembering the unpleasant consequences which resulted from an attempt to comply with an order requiring security for costs, by the deposit of the "memorandum check" of one of plaintiff's counsel, as may be seen by reference to the case of State v. Hunt, 4 Strob. 322, it seems to us that the wisdom and propriety of a strict construction of the rule of court is fully vindicated; for, although the well-known courtesy and sense of propriety which have always characterized the professional conduct of the counsel engaged in this cause might render such unpleasant consequences highly improbable in this case, yet we must bear in mind the fact that we are declaring a rule applicable to all cases, and must not be in-

Digitized by Google

fluenced by the fact that the character of the parties concerned in a particular case may not call for a rigid construction of the rule in such case.

It is contended, however, that, under the statements made in the affidavit of Mr. Thomson, the transaction between him and the clerk, Trimmier, should be regarded as a loan by Trimmier to Thomson of the amount of money specified in the note, and an immediate deposit by Thomson of that sum of money with Trimmier as clerk. While we cannot for a moment doubt that Mr. Thomson so understood the transaction, yet it appears from the affidavit of Mr. Sanders that Trimmier did not so understand it, and to avoid just such misunderstandings is another reason for requiring a rigid compliance with the express requirements of the rule of court. But in addition to this we cannot regard the testimony of Mr. Thomson, as to the understanding between himself and Trimmier, in so far as it tends to contradict or vary the terms of the note, as competent evidence. It is not necessary to cite authority to show that, while parol evidence may be offered to explain, or even contradict, a receipt, such evidence is not competent to vary or contradict the terms of a note. Hence while it was competent to show that, although the receipt purported to acknowledge the deposit of the sum of money therein mentioned, no money was in fact deposited, yet we do not understand that it was competent to show that the note was not what it purported to be. The note must be regarded as what it purports to be,—simply a promise by Thomson to pay Trimmier, as clerk, whenever called for, the amount of money which it had been ascertained was proper and necessary to secure the payment of the costs; and its terms clearly negative the idea that any money was ever paid to or deposited with the clerk.

The only remaining inquiry is whether the plaintiffs should not have been allowed further time to comply with the order requiring security for costs. A conclusive answer to this is that it does not appear that any such application was made to Judge KERSHAW, or that he made any ruling in reference thereto. In this respect the case differs materially from McMillan v. McCall, 2 S. C. 390, where such an application was made to and granted by the circuit judge. But, even if such application had been made to Judge KERSHAW, we do not see how it could have been granted. The order of Judge ALDRICH, after the time limited for compliance therewith had expired, was final, and could not be reviewed, modified, or reversed by his successor. As is said in McCollum v Massey, 2 Bailey, 606: "An order for security for costs by a given day, and, if the requisition is not complied with, that the plaintiffs be nonsuited, is final, after the expiration of the time limited." The reason given is that it then becomes authority for the entry of judgment,—is in fact a final judgment. We do not see why a defendant could not at once, upon the expiration of the time limited, enter judgment of nonsuit, without any further order to that effect; though perhaps the safer and better practice would be to obtain such further order, finally adjudicating the fact that the security for costs had not been entered within the time allowed for that purpose. Here the right to enter judgment of nonsuit followed from Judge ALDRICH'S order, which in express terms so provided in the event of the failure of the plaintiffs to comply, and the only question was, or could have been, whether they had complied with the terms of the order. The case of Williams v. Connor, 14 S. C. 621, cited by appellants, is not in point; for there the order requiring security for costs imposed no penalty for a non-compliance with its terms. It did not provide, as here, that the plaintiffs, on failing to comply, should be nonsuited. It did not authorize the entry of a judgment, and was not, therefore, final in its character.

It is also claimed that the plaintiffs were entitled to relief under the provisions of section 195 of the Code. Here, also, it would be sufficient to say that no such application was made to Judge KERSHAW, and no facts appear in the case upon which such relief, even if asked for, could have been granted. That section authorizes the court "to relieve a party from a judgment, order, or other proceeding taken against him through his mistake, inadvertence, surprise, or excusable neglect." It does not appear that the order of Judge ALDRICH, or the failure to comply therewith, was the result either of mistake, inadvertence, surprise, or excusable neglect on the part of the plaintiffs. On the contrary, the plaintiffs stood on the ground that they had complied, and that is really the only question in the case, and, as we have seen, that ground cannot be sustained. The judgment of this court is that the judgment of the circuit court be affirmed.

SIMPSON, C. J., and MCGOWAN, J., concur.

(30 S. C. 467)

GASTON v. BENNETT.

(*Supreme Court of South Carolina.* March 27, 1889.)

DEED—FRAUD—EVIDENCE.

1. In an action to set aside a deed by plaintiff, it appeared that a decedent had given to plaintiff, at a certain valuation, the land described in the deed, and gave defendant's mother other property of less value, directing that, on final settlement of the estate, the two should be made equal, and defendant, as sole heir of his mother, became entitled to this difference. The will of the executor directed that the equalization be made out of his own estate, and a sum sufficient to affect the equalization was paid to defendant accordingly. The deed was made a few days after, for the ostensible consideration of a life support, love and affection and five dollars; but defendant testified that the relinquishment of his claim on the estate was part of the consideration, though not mentioned in the deed, and stated that he thought he was to have one-half the realty also, to make him equal. No security for plaintiff's support was reserved. Plaintiff was weak-minded, and there was evi-

Digitized by Google

lence that he was impressed by defendant that, unless the deed was executed, defendant would prosecute his claim against the land, and the whole might be lost. *Held* that, though plaintiff was not mentally incompetent, the evidence showed that the deed was obtained by undue means, and should be set aside, allowing defendant for permanent improvements, after deducting the value of the rents, less any amounts advanced for plaintiff.

2. The deed having been thus obtained, the transaction cannot be supported because advantageous to plaintiff.

Appeal from common pleas circuit court of Spartanburg county; PRESSLEY, Judge.

Action by Thomas J. Gaston against H. Ashmore Bennett. Plaintiff appeals.

Bomar & Simpson and *Arch. B. Calvert*, for appellant. *Thompson, Nicholls & Moore* and *Carlisle & Hydrick*, for respondent.

MCIVER, J. The action in this case was brought to set aside a deed for a tract of land executed by the plaintiff to the defendant, upon the ground that the plaintiff, being weak-minded and thus liable to imposition, was in fact imposed upon by the defendant, and thus induced to execute the deed. The case does not rest upon the ground that the plaintiff was *non compos mentis*,—absolutely incapable of making a contract,—but it is rather based upon the ground that the plaintiff was a person of such weak understanding as to be easily imposed upon, and that defendant, taking advantage of his condition, induced him to make the deed in question without adequate consideration. It was not necessary, therefore, for the plaintiff to show that he was mentally incapable of making a contract. As is said in 1 Story, Eq. Jur. § 238, quoted with approval in Banker v. Hendricks, 24 S. C. 13: "The doctrine, therefore, may be laid down as generally true that the acts and contracts of persons who are of weak understandings, and who are thereby liable to imposition, will be held void in courts of equity if the nature of the act or contract justify the conclusion that the party has not exercised a deliberate judgment, but that he has been imposed upon, circumvented, or overcome by cunning, artifice, or undue influence." This being, in our judgment, the legal principle by which the plaintiff's case must be tested, we will proceed to consider the case under the light of such principle.

The issues in the action were referred to a referee for trial, from whose report it appears that the consideration stated in the deed was "five dollars, natural love and affection, and a proper support and maintenance for plaintiff for life," though the defendant in his answer alleges that he had a claim on or interest in the tract of land, under the will of Samuel Gaston, and the surrender of this claim was a part of the consideration and inducement for the execution of the deed. The referee found, in effect, that the plaintiff was a person of such weak understanding that he could be easily imposed upon, and that defendant, taking advantage of such weakness, induced the plaintiff to execute the deed for an inadequate, though not grossly inadequate, consideration,—the land, in his judgment, being worth $3,000; and he recommended that the deed be set aside, and possession of the land restored to the plaintiff, in whose hands it should be liable to defendant for the amount of money expended by him in permanent improvements on the land, after deducting therefrom the value of the rents, less any amounts paid to plaintiff. Indeed, the referee seems to have been of opinion that the plaintiff did not have sufficient mental capacity "to enter into such a bargain and sale of his land." The case was heard by Judge PRESSLEY upon this report, accompanied by all the testimony, with the exceptions filed thereto by the defendant. His honor disagreed with the referee, and, on the contrary, found that the plaintiff had sufficient capacity to make the deed; that it was not obtained by any undue influence, and, on the contrary, was a good arrangement for the plaintiff. He therefore rendered judgment that the report of the referee be overruled, and the deed be established as a good and valid conveyance. From this judgment the plaintiff appeals upon the several grounds set out in the record.

Inasmuch as there is a direct conflict between the referee and the circuit judge as to the facts, we find it necessary to examine carefully the testimony, which is all set out in the "case." The result of this examination constrains us to say that we cannot concur in the conclusions reached by the circuit judge. While there is a conflict of testimony as to whether the plaintiff had sufficient mental capacity to execute the deed in question, there seems to be no conflict as to the fact that he was a person of weak mind, though the witnesses differ as to the extent of that weakness. Setting out with that fact as established, it seems to us that the real inquiry in the case is not, as both referee and circuit judge seem to have supposed, whether the plaintiff had sufficient mental capacity to make a contract, but whether the defendant, taking advantage of the acknowledged weakness of mind of the plaintiff, by undue influence induced him to execute the deed. We do not for a moment suppose that any such influence was used at the time the deed was signed in the office of the judge of probate. The character of the witnesses then present, some of whom are known to the court, is such as to forbid such an imputation. But, if any improper influences were used, the natural inference would be that the defendant would not venture, in the presence of such witnesses, to resort to any improper means, but would have brought such agencies to bear upon what little mind the plaintiff had beforehand. A careful study of the evidence has impressed us with the conviction that the defendant had impressed the plaintiff with the belief that if he did not execute the deed he would prosecute his claim against the land under the will of Samuel

Digitized by Google

Gaston, and the whole property might be lost by the expenses of litigation. This appears not only from the testimony of the plaintiff, but the defendant in his answer, as well as in his testimony, says that the relinquishment of this claim constituted a part of the consideration of the deed; and yet, singular to say, no such consideration is mentioned in the deed. Why? The defendant knew that this claim had been previously settled, for we find in the case a copy of a receipt, signed by defendant, bearing date 20th April, 1885, nine days before the deed was executed, whereby the defendant acknowledged the receipt from Elizabeth A. Gaston, executrix of A. P. Wakefield, of one thousand and fifty-eight dollars, "in full of amount to equalize me with Thomas J. Gaston under the will of Samuel Gaston, in a final settlement as provided in the will of her testator;" and J. D. Leonard, who was one of the subscribing witnesses to the deed, was a subscribing witness to said receipt. It looks very much as if the release of this claim, which manifestly constituted a material, if not the main, consideration, was omitted from the deed, because one of the subscribing witnesses, J. D. Leonard, who is represented to be a person of good character, knew, from having signed the receipt as a witness, that the defendant had already received full satisfaction therefor. Inasmuch, however, as Leonard in his testimony says, "The papers were all signed at same time,—receipts on settlement and deed," it may be possible that there is a clerical error in the date of the receipt above referred to, (though, of course, we cannot undertake to decide cases except upon the papers as presented to us.) We will assume, for the sake of argument, that such was the fact. Even then we do not understand why that which we have no doubt was the main consideration which induced the plaintiff to sign the deed should have been omitted. But, in addition to this, it seems to us that the claim was wholly unfounded, and the defendant must have known it to be so; and we can well understand how such a claim could have been used to excite the fears of a weak-minded person to such an extent as to induce him to do that which he otherwise would not have done. The facts upon which the claim rests are as follows: Samuel Gaston died, leaving a widow and two children,—the plaintiff and the mother of defendant. By his will he gave his whole property to his wife for life, or during her widowhood, and, after her death or marriage, the land in question was given to the plaintiff at a valuation of $1,700, and certain other property, valued at $612, was given to defendant's mother. The will directed that upon a final settlement of the estate the two children should be made equal. Upon the death of defendant's mother, he, being her sole heir, became entitled to her interest under the will of Samuel Gaston, and as such became entitled to receive from the estate of Samuel Gaston an amount sufficient to make up to him the difference between the value of the property devised to plaintiff, $1,700, and the value of the property given to his mother, $612. But it appears that A. P. Wakefield, who was executor of the will of Samuel Gaston, provided by his will that the defendant should be paid out of his estate a sum sufficient to make him equal with plaintiff. Now, as it was the duty of Wakefield, as executor of Samuel Gaston, to make provision for the equalization required by the will of his testator, and as he did so by his will, we do not see what shadow of claim the defendant could have upon the land devised to plaintiff, at least until the provision made by the executor had proved insufficient for the purpose. But, so far from this being the case, as the event has shown, the provision made by the executor has in fact proved sufficient and has been accepted.

We think that the defendant must have known, and his conduct shows that he did know, that this was a groundless claim. It does not appear that any steps were taken to enforce this claim, or even any mention made of it until about the time this deed was obtained from the plaintiff. It is true that the defendant does say, in his answer, "that for some time previous to the date of the deed * * * the defendant had tried to induce the plaintiff and the executors of said will to pay to him the amount necessary to equalize them in the legacies and devises under the will, which they refused to do;" but when he goes on the stand to testify, where he would be subjected to the ordeal of a cross-examination, he says nothing of the kind. On the contrary, what he then says would rather leave the impression that nothing had been said about this claim until the plaintiff, shortly before the deed was executed, came to him, as he says, and asked if he "would not take care of him, and take charge of the place, and I told him I would if he would make me safe in the trade," and even then this claim was not mentioned; for he says: "Nothing said then further in reference to trade. Afterwards he agreed to make deed to me. This deed was in settlement of money coming to me from Samuel Gaston's estate and from plaintiff." Now, if either defendant or his mother ever had any claim on the land devised to plaintiff, it would have arisen upon the death of the life-tenant, the widow of Samuel Gaston. When she died is left in some doubt by the testimony. One of the witnesses, Thomas P. Gaston, says she died "in the fall of 1864 or spring of 1865," while another witness, T. J. Wakefield, says she died in 1885. All the circumstances show that this latter date could not have been the correct date, and may possibly be a misprint. If the old lady died in the spring of 1865, then the claim, if it ever existed, would have been presumed paid by lapse of time, as the deed was executed on 29th of April, 1885. But in this confusion of dates, we are unwilling to rest our decision upon this ground. The de-

Digitized by Google

fendant in his testimony also says: Mr. Anthony Wakefield provided that I should be made equal with plaintiff in his will. It would take over $1,000 to make me equal with plaintiff. I got a note for $1,058 to make me equal with plaintiff. I thought I was to get half of the real estate also to make me equal with plaintiff." The absurdity of this statement, so patent upon the face of it, shows that defendant knew that this pretensive claim, which he used as a means of extorting from the fears of this weak-minded person a deed for every foot of land which he possessed, was totally groundless. According to that statement, he would receive not only the $612 worth of property under the will of his grandfather, but in addition thereto the $1,058 from the estate of the executor, Wakefield, which he chose to accept in the note of a third person, a part of which he says has been paid, and also "half of the real estate,"—at least, $850,—amounting, in all, to $2,520,—while the plaintiff would only receive $850. Such a mode of equalization, however much it might commend itself to a person capable of taking advantage of a weak-minded relative, can scarcely receive the sanction of a court of equity.

Both the referee and the circuit judge seem to have proceeded upon the theory that, in order to maintain this action, it was necessary to show that the plaintiff was incompetent mentally to make this deed. But, as we have said above, this is not essential, and we do not rest our decision upon that ground. On the contrary, we do not think that the testimony was sufficient to show that the plaintiff was not possessed of sufficient mental capacity to make a contract, but we think it does show that the plaintiff was a person of such weak intellect as to render him liable to imposition, and that the defendant, taking advantage of his condition, did impose upon him by exciting his fears, in reference to a pretensive claim known to be groundless, set up by defendant for the purpose of inducing him to do that which he otherwise would not have done. Upon this ground we think the deed should be set aside, allowing the defendant just compensation for such permanent improvements as he may have put upon the land, after deducting therefrom the value of the rents, less any amounts paid to or advanced for plaintiff by the defendant.

It is urged, however, that the trade was a good arrangement for the plaintiff, and there is not only much testimony to support that conclusion, but it has also been adopted by the circuit judge. But, even if this be so, we do not understand that it would be sufficient to support the transaction. A person cannot be compelled to dispose of his property, even upon advantageous terms, nor can he be induced to do so by the use of such means as a court of equity would condemn. We must say, however, that we cannot agree that this was an advantageous trade for the plaintiff. Conceding that the testimony shows that the annual income from the property, in the condition in which it was at the time the deed was executed, was but little, if anything, more than would be sufficient to support the plaintiff, yet no security whatever was provided for the performance of the covenant for such support. The defendant might, in a very short time, through improvidence or misfortune, become totally unable to provide for the maintenance of the plaintiff; and it seems to us justice and fair dealing required that some security should have been given, and the fact that it was not done is another evidence that the defendant was looking alone to his own interest, regardless of the welfare of his weak-minded relative. In this respect the case is much stronger than the case of Banker v. Hendricks, supra, for there the covenant for support was secured by a mortgage on the property conveyed. The judgment of this court is that the judgment of the circuit court be reversed, and the case remanded to that court for the purpose of carrying out the views herein announced.

SIMPSON, C. J. Under the ruling in Banker v. Hendricks, 24 S. C. 13, I concur.

MCGOWAN, J., concurs.

(30 S. C. 459)

BURNSIDE, Judge of Probate, *v.* WATKINS *et al.*

(*Supreme Court of South Carolina.* March 27, 1889.)

HOMESTEAD—ENFORCEMENT.

1. In partition proceedings the decedent's widow was assigned one of three tracts of his land at an assessed valuation, and the others were ordered to be sold. At the sale the widow bought one of the tracts, and gave her bond for an amount exactly equal to the price of the tract so purchased, and a sum which, deducted from the assessed value of the tract assigned to her, would give her one-third of the total value of the real estate, estimating the values of the two tracts sold at the prices obtained for them, but much greater than the amount necessary to make equality of partition, basing the calculation upon the values of the latter two tracts, as assessed by the commissioners. A judgment was rendered on this bond, under which the tract purchased was sold for a price insufficient to satisfy the judgment, and an execution was levied on the tract assigned to the widow, whereupon her heirs claimed a homestead therein. There was no direct parol evidence that the bond included a sum to secure equality of partition. *Held*, that the circumstances mentioned were sufficient to establish that fact.

2. Under Gen. St. S. C. § 2001, providing that a homestead exemption shall not extend to process to enforce the payment of taxes or obligations given for the purchase of the homestead, and that the court shall certify on such process that it is issued for some one or more of such purposes, and for no other, it is error to refuse to allow a homestead to be set apart in the case mentioned, the process not having such a certificate indorsed thereon.

3. Though under act S. C. 1791 an amount due from a widow for equality of partition is a lien on the land assigned to her, the amount so included in the bond mentioned is not such a lien, as well because it was not assessed by the commissioners of partition, as therein provided, or by the order of court confirming their report, as for the reason

Digitized by Google

that such lien exists only in favor of the other persons interested in the property, and not of the officer making the sale.

Appeal from common pleas circuit court of Laurens county; J. B. KERSHAW, Judge.

An execution having been issued upon a judgment in favor of the judge of the probate court against Elizabeth C. Watkins, deceased, and levied on a tract of land, her minor children claimed a homestead therein, and on their motion commissioners were appointed to assign the same. Upon making their report the court decided that the said children were not entitled to such homestead, and they appeal.

W. H. Martin, for appellants. *Ferguson & Featherstone*, for appellee.

MCIVER, J. On the 10th of May, 1870, Elisha Watkins, being seised and possessed of certain real estate, died intestate, leaving as his heirs at law his widow, Elizabeth C. Watkins, and her children, as well as his children by a former marriage. Under proceedings for the partition of his estate, instituted in the court of probate, commissioners were appointed, who made their return, stating that they had divided the real estate of intestate into three tracts, and valued the same as follows, viz.: Tract No. 1, containing 155 acres, at $6 per acre; tract No. 2, containing 65 acres, at $11 per acre; and tract No. 3, containing 192 acres, at $5 per acre. They recommended that tract No. 1 "be set off to Mrs. Elizabeth C. Watkins, the widow of said deceased, and that tracts No. 2 and 3 be sold upon such terms as the court will direct." On the 23d of November, 1870, this return of the commissioners in partition was confirmed by an order of the judge of probate, who further ordered "that tract No. 1 be set off to the widow of said deceased, and tract No. 2 and 3 be sold by this court, upon the 19th day of December next, upon a credit of one and two years, interest from day of sale, and to be compounded if not paid annually; purchaser to give bond and mortgage to secure purchase money; the costs of these proceedings to be paid cash." In pursuance of this order the two tracts, Nos. 2 and 3, were sold on the day appointed, each for the sum of $500, the widow being the purchaser of tract No. 2; and on the 19th day of December, 1870, the widow, Elizabeth C. Watkins, with the other defendants, executed a bond to the judge of probate, in the penal sum of $1,573.33, to secure the payment of the sum of $786.67, "in two annual installments, with simple interest from date." On the 15th of July, 1881, the judge of probate commenced an action against said Elizabeth C. Watkins and her sureties above named on the said bond, and on the 7th of March, 1883, recovered judgment thereon for the sum of $1,456.64 and costs. Under execution issued to enforce said judgment, tract No. 2 was sold for the sum of $400, but at what time is not stated. On the 26th of November, 1886, the said Elizabeth C. Watkins died intestate, leaving several children, some of whom are minors, and all of them living on tract No. 1, which had been assigned to the widow under the partition proceedings above mentioned. On the 5th of September, 1887, tract No. 1 was levied on by the sheriff under the execution issued to enforce the judgment above mentioned, whereupon the children of Elizabeth C. Watkins gave notice to the sheriff that they claimed homestead in said tract. In pursuance of this notice appraisers were duly appointed, who made return, appraising the said tract at $648.75, and assigning the same to the said children as a homestead. To this return the plaintiff excepted upon two grounds, but, the second having been abandoned, it is only necessary to state the first, which is as follows: "Because the judgment obtained by said plaintiff against Elizabeth C. Watkins, in her life-time, is based upon a bond given to secure the purchase money for the tract of land set off by the said appraisers to the defendants as a homestead." Upon this return, and the exception thereto, the case came on to be heard by his honor Judge KERSHAW, who rendered judgment (omitting the formal parts) as follows: "It appearing that the judgment on which said execution was issued was obtained upon a bond given by the said Elizabeth C. Watkins for equality of partition, in part, on the division of said real estate, which was set off by the said appraisers as a homestead herein, it is ordered and adjudged that the return of said appraisers, in so far as it sets off homestead to the heirs at law of the said Elizabeth C. Watkins in the real estate, be set aside, and in so far as it sets off personal property it be affirmed." From this judgment the children of Elizabeth C. Watkins appeal upon the grounds set out in the record, which are substantially as follows: (1) Because of error in holding that the bond upon which the judgment was recovered was given for equality of partition; (2) because, even if it was, it cannot be regarded as such an obligation as would override the claim of homestead; (3) because in any event the claim of homestead should have been sustained to so much of the land as constituted the widow's share, and only the excess thereof could have been made liable to the judgment.

The first ground raises a question of fact of which the only evidence adduced was that found in the several papers above referred to, it being stated in the "case" that no parol evidence was offered as to what the bond was given for. Now, as it is not stated in any of these papers that the bond, or any part thereof, was given to secure equality of partition, it is quite clear that the conclusion reached by the circuit judge rested entirely upon an inference drawn from what does appear in these papers. There can be but little doubt that such an inference would be fully warranted by what appears in the documentary evidence. The bond was given on the day appointed for the sale, and was undoubt-

Digitized by Google

edly intended to secure the payment of the purchase money of the tract No. 2, bid off by the widow; but as that purchase money only amounted to $500, and the bond was given for $286.67 more than that sum, the inference is irresistible that the bond was intended to secure not only the payment of the purchase money of tract No. 2, but also something else; and as the excess over such purchase money corresponds within a fraction of a cent with the amount that would be necessary to equalize the shares, taking the value of the tract set off to the widow to be what it was assessed at by the commissioners in partition, and the values of the other two tracts to be what they brought at the sale, the inference would be at least fair that so much of the bond as exceeded the purchase money of the tract bought by the widow was given to secure equality of partition. The circumstances relied on to repel this inference—that the bond was not drawn in accordance with the terms prescribed by the order of sale in that it called for simple interest, instead of interest payable annually, and in that there does not appear to have been any mortgage as required by the order of sale, together with the fact that no allowance was made for the cash payment required—would scarcely be sufficient for that purpose. It is contended, however, that the mode just adverted to of ascertaining the amount necessary to produce equality of partition would be improper and unjust to the widow, for, if the tract assigned to her should be estimated at the value placed upon it by the commissioners in partition, then the other two tracts ought to be estimated in the same way, and, if that were done, then the sum necessary to produce equality of partition would be $61.66, instead of $286.67, thus destroying the inference arising from the practical identity between the sum necessary to produce equality and the excess of the bond over the purchase money of tract No. 2. To illustrate: The mode adopted to ascertain the sum necessary to produce equality of partition was as follows:

Value of tract No. 1, as assigned to widow	$ 930 00	
Value of tracts No. 2 and 3, as assigned by sale	1,000 00	
		$1,930 00
Of this the widow received in tract No. 1	$ 930 00	
And, her share being ⅓ of $1,930.00	643 33⅓	
She would owe	286 66⅔	

But according to the mode suggested by the appellants the figures would stand as follows:

Value of tract No. 1, as assessed by commissioners	$ 930 00	
Value of tract No. 2, as assessed by commissioners	715 00	
Value of tract No. 3, as assessed by commissioners	960 00	
		$2,605 00
Of this the widow received in No. 1	$ 930 00	
And, her share being ⅓ of $2,605.00	868 33⅓	
She would owe only	61 66⅔	

At first view there would seem to be great force in appellants' suggestion, but it must be observed that in the return of the commissioners in partition no amount is mentioned as necessary to secure equality of partition, nor is there any recommendation in regard thereto, though from that return it would seem that the sum of $61.66 was necessary for that purpose. And in the order confirming the return this matter is not mentioned or provided for; perhaps for the reason that the idea was to await the result of the sale before fixing the amount which the widow should be required to pay in order to secure equality. Accordingly, after the sale was made, the widow gave her bond for an amount not only sufficient to secure the payment of the purchase money of the tract bid off by her, but also the amount, as shown by the result of the sale, to be necessary to secure equality of partition. She was not obliged to accept the tract assigned to her by the commissioners in partition at the valuation placed upon it by them, but might have contested that valuation. This she does not appear to have done, and, having accepted that tract at that valuation, she must abide by it. We think, therefore, that the circumstances of the case, as presented by the documentary evidence, were sufficient to justify the conclusion that the bond was given by the said Elizabeth C. Watkins in part for the purpose of securing equality of partition. But, assuming this to be the fact, the question still remains whether the conclusion so reached warranted a judgment setting aside the assignment of homestead.

The right of homestead, with the qualifications thereof, rest upon the provisions of the constitution and such statutes as have been enacted to enforce such provisions. Under the law as it stood at the time the bond here in question was given, which, so far as this question is concerned, seems yet to be substantially the same, the homestead exemption did not extend to process issued to enforce the payment of taxes or obligations contracted for the purchase of said homestead: "Provided the court or authority issuing said process shall certify thereon that the same is issued for some one or more, and no other, of said purposes." Gen. St. S. C. § 2001. Under this express statutory provision we do not see how one seeking to avoid the homestead exemption upon the ground that the obligation which he is endeavoring to enforce was contracted for the purchase of such homestead can be permitted to do so without complying with the condition upon which alone he is authorized to avoid such exemption. The legislature having, in pursuance of the mandate of the constitution, undertaken to provide by "suitable legislation" the manner in which the holder of an obligation contracted for the purchase of a homestead may enforce the same against such homestead, it is difficult to understand by what authority the courts could dispense with that express requirement. We are not

Digitized by Google

at liberty to inquire into the wisdom or propriety of such a requirement, as it is quite sufficient for us to know that the law is so written. But, if we were, it would be easy to show that the provision is eminently wise and proper. Before one should be deprived of his sacred right of homestead it is well that the law requires the clearest and most explicit evidence—a matter of record about which there can be no controversy—of the fact which justifies such deprivation. Indeed, the controversy in this very case affords the strongest illustration of the wisdom of the legislative provision. Now, as it is not pretended that the required certificate was indorsed upon the process which the plaintiff is seeking to enforce against the homestead in this case, upon the ground that the obligation upon which such process was based was contracted in part only for the purchase of the homestead, it seems to us that such process cannot be enforced against the homestead, and that the circuit judge erred in holding otherwise. Indeed, it not only does not appear that the required certificate was ever obtained in this case, but it is somewhat difficult to conceive how it could have been obtained. The provision of this statute is explicit, not only that the court issuing the process shall certify thereon that it was issued for some one or more of the purposes specified, but also for "no other." Now, as it is conceded that much the larger part of the amount of the execution was for a purpose other than the purchase of the homestead, to-wit, for the purchase money of tract No. 2, which has already been sold under the execution, we do not see how it was possible for the plaintiff ever to have obtained the requisite certificate. If a creditor chooses to mix up with an obligation contracted for the purchase of a homestead an obligation of a different character, he must take the consequences of his own act. There certainly was no propriety in so doing in the present instance. Any amount due by the widow for equality should have been made payable to the other heirs at law, and there was not only no necessity for embracing it in the bond given to the judge of probate to secure the payment of the purchase money of property sold under his order, but there was no propriety in so doing, as it was well calculated to produce confusion.

It is, however, contended that the amount due by the widow for equality of partition was a statutory lien upon the land assigned to her under the provisions of the act of 1791, which had not been repealed at the time of the sale under which the bond in question was given, against which a homestead exemption could not be claimed, as such a lien stands on the same footing as a mortgage. Conceding that this is so, we do not see how it can avail the plaintiff in this case. In the first place, the amount due on such lien, so called, was not fixed or determined either in the return of the commissioners in partition or in the order confirming such return, and it is somewhat difficult to understand how a lien for an unascertained and undefined amount could be enforced. If it should be said that the court may now ascertain the amount, the answer is; that has never yet been done; for in the judgment appealed from no amount is mentioned as due on account of the purchase money, not even the proportion which it bore to the whole amount of the bond. It is only stated that the bond was given "for equality of partition in part;" but what part is not indicated in any way. How, then, could such a lien, if it be a lien, be enforced? In addition to this, the statutory lien provided for by the act of 1791, owing its existence solely to special statutory provisions, the doctrine is well settled that, in order to create such a lien, the provisions of the statute must be strictly complied with. One of those provisions, and one which is manifestly material, is that property which cannot be fairly divided may be set apart to one or more of the parties interested therein, "upon the payment of a sum of money, to be assessed by the said commissioners," and, as no such assessment has ever been made, we do not see how such a lien could ever arise. But, more than this, the lien provided for by the statute to secure the sum necessary to produce equality of partition is a lien in favor of the other heirs or parties interested in the property assigned to one of them upon the payment of a sum of money assessed by the commissioners in partition, and the officer of the court who makes the sale of other portions of the property has nothing to do with it. He may, by virtue of the statute, acquire a lien on the property sold by him to secure the purchase money of such property; but how he could acquire such lien upon property not sold by him, but assigned by the commissioners in partition to one or more of the parties interested, upon payment by them to the other parties of the sum of money assessed by the commissioners, it is very difficult, if not impossible, to conceive.

Under the view which we have taken the questions presented by the other grounds of appeal cannot arise, and need not, therefore, be considered. The judgment of this court is that the judgment of the circuit court, in so far as it sets aside the return of the homestead appraisers in regard to the real estate, be reversed, and, in so far as it confirms said return as to the personal property, be affirmed.

SIMPSON, C. J., and MCGOWAN, J., concur.

(30 S. C. 479)

TOMPKINS *et al. v.* AUGUSTA & K. R. CO.

(*Supreme Court of South Carolina.* March 29, 1889.)

STATUTORY NEW TRIAL.

1. An action to enjoin a railroad company from appropriating land for its road, and for damages for such appropriation, is not an action "for the recovery of real property, or the recovery of the possession thereof," within the meaning of Code S. C.

Digitized by Google

§ 98, subd. 2, limiting the plaintiff in such cases to two actions.

2. When the action is in form "for the recovery of real property," the court cannot look beyond, to discover whether plaintiff had ulterior purposes in bringing it.

Appeal from common pleas circuit court of Edgefield county; KERSHAW, Judge.

Action in form to recover real property, brought by Stephen S. Tompkins and others against the Augusta & Knoxville Railroad Company. From an order striking out a plea of *res adjudicata* defendant appeals.

J. Ganahl and *Sheppard Bros.*, for appellant. *Gary & Evans*, for respondents.

MCGOWAN, J. The circuit judge states this case clearly, as follows: "The plaintiffs' action is for the recovery of possession of real estate occupied and used by the defendant as a way for their track. In November, 1881, the plaintiffs commenced an action against the defendant company, seeking to enjoin it from appropriating any portion of the said real estate here sought to be recovered to the use and benefit of the said railroad company, and from constructing a railroad through said premises, and for damages for having graded and for proceeding to construct said railroad, etc. On December, 9, 1882, the plaintiffs, while the said action (above) for injunction, etc., was pending, commenced another action against the defendant to recover the possession of the same tract of land described in the former action, to which the defendant answered, pleading, among other matters, the pendency of the action first above mentioned. This action was brought to trial, and judgment was entered against the plaintiffs upon the merits, after an appeal to the supreme court. See 21 S. C. 420. Before the trial of this action the first (injunction) action was discontinued by the plaintiffs, and nothing was decided as to the plea of *lis pendens*, above mentioned. Judgment entered September 8, 1883. On some day, (not stated,) but within two years after the judgment in the action next above mentioned, the plaintiffs commenced this action against the defendant to recover possession of the same land. To this action the defendant answers, pleading, among other things, *res adjudicata;* setting out the former proceedings above recited in bar to the present action. The plaintiffs moved to strike out the plea 'as irrelevant,' inasmuch as the Code allows the plaintiffs a second action in cases of this character. The defendant insists that the statute allowing two actions does not apply to this case, and, if it does, the plaintiffs have already had two actions for the same cause, before the commencement of this action, which is the third, asking relief in regard to the same subject-matter," etc. The circuit judge held that the action first above mentioned is not within the meaning of the act limiting the plaintiff to two actions. It is an equitable action in part, and an action for damages for alleged trespasses in part, and in no respect is it an action "for the recovery of real property, or for the recovery of possession thereof." That this is the second action for the recovery of the real property described brought by the plaintiffs, and having paid the costs of the former action, and having commenced this within two years after the judgment in the former action, they had the right, under the statute, to bring the present action; and he ordered the plea of *res judicata* to be stricken out as irrelevant to the present action.

From this ruling and order the defendant company appeals to this court upon the following exceptions, alleging error: "(1) In deciding that the action commenced in November, 1881, asking to enjoin the defendant company from appropriating any portion of the real estate herein sought to be recovered, and for constructing a railroad through said premises, and for damages for having graded and proceeded to construct said railroad, is not within the meaning of the act limiting the plaintiff to two actions. (2) In deciding that the present action for the recovery of the real property described in the complaint is the second action brought by the plaintiffs, and that having paid the costs of the former action, and having commenced this within two years after judgment in the former action, the plaintiffs had a right under the statute to bring the present action. (3) In deciding that the plea of *res judicata* is irrelevant to the present action, and in striking out this plea of defendant. (4) In deciding that the act of South Carolina giving two actions for the recovery of realty, or recovery of possession thereof, applies to easements in said real property. (5) In deciding that the statute of the state, which gives two actions for the recovery of real property, or the recovery of the possession thereof, applies to the present action or that brought on December 9, 1882, when these two actions are not for recovery of title to said property, nor for the possession thereof, but, under the issue made, are to determine whether or not the defendant had duly acquired the easement of the right of way for its railroad over and upon said real property. (6) In deciding that when a railroad company, with power to condemn land for right of way, obtains the consent of the owners of land to enter thereon and construct its railroad, it is subject to two actions, on determining the issue of whether or not said consent has been duly given," etc.

The first exception alleges that it was error to hold that the first action of the plaintiffs, brought in November, 1881, for injunction, damages, etc., was not within the scope of the act limiting the plaintiffs to two actions. Subdivision 2, § 98, Code, declares that "the plaintiff, in all actions for the recovery of real property, or the recovery of the possession thereof, is hereby limited to two actions for the same, and no more: provided," etc. The provision itself indicates that the object was to create a limitation, rather than to give a special privilege, in allowing two actions to be brought by the same plaintiff "for the re-

Digitized by Google

covery of real property," etc. The old action of ejectment, by reason of its fictitious proceedings, could be brought and repeated any number of times; and this provision was originally made to limit such actions to two, and no more. See Geiger v. Kaigler, 15 S. C. 271. In considering the act, therefore, the court must construe it strictly, at least not to disregard its terms and object, so as to enlarge the class of actions entitled to two trials. We agree that the first action for injunction, damages, etc., was not an action for the recovery of real property, and therefore not within the meaning of the act.

All the other exceptions, in different forms, make the point that none of the three actions of the plaintiffs were truly "for the recovery of real property," but were really to determine whether or not, under the issues made, the defendant company had duly acquired the easement of the right of way for its railroad over the lands in question. It is urged, as the general rule is that no matter once adjudicated can be stirred again, except the single instance of an action for the recovery of real property, that great care should be taken to ascertain whether those claimed to be are really and truly such actions; that all the actions brought by the plaintiffs against the defendant company were not, strictly speaking, real actions at all, but concerning an easement in the lands, and nothing more. We do not understand that the circuit judge decided that the act giving two actions for the recovery of real property included easements in real property, but that in construing the act the court is bound by its terms, and that, when the action is in form "for the recovery of real estate," it cannot look beyond, to discover whether plaintiffs have ulterior purposes in bringing the action. The two last actions are regular in form "for the recovery of real property," and we agree with the circuit judge that it was right to give the plaintiffs, for this time, the benefit of the act. The judgment of this court is that the judgment of the circuit court be affirmed.

SIMPSON, C. J., and MCIVER, J., concur.

(30 S. C. 483)

WILSON v. KELLY *et al.*

(*Supreme Court of South Carolina.* March 29, 1889.)

ATTORNEY AND CLIENT—COMPENSATION.

An action by one of the heirs and distributees of a decedent against the others, brought to effect a sale of the land in lieu of a partition *in specie*, to adjust advancements to distributees, and to settle administration accounts, is not a suit within the meaning of Code S. C. § 140, authorizing one or more persons to sue or defend for the benefit of others interested in common in the question litigated, or when the parties are numerous, and it is impracticable to bring them all before the court; and therefore plaintiff's attorney cannot be compensated out of the common fund, though his services have inured to the benefit of all.

Appeal from common pleas circuit court of Kershaw county; T. B. FRASER, Judge.

Action by Emily C. Wilson against Jane K. Kelly and others, heirs, etc., of Wiley Kelly, deceased, to settle his estate. The question as to what attorneys were entitled to payment for their services out of the funds of the estate was referred to J. D. Dunlap, master, who filed the following report:

"It having been referred to the master to inquire and report to this court what attorneys herein are entitled to fees to be paid out of the funds in the hands of the court for services rendered the estate of Wiley Kelly, deceased, in these proceedings, and also what would be a proper fee for each attorney, the master would respectfully report: I find as matters of fact: In the year 1875 a petition was filed in the court of probate for Kershaw county, praying for the sale of the lands of the estate of Wiley Kelly, and for a partition of the proceeds among the parties entitled. The petitioners were represented by Mr. J. B. Kershaw, attorney at law. The lands were sold on the terms set forth in the complaint herein. Subsequently, it having been decided by the supreme court that a court of probate had no jurisdiction in an action for partition, Emily C. Wilson, one of the heirs of Wiley Kelly, brought action against the administrator and other heirs, for accounting and partition. Issues arose between the heirs at law, who employed attorneys to protect their interests. Emily C. Wilson was represented by Messrs. Chesnut & Workman; Mrs. Elizabeth Witherspoon by Mr. W. D. Trantham; Mr. Dorsey Kelly by Messrs. Shannon & Kennedy; Mr. Barnwell R. Ingram by Mr. J. T. Hay; the Cunningham heirs by Mr. J. D. Wylie; and the administrator, John R. Shaw, by Mr. J. T. Hay. The first issue was as to whether Dorsey Kelly was entitled to a share of the estate of his father, without accounting for the advancements made to him. He contended that he had bought property from his father, had given his note for same, and had subsequently obtained a discharge in bankruptcy, which relieved him from the payment of the said note. This was hotly contested before the master, the circuit and the supreme courts. It was decided that Dorsey Kelly, before receiving any share of the estate, would have to account for the amount due on the note given to his father. Messrs. Chesnut & Workman, Hay and Trantham, contended for the heirs at law opposed to the claim of Dorsey Kelly, who was represented by Messrs. Shannon & Kennedy. The result of this contest was beneficial to the interests of the heirs at law. The next issue was made by the Cunningham heirs, represented by Mr. J. D. Wiley, and opposed by the other heirs, represented by the attorneys above named. This issue was before the master and the circuit court, and the claim was disallowed by the circuit court. The result of this contest was beneficial to the interests of the heirs at law. The third issue was in regard to the judgment of D. A. Williams, administrator *de bonis non* of the estate of Wm. McKenna against John R. Shaw, administrator of the

Digitized by Google

estate of Wiley Kelly. It was contended by Messrs. Chesnut & Workman, Hay, Trantham, and Shannon, that the said judgment had been erroneously entered for a much larger amount than was due, and that the same should be corrected, so as to reduce it to the amount actually due. This was fought before the master, the circuit and supreme courts, and resulted by the judgment being reduced in the sum of eight hundred and five dollars, a saving to the estate to that extent. In this contest the administrator, John R. Shaw, was represented by Mr. J. T. Hay.

"Many references in regard to the foregoing issues were held before the master, at which the above-named attorneys were present to protect the interest of their clients. The administrator, John R. Shaw, accounted before the master for his actings and doings in relation to the estate of Wiley Kelly at the references held for this purpose. Messrs. Chesnut & Workman, Hay & Trantham attended, and protected the interests of the estate. These attorneys rendered other services in relation to the accounting of the administrator, which inured to the benefit of the estate. Messrs. Chesnut & Workman rendered other services which were beneficial to the estate as well as to the interest of their client. The work and services done and rendered by Messrs. Chesnut & Workman in contending for and sustaining the points made by them were reasonably worth the sum of one thousand dollars, but payment of same cannot be made from the general fund belonging to the estate of Wiley Kelly. The said attorneys were employed by Mrs. Emily C. Wilson alone, and had no contract as to their services with any one authorized to bind the estate. That the services of Mr. W. D. Trantham were reasonably worth five hundred dollars, but the same should not be paid from the general fund, but by Mrs. Witherspoon, who employed him. That the services of Mr. J. T. Hay, rendered in the contests arising between the heirs at law of Wiley Kelly, were reasonably worth three hundred dollars, but he will have to look to Barnwell R. Ingram, who alone employed him, for the payment of same. That the services of Mr. J. T. Hay, rendered in the matter of the judgment of Williams, administrator of McKenna, and for representing the admin strator in his accounting before the master, were reasonably worth two hundred dollars; and that the same should be allowed as a charge against the estate, he having been employed by the administrator, the legal representative of the estate. That the sum of fifty dollars has been paid Mr. Hay by the administrator, leaving a balance of one hundred and fifty dollars, which should be paid him out of the funds in the hands of the court.

"I find as conclusions of law: (1) That although the services rendered by the attorneys herein referred to have inured to the benefit of others with whom there was no contract relation, either directly or through some agent or representative, the same affords no legal foundation for a charge against such other persons. In Westmoreland v. Martin, 24 S. C. 240, it is decided that an attorney's right to fees must in every case rest on contract made with the party himself who is charged, or with his representative. No legal claim for compensation can be founded upon services incidentally benefiting a party other than the employer as against that party, because of the incidental benefits. In Hand v. Railroad Co., 21 S. C. 182, it is laid down that no one can legally claim compensation for voluntary services, however beneficial they may be, nor for incidental benefits flowing to a party as a result of services rendered under the employment of another party. In Hubbard v. Camperdown Mills, 25 S. C. 496, 1 S. E. Rep. 5, (decided November 22, 1886,) it is held that a claim for professional services, resting as it does upon contract, cannot be made a charge against persons other than the client, by the simple fact that the services have inured to their benefit. The master is of the opinion that Messrs. Chesnut & Workman, Trantham and Hay (except as to the services rendered by Mr. Hay to John R. Shaw, administrator) are not entitled to any fees to be paid out of funds in the hands of the court. (2) That Mr. J. T. Hay, having rendered services for the benefit of the estate, and having been employed by John R. Shaw, the legal representative of the estate of Wiley Kelly, is entitled to compensation to be paid out of the funds in the hands of the court. The administrator was a necessary party to the action in so far as set forth in the findings of fact, and as such had a right to employ counsel. That the sum of one hundred and fifty dollars should be paid to Mr. J. T. Hay out of the funds in the hands of the court for said services. All which is respectfully submitted. J. D. DUNLAP, Master. August 20, 1888."

The court overruled exceptions to this report, and decreed in accordance with it. Plaintiff appeals.

W. H. R. Workman and *Lyles & Haynsworth*, for appellant. *Earle & Purdy* and *T. J. Kirkland*, for respondents.

MCGOWAN, J. This appeal involves the question of the allowance, out of funds in the circuit court, of a fee for the professional services of the attorney for the plaintiff. The appellant's statement of facts, which is not questioned, is as follows: "Wiley Kelly, late of the county of Kershaw, departed this life intestate, leaving a considerable estate of real and personal property. Letters of administration were granted to one John R. Shaw about January 22, 1875, and proceedings were thereafter commenced in the probate court for the partition of the real estate of the decedent, and progressed to a sale of the lands, but before compliance by the purchasers it was decided by this court that the court of probate was without jurisdiction in

Digitized by Google

such matter, and the proceedings came to an end. Thereupon this action was commenced by the plaintiff, Emily C. Wilson, one of the distributees, (1) to confirm the sales made by the probate court, as they were considered advantageous; (2) to adjust the rights of all parties to the cause on account of advancements received, and debts due by the distributees; and (3) for an accounting by the administrator. The plaintiff, not having purchased any of the lands at the probate sale, had no interest in any of the questions which arose, other than such as was in common between her and the others, who were ultimately decided to be entitled to the estate. During the progress of the litigation a receiver was appointed, and several important questions arose and provoked active litigation, Mr. Workman, the plaintiff's attorney, taking the leading part in the litigation. The points made and argued are all clearly stated in the report of the master, J. D. Dunlap, Esq., which should appear in the report of the case. The master found that $1,000 would be reasonable compensation for the services of Mr. Workman, but that, although the services rendered inured to the benefit of all the heirs, there was no contract relation between them and the attorney of the plaintiff, either directly or through some agent or representative, and therefore the same affords no legal foundation for a charge against such other persons." Upon exceptions to the report, Judge FRASER confirmed it, and made it the judgment of the court. From this order the plaintiff appeals upon the following exceptions: "(1) Because his honor held that 'the doctrine which allows fees to a counsel for a representation of a class does not apply to a case like this.' (2) Because his honor did not find, as a matter of fact, that the services of plaintiff's counsel mentioned in the master's report were rendered in creating and preserving a fund in the hands of the court for common distribution among the parties now entitled thereto, with the acquiescence and approval of the court administering said fund; and the plaintiff stood before the court as a representative of such class. (3) Because his honor disallowed the plaintiff's claim for counsel fees," etc.

Section 140 of the Code provides that "when the question is one of a common or general interest of many persons, or when the parties are numerous, and it may be impracticable to bring them all before the court, one or more may sue or defend for the benefit of the whole." The question as to the principle on which counsel fees may be charged has lately been several times before this court; and, as we think, it has been settled that, "where compensation is allowed out of a common fund belonging to others, for expenses incurred and services rendered in behalf of the common interest, it is upon the principle of representation or agency, *e. g.*, to the plaintiff in a creditor's bill, or to a defendant made a party as a representative of a class too numerous to be served." See Hand v. Railroad Co., 21 S. C. 165; Westmoreland v. Martin, 24 S. C. 240; Hubbard v. Camperdown Mills, 25 S. C. 496, 1 S. E. Rep. 5. According to these authorities the only matter for decision here is whether the question made by the plaintiff was "one of a common or general interest of parties too numerous to be served" in the sense of the rule. The parties were not numerous, and were all brought by summons before the court. It was held in the case of Bannister v. Bull, 16 S. C. 229, that the words "one or more to sue for the benefit of others," in the Code, does not apply to co-tenants, "but were manifestly intended for creditors of an insolvent estate, and cases of that character, where the interest is in common. They (co-tenants) may be said, in one sense, to have a common interest. * * * They have interests in the same property while it remains undivided, but such interests are distinct. Each has a right to the extent of his share." We have no doubt whatever — indeed, it comes within our personal knowledge—that Mr. Workman, in maintaining the rights of his client, the plaintiff, who was one of the distributees, rendered valuable services, which inured to the benefit of her co-distributees; but we are unable to see upon what principle, legal or equitable, we would be justified in ordering his fees to be charged upon the general estate. We agree with the master and circuit judge that "the doctrine which allows fees to a counsel for a representation of a class does not apply to a case like this." The judgment of this court is that the judgment of the circuit court be affirmed.

SIMPSON, C. J., and MCIVER, J., concur.

(30 S. C. 490)

OWENS v. GENTRY *et al.*

(*Supreme Court of South Carolina.* March 29, 1889.)

REPLEVIN—EVIDENCE—AGRICULTURAL LIENS.

1. In an action to recover a portion of a crop which had been seized under an agricultural lien warrant, it was denied that plaintiff had any interest in the crop, and it appeared that she claimed title by reason of the fact that the land on which the crop was raised had been conveyed to her by her husband. *Held*, that evidence that the husband had rented a portion of the land in his own name to a third party was relevant, for the purpose of showing that he managed the land in all respects as though it was his own.

2. In such case, where the husband had been allowed to raise a crop upon the land on his own account, and the lien sought to be enforced had been placed upon the crop by the husband for fertilizers, it was not error to charge that, if the jury were not satisfied by the preponderance of the testimony that the property seized was the plaintiff's, then, of course, she was not entitled to recover.

3. An affidavit was sufficient to authorize the issuance of the lien warrant, which recited that the affiant was informed and believed that the husband was disposing of his crops in order to defeat the said lien, and which gave as reasons for such belief that the husband had sold a portion of his crop without applying any of the proceeds to the satisfaction of the lien, and that he had failed to keep his promises with reference to payment.

Digitized by Google

4. In an action of claim and delivery, it is proper for the court to direct the form of the verdict.
5. In an action against a sheriff for an alleged wrongful seizure of property, the warrant and papers under which the sheriff acted may be put in evidence on the cross-examination of plaintiff's witness.

Appeal from common pleas circuit court of Spartanburg county; WALLACE, Judge.

Thomson, Nichols & Moore, for appellant.
Bomar & Simpson, for respondents.

MCGOWAN, J. This was an action of claim and delivery of personal property, viz., 40 bushels of corn, worth $30, and 550 bundles of fodder, worth $8.25, and one lock and key, worth $1. The defendants answered that, as sheriff and deputy-sheriff for Spartanburg, they took the property claimed by virtue of an agricultural lien warrant issued by the clerk of the court (Trimmier) at the instance of the Ashepoo Phosphate Company of Charleston, against William R. Owens, the husband of the plaintiff, and had sold the same, and applied the proceeds to the agricultural lien debt aforesaid; denying that the property was seized wrongfully or maliciously or violently, but in the discharge of their official duty; and denying that the property belonged to the plaintiff, or that she had any interest therein. The cause came on for trial before Judge WALLACE, when it appeared that the property, corn, and fodder taken was a part of the crop raised on the place upon which W. R. Owens and his family resided; that the land (113 acres) belonged to W. R. Owens, but the year before had been conveyed to his wife, the plaintiff, "in consideration of five dollars, and the services which, during their married life, she had rendered" to the grantor, her husband; that Owens, the husband, by authority of his wife, rented in his own name part of the land to one Bishop upon shares in the crop, and cultivated the remainder himself for the year 1886; that on May 22, 1886, W. R. Owens, in his own name, entered into an agreement in writing with the Ashepoo Phosphate Company, and thereby promised to pay them, on or before October 15, 1886, the sum of $77.84, for fertilizers delivered, "to be used by him, the said Owens, in making crops during the current year on lands cultivated by him, known as his, and belonging to himself," and to secure said debt Owens gave the company a lien on all crops raised on said lands during the year 1886. On December 29, 1886, C. S. Greenleaf, the agent of the Ashepoo Company, made an affidavit "that deponent has been informed and believes that the said W. R. Owens is disposing of his said crops, with the intention of defeating the lien of said company, and that his reasons for his belief are as follows: That the said W. R. Owens has sold, as deponent is informed and believes, several bales of cotton raised on said lands in 1886,—the deponent does not know the exact number,—and has applied none of the proceeds of said sales to the payment of said lien debt; that some time in November, 1886, he promised deponent to pay at least a part of said debt, fixing the day therefor, but failed to come and make such payment; after making said promises, he sold, as deponent is informed and believes, a part of his said crop," etc. Thereupon the clerk of the court issued the agricultural warrant, under which the defendants took the property sued for.

The plaintiff requested the judge to charge "(1) that the affidavit in evidence was not sufficient to authorize the issuance of the warrant, and such warrant was null and void; (2) that the sheriff, in proceeding to enforce agricultural liens, acts at his peril if he attempts to enforce a lien upon a warrant not supported by sufficient affidavit, such affidavit having been previously brought to his knowledge." Under a full and lucid charge, the jury found a verdict "for the defendants," and the plaintiff, having failed in a motion for a new trial, now appeals upon the following grounds of alleged error: "(1) In allowing the defendant, on cross-examination of plaintiff's witness, to put in evidence the agricultural lien warrant, and the papers attached thereto. (2) In allowing in testimony the contract between W. R. Owens and Sandford Bishop. (3) In charging that if the jury were not satisfied by the preponderance of the testimony that the property was the plaintiff's, then, of course, she was not entitled to recover. (4) In prescribing, as he did, the form of the verdict the jury should render. (5) In refusing to charge that the affidavit in evidence was not sufficient to authorize the issuance of the warrant, and that such warrant was null and void. (6) In refusing to charge that the sheriff, in preceeding to enforce agricultural liens, acts at his peril, if he attempts to enforce a lien upon a warrant not supported by a sufficient affidavit; such affidavit being previously brought to his knowlege. (7) In refusing to grant the motion for a new trial," etc.

As to the *first* exception, the defendants, sheriff and deputy, took the property officially under a warrant regularly lodged. The plaintiff, in order to prove her case, put up as a witness the deputy-sheriff, who proved the seizure and sale, and upon cross-examination said: "The lien warrant I hold in my hand was my authority for making the levy." Plaintiff's attorney objected, and the judge said: "He can identify and prove a paper, and in that way put the paper in evidence. He can make out his whole case by this witness, if possible." The warrant and record under which the sheriff acted was certainly admissible in evidence, and the only point involved was as to the time when it could be introduced. We do not see why the warrant and the whole record could not be proved on the cross-examination of one of plaintiff's witnesses. In great strictness, the matter proved was merely part of the case for the defendants, to be read and considered with their evidence, but that did not prevent the proof upon cross-examination.

Digitized by Google

The English rule upon the subject prevails in this state. Kibler v. McIlwain, 16 S. C. 554; Dillard v. Samuels, 25 S. C. 322.

Second. We do not see why the rent note of Bishop to W. R. Owens was not admissible. The point in issue was whether the plaintiff, Mrs. Owens, allowed her husband, W. R. Owens, as her agent, to manage the land in all respects as his own, and, as he said himself, "just the same as if it belonged to him," to rent it to others, or to cultivate it himself. Upon that issue it was "relevant" to prove that W. R. Owens rented to another, in his own name, a part of the very land he had conveyed to his wife, and a part of which, with the concurrence of his wife, he cultivated himself. He could not cultivate the land as a lessee, and at the same time deny his lien on the crop for fertilizers.

Third. We do not think it was error to charge "that, if the jury were not satisfied by the preponderance of the testimony that the property was the plaintiff's, then, of course, she was not entitled to recover." As a general rule, certainly, parties are only allowed to recover property which belongs to them. We do not think this case analogous to that of the chimney sweeper's boy who found a jewel, and was held to be entitled to recover it, in an action of trover, against all but the true owner. There was no clear and exclusive possession in the plaintiff here. The title of the land was in her name, but she lived with her husband, and permitted him to make a crop upon it on his own account; and the jury may very well have concluded that the crop was in the possession of the husband, who made it, and in doing so had placed a lien upon it for fertilizers. He cannot be permitted to give a lien upon the crop as his own property with the knowledge of his wife, and then claim that it belongs to her, and she never authorized that contract.

Fourth. "That the alleged lien warrant was wholly irregular, insufficient, and void, and could not protect the defendants in acting under it, and their proceedings were at their peril." It might be enough to say that this question was not considered by the judge below, although he was requested to charge upon the subject; for the reason, as we suppose, that the defendant himself did not make the objection, but it was made by a stranger to that proceeding. If, however, W. R. Owens himself were before the court, and making the objection, we do not think it could be sustained. The affidavit of Greenleaf, the agent, was never controverted. It was very full, giving his reasons for the belief that the said W. R. Owens "is disposing of his said crop with the intention of defeating the lien of the said company." See Monday v. Elmore, 27 S. C. 131, 3 S. E. Rep. 65, in which the chief justice said: "It must be remembered that this was a proceeding upon an agricultural lien, and while this lien law does provide that the affidavit for a warrant of seizure in such cases should 'conform, as nearly as may be,' to the practice in ordinary attachments, yet there is this material distinction between the two: In attachment cases there is no lien on the property attached, which it is intended to enforce, and consequently the mere disposition of the property might not in itself, perhaps, be a sufficient statement showing the intent to defraud. But in agricultural contracts there is a lien, and a statement that the debtor is disposing of his property to defeat this lien contains facts bearing directly on the intent," etc.

Fifth. We are unable to see that the judge erred "in prescribing," as he did, the form of the verdict, and in refusing a motion "for a new trial." The verdict, in an action "for claim and delivery of personal property," is somewhat long and out of the usual course, and to all but lawyers needs to be explained. We think the judge did right in giving to the jury the form, and that the form given was correct. We cannot say that he committed error of law in refusing to grant a new trial. The judgment of this court is that the judgment of the circuit court be affirmed.

SIMPSON, C. J., and MCIVER, J., concur.

(82 Ga. 599)

HARRISON *et al. v.* JONES.

(*Supreme Court of Georgia.* April 8, 1889.)

DEED—CONSTRUCTION—HEIRS.

When an estate is limited in ultimate remainder to the right heirs by blood of the wife, (first tenant for life,) though not to take effect in possession until the death of the husband, (second tenant for life,) the persons contemplated to take in remainder are those kindred of the wife who, according to the laws of inheritance, would take by descent at her death; not such as would take at the death of the husband if the wife had survived until that time. In other words, the heirs of the first tenant for life are to be ascertained at her death, and not at the death of the second tenant for life.

(*Syllabus by the Court.*)

Error from superior court, Chatham county, ADAMS, Judge.

W. W. Montgomery, for plaintiff in error.
J. R. Saussy, for defendants in error.

BLECKLEY, C. J. The instrument presented for our construction is an antenuptial settlement in trust, executed in 1842. The conveyance embraced both realty and personalty, but realty alone is involved in the present controversy. The literal terms of the instrument appear in the official report. So far as now material, the trusts created were substantially as follows: *First*, for the separate use of the wife during her life; *secondly*, then for the use of the husband during his life; *thirdly*, then for the use of the children, if any, in fee; and, *fourthly*, if no children, then and in that case, upon his death, for the use of her right heirs by blood, forever. She, having had no child, died in 1869. He died in 1886. At the time of her death, her right heirs by blood were a brother and a sister, both of whom died before he died, and both left children, some of them the plaintiffs in

Digitized by Google

error, surviving when he died. The sole question for decision is whether these children or their parents were her "right heirs by blood," within the meaning and legal effect of the settlement.

The general rule undoubtedly is that heirs are those persons upon whom a descendable estate is cast by law upon the owner's death. It must follow that "right heirs by blood" are such, and so many of the heirs general as would by reason of blood participate in such an estate were it so cast. All collateral inheritance is by reason of blood only. Brother and sister are collaterals; so are nephew and niece. It is not disputed that the former two are nearer in degree than the latter two. We can see nothing in the settlement to indicate that the heirs are to be looked for at the death of the husband, rather than at the death of the wife. As soon as those in whom the ultimate remainder was to vest were ascertained, that remainder vested; and these persons were ascertained when the wife died, for then it became known with absolute certainty who were her "right heirs by blood." They did not, by dying, cease to be such heirs, and admit a new set, but died without leaving any vacancy in the character, or any room for substitution. Whatsoever their children acquired of the property embraced in this settlement came through them, and did not come over their heads, or under their feet. If the children claim by descent, the *propositus*, as to them, is their parent, not their aunt; and, if they claim by purchase, their title is the parent's will, not the settlement. Here the nephews and nieces are not, and never have been, the heirs of their aunt. Her heirs by blood were her brother and sister, and she has not had, and never can have, any other heirs by blood. Indeed, as she left a husband, who, according to our statute, there being no children, was her sole heir at law, even the brother and sister were not heirs, but only the persons who would have been heirs had blood alone been regarded. The designation by the word "heirs" of persons who were not heirs was intended as a description of a class of persons, and, though not accurate, is perfectly intelligible; the meaning being, such of the wife's kindred as, by the laws of inheritance, would be her heirs were the husband already dead when she herself died. The intent was to exclude the husband as heir at law of the wife, and to substitute her next of kin at the time of her death; and this intent was to prevail whether he survived her or not. The settlement, as we have said, contains no words indicating that the right heirs of the wife by blood were to be sought for at the death of the husband rather than at her own death. This being so, the general rule obtains. Danvers v. Clarendon, 1 Vern. 35; Doe v. Spratt, 5 Barn. & Adol. 731; Newkirk v. Hawes, 5 Jones, Eq. 265; Abbott v. Bradstreet, 3 Allen, 587; Minot v. Tappan, 122 Mass. 535; Prove v. Torr, 128 Mass. 38; Hawk. Wills, 94, 95, *et seq.*; Schouler, Wills, § 563. In Haddock v. Perham, 70 Ga. 572, there was no dispute as to the persons filling the description of "heirs" of the testator, (see page 575;) and, consequently, there was no occasion to distinguish in that regard between any two groups or classes of persons. What was said upon the point was merely casual or incidental, and is, we think, to be treated as *obiter*. We confine this opinion to the one question made in the briefs of counsel, and above decided. The controlling effect of this question upon the main cause we understand is conceded. Judgment affirmed.

(82 Ga. 535)

ROBINSON *et al.* *v.* STATE.

(*Supreme Court of Georgia.* April 8, 1889.)

CRIMINAL LAW — CONTINUANCE — INSTRUCTIONS — EVIDENCE — RESCUE.

1. Rescue and aiding a prisoner to escape, within the purview of the Code of Georgia, distinguished.
2. The evidence was sufficient to show the participation of each of the accused in the guilty act.
3. Continuance or postponement of the trial was not required for the absence of one of the prisoner's counsel after his leave of absence had expired.
4. The array was not disqualified by hearing the evidence alone, without forming or expressing any opinion thereon. The panel, lacking two jurors of being full, was properly filled by adding the required number.
5. Exception to remark of the court, "Yes, yes!" etc., too trivial to require discussion.
6. The sentence of a prisoner connected with the same transaction, and the remarks of the court in passing sentence, will not prevent subsequent trials from being legal.
7. The book of minutes of a municipal corporation may be proved to be such by any witness who knows the fact.
8. Though evidence of a conversation be improperly admitted, a new trial will not follow necessarily.
9. While counsel for the state should not argue to the jury from the omission of the accused to to make a statement, the effect of such impropriety may be obviated by an appropriate charge from the court.
10. The charge on reasonable doubt was not objectionable.
11. The charge touching *alibi*, if erroneous, was not hurtful, because the evidence, both for the state and the prisoner, showed there was no *alibi*.
12. A charge to the effect that the jury must arrive at a verdict is to be construed with reference to the subject-matter which the court had under consideration, namely, the duty of reconciling conflicting evidence.
13. The marshal of a town *de facto* is an officer capable of making lawful arrests; and to aid the escape from him of a prisoner in his custody is a violation of the statute.
14. The rejection of evidence to show that the marshal was conditionally appointed or elected was not error, the fact being that he entered upon service and actually served.
15. For the court, on the conclusion of the prisoner's statement, to ask him whether he meant to deny the testimony of the witnesses was improper, but, being meant for the purpose of calling his attention in a friendly way to an omission in his statement, is not cause for a new trial.
16. The court may check the exuberant volubility of a witness by saying, "You talk too much."
17. The refusal to charge as requested is not error where the charge, as given, presents the matter fully and fairly to the jury.

(*Syllabus by the Court.*)

Digitized by Google

Error from superior court, De Kalk county; R. H. CLARKE, Judge.

Alexander & Turnbull, for plaintiffs in error. *J. S. Candler*, Sol. Gen., for the State.

BLECKLEY, C. J. 1. These indictments being for the offense of aiding Wesley Hubert, a prisoner, to escape from custody, the first question is whether the offense proved was the one charged, or whether it was the offense of rescue. The two relevant sections of the Code are as follows. "Rescue is the forcibly and knowingly freeing another from arrest or imprisonment." Section 4478. "If any person shall aid or assist any prisoner to escape, or attempt to escape, from the custody of any sheriff, coroner, constable, officer, or other person who shall have the lawful charge of such prisoner, such person so offending shall, on conviction, be punished," etc. Section 4483. We think that rescue takes place where there is no effort on the part of the prisoner to escape, but his deliverance is effected by the intervention of others, without his co-operation; whereas the offense of aiding a prisoner to escape consists in inciting, supporting, or re-enforcing his exertions in his own behalf, tending to the accomplishment of that object. The evidence shows, in all three of these cases, that Wesley Hubert was not merely passive, but was himself making demonstrations, and putting forth some effort to effect his escape.

2. In each of the cases there was evidence from which the jury could infer that the accused encouraged, or otherwise contributed, to the efforts of the prisoner to render his escape effectual; and in point of fact his efforts were effectual. The escape was accomplished.

3. We discover no error in refusing to continue the case of Jack Goldsmith because of the absence of one of his counsel. The leave of absence which had been granted had expired. The same observation applies to the refusal of the court to postpone the case until the following week.

4. The challenge both to the array and to the polls was properly overruled. Although it appeared that the jurors were present, and heard the evidence delivered on oath, it did not appear that they or any of them had formed and expressed any opinion as to the guilt or innocence of the party making the challenge. The objection that the panel required two more jurors to render it full was met by summoning that number to complete the panel, and thus completing it.

5. The exception that the court remarked, "Yes, yes!" etc., when the reporter was requested to note an objection to a certain ruling, is too trivial to require discussion.

6. Lovejoy, who had been previously tried, was sentenced in the due administration of judicial business, and we cannot hold that the regular proceedings of a court are to be varied or delayed by the fact that they may affect the minds of jurors with reference to other business which must subsequently come up for trial. Johnson v. State, 59 Ga. 189; Townsend v. State, 76 Ga. 105; Collins v. State, 78 Ga. 76.

7. It was competent to prove that Hurst was the acting marshal of Decatur, and to show by any one who knew the fact that the book of the minutes of the town council was such book. There was no objection that a certified copy from the book would be the primary evidence, according to sections 3816 and 3817 of the Code.

8. It may have been somewhat irregular to allow witnesses to testify as to what passed between them and others in reference to the arrest of the negro Hubert, but this, we think, did not vitiate the trial.

9. The same may be said as to allowing the state's counsel to argue from the failure of the defendant to make a statement. The court was particular to obviate, by an appropriate charge, any hurtful result.

10. The charge of the court upon reasonable doubt seems free from objection. We do not see that it varied substantially from that usually given, and which has been held correct in hundreds of cases.

11. Touching *alibi* the court may have given an improper charge. We need not rule on that question, for really any charge whatever upon the subject of *alibi* was in favor of the prisoner. According to the evidence, there was no *alibi* involved in the case. No absence from the scene of the crime appeared, whether the testimony for the accused or for the state be regarded. All of these parties were in the crowd, and were legally present when the offense was committed.

12. The charge of the court to the effect that the jury must arrive at a verdict is to be understood with reference to the subject-matter under consideration, which was the duty of reconciling conflicting evidence. The court simply meant that the jury must arrive at some conclusion which would reconcile all the evidence, if they could do so.

13. The marshal of a town *de facto* is, to all intents and purposes, an officer, as to the legal power of making arrests; and this is so whether he had given bond and security or not, and whether he resided in the corporate limits or not.

14. The rejection of evidence that the marshal was elected or appointed conditionally, with the understanding that he was not to exercise the duties of the office until he removed within the town, and that at the time of Hubert's arrest he had not complied with said condition, was not error. No such condition appeared upon the minutes of the council. It rested altogether in parol. Besides, if such condition was imposed, it did not in any way militate against the subsequent fact that the marshal acted as marshal, and was in all respects an officer *de facto*. Proof that he so acted established his official character. Code, § 3764.

15. It certainly was irregular to interrogate Henry Goldsmith after he had concluded his statement by asking him whether he meant

Digitized by Google

to deny the testimony of the witnesses; but the court explains that this was done for the purpose of calling attention to an omission in the statement, and with a purpose altogether friendly. The motive was a kind one. Nevertheless, the act was not well advised, and we cannot approve it. But we do not feel warranted in directing a new trial on account of it.

16. That the court said to the witness Millie Stills, "You talk too much, Millie," does not seem to require a new trial. The remark was made simply to check her volubility, while she was rattling away so that her evidence could, with difficulty, be separated from mere "talk."

17. The refusal to charge in the case of Henry Goldsmith that if he started into the crowd under the impression that his brother Jack was in a fight, and, immediately upon being told that he was not, desisted, without having committed any act tending to liberate the prisoner, then the jury would be authorized to find him not guilty, was not error, considered in the light of the whole charge as contained in the record. The jury were instructed that there could be no conviction unless they believed from the evidence that the accused aided or assisted in the escape of Hubert from the officer.

Our conclusion is that the court did not err in refusing to grant a new trial in all or any one of the three cases. Judgment affirmed.

(80 Ga. 427)

PRATHER *v.* RICHMOND & D. R. CO.

(*Supreme Court of Georgia.* July 11, 1888.)[1]

MASTER AND SERVANT—NEGLIGENCE.

1. In an action for the death of a railroad employé it appeared that he was one of the crew of a construction train which carried rails, dirt, etc., and that it was his duty to do any work for the successful working of the train. The court charged that if one or more of the same class of laborers in which was deceased, and selected indifferently from their number,—now one and then another,—was charged with the duty of manning the brakes, and keeping a lookout, and giving signals of danger, then deceased was a co-employé with any such laborers, and with the conductor and boss of the squad, and the engineer and fireman; and that, if deceased "immediately or remotely, directly or indirectly," caused the injury or any part of it, etc., there could be no recovery. *Held*, that the charge was not defective as making deceased an employé about the train when he had nothing to do with its movement; nor was the use of the words "immediately or remotely" error, as being argumentative and misleading.

2. A charge that if an employé is killed while in disobedience of a rule of the company or an order of the conductor, given him while he is under the command of the conductor, his widow cannot recover unless the disobedience did not directly or indirectly contribute to the injury, and that the burden is on plaintiff to show that it did not thus contribute, is correct, when given in connection with a charge that if deceased was disobeying the orders of the conductor, yet if the employés were in the habit of disobeying him, with his knowledge, in the way that deceased was doing, it would not bar recovery.

3. The question as to whether the order of the conductor which deceased was disobeying was reasonable or not was for the jury.

4. The burden was on plaintiff to show that deceased was without fault, or that defendant was in fault.[2]

5. The construction train was in a deep cut. A cow was seen near the track, and immediately the brakes were applied, and the speed of the train diminished to six miles an hour. Suddenly, after the cow had crossed the track, another jumped on the track just as the forward car reached the crossing. It was not seen, and could not have been seen, till it started across the track, and the train could not have been stopped after it was discovered. The car struck the cow, and was derailed, and plaintiff's husband was killed. *Held*, that the company was not in fault, and not liable.

Error from city court of Atlanta; VAN EPPS, Judge.

Action by Mrs. Prather against the Richmond & Danville Railroad Company for the death of plaintiff's husband. Judgment for defendant, and plaintiff brings error.

Hoke & Burton Smith, for plaintiff in error. *Hopkins & Glenn*, for defendant in error.

SIMMONS, J. This case comes here on a writ of error sued out by the plaintiff, because she alleges that the court below erred in refusing her a new trial. There are 12 grounds taken in the motion. The first two were not insisted on before us, the counsel admitting that if the court had committed no error there was sufficient evidence to sustain the verdict. It therefore becomes necessary for us to examine the alleged errors of law, and determine from them whether the plaintiff in error is entitled to a new trial or not. We begin with the third ground of the motion, which is: (3) Because the court erred in charging the jury as follows: "If this was a construction train engaged in the business of carrying laborers and material to be used by them from one point on the road to another, and one or more of the same class of laborers in which the plaintiff's husband was, and selected indifferently from their number,—now one and then another,—was charged with the duty of manning the brakes of the flat-car, and keeping a lookout and giving signals of danger ahead, then the plaintiff's husband was a co-employé with such other laborers, and with the conductor or boss of the squad and the engineer and fireman of the engine, and engaged in the same manner with them; and, in order for the plaintiff to recover on this state of facts, it must appear that Wesley Prather was wholly blameless,—that is, that he himself was guilty of no negligence which contributed to the cause of the injury. If he immediately or remotely, directly or indirectly, caused it or any part of it, or contributed to it at all, then his wife cannot recover." It is objected to this charge, first, that the court in the charge placed the deceased, when riding on the flat-car, as an

[1] Publication delayed by late receipt of copy.

[2] Respecting the burden of proof in actions for negligent injuries, see Seymer v. Town of Lake, (Wis.) 29 N. W. Rep. 554, and note; Railway Co. v. Foreman, (Tex.) 11 S. W. Rep. 326; Telegraph Co. v. Varnau, (Pa.) 15 Atl. Rep. 624, and cases cited.

Digitized by Google

employé engaged about the work, although at the time he had nothing to do with the movement of the train; and which required him to be blameless before he could recover.

1. We think the charge was correct. The character of this train and the nature of the deceased's employment must be borne in mind. This was a construction train, used for the purpose of hauling steel rails, dirt, and anything else that was necessary for repairing the road-bed. The evidence shows that this train would have been useless without hands to load and unload it; that it had a crew of from 18 to 26 constantly employed; that Prather, the deceased, was one of this crew, and his business was to do anything to insure the successful working of the train. The train, equipped for its work, consisted in the locomotive, the steam-power, the cars, and the physical force, of which latter the deceased represented a part. He belonged to this train, and we think was an employé on it, and co-employé with the balance of the crew, although at the time of the accident he had no active duty to perform. The fact that he had no active duty to perform while riding from one point of work to another did not make him any the less an employé during those times. He could not be an employé while at work at one mile-post, and, having finished there, get on the car to go to the next mile-post, and while riding the mile become a passenger, and at the end of the mile become an employé again. "The true test of fellow-service is community in that which is the test of service,—which is subjection to control and direction by the same common master in the same common pursuit. * * * 'In order to constitute fellow-laborers, * * * it is not necessary that the servant causing and the servant sustaining the injury shall both be engaged in precisely the same, or even in similar, acts. Thus, the driver and guard of a stage-coach, the steersman and rowers of a boat, the man who draws the red-hot iron from the forge and those who hammer it into shape, the engineman and the switcher, the man who lets the miners down into, and who afterwards brings them up from, the mine, and the miners themselves,—all these are fellow-laborers * * * within the meaning of the term.'" 3 Wood, Ry. Law, § 388, and authorities there cited. It will be seen, by reference to the plaintiff's declaration, that she calls him an employé or "train-hand." It must be borne in mind also that this train was not a freight or passenger train, but a gravel or construction train, used by the defendant as such, and not used as common carrier of goods or passengers. It is argued that this case is covered by the case of Railroad Co. v. Ayers, 53 Ga. 12. We do not think so. If that case was ruled correctly (of which I have grave doubts) it does not conflict with our ruling in this case. The facts are entirely different. In that case Ayers did not belong to that train, as Prather did to this. He was a "track raiser," a separate and independent employment from that of a train-hand, who is part of the crew of the train.

2. The second criticism made upon this part of the charge is that the use of the words, "immediately or remotely," etc., was argumentative, and calculated to mislead the jury. We do not think that this was error. It was simply a definition of the words "without fault," used by our Code. Besides, it is in the very language used by this court in Railroad Co. v. Mitchell, 63 Ga. 173, when construing section 3036, and defining the meaning of these words, and is not inconsistent with what has been ruled in other cases, that the contributory negligence of the employé must be substantial.

3. Exception is made as the fourth ground of the motion to the charge, because the court charged the jury that "the burden is on the plaintiff to show that her husband was without fault, or that the defendant was in fault." This rule has been so long settled by this court that we do not think it necessary to devote any time to show the correctness of it.

4. In the fifth ground of the motion the plaintiff in error complains of and criticises the use of the words "ordinary perils," because the jury might infer from it that if accidents frequently happened they were therefore ordinary perils, and no recovery could be had, though the other employés were negligent. We do not think that any such inference could be drawn from the language used. Taken in connection with the charge upon the question of negligence, it is a sound proposition in law. The only adverse criticism we can make upon the charge as given is the use of the word "ordinary." Why confine it to the word "ordinary?" Does not the employé assume the risk of all perils incident to his employment,—necessary, ordinary, and extraordinary,—except the negligence of the company, its servants and agents?

5. The sixth ground of the motion complains of the following charge of the court: "The jury is instructed that the law is that before an employé can recover he must be free from fault, and that if an employé is killed while in disobedience of a rule of the company, or an order of his conductor, given him while he was under the command of the conductor, his widow cannot recover for his homicide, unless it clearly appear from the evidence that such disobedience did not directly or indirectly contribute in any degree to the injury. The burden is upon the plaintiff to show that he did not thus contribute; and if she has failed to do this it will be your duty to return a verdict for the defendant." We see no error in this charge, taken in connection with the entire charge upon the same subject. It is certainly a sound proposition, under the decisions of this court, that before an employé can recover from a railroad company he must be free from fault; and we think it follows that if he is killed while in

Digitized by Google

disobedience of a rule of the company, or an order of his conductor, given him while he is under the command of the conductor, his widow cannot recover for his homicide, unless it appear from the evidence that such disobedience did not directly or indirectly contribute in any degree to the injury. The employé is bound to obey all reasonable rules and regulations of the company, and all reasonable orders of the person who is in command of the squad, given either for the protection of the interests of the company or the protection of the employé himself. If he disobeys these rules or orders, the burden is upon the plaintiff to show that the disobedience did not contribute to the injury. The court charged, in substance, that if this employé, the plaintiff's husband, would have been killed whether standing or sitting with his legs hanging over the car, or not, his disobedience to the order of his superior would not bar the plaintiff's recovery. And the court also charged that if the conductor had given such orders, yet, if they were in the habit of riding that way, with the knowledge of the conductor, then a failure to comply with the order would not bar the plaintiff's recovery. Taking the whole charge upon this subject together, we think it was a fair and impartial presentation of the law to the jury.

6. There was no error in charging the jury as complained of in the seventh ground of the motion. We think the rule is well established that, if it is shown that the employé has disobeyed the orders of his superior, the burden is upon him to show that such disobedience did not contribute in any degree to the injury. Railroad Co. v. Mitchell, 63 Ga. 174; Railway Co. v. Ray, 70 Ga. 674. There was no error in the charge complained of in the eighth ground of the motion. The ninth ground has been considered in passing upon the third ground, and what has been said in reference to the former will apply to this ground.

7. Nor do we see any error in refusing to charge as set out in the tenth and eleventh grounds. The conductor was in charge of the train. It was an independent train. He represented the company. It was his right and duty to give all necessary orders for the protection of the interests of the company and the safety of its servants. If he gave the order not to sit with the legs hanging over the side of the car, and it was a reasonable order, the servant must obey it. If he disobeyed it, and was injured, he could not afterwards say it was not an order, but simply "advice or warning" against danger. Nor could he say that while he was "riding from one point on the road to another, and had nothing to do with the running of the train, it was not such an order as he was bound to obey." The servant is bound to obey all reasonable rules and orders given him by his superior in and about the business of his employment. We have shown in the former part of this opinion that Prather was an employé at the time of the disaster. If he was, and this was a proper order for the protection of the interests of the company, or even for his own safety as such employé, he was bound to obey it. If he disobeyed it and was injured, he must show to the satisfaction of the jury that his disobedience did not contribute to his injury. Nor would it have been proper for the court to have instructed the jury that it was not such an order as required him to obey. The court very properly, in his able, lucid, and impartial charge, left these and kindred questions to the jury, where they properly belong.

8. Admitting, for the sake of argument, that there are errors in the charge, still we would not feel authorized to reverse the judgment of the court below in this case. We have read the evidence closely and carefully, and have come to the conclusion that the verdict is right, and that the jury were compelled by the evidence to find this verdict. Whether the husband of this plaintiff was standing or sitting, or had his legs hanging over the side of the car or not, in our opinion it would make no difference in the result. It appears to us, from the evidence, that this was an unavoidable occurrence, which could not have been prevented by the exercise even of extraordinary diligence. A large preponderance of the evidence clearly shows that there were two cows near the track; that this engine and train were in a deep cut; that when the first cow was seen the brakes were applied, and the speed of the train was decreased to about six miles an hour; that after the first cow had crossed the track, a second cow suddenly jumped on the track just as the forward car reached the crossing; it was not seen, and could not have been seen, by any one until it started across the track; it was impossible to stop the train, after the second cow was seen or could have been seen; the forward car struck it and was derailed, resulting in the death of the plaintiff's husband. From this it will be seen that the railroad company is not chargeable with fault or negligence; and therefore, whether the plaintiff's husband was at fault or not, she is not entitled to recover.

9. Under the view we take of this case, it is unnecessary to discuss the twelfth ground, in regard to newly-discovered testimony, further than to say that some of the testimony is cumulative in its character, and the remainder of it negative, relating principally to whether any orders were given by the conductor in regard to standing up or sitting down with the legs hanging over the side of the car. Judgment affirmed.

(82 Ga. 552)

MARTIN *v.* FOLEY.

(*Supreme Court of Georgia.* April 8, 1889.)

MASTER IN CHANCERY—REFERENCE.

In an equity suit to set aside a deed alleged to have been procured by fraud and undue influence, and to have an accounting in case the deed is set aside, where it is apparent to the trial judge that the controlling issue is as to the validity of the

Digitized by Google

deed, it is not error to refuse to refer the cause to an auditor before the trial by a jury of that issue, as the reference of an equity cause is discretionary with the court, under Code Ga. §§ 3097, 4202.

Error from superior court, Chatham county; ADAMS, Judge.

Jas. Atkins, and *J. G. & D. H. Clark*, for plaintiff in error. *J. R. Saussay*, for defendant in error.

SIMMONS, J. Owen Foley died in the year 1855, testate, leaving a large estate, which he directed in his will should be equally divided between his wife and his two children, Catherine and Francis O. Foley. Two executors were named in the will, who qualified, and in 1873 either resigned or were discharged. Honoria Foley, the widow, was appointed administratrix with the will annexed, and took charge of the property. After the son, Francis O., attained his majority, he sold his interest in the estate to his mother and sister. Several years subsequent to that sale he died, leaving a widow and one child. This widow intermarried with one Martin, who took out letters of administration on the estate of Francis O. Foley, and, as such administrator, filed this bill against Honoria Foley, the mother of his intestate, for an accounting and settlement of said estate, and to set aside the deed made by Francis O. Foley to his mother and sister, on the grounds of fraud in the procurement of the same, undue influence exercised over the minds of the son and brother by the mother and sister, and gross inadequacy of consideration. On the trial of the case the jury found against the complainant in the bill, and he moved for a new trial on many grounds, which motion was refused by the court, and he excepted.

While there are many grounds in this motion for a new trial, counsel for the plaintiff in error only insisted upon two of these grounds before us, either in his brief, or in his oral argument to the court, for a reversal of the judgment of the court below. It is therefore unnecessary for us to notice the other grounds taken in the motion, further than to say that the plaintiff in error has not shown to us the errors complained of therein.

The grounds insisted on here are (1) that the jury found contrary to the evidence, in answering special questions submitted to them by the judge on the trial of the case; and (2) that the court erred in refusing to refer this case to an auditor, on the application of the complainant prior to the beginning of the trial before the jury. The jury were required by the court to find the special facts in the case, in answer to certain interrogatories propounded to them by the court, and they found the following facts: "That Francis O. Foley, the complainant's intestate, did sell and convey his interest in his father's estate devised to him in his father's will to the defendant, his mother, and his sister, Catherine Foley, on the 16th day of September, 1873; that there was no fraud or concealment or misrepresentation of any material facts made willfully or recklessly to deceive, or without knowledge by the defendant or Catharine Foley, to said F. O. Foley in making said contract of sale; that there was no suppression of any fact material to be known, which the defendant was under an obligation as administratrix or parent to communicate to Francis O. Foley, in reference to the property in question; that the defendant, as the mother of Francis O. Foley, or Catherine Foley, as his sister, did not exercise a controlling influence over the will, conduct, and interest of Francis O. Foley, in procuring any sale to be made by him to her of his interest in his father's estate; that the deed was made by Francis O. Foley to his mother, the defendant, and his sister, freely, voluntarily, and without the slightest persuasion or influence towards this object by them; that the deed was made upon a fair and adequate consideration, joined with an equality of mental ability, and that the consideration named in said deed was paid; that Francis O. Foley was acquainted with the nature, value, and profits arising from the estate of his father, or had full and ample opportunity to inform himself of the same; that the estate of Owen Foley was distributed to the parties entitled thereto in the lifetime of Francis O. Foley, to-wit, on the 15th of March, 1877; that at the time of making the deed to his mother, the defendant, and his sister, Francis O. Foley was in a fit condition to manage his own business, and to make a contract disposing of his own interest in said estate to his own advantage."

1. We have examined the evidence in this record, and find sufficient testimony therein to authorize the finding of the jury. The able and impartial judge who presided at this trial was satisfied with their finding, and we will not disturb it.

2. Prior to entering into the trial, it appears that the complainant asked that the case be referred to an auditor to take the account between the complainant and Honoria Foley, which was refused by the court. We do not think that the court erred in refusing to send this case to an auditor. It is the duty of the court, when an auditor or master in chancery is demanded by one side or the other, to examine the pleadings in the case, and determine whether it would be to the interest of the litigants and the court for the reference to be made. In this case we suppose that the judge examined the pleadings, and ascertained that the main and important issue was whether this deed from the son to the mother and sister was procured as alleged in the bill. This was a controlling point in the case. If the deed was valid, it was unnecessary to take any account, because the mother was not indebted to her son's estate in any manner, and the verdict in this case shows the wisdom of the judge's refusal to refer the case to a master or auditor. It would have been perfectly useless to have taken the account between these parties,

Digitized by Google

causing expense and consumption of time, when the finding of the auditor or master would have been worthless if the deed was a valid one. The court did right, therefore, in refusing the reference, and requiring the jury to try the main issue in the case, as to fraud and undue influence in procuring the deed. These two questions it was peculiarly within the province of the jury to pass upon. No auditor or master is as well qualified to pass on questions of fraud or undue influence as a jury of 12 men. Besides, by sections 3097 and 4202 of the Code, it is within the discretion of the judge, in an equity case, to refer a case to an auditor or not. Judgment affirmed.

(82 Ga. 572)

HALL v. MCAUTHUR.

(*Supreme Court of Georgia.* April 8, 1889.)

CONTRACTS—PLEADING.

Under Code Ga. § 3471, providing that in any action at law on a contract defendant may plead total or partial failure of consideration, defendant, in an action on a note, after pleading the general issue, may amend his plea so as to allege as a defense that the note was given in part payment for land; that plaintiff represented that he had a complete title to the land, and agreed to deliver a perfect title to defendant, but that in fact he had only a sheriff's deed under an illegal tax-sale, which illegality was known to both the sheriff and plaintiff; and that plaintiff failed to give him any additional title, whereby the consideration of the note wholly failed.

Error from superior court, Pulaski county; KIBBEE, Judge.

Martin & Smith, for plaintiff in error. *A. C. Pate*, for defendant in error.

SIMMONS, J. McAuthur, surviving partner of McAuthur & Griffin, sued Hall upon a promissory note for $150, which note was payable to said firm. The defendant pleaded the general issue, and afterwards offered an amendment to his plea, in substance as follows: That the note sued on was given in part payment for a certain lot of land; that at the time of the purchase of the land it was expressly stipulated between him and Griffin that Griffin would deliver to him a full chain of title; Griffin representing to the defendant that he had a full chain of title to the land from the state down to himself; that he paid Griffin $250 on the purchase, but that when Griffin came to make the defendant a deed to the land the only title he proposed to turn over to the defendant was a sheriff's deed; that the land had been illegally sold by the sheriff under a tax *fi. fa.*, as wild land; that it was not wild land, having been in cultivation for at least 30 years, as was well known to the sheriff and to Griffin; that Griffin had failed and refused to give him any additional title; and that, therefore, the consideration of the note had wholly failed. This amendment was disallowed by the court, and the jury returned a verdict for the plaintiff, and the defendant filed his bill of exceptions to the judgment of the court refusing the amendment. We think the court erred in refusing to allow the amendment. We know of no law which prevents a defendant from filing a plea of total or partial failure of consideration to a promissory note. In this plea, it is true, the defendant calls it a plea of total failure of consideration; but the facts which he alleges therein show that it was a partial failure of consideration, because he alleges that he has paid a part of the purchase money, and is in possession of the land. He alleges that he contracted for a full chain of title, from the grant which the state originally issued down to the time when he purchased, and that Griffin failed and refused to furnish this full chain of title. If this was the contract between these parties, it seems to us that he ought to be allowed to prove it. We know of no reason why a purchaser may not stipulate in his contract the kind and character of title he shall receive from his vendor. If that stipulation and agreement is for a full chain of title, and the vendor fails or refuses to furnish what he agreed to furnish, then we think it is a proper subject of inquiry by a jury whether the defendant has been damaged, and how much, by this failure on the part of the vendor. Code, § 3471[1]; Fisher v Dow, 10 S. W. Rep. 455. Judgment reversed.

(82 Ga. 548)

THOMPSON v. MORGAN, Sheriff, *et al.*

(*Supreme Court of Georgia.* April 8, 1889.)

CHATTEL MORTGAGES—LIEN.

1. Under Code Ga. § 1956, requiring chattel mortgages to be recorded in the county where the mortgagor resides at the time the mortgage is executed, and section 1957, declaring that mortgages not recorded within the time required, though valid as against the mortgagor, are postponed to all other liens created or obtained before the actual record of the mortgage, a chattel mortgage executed in February, but not recorded in the county of the mortgagor's residence, will be postponed to a judgment obtained in the following November.

2. Code Ga. § 3979, requiring one who contests the validity or fairness of a mortgage to file an affidavit of the grounds relied on to defeat the mortgage, with bond and security, has no application to such a case.

Error from superior court, Bryan county; ADAMS, Judge.

A. C. Wright, for plaintiff in error. *R. F. C. Smith*, for defendant in error.

SIMMONS, J. W. J. and N. E. Kelly obtained two judgments against Smith, on November 7, 1887. Executions were issued thereon and levied upon a certain mule, which was sold thereunder. One J. C. Thompson had a mortgage on the mule, which he had foreclosed on the 14th of December, 1887. The mortgage was dated February 9, 1887, and was recorded in Tatnall county. It was not recorded in Bryan county, where the mortgagor resided at the time of its execution, and where he still resided at the time of its foreclosure and the sale of the mule. Thompson claimed the money in the hands of the sheriff,

[1] This section provides that, as between the original parties, defendant in an action at law on a contract may plead total or partial failure of consideration.

Digitized by Google

because, as he alleged, his lien was older than the lien of the Kellys' judgments. Under this state of facts, the trial judge ordered the sheriff to pay over the money in his hands on the judgments of the Kellys; holding that, as Thompson had never recorded his mortgage in the county where the mortgagor resided, the judgment lien of the Kellys took precedence over the mortgage lien. We see no error in this ruling of the court below. Code, § 1956, requires mortgages on personalty to be recorded in the county where the mortgagor resided at the time of the execution of the mortgage, if a resident of this state. Section 1957 declares that mortgages not recorded within the time required remain valid as against the mortgagor, but are postponed to all other liens created or obtained, or purchases made, prior to the actual record of the mortgage. Thompson not having recorded his mortgage at all in the county of the mortgagor's residence, his lien, although it remained valid as against Smith, the mortgagor, was postponed to the judgment lien of the Kellys. It is insisted, however, by the plaintiff in error, that the Kellys, if they contested the validity or fairness of Thompson's mortgage, should have made an affidavit of the grounds on which they relied to defeat the mortgage, and given bond and security as provided in section 3979 of the Code. We agree with the trial judge that, under the facts of this case, this section of the Code had no application. Judgment affirmed.

(82 Ga. 431)

LONG v. WIGHT.

(Supreme Court of Georgia. April 8, 1889.)

JUDGMENT—EXECUTION—LIMITATION.

The levy of execution on land as the property of defendant is sufficient to keep the judgment alive, though the land was not defendant's property at the time, and though there was no entry on the execution, before the levy on the land was made, that no personal property was to be found.

Error from superior court, Decatur county; BOWER, Judge.

D. A. Russell, for plaintiff in error. *Donalson & Hawes*, for defendant in error.

SIMMONS, J. A *fi. fa.* in favor of Wight, proceeding for the benefit of Sizemore, transferee, was levied upon certain cattle as the property of Long, defendant in *fi. fa.* Long interposed his affidavit of illegality on the following grounds: (1) Because the *fi. fa.* had been fully paid before the levy; (2) because the *fi. fa.* and the judgment on which it is founded are dormant, seven years having elapsed since its date to the first legal entry by an authorized officer; (3) because there is no sufficient legal judgment in said case of Wight v. Long. Upon the trial it appeared that the *fi. fa.* of plaintiff was a common-law *fi. fa.*, issued from a justice's court of the 1,188th district G. M., dated May 16, 1874; that on it was an entry of the receipt of $50, December 11, 1874, signed by plaintiff's attorney; also, an entry of levy, "on lot of land No. 95, in 19th district," as the property of M. W. Long, dated March 26, 1881, and signed "F. J. SHORES, Const., 1,005 District G. M.;" also, an entry of the dismissal of this levy, dated March 28, 1881, and signed by Shores; also, the following entry: "I have this day levied this *fi. fa.* on the ten head of stock cattle, this January 13, 1886. W. B. LYNN, Const., 1,188th Dist. G. M." Long testified that on the 26th of March, 1881, he resided in the 1,188th district G. M., and owned no property in the 1,005th district G. M., and that there was a constable in the 1,188th district. Sizemore testified that Long lived across the river in 1881. Shores, constable of 1,005th district G. M., levied the *fi. fa.* on the land, and afterwards dismissed it. "Lot of land No. 95 in the 19th Dist. is where I live, and is in the 1,005 Dist. G. M." The jury found in favor of the plaintiff and against the illegality. Defendant moved for a new trial on the following grounds: (1) Error in admitting the *fi. fa.* and entries thereon; the objection thereto being that the entry of levy was void for uncertainty, and contained no definite or sufficient description of the property. (2 and 3) Verdict contrary to law, evidence, etc. (4) Error in striking the third ground of illegality, on demurrer by plaintiff, on terms. No demurrer to this ground, and no order striking it, appears in the record. The motion was overruled, and defendant excepted.

The only ground insisted on before us for a reversal of the court below was that the court erred in holding that this judgment was not dormant. The judgment was dated May 16, 1874. On it was entered the receipt of $50, December 11, 1874; also an entry of levy on lot of land No. 95 in the Nineteenth district, as the property of M. W. Long, dated March 26, 1881, and signed, "F. J. SHORES, Constable, 1,005 District G. M." There was also another levy, dated January 13, 1886. It was contended by the plaintiff in error that the levy made by Shores, the constable of the 1,005th district, was illegal and void, because levied on a lot of land which did not belong at the time to the defendant in *fi. fa.*, and because there was no entry on the *fi. fa.*, before this levy on the land was made, that no personal property was to be found. The rule seems to be, according to the decisions rendered by this court, that any *bona fide* action of the plaintiff, which shows that he intends to keep the judgment alive, will prevent its dormancy. Smith v. Rust, 79 Ga. 519, 5 S. E. Rep. 250; Gholston v. O'Kelley, 7 S. E. Rep. 107, (March term, 1888.) As far as appears from this record, the levy was a *bona fide* attempt on the part of the plaintiff in *fi. fa.* to collect the amount of the execution. It shows action on his part to collect his judgment, and this, as we have seen by the above citations, is sufficient to prevent dormancy of the judgment. But it is contended by the counsel for the plaintiff in error that the evidence

Digitized by Google

shows that the defendant did not own the lot of land at the time it was levied on, and that there was no entry of "No personal property to be found," made prior to the levy on the land. We do not think that for these reasons the levy was void. It was made, it is true, by the constable of a different district from that in which the defendant appears to have resided, but he was "an officer authorized to execute and return the same." Code, § 2914. And although he may have made a mistake in levying upon land when there was personal property, or before the entry of "No personal property to be found" was made on the execution, still, in our opinion, it would be a sufficient entry to prevent the dormancy of the judgment. In the case of Prendergast v. Wiseman, 7 S. E. Rep. 228, (March term, 1888,) it was held that "a sheriff's return upon a *fi. fa.*, repeated within each period of seven years, to the effect that he knows of no property on which to levy the *fi. fa.*, prevents the judgment from becoming dormant. * * * And this is so whether the return be true or false, and whether the counsel for plaintiff in *fi. fa.* knows of property subject to levy or not." BLECKLEY, C. J., in the opinion of the court, says: "The fact of an entry by the proper officer, and not the truth of it, is the material matter with respect to keeping the *fi. fa.* from becoming dormant. If the officer make a false return, and thereby any person be injured, the redress for the injury is against the officer; and, whether it be sought or not, the effect of the return in keeping the *fi. fa.* alive is the same." Judgment affirmed.

(82 Ga. 212)

AULTMAN *et al. v.* MASON.

(*Supreme Court of Georgia.* April 22, 1889.)

SALE—ACTION FOR PRICE—DEFENSES.

1. In an action on notes given for the purchase price of an engine and saw-mill, a plea of breach of warranty and failure of consideration does not vary or contradict the written contract between the parties, and may be made without alleging fraud, accident, or mistake.
2. In such case, where the contract of purchase was a single one, though separate notes were given for the engine and the saw-mill, damages for a breach of warranty of the engine could be deducted from the notes.

Error from superior court, Johnson county; HINES, Judge.

A. F. Daley, for plaintiffs in error.

SIMMONS, J. This was an action to recover a balance due on certain promissory notes given for the purchase price of an engine and saw-mill. The defendant filed two pleas to the action: (1) The plea of the general issue; and (2) the plea of breach of warranty and failure of consideration. On the trial of the case the jury returned a verdict for the defendant. The plaintiffs moved for a new trial, which motion was overruled by the court and they excepted. The grounds of the motion for a new trial are as follows: (1) and (2) That the verdict is contrary to law and the evidence; (3) that the court refused to strike the defendant's plea of breach of warranty and failure of consideration, on the ground that such plea contradicted and added to the contract between the parties without any allegation of fraud, accident, or mistake; (4) that the court erred in charging the jury that they should allow, by way of recoupment against the notes sued on, the damage or expense incurred by defendant by reason of any breach of warranty on the engine, although separate notes were given for the saw-mill, and no breach of warranty or failure of consideration was alleged or proved as to the saw-mill.

1. We have read the testimony in this case as sent up in the record, and, while we would not have found as the jury did,—taking the whole of the testimony into consideration,—yet, if the jury believed the defendant's witnesses,—as under our law they had a right to do,—there was sufficient evidence to authorize their finding. The trial judge was satisfied therewith, and we cannot say that he abused his discretion in refusing to grant a new trial on the ground that the verdict was contrary to the evidence.

2. While we do not decide that the special plea filed in this case was a plea of breach of warranty, yet, as it was so recognized by the court below, and by the counsel for the plaintiffs, and as he alleges in his motion for a new trial that it was a plea of breach of warranty, we will so treat it for the purposes of this case. Treating it thus, we hold that the court did not err in refusing to strike said plea upon the ground complained of in this part of the motion for a new trial. A plea of breach of warranty and of failure of consideration does not add to or vary the contract between the parties; nor is it necessary to allege therein fraud, accident, or mistake. While "it is an undoubted rule of the common law that parol contemporaneous evidence shall not be received to vary or contradict a written contract, this rule, however, does not preclude proof between proper parties to negative the presumption which the law raises, that a note or bill is founded on a valuable consideration. Nor does it stand in the way of parol evidence to contradict an express, and even specific, admission in the paper of a consideration. It may be shown that there was no consideration, or a different one." 2 Suth. Dam. 134. "The consideration being open to inquiry, so far as the promise to pay depends upon its existence, continuance, or amount, such promise may be indirectly varied and controlled by parol evidence; not by showing that a different promise from the written one was made, but that it is different in legal effect, as a consequence of a want, cessation, or shrinkage of the consideration; by evidence that the consideration implied had no existence; that it did not continue, or was, or has become, deficient in amount. The promise may thus be altogether undermined, postponed, or reduced. A different agreement cannot be

Digitized by Google

shown from that expressed in the note." Id. 136. See Code, §§ 2748, 2857, 3471; Knight v. Knight, 28 Ga. 165; Butts v. Cuthbertson, 6 Ga. 166; Finney v. Cadwallader, 55 Ga. 75.

3. Nor was there any error in the charge complained of in the third ground of the motion. The purchase of the engine and saw-mill was one contract, and not two separate and distinct contracts, as claimed by the plaintiffs in error, although the notes were given separately for the engine and for the saw-mill. Being one contract, if there was an express warranty made by the vendor, and that warranty had failed, the defendant had a right to have his damages and the necessary expenses sustained by him by reason of the breach of warranty, deducted from the notes. 55 Ga. 75, supra. Judgment affirmed.

(83 Ga. 255)

JONES v. HAMMACK.

(*Supreme Court of Georgia.* April 24, 1889.)

EXECUTION—RELIEF AGAINST.

In an action against the beneficiaries of a trust-estate a judgment was rendered for the plaintiff, which provided that it should be paid out of the life-estate which J., one of the beneficiaries, had in a portion of the trust lands. *Held* that, the court having jurisdiction of the parties and subject-matter, the judgment was not void, and that when, on an execution being levied on the life-estate of J., a judgment sustaining a demurrer to an affidavit of illegality was not excepted to, J. was precluded from afterwards filing a claim to the land levied on, upon the same grounds upon which the affidavit of illegality was based.

Error from superior court, Burke county; RONEY, Judge.

J. J. Jones & Son, for plaintiff in error. *R. O. Lovett* and *E. L. Brinson*, for defendant in error.

SIMMONS, J. Hammack brought suit on a promissory note for $140, given by one Wesley Jones, as trustee of certain trust property described in the declaration. The trustee died after the note was given, and before this suit was brought, and no successor was appointed in his place. The declaration set out the beneficiaries of the trust, and described the property of the trust-estate, and prayed process against said beneficiaries. It alleged that the note was given for a cotton-gin, which was necessary for the trust-estate. All the beneficiaries were properly served, and they filed pleas to said action. Judgment was rendered by the court for the amount due on the note. The judgment recites that "J. B. Jones is, under the terms of the deed creating said trust-estate, entitled to a life estate in the said trust property," (describing it;) "and, it further appearing that said trust-estate is liable for said debt, it is adjudged that the said sums as aforesaid be paid out of the life-estate of said J. B. Jones in the aforesaid described trust land." Upon this judgment execution was issued, and was levied upon his life-estate in a portion of the trust lands. J. B. Jones filed an affidavit of illegality thereto, upon the ground that the levy was illegal and void, because it did not follow the judgment, and for uncertainty; and that the judgment was illegal and void because it was against the life-estate of the deponent, and because it did not follow the declaration, and was void for uncertainty because the trust-estate had no such title to the land levied upon as could then be sold. This illegality was demurred to as to all the grounds thereof, and the demurrer was sustained. No exception was taken to the judgment sustaining the demurrer. Afterwards J. B. Jones, for himself and other beneficiaries, filed a claim to the land levied on. After the introduction of evidence in the case, it was submitted to the judge for decision without the intervention of a jury, and he held the property subject on the ground that the same questions made in the claim case were made and decided against the claimants in the affidavit of illegality, and that the judgment in that case, having been against the defendants and unexcepted to, it was binding upon them in this case. They excepted to this ruling, and brought the case here. We think the court was right. All the questions made in the claim case were decided against J. B. Jones upon his affidavit of illegality. The judgment sustaining the demurrer to the grounds of the affidavit of illegality was unexcepted to, and was therefore a valid and binding judgment upon him. The court that sustained the demurrer to the illegality had jurisdiction of the subject-matter and the parties; and, whether the judgment was right or wrong, it binds the parties to that proceeding. The same may be said of the original judgment upon the suit brought on the note. The court that rendered that judgment had jurisdiction of the subject-matter and the parties, and that judgment was unexcepted to, and binds them. The original judgment may have been erroneous, under the pleadings in the case, but was not void, as was contended here by the counsel for the plaintiff in error. If there were any defects in the pleadings, as claimed by counsel for the plaintiff in error, they were amendable, and were cured by the judgment. See Zimmerman v. Tucker, 64 Ga. 432; Artope v. Barker, 74 Ga. 462. Judgment affirmed.

(82 Ga. 656)

CHURCH-WARDENS, ETC., OF CHRIST CHURCH v. MAYOR, ETC., OF SAVANNAH.

(*Supreme Court of Georgia.* April 8, 1889.)

CEMETERIES.

1. The title to the cemetery connected with the parish church in Savannah called "Christ Church" was vested by the provincial act of 1758 in the rector of said church as a corporation.

2. After the Revolution, ecclesiastical property held by the rector for pious uses devolved upon the church or society constituting the local body of Christians then and now known as "Christ Church," and all such property not expressly withdrawn by the state passed to the corporation created by the act of 1789, this corporation being "The Church-Wardens and Vestrymen of the Episcopal Church in Savannah called 'Christ Church.'"

(*Syllabus by the Court.*)

Digitized by Google

Error from superior court, Chatham county; ADAMS, Judge.

R. Falligant and *W. G. Charlton*, for plaintiffs in error. *J. R. Saussy* and *S. B. Adams*, for defendants in error.

BLECKLEY, C. J. In December, 1789, certain persons, of whom the plaintiffs are the successors, were incorporated by an act of the general assembly by the name and style of "The Church-Wardens and Vestrymen of the Episcopal Church in Savannah, called 'Christ Church.'" Marb. & C. Dig. 144. The preamble to the act recites that it is necessary for the promotion of religion and virtue that churches and religious societies be made capable of holding, enjoying, and defending any property that they may have, or may acquire by gifts, grants, or otherwise, and that Christ Church in Savannah has long since been established. The act proceeds to invest the corporation which it creates with all manner of property, both real and personal, donations, gifts, grants, hereditaments, privileges, and immunities whatever, which may belong to the said church, to have and to hold the same for the proper use, benefit, and behoof of the said church. The question in this case being whether this corporation acquired title to the cemetery in controversy, the first step to be taken is to ascertain whether that cemetery was at the date of this act of incorporation the property of Christ Church. This carries us back to the provincial act passed 15th of March, 1758, (Colonial Acts, 19,) which divided the province into parishes, and established religious worship therein according to the rites and ceremonies of the Church of England. The territorial division made was into eight parishes, the first of which embraced the town and district of Savannah, extending up the river Savannah, including the islands therein, as far as the south-east boundary of Goshen, from thence south-west to the River Great Ogeechee, and from the town of Savannah eastward to the mouth of the River Savannah, including the sea islands to the mouth of the River Great Ogeechee, and all the settlements on the north side of said river, to the western boundaries thereof. The name given to this parish was "Christ Church." The second section of the act declared that the church already erected in the town of Savannah, and the ground as then used as a cemetery or burial place thereto, should be the parish church and cemetery of Christ Church. The third section declared that the clerk, then present minister of Savannah, (Bartholomew Zouberbuhler by name,) should be the rector and incumbent of said church; and that he was thereby incorporated and made a body politic and corporate by the name of "The Rector of Christ Church in the Town of Savannah;" was enabled to sue and be sued by such name; was declared to have the care of souls within the parish; and that he should be in the actual possession of the church, with its cemetery and appurtenances, to hold and enjoy the same to him and his successors, together with the glebe land already granted to him, and the messuage or tenement near to the said church, with all and singular the buildings and appurtenances thereunto belonging, and also all such other lands, tenements, and hereditaments as should or might thereafter be given and granted to the said church or the incumbent thereof. A subsequent act, of April, 1763, (Colonial Acts, 197, 198,) reciting that the cemetery in the parish of Christ Church belonging to the said parish had become too small for the occasion, directed that the cemetery be enlarged and extended to the line of Abercorn street to the westward, and 100 feet to the southward,—the whole to contain 210 feet square; and the church-wardens and vestrymen of the parish were empowered at their discretion to agree with and hire workmen to complete, inclose, and finish the same. Another act, passed April 11, 1768, (Id. 433,) reciting that the cemetery or public burial ground for the parish of Christ Church, notwithstanding the previous addition, was apparently too small to answer the purposes intended, authorized the church-wardens and vestry to lay out an addition of 170 feet in length, of and from the common of the town of Savannah, and adjoining the cemetery or public burial ground, to the eastward; and that the addition so laid out should from thenceforth forever be and remain as part and parcel of the said cemetery or public burial ground; and the wardens and vestry were empowered to inclose the same accordingly, at their discretion. Both these additions were made, as we may assume from the record and from the argument of counsel in the present case. A still further addition was made, under an ordinance of the municipal council of Savannah, in 1789, during the same year that the corporation of the plaintiffs in error was created, and some months before that creation; but as this last addition is not now in controversy, we need not further notice it for the present.

1. We can have no doubt that the original cemetery, with the two enlargements made by the provincial legislature, was church property, and vested in the spiritual corporation consisting of the incumbent of the parish, constituted by the act of 1758. That act must be understood as it was intended by the provincial legislature. It has the same meaning for us in 1889 as it had for the courts of the province, or for those of Westminster Hall, in 1758. We must construe it now precisely as those courts would have construed it then had it come up before them for construction. They certainly would have held it as meaning to fix the title to all the enumerated property, including the cemetery, in the corporation which it created. Those courts would have had no difficulty in accounting for the words "shall be in the actual possession of the said church, with its cemetery and appurtenances, and shall hold and enjoy the same to him and his

Digitized by Google

successors." They would have construed them as a statutory investiture of the temporal part of the benefice as the same was constituted or declared by the act of incorporation. The method of induction at common law, and the effect of it, are stated by Blackstone (1 Comm. 391) thus: "Induction is performed by a mandate from the bishop to the archdeacon, who usually issues out a precept to other clergymen to perform it for him. It is done by giving the clerk corporal possession of the church, as by holding the ring of the door, tolling the bell, or the like; and is a form required by law, with intent to give all the parishioners due notice, and sufficient certainty of their new minister, to whom their tithes are to be paid. This, therefore, is the investiture of the temporal part of the benefice, as institution is of the spiritual. And when a clerk is thus presented, instituted, and inducted into a rectory, he is then, and not before, in full and complete possession, and is called in law *persona impersonata*, or parson imparsonee." If it were true that the cemetery of a parish church would not pass to the parson and his successors by induction thus performed, it might be said that statutory investiture, such as we are considering, was broader, and comprehended more than the induction of the common law. We find it impossible to read the act of incorporation from the stand-point of those who passed it, and of the time in which it was passed, without regarding it as taking effect upon the title to the cemetery in precisely the same manner as upon the title to the church. The possession, holding, and enjoyment of both are provided for by identically the same language. And, looking in the same way to the acts of 1763 and 1768, providing for the enlargement of the cemetery, we feel sure that they were intended to bring the additions into exactly the same relation to the corporate body, with respect to title, as that borne by the original cemetery. The latter of these acts expressly declared that the addition which it provided for "should thenceforth forever be and remain as part and parcel of the said cemetery." Thus the cemetery was mentioned as one, notwithstanding a previous addition had been made, and the contemplated further addition was to be and remain as part and parcel of the whole. That this latter act described the cemetery as the "public burial ground for the parish of Christ Church," does not militate against the view which we have expressed touching title, as it respects either the original cemetery or the additions made thereto. No doubt, under the system then prevailing, the cemetery of a parish church was always the public burial ground for the parish. There is no reason of which we are aware to think otherwise. We see not how this would operate to hinder the spiritual corporation from holding the title, and having such legal property in the cemetery as would be consistent with its use as the public burial ground for the parish. There would be no obstacle at the present day any more than there was then to constituting a religious body the owner of a burial ground in which all the inhabitants of a given district might have a right to be interred. There is no incompatibility between corporate ownership and such use, and no legal necessity for uniting title and use for burial in the same person or persons. To whom does a given cemetery belong? is a very different question from that, for whose sepulture is it intended? For an act approved December 19, 1818, vesting the fee-simple of the cemetery or burial ground in the city of Augusta in the trustees of the Protestant Episcopal Church of that city, see Lamar, Dig. 848, 849. It is not improbable that this cemetery is the same spoken of in the fourth section of the act of 1758 (above cited) for dividing the province into parishes, and which was then appurtenant to the parish church of Saint Paul, the rector of which church was incorporated by the fourth, as was the rector of Christ Church by the third, section of that statute.

2. Having, as we conceive, by a right and proper construction of the original act of incorporation ascertained that the cemetery now in question belonged to the corporate body known by the name of "The Rector of Christ Church in the Town of Savannah," what became of that corporation and its effects when regal government ceased to exist in Georgia, and the province became a sovereign state? These questions open a wide field for research, both legal and historical, —a field into which we have entered only far enough to satisfy our own minds that, whatever may have become of the corporation, its property of all kinds was still property appertaining to the church; and, if subject to seizure and appropriation by the state, (which, from the authorities, admits of question,) no such seizure or appropriation of this cemetery has ever been made by the state of Georgia. On the contrary, we find that by the act of 1789, creating the new corporation, Christ Church in Savannah was recognized as having been long since established, and we have no doubt that this refers to the same religious society and spiritual body of Christians which had from the beginning, and continuously thereafter, constituted the parish church of the same name in Savannah. According to the preamble it was desirable that churches and religious societies be made capable of holding, enjoying, and defending any property that they may have or may acquire. The state, so far from intending to take away from Christ Church any church site, church edifice, or cemetery which had ever belonged to it, either in its corporate or social capacity,—that is, as a spiritual corporation by virtue of the act of 1758, or as a mere religious society,—designed to confer on it corporate capacity for holding, enjoying, and defending all its property, no matter when or how acquired. It is said a distinc-

Digitized by Google

tion is to be taken between property derived from the government by public grant or by the exercise of the power of taxation, and property donated to the church by individuals or purchased with its own money; but we find no very clear warrant for this distinction, either in decided cases on the subject elsewhere, or in the conduct of the state towards ecclesiastical bodies which the province fostered prior to the Revolution as part of a religious establishment. Whatever may have been the power of the state to reclaim grants and the proceeds of provincial taxes, it has forborne to exercise the power by any general law. No such law has come down to us. A few local and special acts touching glebe lands are to be found. See Marb. & C. Dig. 160, 161; Clayt. Dig. 64, 479. There is every probability that the great bulk of glebe lands were disposed of under the name of "commons," "vacant lands," etc., by virtue of various local acts passed from time to time during the first 20 or 30 years after the Revolution.

In investigating the subject for the present case we have had the assistance of the able and eminent historian of Georgia, Charles C. Jones, Jr., LL.D., and the information which we have derived from him has contributed materially to the establishment of this conclusion. But no instance has been brought to our knowledge in which the state has by legislation ever resumed as public property any church site, church edifice, or cemetery which belonged before the Revolution to any local church or body of Christians, whether of the established religion or of dissenters therefrom. We think that the grants to new corporations of the Episcopalian denomination of property which formerly belonged to local bodies of the established church are to be regarded less as an assertion of title in the state to such property than as a recognition of continuous ownership in such local bodies; the new corporations being, as a general rule, created at church request, and for church benefit. To go, for an example, no further than the present case, we find from the record that the same persons who were incorporated by the act of 1789 as "The Church-Wardens and Vestrymen of the Episcopal Church in Savannah, called 'Christ Church,'" were the identical persons who had previously to the act of incorporation been elected by the parishioners of that church to the official positions which the act recognizes them as filling. In other words, they were not made wardens and vestrymen by the legislature, but by the church. And it appears from the record that before their incorporation, but the same year, they were recognized by the municipal government of Savannah, by means of official correspondence, as having some connection with the cemetery as it then existed. There is no accounting satisfactorily for this recognition, but upon the theory that up to that period, which was the time when the city made an addition to the area of the cemetery, the Christ Church of both ante and post Revolutionary times was still regarded as the owner of the cemetery. No doubt this recognition was conformable to the fact and the law of the matter, for there is no trace anywhere, so far as we know, or can ascertain, that the state ever resumed, or sought to resume, the property in this cemetery. It is certain there has been no express grant of it by the state to the city of Savannah. If it be demanded how it passed from the old rector and his successors in their corporate capacity, and became the property of the church of which he and they were the rectors down to the extinction of the corporation by the repudiation of the church as a government establishment, the answer is that the incorporated rector held it in trust, and when the trustee became no more, the title devolved informally, but substantially, upon the church, the *cestui que trust*, until by the subsequent act of 1789 the legislature supplied a new trustee by incorporating the wardens and vestrymen. As to succession in a subsequent corporation, see Milton v. Milton, 10 Pick. 447; Society v. Episcopal Church, 1 Pick. 372; Parsonsfield v. Dalton, 5 Me. 217. Grants for pious uses, Pawlet v. Clark, 9 Cranch, 292; Brown v. Porter, 10 Mass. 93; Beatty v. Kurtz, 2 Pet. 566. Parish and municipal uses distinguished, Richardson v. Brown, 6 Me. 357. Establishment, care, and control of burial grounds, now a municipal, rather than a parochial, duty, Lakin v. Ames, 10 Cush. 218.

We are not aware that the question has ever arisen in Georgia upon the power of the state to take to itself the property of the ante-Revolutionary church. In Virginia the question was decided in the affirmative by a divided court. Turpin v. Locket, 6 Call, 113; followed afterwards in Selden v. Overseers, 11 Leigh, 127. The deprivation of the clergy, however, went no further than the statute provided. Claughton v. Macnaughton, 2 Munf. 513. The supreme court of the United States, in Terrett v. Taylor, 9 Cranch, 43, in a learned and elaborate opinion by Judge STORY, held some of the Virginia legislation touching the subject unconstitutional. The same court, speaking by the same eminent judge, in Pawlet v. Clark, Id. 292, further developed the argument in discussing a statute of Vermont. A supplement to Terrett v. Taylor, supra, will be found in Mason v. Muncaster, 9 Wheat. 445. And see 2 Story, Const. § 1385; Cooley, Const. Lim. 275, and note. Inasmuch as there has been no attempt by the state to assert any title in its behalf to the cemetery now in controversy between the parties to the present litigation, we are not called upon to say whether the state could effectively have made such assertion or not. The court below erred, we think, in holding and deciding that the plaintiffs in error never had title to the cemetery, and in dismissing the bill chiefly on that ground, as appears from the opinion of the court in the record. For the present we de-

Digitized by Google

cide no other question in the case, but leave the doctrine of prescription and all other matters of defense to be dealt with anew on the rehearing. Judgment reversed.

(83 Ga. 283)

JENKINS *et al.* v. JENKINS.

(*Supreme Court of Georgia.* April 17, 1889.)

MARRIAGE—CIRCUMSTANTIAL EVIDENCE.

1. Where the direct evidence touching the fact of an alleged marriage is conflicting, one of the parties to such marriage affirming and the other denying that it took place, and where all the material circumstances, save the fact that the party denying it contracted a subsequent marriage with a third person, which was regularly solemnized, go to support and corroborate the affirmative witness, a finding by the jury to the effect that the testimony of that witness was true is not contrary to evidence or to law.

2. The presumption of law, founded on cohabitation and repute, that a marriage had taken place, will not prevail over proof of a subsequent marriage in fact by one of the parties with a third person; but, notwithstanding such proof, circumstantial evidence, as well as direct, may be used to establish the actual occurrence of such prior marriage as matter of fact to be found by the jury.

(*Syllabus by the Court.*)

Error from superior court, Fulton county; MARSHALL J. CLARKE, Judge.

John A. Wimpy, for plaintiffs in error. *R. J. Jordan*, for defendant in error.

BLECKLEY, C. J This, at bottom, is a controversy between two ladies over property. These litigants may be distinguished by the lady Theresa and the lady Josie. The former claims alimony out of property which Jenkins, the disputed husband, conveyed to the latter in April, 1887, by deed founded on love and affection. The marriage of Jenkins to Josie, in October, 1886, publicly, in Atlanta, Ga., by license and a clergyman, in the presence of many witnesses, is clearly proved by the evidence, and, indeed, was an admitted fact in the pleadings. An alleged previous marriage by the same Jenkins with Theresa is in dispute. This marriage, if it occurred at all, took place in June, 1882, at Stapleton, on Staten Island, state of New York, by a clergyman, in the presence of only one person. The name of the clergyman has been forgotten, and the name of the other person, who was an aged female, is not remembered in full; her Christian name having also been forgotten. Jenkins was a United States soldier in garrison on the island. In November, 1884, his time of service having expired, he came to Atlanta, and located there, bringing Theresa with him. He resided in Atlanta nearly two years before separating from her. According to her testimony she bore three children, two of whom are dead. Both upon the island and in Atlanta, according to some of the evidence, he recognized her as his wife, introduced her as such, and cohabited with her. After the separation he agreed to make her a small monthly allowance in money, which he paid to her for several months, and then discontinued the payment. She testified on the trial of the present case to the fact of the marriage, and that the clergyman gave her a marriage certificate, which she kept until Jenkins took it away from her in Atlanta, and burned it up. She stated that while residing on the island she kept this certificate in a frame hung up in her room, where it could be seen and read. One of her witnesses testified that he had seen it and read it. Jenkins, in his testimony, denied that any marriage took place, or that there was any marriage certificate, or that he had destroyed it. In its last analysis the case resolved itself into a question of credibility of witnesses; the only two witnesses examined who knew whether the marriage actually took place being Theresa and Jenkins, both of them parties to the bill, one as complainant, and the other as defendant. The jury found for the complainant, thereby indorsing her credit, and repudiating his. The proceeding was for alimony only, as authorized by section 1747 of the Code, and it was claimed in behalf both of the complainant and her child. The bill was filed in June, 1887. The jury allowed $15 per month, and made it a charge upon the property in controversy. A motion was made for a new trial on the usual grounds, and because the court erred in charging the jury thus: "'Circumstantial evidence' is that which tends to prove the fact in question by the proof of other facts from which it may be inferred. If the fact to be proved were a marriage, an instance of direct testimony would consist in the sworn statement of a witness who was present at the marriage, and observed the performance of the ceremony. An example of circumstantial evidence in a case of that kind would consist in such a set of facts surrounding the parties supposed to be man and wife in their relation to each other, and attendant upon their lives, as that, from these facts, it could be reasonably inferred that a marriage had occurred."

1. The evidence is voluminous, and every word of it has been carefully read, and the whole carefully considered. The material circumstances, except the one fact of marriage in Atlanta with Josie shortly after ceasing to cohabit with Theresa, all tend to support and corroborate the testimony of Theresa. If her testimony was true, the verdict was undoubtedly correct.

2. Whether the court erred or not in defining "circumstantial evidence" is easily seen by comparing the charge complained of with section 3748 of the Code, which states that "'direct evidence' is that which immediately points to the question at issue; 'indirect' or 'circumstantial' evidence is that which only tends to establish the issue by proof of various facts sustaining, by their consistency, the hypothesis claimed." The charge as given first described "direct evidence" as "that which points immediately to the fact to be proven," and then proceeded to circumstantial evidence, etc., in the language quoted from the motion for a new

Digitized by Google

trial. We think that in sense and substance the charge and the Code are identical; nor do we understand the learned counsel for the plaintiff in error to deny this. But his point in argument was that the court should have delivered no charge whatever upon circumstantial evidence, inasmuch as an actual marriage, regular in all respects, with Josie, was established by direct evidence. He relies upon 1 Bish. Mar. & Div. §§ 444–446, as illustrated by Taylor v. Taylor, 1 Lee, Ecc. 571; Chamberlain v. Chamberlain, 71 N. Y. 423; Poultney v. Fairhaven, Brayt. 185; Clayton v. Wardell, 5 Barb. 214, 4 N. Y. 230; Myatt v. Myatt, 44 Ill. 473; Jones v. Jones, 45 Md. 144; Jones v. Jones, 48 Md. 391.

Some of these cases may go to the extent contended for, but Mr. Bishop's summing up of the result (section 446) is this: "In general, and by the opinions of most judges, if, while three persons are living, two of them cohabit matrimonially, and then, separating, one of them and the third do the same, no marriage in either instance will be presumed from such mere cohabitation and repute. But if the actual fact of a marriage is proved, as introducing either one of the cohabitations, it will not be invalidated by the evidence of the other." That Bishop intends to draw a distinction between presuming a marriage from mere cohabitation and repute and proving a marriage by circumstantial evidence is plain from what he says in subsequent sections, (sections 485–493.) The true doctrine of the authorities is that where two alleged marriages compete, and one of them is proved as a fact, whether by direct or circumstantial evidence, the other cannot be left to stand upon the mere legal presumption founded on cohabitation and repute. But withdrawing from certain facts their consequence as a presumption of law does not prevent them, in connection with other indirect facts, from becoming plenary proof as a presumption of fact distinguished from a presumption of law. Our Code (section 3752) says: "Presumptions are either of law or of fact. The former are conclusions and inferences which the law draws from given facts; the latter are exclusively questions for the jury, to be decided by the ordinary test of human experience." Where there is a legal presumption, the law does the reasoning, and draws the inference. Where presumptions of fact are involved, the jury are left to do the reasoning, and to make an inference or not, according as they shall believe the premises warrant. With no competing actual marriage proved, the law presumes marriage from cohabitation and repute. But this presumption the law declines to raise in opposition to a competing marriage actually proved. Here the jury were not instructed to apply any legal presumption whatsoever, but were left to use all the evidence, both direct and circumstantial, in ascertaining whether the actual fact of marriage was established.

In another part of the charge they were instructed that "the burden of proof in this case is upon the complainant. What that means is that it is for the complainant to satisfy you of a marriage between her and the defendant, John R. Jenkins, and all the other facts essential to a recovery on her part, and not for the defendants to show to the contrary. The complainant carries this burden when she shows you that the greater weight of evidence is in her favor." Again: "If you believe from the evidence, after you have considered it all fairly, that the complainant was married to John R. Jenkins, as she alleges," etc., "then you ought to find in favor of the complainant. * * * On the other hand, if you should believe from the evidence, after you have attentively gone over it all, that there was never any marriage between the complainant and the defendant John R. Jenkins, then your verdict ought to be in favor of both these defendants." It is plain that the court intended the case to turn upon the establishment or non-establishment of an actual marriage by the complainant with Jenkins, as matter of fact solely, and with no aid from any legal presumption whatsoever. We can recognize as sound law for us no authority which prevents actual marriage from being established by circumstantial, as well as by direct, evidence. According to section 3750 of the Code, the rules of evidence on all trials are the same, save where exceptions are made by statute. We have no statute that confines the proof of marriage in any case to direct evidence, or declares that marriage cannot be shown as a fact by circumstantial evidence. In this case both classes of evidence were combined, and the court was correct in explaining the nature of both to the jury, and in not restricting the jury to the consideration of one class only. Judgment affirmed.

(83 Ga. 129)

HARRISON v. STATE.

(*Supreme Court of Georgia.* April 24, 1889.)

CRIMINAL LAW—CONTINUANCE—ALIBI—INSTRUCTIONS—EVIDENCE.

1. Where no motion for a continuance is made for absence of counsel or witnesses, the court does not err by disregarding such absence, the accused having had full time after his arrest to prepare for trial. Cumulative evidence to prove an *alibi*, even if newly discovered, is not cause for a new trial.

2. A charge to the jury which, properly construed, makes presence at the time and place of the homicide a necessary condition of guilt, is favorable, not prejudicial, to the accused.

3. Touching *alibi*, the rule in Georgia, as established by authority, consists of two branches: The first is that, to overcome proof of guilt strong enough to exclude all reasonable doubt, the *onus* is on the accused to verify his alleged *alibi*, not beyond reasonable doubt, but to the reasonable satisfaction of the jury. The second is that, nevertheless, any evidence whatever of *alibi* is to be considered on the general case with the rest of the testimony, and, if a reasonable doubt of guilt be raised by the evidence as a whole, the doubt must be given in favor of innocence. In sense and substance the charge of the court in the present case

Digitized by Google

conformed to the rule, certainly to the latter branch of it.[1]

4. The jury are not precluded from considering the prisoner's statement throughout by instructing them that the statute allows them to believe it on material matters in preference to the sworn testimony.

5. The evidence was conflicting, the credibility of the witnesses was for the jury, and their verdict was warranted, if they believed those who testified in behalf of the state, and did not believe those who testified in behalf of the accused

(*Syllabus by the Court.*)

Error from superior court, De Kalb county; R. H. CLARK, Judge.

Haygood & Douglas and *H. C. Jones*, for plaintiff in error. *John S. Candler*, Sol. Gen., and *Clifford Anderson*, Atty. Gen., for the State.

BLECKLEY, C. J. The plaintiff in error bears three names in the record,—Harrison, Haralson, and Harris. He was convicted of murder, and sentenced to imprisonment for life. The person killed was Hurst, the marshal of Decatur. The homicide occurred while the marshal had in custody one Hubert, in the midst of a large crowd, some of whom were endeavoring to rescue the prisoner or promote his escape from the officer. Several shots were fired, and there is no doubt that one of them killed the marshal. The indictment was found at the February term, 1888, and the trial took place at the following August term. Harrison was arrested upon a bench-warrant, and was confined in jail for about six months. Gen. Gartrell, one of his counsel, was not present at the trial, but was represented by Mr. Haygood. There was no motion made for a continuance, but Mr. Haygood stated to the court that he had received a telephonic message from Gen. Gartrell saying that he could not attend on account of the illness of his wife, and requesting Mr. Haygood to represent him. It seems that at that stage steps were taken to subpœna more witnesses in behalf of the accused, and these witnesses, or most of them, came into court while the trial was in progress, but neither the accused nor his counsel saw them, or knew of their presence. The court had no concern with the matter, and was not called upon in any way to continue the case, suspend it, or postpone the trial.

1. Affidavits by these witnesses, produced on the motion for a new trial, show that their evidence would have been material upon the question of *alibi*, but it would only have been cumulative, as other witnesses testified on that subject in the prisoner's behalf. The policy of the law is adverse to granting new trials on account of merely cumulative evidence, more especially where the point to which the evidence relates is the defense of *alibi*. Wright v. State, 34 Ga. 110. The decisive matter, however, against this ground of the motion for a new trial, is that there was no diligence to have the witnesses at court. Although the prisoner knew of them, he took no steps to have them served with process until his case was called for trial, and he neither made a motion for continuance, nor rendered any reason to the court to explain his delay in having them summoned. If the absence of Gen. Gartrell as counsel was cause for a continuance, a motion to continue on that ground should have been made. Certainly the court was warranted in disregarding his absence as well as that of the witnesses, under all the circumstances.

2. The court charged the jury that, if they did not believe the accused was present, endeavoring, with the others, to effect the rescue, they could not find him guilty, because his presence was necessary at that time in order to convict him. This charge is complained of because the evidence shows that the rescue from the marshal took place several hours before the affray in which Hurst was killed, and hence the charge was equivalent to intimating to the jury that, if they were satisfied the prisoner was engaged in that rescue, they could from that infer that he was present at the killing of Hurst. There is no merit in this ground of the motion. The rescue referred to in the objection was accomplished, and the court's charge related to a subsequent attempt to effect another rescue, and it was during that attempt that the homicide took place. Instead of the charge being hurtful to the accused, it was altogether favorable to him. It states that his presence was necessary at the time. What time? The time of the killing, of course, not several hours previously.

3. Another part of the charge was as follows: "Well, now, the next thing is as to the strength of the evidence of *alibi*,—what that evidence (considering the credibility of the witnesses, and what the witnesses testified to) amounts to. The law says that it must outweigh the evidence introduced on the part of the state, provided, as I have charged you, if the state's evidence is sufficiently strong, without more, to produce a conviction in your minds of the guilt of the prisoner beyond a reasonable doubt. In order to remove that,—the *alibi*,—the testimony sustaining the *alibi*, in the judgment of the jury, should outweigh or preponderate over the evidence for the state." The first objection to this charge is that it directed the attention of the jury to the credibility of the prisoner's witnesses specially, and in no part of the charge were they instructed to look to the credibility of the state's witnesses. This criticism is of but slight value, and we think it needs no discussion.

The next objection is more grave, but we think it is answered by construing the whole charge together as we find it in the record. The objection is that the language of the court excluded the testimony of *alibi* as it affected the question of reasonable doubt upon a consideration of all the testimony, unless

[1] Concerning the burden of proof when the defense of *alibi* is interposed, see State v. Child, (Kan.) 20 Pac. Rep. 275; Cole v. State, (Miss.) 4 South. Rep. 577, and note.

Digitized by Google

such testimony outweighed the evidence for the state, whereas the prisoner was entitled to the benefit of a reasonable doubt produced in the minds of the jury by the consideration of all the evidence, including that of *alibi*, at the close of all the testimony. On looking at the full charge, we find the jury were instructed thus: "Now, do you believe from the evidence that this defendant was there? because you must fix him there in order to convict him of anything; and that, in the next place, he was one of this party; and that the common purpose and design of that party was to effect a rescue, and in that rescue the marshal lost his life? I say, if you believe it beyond a reasonable doubt, it would be your duty to find the defendant guilty of the crime of murder; if, as I have charged you, of course, you believe his death was caused by a shot from some one of the persons who were engaged in that rescue." Again: "If the state has made out such a case as I have narrated to you, then you would proceed further in your investigation, and say whether the defendant by his evidence has relieved himself from the effect of the state's evidence, or has put the matter in such a condition as would raise upon your mind a reasonable doubt as to his guilt." Again: "You have observed, gentlemen, that whether you depend upon the evidence of the defendant's guilt, or whether you take the statement into consideration or not, whatever you believe against him you must believe beyond a reasonable doubt." Again: "If you do not believe that he is guilty, or have a reasonable doubt as to his guilt, you will say: 'We, the jury, find the defendant, Sandy Harris, not guilty.'"

Under these instructions, the jury, we think, must have felt it incumbent upon them to give the prisoner the benefit of any and all reasonable doubt upon summing up the entire evidence, including that relating to the *alibi;* and this, in the present state of the Georgia authorities, seems to be sufficient. Compare Arnold v. State, 53 Ga. 325; Johnson v. State, 59 Ga. 142; Goldsmith v. State, 63 Ga. 85; Jackson v. State, 64 Ga. 344; Wade v. State, 65 Ga. 756; Landis v. State, 70 Ga. 651; Bryan v. State, 74 Ga. 393; Ledford v. State, 75 Ga. 856; Simpson v. State, 78 Ga. 91. The cases which perhaps bring out the exact shades of our law touching *alibi* the most fully are Landis v. State and Ledford v. State, supra; and the doctrine of these cases, especially of the latter, is this: "Though the burden was the defendant's to show *alibi* to the satisfaction of the jury, and on that issue reasonable doubts would not avail him, yet on the final issue of guilty or not guilty * * * all the evidence is for the consideration of the jury, and it is for them to say whether, from all of it, he is guilty beyond a reasonable doubt." Were our own minds not hedged in by authority, we should be inclined to adopt the view expressed by Judge Thompson, (2 Thomp. Trials, § 2436,) who, after recognizing that the burden of proof is upon the accused, adds: "But, upon the most unshaken grounds, this burden is sustained, and an adequate *quantum* of proof produced by the defendant, when he succeeds in raising a reasonable doubt in the minds of the jurors as to whether or not he was at the place of the crime when it was committed." See the various lines of decision on the subject stated and discussed in 2 Thomp. Trials, supra, §§ 2435–2442. It seems to us that, in the metaphysics of trial, there is great difficulty in distinguishing between reasonable doubt on the specific defense of *alibi* and reasonable doubt of guilt upon the whole case taken together. Where presence is necessary to constitute guilt, it seems that a reasonable doubt of presence would, by irresistible logic, involve reasonable doubt of guilt. As well as we can formulate the rule prevailing in Georgia, we have done so in the third head-note to this opinion. The exception in this case goes to the second branch of the rule, and on that branch, if not on the first, the charge as a whole conforms, in sense and substance, to the rule.

4. On the subject of the prisoner's statement, the court charged as follows: "What the law means by believing it in preference to the sworn testimony is when the sworn testimony and the statement conflict in material matters, and material matters are those necessary to constitute the offense." This charge is attacked as instructing the jury that the prisoner's statement could not avail him unless in conflict with the sworn testimony, and as denying him the benefit of his statement if sustained or corroborated by the witnesses. No fair construction of the charge could extract from it this meaning. The statute says that the jury may believe the statement in preference to the sworn testimony, and the court explained the import of the statute, and did not undertake to limit the jury, in their consideration of the statement, to those matters touching which it might be in conflict with the evidence. There was nothing said as to the statement not being available upon other matters. The charge given in Lovejoy v. State, 8 S. E. Rep. 66, (October term, 1888,) was obnoxious to that objection; part of the instruction then being: "His statement, to avail him, must be in those parts that are in conflict with the evidence, and in conflict in material matters." No such phraseology as this occurs anywhere in the charge now under consideration. But why should the presiding judge be more specific than the statute itself, or go beyond its terms? There is no obscurity or ambiguity in the statute. The legislature has made the matter as clear as can the judiciary. Why should not the legislature be left to address the jury in its own language?

5. The remaining grounds of the motion for a new trial (except the eleventh, which was not argued) go to the question of the sufficiency of the evidence under the law to warrant conviction. The evidence was ap-

Digitized by Google

parently conflicting as to whether the accused was present at the scene of the crime or not. Two witnesses for the state identified him as present, and one of them testified that he took part in the shooting. As many or more witnesses in his behalf testified to his absence. Upon the jury devolved the responsibility of discriminating between these antagonistic witnesses, comparing their credibility, and discovering where the truth lay. They have performed their function, the presiding judge has approved their finding, and, while we can perceive that a mistake may have been committed, we have no such evidence of it as would warrant us in setting aside the verdict, and directing a new trial. Judgment affirmed.

(102 N. C. 465)

STATE *ex rel.* DE BERRY *v.* NICHOLSON.

(*Supreme Court of North Carolina.* April 15, 1889.)

ELECTIONS—IRREGULARITIES—CONTEST.

1. Though the election returns made to the canvassing board fail to designate the office for which the votes for the contesting candidates were cast, the court in *quo warranto* proceedings may look behind the returns to ascertain the truth, as by inspection of the ballots.

2. A disregard of constitutional or statutory directions, except as to the time and place of holding the election, relating to the manner of conducting it, and which does not affect the result as a fair expression of the popular will, does not warrant a rejection of the vote cast.

3. The same principle must govern the registration of electors. If none are incompetent to vote who are put on the list, the registration must be accepted as the act of a public officer, and entitles the electors to vote, notwithstanding irregularities as to administering the oath, the registrar's appointment, etc.

4. A constitutional requirement that the oath administered to persons offering themselves for registration as voters shall bind them to support the constitution "and laws of the United States," and the constitution and laws of the state not inconsistent therewith, is satisfied by an oath to support the constitution of the United States and that of the state. All valid laws, whether state or national, are included by implication.

5. Where the register testifies that the oath was not administered upon the Bible, but does not state how it was administered, it will be presumed, in the absence of direct evidence, that the oath was taken with uplifted hand, as specified in Code N. C. § 3310, for persons who have conscientious scruples against swearing upon the "holy evangelists," as specified in the preceding section; and whether such scruples in fact existed or not is immaterial, that form of oath being sanctioned by the statute.

6. The fact that the registration book was not kept open for the prescribed time on the Saturday before the election cannot be allowed to vitiate the election, where it appears that the book was kept open until 2 o'clock P. M., and that no one was denied an opportunity to examine it, or sought it afterwards.

7. The fact that one of the officers of election absented himself from the voting place for a short time for dinner is not material, where it appears that no one voted while he was gone, and that there was no opportunity for tampering with the ballot-boxes.

8. Code N. C. § 2687, provides for separate ballots for each of the various classes of officers to be voted for, viz., state, congressional, judicial, legislative, and county. *Held*, that it is not obnoxious to this section for the voter to hand in his ballots for the different classes, rolled together and secured by a band, and for the judges of election to distribute them among the boxes.

9. In response to an inquiry from the jury in an election contest as to their right to pass upon the legality of the votes, they are properly told that that is a question of law for the court, and advised to accept the law as the court declared it, and apply it to the facts.

Appeal from superior court, Richmond county; MERRIMON, Judge.

Burwell & Walker, for appellant. *J. A. Lockhart* and *E. C. Smith*, for appellee.

SMITH, C. J. The relator of the plaintiff and the defendant were, at the election held in Richmond county, in the month of November last, competing candidates for the office of register of deeds for said county, and were voted for as such at the various precincts therein. The returns of the several elections were duly made to the board of county canvassers, one of which, that coming from Wolf Pit township, while giving the votes cast, respectively, for the two candidates, omitted the name of the office for which the votes were cast, as were the others, except the vote for electors, which did conform with the requirements of the statute. The board of county canvassers proceeded to open, canvass, and determine the result of the election, rejecting the returns from Wolf Pit precinct for the imperfection mentioned, and declared the defendant to be elected; he having received. of the votes cast at the other places of voting in the county, 1,740 votes, and the relator 1,628 votes. There were cast at the rejected precinct for the relator 265, and for the defendant 105, votes, which, if counted, would have reversed the result, and given to the relator a majority of 48 votes. The exhibit of the rejected returns shows that none of the offices to fill which the election was there held are designated; it containing only the names of the several persons voted for, and the number of votes given to each, except the electors of president and vice-president of the United States. The sole issue submitted to the jury, and responded to in the affirmative, is in these words: "Was the relator duly elected to the office of register of deeds of Richmond county at an election held on the 6th day of November, 1888, and is he entitled to be inducted into said office?" Upon this verdict it was declared and adjudged that the defendant is not and the relator is rightfully entitled to said office, and to be admitted into its possession on complying with the condition prescribed by law. From this ruling the defendant appeals.

The legality of the action of the canvassing board in refusing to count, for the reason alleged, the votes cast at the township mentioned in ascertaining the general result, is alone drawn in controversy in the action; and to support that action the appellant superadds and assigns numerous alleged irregularities and departures from the statutory regulations in the conduct of the election at that voting place. Those enumerated in the answer and urged in argument upon the hear-

Digitized by Google

ing before us are now to be considered, and their sufficiency to affect the result to be determined.

1. The defect in the return itself, as a ground for its entire exclusion from the court. The statute[1] does require the canvassing board, in passing upon the returns conveyed to it by a designated judge of election acting at the place of voting to "make abstracts, stating the number of legal ballots cast in each precinct for each office, the name of each person voted for, and the number of votes given to each person for each different office," and this presupposes the return to furnish the information without which the abstract could not be prepared. But, as the board judicially determines the result, is this omission irremediable and fatal to the reception of the vote, or may it be supplied or deduced from attending facts? When from the possession of the other regular and unobjectionable returns it is seen what persons were voted for, and to fill what offices, may not the knowledge thus obtained be used to supply the defect, in the absence of any suggestion that the electors voted for any others to fill the office? Or may not the canvassing board resort to the ballots or the personal knowledge of the member of the body who brings the return in proof of the fact? It would be strange if so technical and rigid a rule of action should be sufficient to stifle so large an expression of the popular will, and defeat its operation in the choice of a public county officer. But, however this may be, in the action of the canvassing board, whose functions are largely ministerial, it is certainly competent in the court to which the wronged party appeals in suing out the writ of *quo warranto* to look behind the return to see for what office the votes were given to the contesting candidates, and an inspection of the ballots themselves would very conclusively settle the inquiry, if it became necessary, the ballots being identified, without further proof. In the present case the fact is not disputed, for the complaint avers that the parties to the suit were the opposing and competing candidates for the office of register of deeds for said county, and were voted for as such, at the various polling places, precincts, and townships in said county; and this is admitted in the answer, with the sole qualification that the ballots cast in the disputed township were not legal.

The reason given for the rejection of the entire vote cast at this precinct failing to invalidate the election there held, and to warrant the retention of the office into which the defendant has been inducted, his counsel assails the vote on other grounds, alleging that: (1) The proper oath (and in some instances none was taken) was not administered to the electors before the registration of their names; (2) the registrar of voters was not legally appointed; (3) the failure to keep open for inspection the registration books from 9 A. M. until 5 P. M. on Saturday preceding the election; (4) the rolled up votes were improperly received, and other deviations from the statutory regulations as found in 2 Code, c. 16, § 2668, and following. It is not pretended that persons incompetent to vote for want of the necessary qualifications of an elector have in fact been registered, but that the prerequisite conditions for such registration have not been observed, and their votes ought not to have been received. In Southerland v. City of Goldsboro, 96 N. C. 49, 1 S. E. Rep. 760, it is declared that registration, as prescribed in the constitution, is an essential prerequisite to the exercise of the right of suffrage, as much as the possession of the personal qualifications, without which no one is entitled to be registered, and that, when such registration is made, the registration furnishes *prima facie* evidence of the right to vote, made as it is under officers of the law charged with that duty. So that here, in the registration, we have evidence of the personal qualifications of the voter, his right to be registered, and his actual registration, without any testimony to the contrary; and thus the sole question is as to the effect of the omission to comply strictly with the law in the particulars pointed out, or others of a similar kind, upon the validity of the election held in the township in which they occurred. We propose to consider these alleged irregularities in a group, because the answer to them is common and alike applicable to each. In Perry v. Whitaker, 71 N. C. 477, an election to ascertain the will of the electors, as representing the body of which they form a part, in reference to a prohibition of the sale of spirituous liquors in the township, was declared void, "for the reason that a large number of the citizens of the city were not allowed to vote, for the reason that they were not registered, and no opportunity was afforded them to vote." In Swain v. McRae, 80 N. C. 111, it is declared that the failure to have a new registration when ordered, because the order was made within 30 days of the time required by law for opening the books of registration, did not excuse the action of the canvassing board in excluding that precinct vote from the count made to ascertain the general result. The true principle which should govern in cases of popular elections is thus concisely and clearly laid down in People v. Cook, 8 N. Y. 67, and reported as a leading case, with a valuable note, in Brightly, Elec. Cas. 438: "The neglect of the inspectors or clerks to take an oath would not have vitiated the election. It might have subjected those officers to an indictment, if the neglect was willful." So BREESE, J., in a carefully considered case in Illinois, thus more fully states the rule: "The rules prescribed by law for conducting an election are designed chiefly to afford an opportunity for the free and fair exercise of the elective franchise, and to ascertain with certainty the result. Such rules are directory merely, not jurisdictional or

[1] Code, § 2694.

Digitized by Google

imperative." "If an irregularity of which complaint is made be shown to have deprived no voter of his right, nor admitted a disqualified person to vote, if it cast no uncertainty upon the result, and had not been occasioned by the agency of a party seeking to derive a benefit from it, it may well be overlooked in a case of this kind, where the only question is which vote was the greatest. The forms which must be observed in order to render the election valid are those which affect the merits." Piatt v. People, 29 Ill. 72.

We deem this a sound and just exposition of the law, and as furnishing a reasonable guide in solving controversies growing out of popular elections, which are becoming so numerous. Judge McCRARY, in his work on Elections, speaking of irregularities in conducting them, which deviate from the provisions and directions of the statute, pushes the proposition further, and says that "if, as in most cases, the statute simply provides that certain acts or things shall be done within a particular time or in a particular manner, and does not declare that their performance is essential to the validity of the election, then they will be regarded as mandatory if they do, and directory if they do not, affect the merits of the election." Sections 187–190, inclusive.

It is urged with much emphasis, in the argument for the defendant, that the form of the oath itself, and the manner in which it was administered to the voter, depart from the imperative demands of the constitution and the positive provisions of the statute, to a degree that vitiates the registration of so large a number that are thus rendered illegal voters that, if excluded, would change the result of the election, and give it to the defendant. There are estimated to be about 400 votes which are exposed to this condemnation. The registrar testifies that he did enter some names on the registry at first without swearing the persons, but does not undertake to state the number, nor does it appear for whom these voted, if they voted at all. But he says he did not swear those to whom he did administer the oath upon the Bible without stating in what manner it was done, and that the form of the oath used was that prescribed in the statute, (Code, § 2681.) It is in these words: "I—do solemnly swear (or affirm) that I will support the constitution of the United States and the constitution of the state of North Carolina; that I have been a resident of the state of North Carolina for twelve months, and of the county of ——— for ninety days; that I am a duly-qualified elector, and that I have not registered for this election at any other precinct; and that I am an actual and *bona fide* resident of ——— township, (or precinct,)—so help me God." Inasmuch as 400 or more voters were registered upon taking the oath in this form, and the total number of ballots cast were but 370, it must be inferred that all who did vote voted upon such oath, and the contention is that the rejection of the whole ballot operates only as an exclusion of those cast by persons alleged to have been illegally registered. If the proposition of all illegal and incapacitating registration be conceded, the conclusion drawn follows as a consequence, and the entire ballot cast at the precinct must be discarded. But it ought to appear, to warrant this, that none of those voting were regularly and properly sworn; for it is no reason to deprive a qualified voter of his vote that another has been registered who ought not to have been and has no right to vote. In such case, the list should undergo expurgation, and those of the latter class, not qualified, stricken from the number given to the candidate for whom, when ascertained, the illegal votes were cast; for it is equally the right of the candidate receiving lawful votes to have them counted, as for the opposing candidate to have those that are not lawful rejected from the count. But assuming the alleged taint to permeate the entire registry, is it such as to vitiate and annul the entire or indeed any part of the vote cast at the contested precinct? The oath taken is that prescribed by the statute, in very words, and differs from that directed to be taken by section 2, art. 6, of the constitution, only in the omission of the words "and laws of the United States" following the word "constitution," and "Laws of North Carolina not inconsistent therewith" following the same word, in reference to the state. In substance and legal effect, the constitutional requirement is fully met in the oath as taken; for, as the laws derive their force from the constitution which gives authority for their enactment, it is plain that an obligation undertaken and a promise made "to support and maintain" the respective constitutions extend to and embrace all legislative action which is authorized by and made pursuant to them, and the violation of a valid enactment is a violation of the constitution that imparts its sanction to the enactment.

The next objection is directed to the mode of administering the oath. It must be inferred, in the absence of any direct evidence upon the point, that the oath was taken with uplifted hand, as specified in section 3310 of the Code, and was accepted as a valid mode of administering it by both the registrar and the elector. We regard this objection as equally untenable with the other. The oath was administered in the form authorized by law (section 3310) for persons who have conscientious scruples about swearing upon the "holy evangelists," as specified in the preceding section, in providing that such may be sworn with the right hand uplifted. Whether, if an inquiry had been instituted, the presence of such scruples would have been found to exist or not, it is quite sufficient that an oath was administered in a form sanctioned by the statute, and taken with a full recognition of its binding force upon the conscience and of the responsibilities which are incurred by taking it. Aside from these considerations, we are of the opinion that a

Digitized by Google

disregard of those directions found in the law, fundamental or statutory, (except as to the time and place of holding the election,) relating to the manner of conducting it, designated as irregularities, not affecting the result as a fair expression of the popular will, does not warrant a rejection of the vote given at a polling place. The same principle must govern the registering of the electors. If none are incompetent to vote who are put on the list, the registration must be accepted as the act of a public officer, and entitles the elector to the casting of his vote, and this, in my opinion, speaking for myself, even if there had been no oath in fact administered, so far as it concerns the elector and the person to whom he gives his ballot, just as other acts of the officer acting *de facto* under color of office, and so recognized by the public, cannot be questioned by inquiring into his rightful title thereto in their relations to others. His acts and the exercise of his functions from the highest considerations of public policy, as affecting the interests of third persons, must be accepted as rightful and valid. This includes and disposes alike of the objection to the registrar's appointment, and to his alleged non-observance of the statutory directions in placing the electors' names upon the registry. It is needful only to refer in this connection to Norfleet v. Staton, reported in 73 N. C. 546, where the effect of acts of persons acting *de facto* as such, and not *de jure*, is fully discussed, and authorities referred to. In this case a judge elected to fill a vacancy in the term of office in pursuance of an act of the general assembly, declared to be repugnant to the constitution, which itself provided a different mode of supplying a vacancy, made an appointment of clerk, while so acting, the validity of which was called in question, and sustained upon an appeal to this court. Yet in this case an appointee, deriving his title under the constitution, was asserting his claims to the office, which were afterwards made good, and he inducted into possession. The extension of the principle to those charged with the duty of conducting a popular election is fully supported by adjudications. McCrary, Elec. § 216.

The fact that the registration book was not kept open during the whole prescribed period on the Saturday before the election cannot be allowed to render the election void, when it was kept open for inspection up to 2 o'clock P. M., and no one was denied the opportunity of examining it, or sought it afterwards. This does not vitiate the election. Quite as little force is found in the objection that one of the officers absented himself for a short time for dinner, as it affirmatively appears from the uncontradicted testimony that no one voted during the interval, and tampering with the ballot-boxes did not take place, nor was opportunity afforded for it. Again, there were many votes—more than a hundred, as a witness testified—handed in, rolled up, secured by an elastic band, which were given for the relator, and these were distributed among the boxes by the judges. These were, in our opinion, not obnoxious to the requirements of section 2687, and were properly received and counted.[1] Deloatch v. Rogers, 86 N. C. 357. What has been said is an answer to the complaint made of the refusal of the court to give any of the 15 instructions asked, which are based upon the imperfections and irregularities already considered and passed upon, and sustains the instruction given, which is confined to an inquiry as to the state of the vote as actually given at the Wolf Pit township place of voting, about which, indeed, there was no controversy.

A further error is assigned in the response to an inquiry from the jury as to their right to pass upon the legality of the votes. The negative is the only answer that could be given, as it was a pure question of law, about which it was the duty of the judge to instruct, and them to be guided thereby. It is true the verdict involved an inquiry into the lawfulness of the votes as well as of their number, but it was eminently proper to advise the jury that they should accept the law as declared by the court, and apply it to the facts as they find them to be; for only in this division and exercise of functions by the court and jury concurrently leading to the verdict can the law be properly administered in the courts, and enforced before juries. The response of the judge is, in substance, that the jury should take and act upon the law as laid down by him. In this, not as a mandate, but as advice, there is no error. The judgment must therefore be affirmed, and it is so ordered.

(103 N. C. 438)

STATE v. BELL.

(*Supreme Court of North Carolina.* April 23, 1889.)

APPEAL — REVIEW — OBJECTIONS NOT RAISED BELOW.

Where, in a criminal case, no errors are assigned on appeal or in the record, and in return to a writ of *certiorari* it is certified that no exceptions were noted before or after verdict, judgment will be affirmed, if no error appears in the record.

Devereux & Wilder, for appellant. *The Attorney General*, for the State.

DAVIS, J. The defendant was indicted for rape, and tried before BOYKIN, J., at August term, 1888, of the superior court of Madison County, and upon conviction and judgment appealed to this court. No errors are assigned in the case on appeal, or in the record,

[1] "Sec. 2687. The state officers, viz., governor, lieutenant governor, secretary of state, auditor," etc., "shall be voted for on one ballot. The members of congress for their respective districts shall be voted for on one ballot. The justices of the supreme court, judges of the superior court, and solicitors shall be voted for on one ballot." [Like provisions for members of the assembly and county officers, and a requirement that the ballots shall be printed or written on white paper, and without device.]

Digitized by Google

and in return to a writ of *certiorari* from this court, it is certified that no exceptions whatever "were noted at any time before or after verdict, either to the admission or to the refusal to admit evidence or to the charge of the judge." Upon a careful examination of the record, no error appears, and the judgment must be affirmed.

(103 N. C. 322)

GIBSON v. BARBER *et ux.*

(*Supreme Court of North Carolina.* April 29, 1889.)

APPEAL — MANDATE AND SUBSEQUENT PROCEEDINGS.

Plaintiff bought land at mortgage sale, and brought an action against the mortgagors for possession. They attacked the validity of the sale, and asked that the deed made thereunder be declared void. Judgment was rendered annulling the sale, and directing a reference to ascertain the amount to be credited on the mortgage debt by reason of the sale of certain property under a chattel mortgage given by defendants. So much of the judgment as related to any controversy beyond the land was held erroneous, and reversed by the supreme court on appeal, as being outside the scope of the action. The legal title to the land was declared to be in plaintiff, subject to defendants' right to redeem; and it was held that the judgment should have directed a sale if the debt were not paid by a day fixed. After the cause was remanded, the superior court directed a sale, unless within 90 days the debt should be paid, the sale to be made by a commissioner, at the courthouse door, for cash, and after advertisement as required in case of a sheriff's sale. *Held*, that the judgment was in accordance with the principles settled on the appeal.

Appeal from superior court, Richmond county; J. H. MERRIMON, Judge.

W. A. Gibson purchased land under a foreclosure of a mortgage executed by H. A. Barber and wife, and brought this action to dispossess them. They defended on the ground of the illegality of the sale, and asked that the deed be declared void, and subject to their right of redemption. The judgment of the court and the action of the supreme court on appeal therefrom are set forth in 6 S. E. Rep. 766. The action being remanded, the following judgment was rendered: "This cause coming on to be heard upon the certificate of the supreme court, and the plaintiff insisting and it appearing to the court that, according to the correct interpretation of the opinion and decision of the supreme court, he is entitled to a judgment to foreclose the mortgage mentioned and set forth in the pleadings, fixing a period within which the defendant must pay the amount of the debt secured by said mortgage, and in default thereof decreeing a sale of the land to satisfy said debt; it is therefore now by the court here, upon motion of counsel for the plaintiff, adjudged that the mortgage described in the complaint be foreclosed; that the defendants, Barber and wife, have ninety days within which to pay off and discharge the bond described in the complaint, and the interest thereon accrued, and the cost of the action to be taxed by the clerk; and, if the same be not paid within ninety days from the adjournment of this court, then the land described in the said mortgage shall be sold at public outcry at the court-house door in said county by Thomas C. Guthrie, who is hereby appointed commissioner for that purpose. The sale shall be for cash and after advertisement, as required by law for sales made by sheriffs, and the said commissioner will collect the money and pay it into court, and make full report of his proceedings in the premises to the next term of this court." From this judgment defendants appeal.

Burwell & Walker, for appellee.

SHEPHERD, J. When this case was last before the court (100 N. C. 192, 6 S. E. Rep. 766) it was held that "so much of the proceeding as looks to an adjustment of controversies arising out of the administration of the whole trust-estate by the mortgagee and beyond that which belongs to the land must be declared to be erroneous, and is reversed." "The cause," says the court, "will proceed in the court below in accordance with the law as declared in this opinion." It was also held that the plaintiff, by his purchase, took the legal estate, subject to the right of the defendant to redeem, and that the judgment should have directed that, if the indebtedness was not paid by a day certain, the land should be sold. We have examined the judgment of his honor, and it seems to be fully sustained by the principles stated in the opinion. No error was pointed out by counsel, and we are unable to find any. The judgment is affirmed.

(103 N. C. 194)

GILES v. HUNTER *et al.*

(*Supreme Court of North Carolina.* April 23, 1889.)

HUSBAND AND WIFE — RESULTING TRUSTS — MISTAKE — EVIDENCE — APPEAL.

1. Where husband and wife, before Const. N. C. 1868 took effect, joined in an assignment of a fund arising partly from a sale of personalty and partly from a sale of realty of an estate of which she was an heir, and in consideration of such assignment a conveyance was made to the husband, there was no resulting trust in favor of the wife in the land so conveyed.

2. An exception to a charge that there is no evidence of a certain matter, does not require an examination of the evidence for the mere purpose of passing on the exception, unless the testimony relied on to show error is pointed out.

3. Where a party asks for the reformation of a deed for mistake, a charge that the strongest proof is required before the jury can declare that there is a mistake, and that if they are satisfied clearly of the mistake they should so find, but, unless clearly convinced, they should not so find, is not error.

4. In a suit by a married woman, who alleges that a deed to her husband was in consideration of an assignment of her interest in an estate, and that the deed was made to the husband, instead of to her, by mistake, and that defendants purchased with notice of her rights, she has the burden of proving notice, and it is not error to so charge, especially where the jury are told that if they find no mistake they need not pass on the question of notice, and they so find.

Appeal from superior court, Madison county; MACRAE, Judge.

Digitized by Google

Action by Anna Giles against Hunter and others. Plaintiff appeals.

Charles A. Moore, for appellant. *T. F. Davidson* and *Jones & Shuford*, for appellees.

AVERY, J. This was a civil action tried at the February term, 1888, of the superior court of Madison county, before MCRAE, Judge. The plaintiff alleged in substance, and offered testimony tending to prove: (1) That she was married to one J. M. Giles before the constitution of 1868 was adopted by the people. (2) That at the time of her said marriage there was due her, arising from the sale of negroes and personal property and land, from the estate of her father, who died prior to the year 1854, a considerable sum of money, a part of which was in the hands of the administrator of her father, and a part was due her from her guardian. (3) That on the 8th day of September, 1868, Hannah McDowell, the mother of the plaintiff, conveyed to said J. M. Giles, by mistake of the draughtsman, a tract of land, (described in the complaint;) it being the intention of the parties that said conveyance should be made to the plaintiff. (4) That the only consideration for the said conveyance made to said Giles was the assignment by plaintiff and her said husband of her said interest, made on September 8, 1868, in the following form, to-wit: "Whereas, there are certain moneys due and to become due to the heirs of James McDowell, deceased, and to be paid by the clerk and master in equity for the county of Yancey, state of North Carolina, by whom, and under and by virtue of a decree of said court of equity, certain lands and other property for partition among the heirs of said estate on the ——— day of ———, 18—; and whereas the aforesaid money is due in part to the undersigned Ann Giles; Now, therefore, know all men by these presents that we J. M. Giles and Ann Giles, his wife, for and in consideration of the sum of $1,650 to us in hand paid by Hannah McDowell, the receipt whereof is hereby acknowledged, have on this 8th day of September, 1868, and we do hereby assign, transfer, and set over unto the said Hannah McDowell and her heirs the full amount of said sum of $1,650, and all other moneys due us from any part of said estate from the clerk and master and guardian of said heirs of James McDowell, deceased, to the said Ann Giles as one of the heirs of James McDowell, deceased, and we do hereby direct and instruct the clerk and master in equity, and said guardian of the heirs of James McDowell, to pay over to said Hannah McDowell and her heirs the whole amount of said estate due us in any way or by such decree. In witness whereof," etc. (5) That the defendants purchased said land at an execution sale by the sheriff with notice of the plaintiff's equity, and afterwards the said J. M. Giles conveyed said land to them. The defendants answered, and offered evidence tending to show that there was no mistake in drawing the said deed, but that it was drawn under instruction of the grantor, Hannah McDowell; and that the conveyance was made to J. M. Giles because he had an interest in the money due to his wife, could reduce it to possession, and it would then be his property, and the plaintiff's mother was anxious to convert the fund into land, to prevent J. M. Giles from spending it. The defendants denied notice of any claim on the part of plaintiff before purchasing the land, and alleged that her mother, Hannah McDowell, was a bidder at the sale, and also denied allegations in the complaint generally.

A great deal of evidence was offered to sustain the contentions on each side. The first issue involved the question whether the deed was drawn by mistake; the second, whether the assignment set forth above was the consideration for the execution of the deed; and it was admitted that it was. The third issue involved the question whether the defendants had notice of plaintiff's claim when they bought. The fourth issue was an inquiry as to damages.

The plaintiff prayed the court to instruct the jury as follows: "(1) That if it was the intention and contract of the parties to the deed in which Giles' name appears that the deed was to be made to Anna Giles, whose name was not inserted by the draughtsman, then the plaintiff is entitled to have the same corrected; and if the proofs satisfy the jury of these facts, then they should find 'Yes' to issue No. 1. That to determine this fact they may look to all the circumstances, the consideration paid, etc. (2) That although the property of the wife in this case should have belonged to the husband in consequence of his rights accruing prior to 1868, yet, if he made an agreement that the deed should be made to his wife, it is equivalent to the agreement that the property thus obtained by the marriage should be invested in lands for her benefit, and if such agreement was violated by mistake the plaintiff is entitled to recover. (3) That when land is sold at a chancery sale the money for which it sells remains as real estate, as to infants and *femes covert*, until the change of the same in some of the modes required by law. (4) That the relation of husband and wife is a delicate and fiduciary relation, and the dealings between husband and wife, by which the husband gets an advantage, are to be scrutinized by the courts. (5) The law provides a mode by which a married woman shall dispose of her property, and no mere tacit acquiescence of the wife will estop her from asserting her rights."

The court instructed the jury as follows: "The first issue submitted is whether the deed from Mrs. McDowell to James Giles was so made by mistake or fraud, and was it really intended by the parties to have been made to the plaintiff, Mrs. Giles, instead of her husband? The testimony offered by plaintiff tends to prove that it was the result of a mistake; that the intention of Mrs. Mc-

Digitized by Google

Dowell and of Giles and his wife was that it was to be made to Mrs. Giles, and that, when Mrs. McDowell instructed the draughtsman how to write it, she told him to make it to Mr. Giles, instead of to his wife, by mistake. On the other hand, the testimony offered by the defendants tends to contradict this theory, and to prove that it was well understood between all the parties interested that it was to be made just as it was made, and that there was no mistake about it. There is no evidence of any fraud in the making of this deed. In order to enable the court—which for the trial of this action is a court of equity—to settle the matters in controversy between the parties, (as this is one of the questions which can alone be determined by a jury,) the court asks you to find whether it is true that there was a mistake in the insertion of the name of James Giles instead of Anna Giles as grantee. A deed, on account of the mannea in which it is executed, is presumed to mean what it says, and it requires the strongest proof before a jury can declare that there was a mistake in it, and so empower the court to have it changed in its effect. I have endeavored to give you the testimony fully upon this point as it was delivered by the witnesses, and you have had the benefit of argument from counsel as to the effect of that testimony. Now, if upon a careful consideration of the whole of the evidence you have been satisfied clearly that there was a mistake made by Mrs. McDowell in directing the draughtsman to write the deed so as to convey the land to James Giles, instead of his wife, and that Giles and his wife and Mrs. McDowell had really agreed to have it made to Anna Giles, you will respond to this issue, 'Yes.' But unless you are clearly convinced of this fact,—if you are still in doubt about it,—you will answer 'No.' If your response is in the negative, you may return your verdict without considering the other issues. But, if in the affirmative, you will proceed to the consideration of the second issue: 'Was the land which was conveyed by said deed paid for by a conveyance of plaintiff's interest in the estate of her father?' If you answer 'Yes' to the first issue, and if you believe the testimony offered on this point, you will respond to the second issue 'Yes,' for all the testimony tends to prove that the assignment made by Giles and wife to Hannah McDowell was made in consideration of the conveyance by Hannah McDowell of the land in dispute, either to Giles or his wife. The marriage of the plaintiff to James Giles having taken place, if you believe the testimony, before the adoption of the present constitution, the husband also had his vested rights in his wife's property, real and personal, but it was still the plaintiff's interest in the estate of her father which was conveyed by the deed or assignment of plaintiff and her husband to Hannah McDowell. The third issue is: Did defendants have notice of plaintiff's equity—of any right plaintiff might have had to have the deed reformed so as to make it read to her instead of to her husband, or to have him declared a trustee for her benefit? This notice may be actual notice, or it may be the knowledge of circumstances which ought to lead to further inquiry into the matter, and which would, upon such inquiry, give information of the equity. Has the plaintiff satisfied you by a preponderance of evidence that the defendants did have notice? Defendant Hunter, it is admitted, claims under Trull and Guthrie, and is affected by notice to them, if there was any. Did Mrs. McDowell forbid the sale and give notice then and there, or did she before the sale by the sheriff (which is admitted to have been before the deed from James Giles to defendants) notify them (Trull and Guthrie) that her daughter was the real owner of the land? Or do the circumstances testified to, and which you believe, satisfy you that defendants had this notice before they bought the land? If so, respond 'Yes' to the issue; if not, respond 'No.' And if you respond 'No' to this issue, you need trouble yourselves no further. But if you say 'Yes,' you must consider the last issue. Fourth, as to damages. The damage would be a fair rental value of the land for from three years before the action was begun until the trial,—1872 to 1888,—nearly 16 years. And the amount of damage done to the land by defendants, of course, would be offset by the improvements, if any, put upon the land by defendants."

The plaintiff excepts to the charge given, and to the refusal to give instructions asked. The jury found the first issue for defendants. The plaintiff moved the court for judgment *non obstante veredicto*, upon the alleged grounds that the land having been paid for by the property of Anna Giles, due her prior to the adoption of the constitution of 1868, the deed made by her husband, James Giles, to the defendants for the land in dispute could pass no title to the defendants without the signature and privy examination of the plaintiff, Anna Giles, under the act of 1848-49; but this motion was refused by the court, and plaintiff excepted. The plaintiff moved for a new trial on the following assigned errors in the charge to the jury: (1) In holding that there was no evidence of fraud; (2) to so much of the charge as related to the measure of proof required to show a mistake in drawing a deed in order to reform it; (3) that the court instructed that notice might be shown by a preponderance of evidence; (4) for error in not giving the special instruction as prayed for by the plaintiff.

The plaintiff asks for judgment upon the verdict on the ground that the consideration of the deed executed by Hannah McDowell to J. M. Giles, the plaintiff's husband, on the 8th of September, 1868, was the assignment by her of her interest in a fund arising from the sale of the property of her father, who had died prior to the year 1858. The plaintiff was married to Giles before the

Digitized by Google

constitution of 1868 became the law. The husband could therefore have acquired the absolute title to his wife's personal property by reducing it to possession. If the money arising from the sale of her land was allowed by her consent to be paid to him, it becomes his property. If it was invested with her consent in other lands, and with no request on her part that the land purchased should be conveyed to her, or for her benefit, and the husband took title to himself, the land vested absolutely in him, discharged of any equity in her. Temple v. Williams, 4 Ired. Eq. 39; Black v. Justice, 86 N. C. 504; Hackett v. Shuford, Id. 144. Even the right on the part of the husband to reduce to possession money due to the wife, though not yet exercised by him, would constitute a sufficient consideration to support a deed to him for land; and where, as in this instance, the wife joins in assigning a fund arising in part from sale of personalty and in part from sale of land belonging to her father's estate, and that assigned is the consideration of the conveyance made to him, there is no resulting trust raised in the wife as to the land conveyed. The plaintiff excepts to the charge of his honor that there was no evidence of fraud.

By a careful review of the evidence sent up, we discover no testimony tending to prove fraud. The exception, as stated in the record, did not make it incumbent on the appellate court to examine the evidence for the mere purpose of passing upon this exception, unless the plaintiff had pointed out, in the mass of testimony, that relied upon to show that the court below was in error. It is questionable, too, whether the complaint contains a sufficient allegation of fraud, as distinguished from mistake.

The next exception was to that portion of the charge of the court in which the law as to the measure of proof necessary to establish an alleged mistake in a deed, and entitle a complainant to a decree ordering the deed to be reformed, was stated. The plaintiff has no reason to complain of the instruction on this point. In the case of Harding v. Long, ante, 445, (decided at the present term,) this court reiterated the principle (first laid down as applicable to jury trials in Ely v. Early, 94 N. C. 1) that an alleged mistake in a deed must be shown by clear and convincing proof in order to justify a verdict finding that a mistake was in fact made in drafting it.

The only remaining assignment of error is that the judge erred in instructing the jury that the burden was upon the plaintiff to show by a preponderance of testimony only that the defendants had notice of the equitable claim of the plaintiff. We cannot understand, if it is material, why such an objection and exception should emanate from the plaintiff, but it so appears of record. The general rule is that a party to a civil action, who has the affirmative of an issue, is required to show his contention by a preponderance of testimony. The proof of notice of an equity does not constitute an exception. Besides, the jury were properly told that, if they found in response to the first issue that there was no mistake, it would not be necessary for them to pass upon the third issue. There is no error.

(103 N. C. 374)

STATE v. HINSON.

(*Supreme Court of North Carolina.* April 29, 1889.)

SLANDER—CRIMINAL PROSECUTION—EVIDENCE.

1. On a trial under Code N. C. § 1113, for wantonly and maliciously uttering words imputing unchastity to an innocent woman, evidence of a prevalent report of the truth of the words is inadmissible in disproof of wantonness and malice, where the utterance is not privileged.

2. Where prosecutrix testified on cross-examination that she heard the report concerning her alleged unchastity from her aunt, the refusal to allow her to be asked if her aunt told her from whom the aunt heard the report is not error.

3. Where from his study and practice there is evidence of the professional knowledge of a physician who examined prosecutrix, the ruling of the trial court that he was competent to give his opinion from such examination that prosecutrix never had sexual intercourse will not be reviewed because of his inexperience.

4. The woman is innocent if she did not have sexual intercourse, though she was in the embrace of the man, and they were about to commit the act, but were interrupted before its consummation.

Appeal from criminal court, Mecklenburg county; MEARES, Judge.

Jones & Tillett, for appellant. *The Attorney General* and *Burwell & Walker*, for the State.

SMITH, C. J. The defendant is charged in the indictment found by the grand jury at October term, 1888, of the criminal court of Mecklenburg with the false, wanton, and malicious utterance of slanderous words, as therein set out, of and concerning one Emma Harrison, an innocent woman, imputing incontinency, and a want of chastity, in violation of the statute. Code, § 1113. The statute declares that if any person shall attempt in a wanton and malicious manner to destroy the reputation of an innocent woman by words written or spoken which amount to a charge of incontinency, every person so offending shall be guilty of a misdemeanor, and fined or imprisoned at the discretion of the court. Upon his arraignment the defendant entered the plea of not guilty, on the trial of which before the jury he was convicted. There were two exceptions taken during the examination of witnesses to the ruling out of evidence offered, and one to evidence admitted for the state, and errors are assigned in the refusal of the court to give to the jury certain instructions asked, and to the giving of others in their place. These will be considered in their proper order on the record.

1. The defendant proposed and was not allowed to show a prevalent report of sexual intimacy between one Christenbury and the

Digitized by Google

feme prosecutrix, the making of which charge is the defamatory matter specified in the indictment, in disproof of their wanton and malicious utterance. The cases cited in the brief of defendant's counsel, and found in our own reports, to-wit, Nelson v. Evans, 1 Dev. 9, decided in 1826; McCurry v. McCurry, 82 N. C. 296, decided in 1880; Sowers v. Sowers, 87 N. C. 303, decided in 1882; McDougald v. Coward, 95 N. C. 368, decided in 1886; and Knott v. Burwell, 96 N. C. 272, 2 S. E. Rep. 588, decided in 1887,—were all civil actions instituted to recover damages, and proof of general reports of the truth of the charge imputed to the defendant was received in mitigation of the damages, and in extenuation of the defendant's conduct in repeating what was generally current, and perhaps believed. And so would be received such evidence in a criminal prosecution, after verdict, by the court in ascertaining the punishment merited. But it is not competent to disprove the presence of that malice implied in the utterance of a calumnious and unfounded charge ruinous to the character of the sex, and unwarranted by any moral duty, or as a privileged communication. Still less can it be heard to sustain the defamatory words; the truth thereof, and not a general belief in their truth, being necessary to be shown as a defense to the action. Hampton v. Wilson, 4 Dev. 468. When a slanderous charge is made, the law *prima facie* implies malice from the publication, unless in the case of a privileged communication which appears when the party is acting under a legal or moral duty towards the person to whom it is made; and in such case malice must be proved. Adcock v. Marsh, 8 Ired. 360. No such duty existed here; for, as the testimony shows, the defendant said at a public place, in the hearing of eight or ten persons, just after the said Emma left, that his (the defendant's) daughter had caught Andrew Christenbury and Emma Harrison in the act of adultery, and that the strumpet ought to be drummed out of the county. There is consequently no excusable element in the occasion on which the words were spoken, imparting a privileged character to their utterance; and current rumor could have no effect in rebutting the implied malice; and its existence, not its degree, was only an inquiry before the jury in passing upon the issue of guilt.

2. In the course of the cross-examination of the prosecutrix she stated that the next morning after the alleged criminal intercourse with Christenbury, and before hearing of the report, she wrote a letter to Christenbury, and sent it to him 10 miles distant by a messenger; that she heard of the report from her aunt; whereupon defendant's counsel asked if her aunt told her from whom she got the report. The question, on objection, was disallowed. We are unable to see the pertinency of the inquiry, or any proper use that could be made of the answer. It was wholly immaterial how or from whom the information of the report came. There is no suggestion of any way in which it could have been made available to the defense, nor of the purpose for which it was sought. This was at least due to the court if any complaint is to be made of the refusal to permit the question to be answered.

3. The appellant assigns error in receiving the testimony of a physician who examined the private parts of the prosecutrix, and was allowed to give its results with the opinion formed upon the results that she had never had sexual communication with a man. The objection is based upon the witness' previous inexperience as to the effects of such communication upon the sexual organs of the female. The answer to this exception is that there was evidence from study and practice of his professional knowledge upon the subject of his testimony, and its value is dependent upon the extent of that experience to be judged of by the jury. In Flynt v. Bodenhamer, 80 N. C. 205, it is said, (and approved in Branton v. O'Briant, 93 N. C. 99, and repeated in State v. Cole, 94 N. C. 958:) "The court must decide whether he has had the necessary experience to enable him to testify as an expert. But the value of his opinion, when admissible, must be determined by the jury alone; and it depends upon the opportunities he has had for acquiring skill and knowledge, and the use he has made of those opportunities." The court determines the preliminary facts that the witness is or is not an expert, and when there is any evidence of it, the finding, like that of the jury, is not reviewable in this court. State v. Davis, 63 N. C. 578, and other intermediate cases down to Smith v. Kron, 96 N. C. 392, 2 S. E. Rep. 533.

4. The remaining assignment of error is in the refusal to give this asked instruction to the jury: "If the prosecutrix had surrendered her person to Christenbury for the purpose of committing fornication with him, she would not be an innocent woman, though the act was not completed, in consequence of the coming upon them of other parties." Instead of so charging, the court told the jury "that the woman was innocent, unless she had had sexual intercourse with a man." There was testimony tending to show that the parties were surprised while in the very act of copulation, and prevented from consummating it. As we understand, the parties were in each other's embrace about to commit the act, and were interrupted, so that it did not take place. It is true, the moral degradation from such a surrender of the person is little, if any, less than would have resulted from actual coition, but it is necessary to draw the line somewhere, the overstepping of which destroys the *status* of innocency in the sense of the statute, and short of which it is not lost, and the past adjudications on the construction of the statute draw the line between actual sexual intercourse and any approximation, however near to it. It is difficult to define any other. The

Digitized by Google

subject has been so recently considered in State v. Brown, 100 N. C. 519, 6 S. E. Rep. 568, that we are content without comment to refer to it. There is no error, and the judgment is affirmed.

(102 N. C. 166)

JONES *et al.* *v.* BRITTON *et al.*

(*Supreme Court of North Carolina.* April 30, 1889.)

HOMESTEAD—WASTE—INJUNCTION.

Const. N. C. art. 10, § 2, exempts a homestead "from sale under execution or other final process obtained on any debt." By section 3, the homestead, after the owner's death, is exempt "from the payment of any debt during the minority of the children or any of them," and section 5 declares that if there is a "widow, but no children, the same shall be exempt from the debts of her husband, and the rents and profits thereof shall inure to her benefit during her widowhood, unless she" owns a homestead. Under the constitution and statutes a docketed judgment is a lien on the homestead. Where part of a tract forming a homestead was under cultivation, and the remainder was valuable principally for its timber trees, and the removal of the trees would impair the security of a judgment against the owner, *held*, that the judgment creditor was entitled to have the owner restrained from selling and cutting such timber trees for any purpose other than for necessary repairs and improvements. DAVIS and AVERY, JJ., dissenting.

Appeal from superior court, Northampton county; GRAVES, Judge.

Suit by Jones, Lee & Co. against H. S. Britton and R. W. Pitman. Plaintiffs appeal.

Winborne & Bro., for appellants. *W. H. Day*, for appellees.

MERRIMON, J. The plaintiffs had docketed their judgment against the defendant for $50 with interest from the 29th of January, 1887, and for costs; and at the time the same was so docketed the defendant was a citizen of this state, and entitled to the right of homestead, and was seised and possessed of the land specified in the complaint. He had no personal property subject to levy, and the land mentioned was all he had, was of value not exceeding $1,000, and he was entitled to have his homestead therein. The following is a copy of so much of the complaint as it is material to report: "(6) That plaintiffs are informed and believe that since the docketing said transcript of said judgment the defendant Britton has sold and conveyed to defendant R. W. Pitman the timber trees standing on said tract of land; that a good portion of said tract of land is cleared and in a state of cultivation, while the other portion is valuable chiefly and principally for its timber trees. (7) That the defendant Pitman, by virtue of his said purchase, is now cutting and removing from said land the said timber trees. (8) That defendant Britton is still living in the county aforesaid, and the said judgment is unpaid, and in full force. (9) That if the defendants are allowed to cut and remove said timber trees they will greatly reduce and impair plaintiffs' security for said judgment debt, and inflict upon plaintiffs irreparable damage. (10) That there now exist on said land a mortgage lien and a judgment lien amounting to several hundred dollars, prior to the said lien of plaintiffs, as plaintiffs are informed and believe. (11) That plaintiffs have commenced an action in the superior court of said county to enjoin defendants from cutting and removing said timber trees, and have caused a summons to be issued commanding the defendants to appear at the next term of said superior court. Wherefore plaintiffs ask that defendant be enjoined from cutting and removing the timber trees," etc. A judge at chambers granted an injunction pending the action until the hearing upon the merits. At the final hearing, the court dissolved that injunction, and "ordered and decreed that the plaintiffs are not entitled to have the defendants enjoined from cutting said timber trees," etc. The plaintiffs, having excepted, appealed from that order to this court.

The constitution, art. 10, § 2, gives and secures to every resident of this state the right of homestead. If he has land, he is entitled to have the homestead therein as allowed "exempt from sale under execution, or other final process obtained on any debt," subject to certain specified exceptions. The several statutory provisions prescribing how it shall be valued and laid off to the owner thereof do not give it; they serve the purpose of ascertaining the value thereof, locating it particularly, and defining its limits. Neither the constitutional provision cited, nor any statute, creates, defines, or limits an estate in the owner of the homestead in the land embraced by it. He has and continues to have such estate in the lands embraced by it as he may have acquired from any source, unaffected as to its character or extent, save that while the homestead, as allowed, lasts, it remains "exempt from sale under execution, or other final process obtained on any debt," and it lasts during the life of the owner thereof, and after his death during the minority of his children, or any one of them, and the widowhood of his widow, unless she be the owner of a homestead in her own right. Const. art. 10, §§ 2, 3, 5. The condition and measure of the estate of the owner of the homestead in the land are not changed by or because of the homestead; the estate, unchanged, continues; the restriction—the limitation that distinguishes the homestead—is upon the right of the judgment creditor to have the land sold by execution or other proper final process to satisfy his docketed judgment, which constitutes his lien upon the land. So that, when the owner sells his estate, whatever its condition or measure, in the land constituting his homestead, he sells it subject to his judgment creditor's lien, if there be such creditor; but he sells also the advantage that it shall not be sold at the instance of the creditor until the exemption "from sale under execution, or other final process obtained on any debt" shall be over. It is this exemption from sale that distin-

Digitized by Google

guishes the homestead from other lands of its owner. It suspends and prevents the remedy of the creditor by execution or other final process as long as it continues. Markham v. Hicks, 90 N. C. 204; Rankin v. Shaw, 94 N. C. 405. The rights of the owner of the homestead as to it are not abridged or essentially different from his rights as to other lands he may own, except when there are liens upon it that cannot be enforced while it continues to be the homestead. When such liens exist, he is bound in conscience and by the principles of justice to use and care for the homestead prudently and fairly in the way and manner such property is employed by ordinarily prudent men continuously, in the course of living, promoting their just advantage, and the support, convenience, and comfort of their families. What the character and extent of such use shall be, will frequently depend on the nature and condition of the homestead. The purpose of the law is to allow the debtor to have his homestead —his home—free from sale under final process, as prescribed, for the benefit of himself and his family. It is not contemplated or intended that he shall arbitrarily destroy its value by unnecessarily cutting the timber trees that may be on it, or by pulling down and destroying the buildings on it, so as to disappoint the just rights and expectations of the creditor having a judgment lien upon it. The latter, when the exemption from sale is over, should find the property, not exhausted and rendered valueless, but substantially as it was when the exemption began, less the loss and depreciation arising from the reasonable use of it and wear and tear of buildings. The law expressly gives the judgment creditor a lien on the homestead. This lien is not meaningless and nugatory; it implies that the creditor shall have the property devoted to the satisfaction of his judgment debt as far as may be necessary, when and as soon as the exemption of it from sale shall be over. The law is true, and sincere; it does not thus create and allow a lien in favor of the creditor, and leave the owner of the homestead at liberty to destroy the property, and thus render such lien worthless. As we have seen, he is allowed to live upon and use it, but not destroy or impair the substance of it as against the creditor having a lien; nor, for the like reason, will the person to whom he may sell his homestead be allowed to do so. Obviously the creditor having such lien is entitled to have the property to which it attaches protected against the destruction or unreasonable impairment of it prejudicial to that lien. As it cannot be enforced while the exemption of the property from sale lasts, the property will be properly protected during that time, so that the creditor may in the end have the benefit of his lien. A court of equity will not hesitate, in a proper case, to interfere by injunction, or in other proper way, for such purpose; otherwise the creditor would have no remedy during the exemption. Webb v. Boyle, 68 N. C. 271; Gordon v. Lowther, 75 N. C. 193; Braswell v. Morehead, Busb. Eq. 26; Camp v. Bates, 11 Conn. 51.

In the case before us, the defendant Britton was entitled to his homestead in the lands described in the complaint. He sold the timber trees standing thereon to his co-defendant, to be cut down and carried away. The plaintiffs at the time of such sale had a docketed judgment against the owner of the homestead which constituted a lien on the land. The owner had no right to thus sell the timber trees simply for gain; he could lawfully only cut and use such of them as were necessary for the reasonable use of the homestead property, for making repairs, necessary houses, fences, and the like. To sell and cut away all the timber trees for simple gain were to substantially impair the homestead property subject to the lien; and this, for the reasons stated, is not allowable. This is not strictly an action to prevent waste, but to prevent an injury in the nature of waste, growing out of the peculiar relations of the parties, brought about by the exemption of the property from sale under final process until the homestead shall be over. Courts of equity frequently interfere in a great variety of cases having peculiar characteristics to prevent injuries to property when the courts of common law cannot afford adequate relief in the preservation of the same. 2 Story, Eq. Jur. § 912 et seq. There is, therefore, error. The order denying the injunction must be reversed, and an order entered granting an injunction restraining the defendants from cutting the timber trees on the land for any purpose other than necessary repairs and improvements thereon. To that end let this opinion be certified to the superior court. It is so ordered.

DAVIS, J., (*dissenting.*) I do not think that his honor below erred in dissolving the plaintiffs' injunction, and I therefore do not concur in the opinion of my brethren. The homestead law has been a fruitful source of litigation in the past, and I think a new and wide gate for additional litigation will be thrown open when it is understood that the creditor has in any way the right to overlook and control the extent and manner in which the debtor shall use his homestead in the support and comfort of his family. In the absence of any wanton and malicious waste and destruction of the property, I think he may make any use of it that he may deem most advantageous, not to the creditor, but to himself and family; and, when so used, the court has not the right to molest or interfere with him. How can he derive any benefit from land only valuable for its timber (and we know that there are many such tracts of land) if he is not allowed to sell a timber tree, worth one dollar, because, forsooth, it will be worth one dollar less to the creditor when the homestead falls in? Such land may be valuable, but it is of no value to him. There is hardly a prudent

Digitized by Google

man to be found, who owns land valuable only or chiefly for its timber, who does not gladly avail himself of a saw-mill to realize some advantage by the sale of timber, and why should the owner of a homestead be denied that right? It will not do to say that he may use the timber himself to the extent that it may be necessary for building or repairing or improving the homestead. Having nothing but the land, which is only valuable for timber, he could sell none of it to buy bread or clothing, or even to buy nails or window-glass to put in his house; and to tell him under such circumstances that he was the owner of, or had any interest in, such land would seem a cruel and tantalizing mockery.

I confess my inability to understand the nature of the lien of a judgment upon the homestead. It cannot be, I think, a lien upon the land or any interest in the land during the life of the owner of the homestead, or that of his widow, or the minority of his youngest child. In Markham v. Hicks, 90 N. C. 204, the chief justice says: "The estate of the debtor remains after the allotment, as before, the same, whether it be in fee, for life, or for years. It is this estate in its entirety in the exempt land which the creditor is not allowed to sell under final process by the mandate of the constitution, and to which no judgment lien now attaches, when the debt was contracted, or the cause of action accrued, since May 1, 1877. Code, § 501, par. 4. It is to be remembered that when the constitution was formed and adopted no lien upon land was created by the rendition of a judgment, and it attached only when execution issued, running back to its teste for a commencement; and therefore the prohibition was a full and ample protection, not only against a sale, but against any lien upon the exempt property, for there could be no lien unless the officer having the final process could sell. The general assembly, in the enactment of the Code, seems to have interpreted the constitution as putting an interdict upon a sale of the land set apart,—that is, of the debtor's estate therein, whatever it might be, —until the expiration of the period of exemption, thus rendering unnecessary the incorporation into the Code of the act of 1870. A glance at some of its sections will make this manifest." Without expressing any opinion upon the effect of the act of 1885, c. 359, amending section 501, subsec. 4, of the Code, and as to whether the legislature can, as against a homestead debtor, give any effect to a judgment which it would not have had when the constitution was adopted, I am able to see how a lien may relate back to the date of its teste; but I find some difficulty in understanding how the lien of a judgment may reach forward to the termination of the homestead interest, and by so doing give it a present vitality and effect to deprive the owner of the right to do that which, but for the judgment, he might do. The judgments and liens, as to the rights of the owner of the homestead, it seems to me, can have no force as against the homestead debtor, but are perfectly dormant as to him, being deprived of all vitality by the power of the constitution, though they may spring into life as soon as the homestead interest expires, and take effect then in the order of priority. The judgment can give the creditor no vested right to the homestead, nor any right of any kind, except in subordination to the absolute and untrammeled right of the owner of it to use it in any way he may choose for the support and comfort of himself and family. The judgment creditor is in no sense like a remainder-man or reversioner. He cannot bring "the old action of waste" as it was at common law, nor is he embraced in any one of the classes "for and against whom an action of waste lies," under the Code, § 625 et seq. If an action of waste would not lie, I think neither the old remedy by injunction and sequestration, nor any one of the provisions given by section 338 of the Code, can be invoked.

If it be said that the cutting and selling the timber by the owner of the homestead, though conducive, and perhaps necessary, to the support and comfort of himself and family, impair, *pro tanto*, the security of the creditor, so would the continuous and excessive cultivation of a fertile field or lot exhaust it, and render it barren; but it will hardly be insisted that this is a matter with which the creditor could interfere. It would be *damnum absque injuria*. The rights of the debtor are fixed by the constitution, and are absolute, and cannot be limited by legislation; nor can the homestead, in my opinion, be taken *in custodia legis*, or its use for the support and comfort of the debtor be in any way disturbed by legal process. He can in no way be considered as a mortgagor or tenant for life, any more than the creditor can be likened to a mortgagee, or remainder-man, or reversioner. If he has an estate in fee, it so remains after the allotment of the homestead as before, the only difference being that, as to the homestead, the creditor can acquire no rights, and as to the estate, after the termination of the homestead, the debtor can make no disposition as against the judgment creditor. If the creditor has the right to enjoin the debtor from cutting down and selling timber, why may he not have a receiver appointed to take and invest the proceeds, first, for the use of the debtor during the continuance of the homestead, and then to be paid to the creditor? No one would entertain such a proposition for a moment, and yet it gives the debtor some benefit, and would be far more just and equitable than to compel him to abstain from reaping any advantage from his forest land, because it may blight the expectations of the creditor, looking forward to the time when the timber shall become valuable to him. In Poe v. Hardie, 65 N. C. 447, it is said: "The estate in the homestead, as created by the constitution, is a determinable fee, and the tenant

Digitized by Google

was not 'impeachable for waste,' even before the act of 1870. That act was intended to protect the owner of a homestead against any vexatious litigation which might be instituted by the purchaser of a reversionary interest." Thompson, on Homestead and Exemptions, referring to the various questions that have been presented in regard to the nature of "the estate of homestead," says: "These questions have all, under various phases, addressed themselves to the courts. It would seem, upon principle, that they are questions with which the creditor can have nothing to do." Section 165. Again, it is said, (section 635:) "Although some courts treat the homestead as an intermediate estate in the land, the creditor cannot seize and sell the reversion. 'If it were otherwise,' (quoting the authority of a learned court,—Tucker v. Kenniston, 47 N. H. 267,—) '* * * by depriving the debtor of all use of the homestead except the mere occupation of it, a creditor might contribute largely to a state of things that would drive his debtor from the homestead into the poor-house.'" In Markham v. Hicks, 90 N. C. 204, I can find nothing in conflict with what was said in Poe v. Hardie, so far as it relates to the question before us. The chief justice said: "The correct view of the constitution and the subsidiary statutes is taken and expressed by BYNUM, J., in Bank v. Green, 78 N. C. 247: 'Their legal effect is simply to protect the occupant in the enjoyment of the land set apart as a homestead, unmolested by his creditors.'" If the law will not allow the reversion to be sold because, as declared by this court, its purpose is that the owner of the homestead shall not be harassed or vexed by a purchaser who will become a reversioner, ought the court to allow that purpose to be defeated by permitting him to be harassed and vexed by one, or, it may be, a dozen, judgment creditors? Ought the court to allow a judgment creditor to do just what it was intended there should be no purchaser to do? Can it invest a creditor with a power denied to a purchaser?

But even conceding that, in a proper case, the plaintiff would be entitled to the extraordinary relief asked, I do not think that the allegations of the complaint are sufficient to entitle him to it. It is true that the complaint alleges that plaintiff has a docketed judgment of $50.30 and costs against the defendant Britton, and that there exist prior liens "amounting to several hundred dollars;" that the land containing 200 acres is "not worth to exceed $1,000;" that "a good portion of said land is cleared and in a state of cultivation, while the other portion is valuable chiefly and principally for its timber trees;" that the defendant Britton has sold the timber trees to the defendant Pitman, who is cutting and removing them, which, if allowed, "will greatly reduce and impair plaintiffs' security for said judgment debt, and inflict upon plaintiffs irreparable damage." The amount of the liens on the land is left indefinite, and it does not appear that the timber, if sold, will not leave the land amply sufficient to pay the debts, or that defendant Pitman is insolvent. It does not allege that the value of the land for its ordinary use will be impaired, or that all, or how much, of the timber is being cut and sold, or that a sufficiency will not be left for building, repairs, etc.; that is, for house-bote, plow-bote, fire-bote, hedge-bote, etc. Facts should be stated from which the court can see, if true, that the damage is irreparable; and I think this has not been done.

Counsel for plaintiffs refers to chapter 401, Acts 1885, which enacts: "That in an application for an injunction to enjoin a trespass on land it shall not be necessary to allege the insolvency of the defendant, when the trespass complained of is continuous in its nature, or is the cutting or destruction of timber trees." Are the defendants such trespassers "on land" as the statute contemplates? There is no allegation that they are trespassers on land at all.

I know of no precedent in this state or elsewhere where the constitutional provision is like ours for such an interference with the right of the owner of a homestead to use it as he may think most conducive to the comfort and support of himself and family, and I do not concur in making one. In the earlier days of the homestead law in this state it seems to me that the judicial pendulum lost its equilibrium, and, swayed by a benevolent sentiment prompted by the impoverished condition of the state, it was greatly on the side of the homestead debtor. Having a constitution which guaranties the unmolested right to a homestead, when its owner is denied the right to use it in any way that may best contribute to his support and comfort without being molested, harassed, or vexed by creditors in regard to the manner in which he shall use it, it seems to me that the pendulum is swaying in the other direction.

SHEPHERD, J., (*concurring.*) If any question is well settled in this state it is that all of the lands of a debtor (the homestead inclusive) are subject to the lien of a docketed judgment. Chapter 359, Acts 1885; Rankin v. Shaw, 94 N. C. 405. It is unecessary that there should be a levy. Miller v. Miller, 89 N. C. 405; Mebane v. Layton, Id. 401. Whatever may be said as to the effect of the general lien of a docketed judgment in other states, our decisions place it on the same footing, so far as its binding effect upon the land is concerned, as if a levy had been actually made. Sawyers v. Sawyers, 93 N. C. 324 Lytle v. Lytle, 94 N. C. 686; Lee v. Eure, 93 N. C. 5; Miller v. Miller, supra. Such a lien is therefore a "charge" upon the land. "Formerly, in England, a judgment for the payment of money operated as a charge upon all the lands, tenements, and hereditaments of the person against whom it was entered up, in the same way as if he had charged them by writing under his hand.

Digitized by Google

Provision was made for registration of such judgments. * * * The old English rule in this respect still prevails in most, if not all, of the states; the judgment becoming a lien upon real estate as soon as entered or docketed, but not on personal property until levy made." 1 Rap. & L. Law Dict. 695. The judgment creditor is recognized in a court of equity as a proper and necessary party, with a mortgagee and other incumbrancers, in the adjustment of priorities and the administration of other equities between persons interested in the property. Adams, Eq. 145; Hinson v. Adrian, 86 N. C. 62; Wilson v. Patton, 87 N. C. 318. It is a vested right. Burton v. Spiers, 92 N. C. 503. If, then, the judgment creditor has a charge upon the land, why should he not be entitled, as are others having charges, to the aid of the court in preventing the impairment of his security by the arbitrary acts of the judgment debtor? First, it is said that the extension of such relief to a judgment creditor will be a fruitful source of litigation. This should be addressed to the general assembly, which has seen fit to restore the lien of a docketed judgment. Chapter 359, Acts 1885. Again, it is said that the act restoring this lien may be unconstitutional. I search in vain to find any authority for such a proposition. The constitution simply says that the homestead shall "be exempt from sale under execution, or other final process." Article 10, § 2. It does not say that it shall be exempt from a lien. The validity of such a lien is recognized in Wilson v. Patton, and Hinson v. Adrian, supra, and it is not an open question in this state. It is also asked, how can the debtor derive any benefit from land valuable only for its timber? This forcible suggestion loses its power when applied to a case like this, "where a good portion of the land is cleared and in a state of cultivation." It is also urged that in Markham v. Hicks, 90 N. C. 204, it is said that "it is this estate in its entirety" which the creditor is not allowed to sell. A very cursory examination of that case will show that it refers, not to the manner of using the exempted land, but simply to the sale of what is called the "reversionary interest." Again, it is urged that a judgment creditor cannot bring an action of waste. No one pretends that he can, as he is neither a reversioner nor a remainder-man, but, having a "charge" upon the land, he has a right to invoke the aid of a court of equity in certain cases to prevent the impairment of his security. This is so well settled as to charges generally that it is unnecessary to cite in support of it the various works on equity jurisprudence. That equity has interfered to protect the lien of a judgment creditor will be seen by reference to Webb v. Boyle, 63 N. C. 271; High, Inj. § 252; and the case from Connecticut, (Camp v. Bates,) cited in the opinion of the court, by Justice MERRIMON. But it is said that Thompson, in his work on Homesteads, remarks (section 165) that "these questions have all, under various phases, addressed themselves to the courts. It would seem, upon principle, that they are questions with which the creditor can have nothing to do." What questions? A glance at the chapter (which is entitled "Of the estate or interest in lands and goods necessary to support an exemption") will show that the questions are whether a debtor can have his homestead assigned in equitable estates, for years, in remainder, etc., and yet this is cited as authority as to the manner in which the homestead shall be used when assigned. Equally inapplicable to the question before us is section 635 of the same work, which relates to the sale of the "reversion" only.

It is confidently asserted, however, that a homestead is a "determinable fee," and that the homesteader is not impeachable for waste, and therefore cannot be enjoined in a case like this. Even if the homestead were a "determinable fee," if it had a charge upon it, it would be as much subject to the supervision of a court of equity as if the charge were upon other estates, whether for years, for life, or in fee. So the question as to whether the homestead is a determinable fee has nothing whatever to do with the decision of this case; but the definition affords a striking illustration of the almost bewildering confusion of terms which has grown out of the word "homestead." Another illustration is presented by the use of the words "reversionary estate" when there can technically be no "reversion" in the case of a homestead, for the estate has never been changed. It is hard to understand how the words in the constitution to the effect that a certain parcel of land shall not be sold upon final process for a limited period can be made the basis upon which to erect estates and create reversions. These words in the constitution amount to nothing more or less than a stay of execution for the period mentioned. The "inadvertent" assumption that a new estate is conferred upon the judgment debtor is swept away by the convincing logic of BYNUM, J., in Bank v. Green, 78 N. C. 247, approved by the present Chief Justice in delivering the opinion in Markham v. Hicks, 90 N. C. 204 and Rankin v. Shaw, 94 N. C. 405. Judge BYNUM says that "the homestead has been called a determinable fee, but, as we have seen that no new estate has been conferred upon the owner, and no limitation upon his old estate imposed, it is obvious that it would be more correct to say that there is conferred upon him a determinable exemption from the payment of his debts in respect to the particular property allotted to him." Now, if the homestead provision confers no new estate upon the judgment debtor, but simply exempts it, not from a lien, but from sale upon final process for a limited period, why, I ask again, should the lien—the charge conferred by a docketed judgment—be alone excepted from the protective power of a court of equity? I am clearly of the opinion that there is nothing in the constitution or the laws which war-

Digitized by Google

rants such an exception. But, while I think that a judgment creditor in a proper case is entitled to this protection, I would by no means be understood as assenting to any inference which may be improperly made that the judgment debtor is to be assimilated, in respect to the use of the property, to tenants for life. In my opinion, he has a right to commit the most injurious acts of waste, and he is not to be molested so long as he leaves enough (though it be but the bare land) to satisfy the lien. Nay, he may even impair the security, if he does it in a prudent use of the property for the purposes of which it is alone susceptible of being used,—such as the use of mining land, shingle swamps, and land valuable only for timber. I think the principles we have laid down are applicable to the present case. Here it is admitted that the security will be impaired; that the land is not alone valuable for timber, but that a good portion of it is cleared, and in a state of cultivation; and that the defendant has sold the timber trees, and is about to remove them.

Ordinarily, it is necessary that the facts should be set out in order that the court may see whether irreparable injury will be done. This, I conceive, is wholly unnecessary where the allegation of irreparable injury is, as in this case, admitted. In the administration of this preventive remedy of the court, each case must be governed, of course, by its peculiar circumstances; and it is therefore difficult to lay down any general rule of application. I think the facts in this case entitle the plaintiffs to the injunction as prayed for.

AVERY, J., (*dissenting.*) I regret that after patient consideration of the argument and investigation of every phase of the subject I feel constrained to dissent. My conclusions are embodied in two propositions, each of which I shall discuss as briefly as the importance of the question involved will permit.

1. If the homestead is to be treated as an estate with all of the incident rights and liabilities on the part of the owner that the law attaches to other analogous estates, the owner is not impeachable for waste; and if a court can enjoin him from injury to the land at all, it can interfere only when the waste is wanton, malicious, or extravagant, and not simply because in the enjoyment of the profits he may be doing permanent injury to the land, and thereby lessening the security of the judgment creditor. The homestead right was ingrafted on our system of laws in North Carolina to meet a distressing emergency. Our people were overwhelmed with debt, incurred before their slaves were emancipated, and their stocks had become worthless. The liability remained when their property was destroyed. The unconstitutional stay laws, and the attempt to make the homestead provision retroactive, sufficiently evince the fact that the law-makers were exponents of a popular sentiment, which demanded a temporary suspension of sales, and a present and future provision of a home, whose boundary line those armed with execution or other process for the collection, or even security, of debts could never cross. When the meaning of the framers of our constitution of 1868 may be left in doubt by reason of any ambiguity of the terms in which it is expressed, we are at liberty to consider the circumstances that surrounded them in interpreting its provisions. This principle of construction will apply with equal force however we may settle the vexed question whether the homestead is to be considered as an estate or only a personal right of exemption attaching to the land first when the creditor is armed with authority to subject it to sale. Upon this point opinions of this court, delivered at different times, are apparently conflicting. In Poe v. Hardie, 65 N. C. 447, the court say: "The estate in the homestead, as created by the constitution, is a determinable fee, and the tenant was not 'impeachable for waste,' even before the passage of the act above referred to, (the act of 1870, forbidding sale of the reversionary interest till the termination of the homestead right.) That act was intended to protect the owner of a homestead from any vexatious litigation which might be instituted by the purchaser of a reversionary interest." In Bank v. Green, 78 N. C. 247, it is said: "The homestead has been called a determinable fee; but, as we have seen that no new estate has been conferred upon the owner, and no limitation upon his old estate imposed, it is obvious that it would be more correct to say that there is conferred upon him a determinable exemption from the payment of his debts in respect to the particular property allotted to him." In Littlejohn v. Egerton, 77 N. C. 379, Chief Justice PEARSON, for the court, says: "A condition is a quality annexed to land whereby an estate may be defeated. A homestead right is a quality annexed to land whereby an estate is exempted from sale under execution for debt." The laws enacted to make the provision of the constitution operative (Battle, Revisal, c. 55, §§ 26, 27) designate the interest after the termination of the life-estate as a reversionary interest. In Keener v. Goodson, 89 N. C. 273, it is said that the assignment of a homestead "has no other effect than to attach to his existing estate a quality of exemption from sale under execution." After a sale of the reversion, or a conveyance by the owner, with joinder of the wife, of an allotted homestead, the idea that there are two existing estates in the land is not unreasonable.

Prior to the passage of the act exempting the reversionary interest from sale there were doubtless many sales of the reversionary interest in the land, to take effect in enjoyment after the expiration of a life or lives in being, (the life of the husband, or the lives of the husband and wife,) and possibly 21 years. When our law-makers called the interests—that were

Digitized by Google

then being sold on the first Monday of every month at every court-house in the state—"reversionary interests," they certainly adopted a term that, according to its definition, more nearly described the interest that purchasers were acquiring than any other term known to the law. A "reversion is the remnant of an estate continuing in the grantor undisposed of after the grant of a particular interest. It differs from a remainder. It arises by act of law; a remainder by act of the parties." 2 Bl. Comm. 175. The act referred to proceeded upon the idea that the particular estate was dedicated to the use of the debtor and his family under the provisions of law, while the reversionary estate or interest remained in the debtor, subject to the lien of any judgment that might be docketed in the county where the land lies. This court approved of that view of the matter in holding that it is not necessary that the wife should join the husband in a conveyance of such reversionary interest. Jenkins v. Bobbitt, 77 N. C. 385. On the other hand, when the reversionary interest was sold before the act of 1870 was passed, an interest that had been carved out of the whole fee, and dedicated by law to the use of the family, remained unsold. It might continue during the life of a husband or the widowhood of his wife, and 21 years in some instances. Shall we call it a quality of exemption, when the husband and wife joined, with privy examination of the latter, in conveying all the interest they had power to convey in the husband's only tract of land, worth less than $1,000, and subject to the lien of a judgment? Justice ASHE says for this court, in Adrian v. Shaw, 82 N. C. 474, that their bargainee "acquired a good and indefeasible title for the life at least of Jackson, against the creditors of Jackson, notwithstanding he may have since removed from the state." The same case was before the court again, (84 N. C. 832,) when the court refused to overrule, and adhered thereby to the idea that the grantee of Jackson took a life-estate, as that was the only point involved in either appeal. When the owner sold the life-estate, as there decided, he still held subject to the lien of docketed judgments all of the fee-simple that remained after a life-estate and an interest was carved out of the whole estate by act of law and kept in the grantor, though he was trying to aliene the fee-simple. The estate remaining in Jackson fills exactly the definition of a reversion. It did remain in him subject to the lien, because the sale under execution without assignment of the homestead was void. Lambert v. Kinnery, 74 N. C. 348; Littlejohn v. Egerton, supra; Arnold v. Estis, 92 N. C. 162. It has been contended, not without reason therefore, that such an interest was a determinable fee, and (for the same reason that operated in the case of tenant in tail after possibility of issue extinct) because the tenant once had an estate of inheritance. 2 Bl. Comm. 124, 125, note 6.

If we construe the constitution as marking out two estates so soon as the land becomes liable to sale under a lien, the "homesteader" is not impeachable for waste on the one hand; and on the other the only adjudicated case outside of our own state, cited and relied on to sustain the opinion of the court in this case, is Camp v. Bates, 11 Conn. 51, and in that opinion, on page 57, Chief Justice WILLIAMS says: "Even a tenant in tail without impeachment of waste has been restrained from wanton, malicious, or extravagant waste;" and in support of that proposition cited four chancery cases decided in the English court,—Vane v. Barnard, 2 Vern. 739; Packington's Case, 3 Atk. 217; Strathmore v. Bowes, 2 Brown, Ch. 88; Chamberlyne v. Dummer, 3 Brown, Ch. 549. An examination of these authorities brings out the judicial history of the efforts to restrain tenants not impeachable, and those liable for waste, and shows how the principle stated in Camp v. Bates, and that announced by this court in Crawley v. Timberlake, 2 Ired. Eq. 460, was established. In the English and in the American courts it has been held that no tenant for life, not liable for waste, could be restrained by the courts at the instance of the remainder-man or reversioner, unless it were shown that the waste was wanton, malicious, or extravagant. In England the rule was held to apply where the life-tenant maliciously injured or destroyed houses or ornamental shade trees, or trees planted or left standing for shade along avenues or parks; but it was expressly held that such tenants, by virtue of their exemption from liability for waste, could cut *ad libitum* forest trees for timber, as will appear by reference to the cases cited *supra*. "A tenant for life without impeachment of waste may fell trees fit for the purposes of timber, though young, and not such as would be felled in a course of husband-like management of the estate, (Burges v. Lamb, 16 Ves. 174, 177;) but he will be restrained, though having the legal right so to do, from what has been termed malicious, extravagant, or humorsome waste; for instance, the total destruction of a wood or coppice. So he will be restrained from cutting down trees planted or left standing for ornament; * * * but not merely because they may be really ornamental;" 2 Spence Eq. Jur. 570–573; Williams v. Williams, 15 Ves. 427. This rule applied to tenants for life who held with an express grant in the deed of exemption from waste, and also to tenants in tail after possibility of issue extinct, or one who held a determinable fee, because the two last mentioned might have had an estate of inheritance. Bisp. Eq. § 434; Cooke v. Whaley, 1 Eq. Cas. Abr. 400; 3 Pom. Eq. Jur. § 1348, note 3. In Davis v. Gilliam, 5 Ired. Eq. 308, this court recognized the reason of the rule also in holding that "the husband was dispunishable for waste, because, while in possession, he was not tenant for life in his own right, but was seised with his wife in fee in her right." The ordinary life-tenant, liable for waste, is allowed without

Digitized by Google

restraint to clear as much of the timber land on his estate for cultivation as a prudent owner in fee-simple would, and sell the timber that grew on that part. Crawley v. Timberlake, and Davis v. Gilliam, supra. The rule laid down in the opinion of the court gives the defendant in this action harder measure than is meted out to an ordinary life-tenant, in confining his right to cutting trees "necessary for the reasonable use of the homestead property, for making repairs, necessary houses, fences, and the like." As has been well suggested by Justice DAVIS, it would be just and reasonable, now that timber trees are everywhere being converted into lumber for market, and so many new industries are springing up to consume the product from the saw-mills that are being planted in almost every forest, to allow even ordinary life-tenants more latitude in disposing of trees. If the owner of a homestead, however his right may be designated, is denied by the court the privilege of cutting $50 worth of timber from a homestead worth $900, even for the purpose of paying off a judgment for $50, then his condition would be better if the court would go further and appoint a receiver to sell the timber and apply the proceeds in discharge of the lien. Such a remedy would better accord with the idea that the defendant in this case is still the owner of an estate in fee-simple, and liable to a charge. It is more just and reasonable that the charge should be satisfied out of the proceeds of the sale of trees, than held till the expiration of the so-called "exemption," and then use to buy the land and trees *usque ad cælum*. The law, as applied in this case, calls the "homesteader" an "owner in fee," entitled to the privilege of exemption, but declares his home subject to a lien,—that is, a charge,—and operates so as to give the holder of the lien the power to prevent his selling his pine trees suitable for lumber, as any other tenant in fee could do. Truly it would seem that the constitution has promised bread, and the courts have given a stone, if this new departure in the way of constitutional construction has come to remain a permanent part of our law. The opinion of the courts sometimes seems to be predicated upon the idea of dealing with life-estates and remainders or reversions, and, again, with judgments, charges, and rights.

2. In order to meet every aspect of the argument, I arrive at a second proposition embodying, as I believe, the correct interpretation of article 10. If the homestead be not an estate, but a mere personal right of a land-owner to hold $1,000 in value of land, not liable to sale under execution for debt, still the constitution in express terms gives the further exclusive right of enjoying the rents and profits arising out of the homestead to the persons entitled to it, and thereby grants exemption from impeachment for waste, which carries with it a license not only to use the rents of the farming land, but to appropriate the products of the mines, and the proceeds of the sale of forest timber trees, taken from the whole homestead, as free from restraint or interference as when the fee-simple is held subject to no lien whatever. A review of article 10 of the constitution will show the strength of this position, if we will consider all of the sections that grant and define the right together as *in pari materia*. Section 2 gives the owner of land the power to select the location of the homestead on his own land, not to exceed in value $1,000, and declares it "exempt from sale under execution for debt or other final process," but does not, in terms, declare the duration of the exemption. We are left to sections 3 and 5 for further explanation. Section 3 provides that "the homestead, after the death of the owner thereof, shall be exempt from the payment of any debt during the minority of his children, or any one of them." Here, for the first time, we find the indirect declaration that the owner is to hold the homestead till his death, and then the time of exemption is to be extended during the minority of any child. Still there is no suggestion as to the nature of the dominion that is to be exercised over the territory from which the sheriff is expelled. When we reach section 5 we find, first, the exemption prolonged on certain conditions during the widowhood of the owner's wife, and then the definition of the extent, not only of her rights, but of those of her husband and children, in the enjoyment of the exempted land. Section 5 provides: "If the owner of a homestead die, leaving a widow, but no children, the same shall be exempt from the debts of the husband, and the rents and profits thereof shall inure to her benefit during her widowhood, unless she be the owner of a homestead in her own right." It will not be contended that the constitution should be construed to give the widow, while she remains single, any peculiar power over the land, or exclusive privilege in the enjoyment of it, not extended to the husband or infant child. Every rule of construction would lead us to consider the three sections as a whole, declaring, first, that there shall be an exempt estate, and where and how selected; and then, that it shall extend during the life of the owner, the minority of the children, and contingently during the widowhood of the wife; and, lastly, how the "rents" and "profits" shall be enjoyed. Both of these words are terms known to the law, have a legal meaning, and it must be understood that those who laid the foundation stones of our political edifice understood their legal significance, and intended that they should be interpreted accordingly. In Rapalje & Lawrence's Law Dictionary it is said: "In the law of real property, 'profits' is used in a special sense to denote a produce or part of the soil of land. Therefore, 'if a man seised of land in fee by his deed granteth to another the profit of those lands, to have and to hold to him and his heirs, and maketh livery *secundum formam chartæ*, the whole land itself doth pass, for what is the land but the profits

Digitized by Google

thereof; for thereby vesture, herbage, trees, mines, and all whatsoever parcel of that land doth pass.' Co. Litt. 4*b*." If the grant of the "profit" in land by the owner to another carried with it *ex vi termini* the trees on the land, why should the sovereign state, under which all the lands within its borders are holden, in conferring upon the land-owner the rights of exemption and enjoyment during such exemption in his land, be deemed not to have used "profits" in its apt legal sense, and to have granted for the time prescribed the unrestricted use of mines and timber trees thereon? To the same effect is Bouvier's definition: Under the term "profit" is comprehended "the produce of the soil, whether it arise above or below the surface, as herbage, wood, turf, coal, minerals, stones, also fish in a pond or running water." The damages that were recovered in an action against a disseisor for occupation from the disseisin till the recovery, were called "mesne profits," and the plaintiff in such action recovered not only a reasonable rent for agricultural products, but for timber trees cut down, and new mines opened and worked. Rents would have included the damage arising out of crops raised, but a broader generic term was needed, and hence the action was called one of trespass for "mesne (or intervening) profits." See Rapalje and Bouvier, supra, definition of mesne profits. If the sovereign state, in its organic law, has not invested every citizen who owns a homestead with the right to the untrammeled use of mines, timber, stone, and everything that might be used or consumed by an owner of a life-estate in England, conveyed to him coupled with exemption from waste, then it must be because the state has no power to grant the privilege, or because by a strained construction we distort the meaning of words that have had a known significance as far back as the time of Lord Coke.

I cannot conceive that this privilege of enjoying profits of every kind can be ruthlessly snatched from a grantee holding by virtue of the fundamental law from the sovereign state, under the specious pretext that he is lessening the security of a man who extended him credit with a knowledge of the constitution, and as much subject to its provisions as if they had been incorporated in the note given for his debt. Moreover, it will be observed that the personal property mentioned in the first section of article 10 is declared exempt from sale under execution or other final process, and the debtor's right to it depends entirely upon that declaration. Yet it is held that he has the unrestricted power to dispose of personal property assigned him, and to have other articles exempted in a reassignment made to him, even though the judgment creditor's security may be diminished. Durham v. Speeke, 82 N. C. 87. This section is mentioned to show that the construction given it by this court is in harmony with the idea that the purpose of the framers of the constitution was not only to exempt the property, real and personal, assigned for the debtor's family, from seizure, levy, or sale, but from interference or control on the part of the creditor. In Bank v. Green, 78 N. C. 247, Justice BYNUM, for the court, speaking of article 10 and the subsidiary statutes, says: "Their legal effect is simply to protect the occupant in the enjoyment of the land set apart as a homestead, unmolested by his creditors." Chief Justice SMITH, following the opinion, in Markham v. Hicks, 90 N. C. 204, states the rule still more forcibly: "They [the constitution and statutes in reference to exemption] place the property, when ascertained and set apart, outside of that which the creditor may seize and appropriate to his judgment, as if, for the time, the debtor did not own it."

But it is contended that the plain letter of the constitution must be disregarded, the spirit that inspired the convention ignored, and the rights of one holding this favored family franchise from the state determined by analogy to the ruling of this court, in a case where the debtor belonged to a class expressly excluded from claiming a homestead in their lands. In McKeithan v. Terry, 64 N. C. 25, this court held that where a *fi. fa.* was issued and levied on land in December, 1867, it was liable to sale on a *vend. ex.* issued on the judgment in 1869, discharged of any homestead right, because by the levy a specific lien had been acquired. In the case of Webb v. Boyle, 63 N. C. 271, which is the sole reliance of the court, among our own decisions, to sustain the position that the owner in fee-simple of land can be restrained in cutting timber by a judgment creditor, an execution had been issued, and a levy made upon the land in 1861, and again in 1867, when the creditor was prevented by military orders and stay laws from selling it. Boyle, the debtor, therefore had no right to a homestead in his land. If his land had been subject to the homestead provisions of the constitution, Justice DICK, who subsequently delivered also the opinion of the court in Poe v. Hardie, would have adverted to the fact that an occupant holding without impeachment for waste was being restrained from any destruction of timber, not wanton, malicious, or extravagant. Conceding the principle contended for as established by the case of Webb v. Boyle, it was applied there to land in which the owner could not claim a homestead, and it is therefore distinguishable from this case. But it may be well to note the fact that of the authorities cited in Webb v. Boyle not one relates in the remotest degree to or tends to establish the new doctrine that a judgment creditor can in any case enjoin the debtor from committing ordinary waste, such as cutting or disposing of pine timber trees on his land. The section (455) in High on Injunction, cited in support of the decision in this case, is based entirely upon Webb v. Boyle,—is, in effect, a quotation from it. I have shown that it is not in point, if adhered to by this court as correct.

Digitized by Google

But it is a significant fact that so careful and discriminating a writer as Mr. Pomeroy has in his work on Equity Jurisprudence neither cited Webb v. Boyle, nor noticed the extreme principle enunciated in it. In a somewhat extended examination of authorities, I have failed to find the case cited with approval by any other court or writer, or alluded to, except in the short section of High on Injunction, embodying a syllabus of the opinion, inserted in his work without comment, as we infer, to show the *ultima thule* to which a court stretched its equitable jurisdiction at the close of a gigantic and exciting civil war, when the lines that define the powers and duties of courts in the protection of private rights were so far obscured that gross usurpations of authority were recognized as lawful by legislatures, and sanctioned by the judicial departments of state governments. It would seem from an examination of sections 421 and 431 of High on Injunction, that the author does not in fact concur in the doctrine laid down in Webb v. Boyle. While the syllabus in Camp v. Bates is misleading, when we examine the facts, we find that the court granted an order to restrain an insolvent debtor, at the instance of a creditor who had levied an attachment on his land, upon the allegation that the defendant had committed waste "by cutting down and carrying away the young wood and timber growing thereon; that he threatens to cut down, carry away, and convert to his own use all the wood and timber and fruit trees, which would render it of little value or security to the plaintiff; and that the plaintiff was apprehensive this would be done before he could obtain judgment and execution in said suit." The learned chief justice rests his decision entirely upon the nature of the threatened waste when he says: "The possessor therefore has always been suffered to remain unmolested as long as he contented himself with ordinary returns. This seems necessary, that the property may not be abandoned; but it can confer no right to do such acts as are charged in this bill,—acts of wanton, malicious waste." It is not contended that where the defendant made a contract, such as thousands of citizens of the state have made within a recent period, to sell the "timber trees," (understood everywhere to mean the trees large enough to be valuable for the purpose of sawing into lumber,) that he thereby threatened a wanton or malicious destruction, like one who cuts down fruit trees. Nor can it be successfully maintained, on reason or authority, that the judgment debtor, with right of homestead in his land, is no more protected against the interference of the judgment creditor than the mortgagor is against restraint on complaint of the mortgagee for diminishing his security. The mortgagor is only a tenant at will of the mortgagee as to the mortgaged land, while the mortgagee has the right to take possession, if his debt is not paid, and receive the rents of the land,—is, really, in law, the owner of the land. The defendant in this case is the owner in fee of a tract of land worth less than $1,000. The creditor has no estate or right in the land,—only a lien on it as a security for his debt. The laws of North Carolina do not recognize in the judgment creditor one who has a charge on the land. He has no power to touch an ear of corn or a blade of grass raised thereon, and he is as much a trespasser, if he attempts to exercise ownership, as if he held no claim against the debtor. By what arbitrary rule, then, can we defy the constitution, and declare the homestead right one of no higher dignity than a tenancy at will under the creditor? The words "charge upon land" are used in a general sense to mean any claim to satisfy which it is liable to be sold. See Rap. & L. Law Dict. And a homestead may eventually be sold to satisfy a judgment docketed in the county.

The case of Gordon v. Lowther, 75 N. C. 193, cited in the opinion to sustain the power of the court to grant injunction, is one in which Justice SETTLE, for the court, justifies the granting of injunction against the defendant on the ground that she was "a tenant for life with contingent remainder in fee," etc. But it is contended that the defendant in this case must be treated as the owner in fee. If so, I maintain that the sovereign has granted him an exemption from impeachment for waste, and a consequent exemption from injunction against any but wanton, malicious, or extravagant waste, as distinctly as the exemption from sale under execution for debt as to his land, and for the same period. If an estate of lesser dignity is marked out by the constitution as the measure of the debtor's right when the land becomes liable to a lien, then I contend that the estate is a determinable fee, the holder of which would be exempt from impeachment for waste by the common law, as well as by the express grant of the profits in the constitution, and, according to all authorities in England and America, would not be subject to restraint by a court of chancery except for wanton, malicious, or extravagant waste.

Braswell v. Morehead, Busb. Eq. 26, is the only remaining authority relied on to establish the plaintiff's right to extraordinary relief. The principle decided there was that one holding a contingent estate by executory devise in slaves was entitled to an order restraining the guardian of an infant, whose right to the absolute property in said slaves would accrue on the contingency that she should attain the age of 21, from removing said slaves from the state till the infant should arrive at the said age. I cannot see, therefore, how the right of the plaintiff to the injunction is sustained by that authority.

I am not disposed to doubt that a docketed judgment creates a lien upon the land of the debtor in the county, when it is entered, though the statute does not purport to convert that lien into a charge, but merely defines the rights of the creditor as to priority. In McKeithan v. Terry, supra, the court de-

Digitized by Google

clared that an actual levy before 1868 created a specific lien which was superior to the homestead right, while it was then held on the contrary that a judgment docketed in the county did not defeat the right. We do not deem it material to determine whether a docketed judgment, obtained on a contract made since the homestead provision was enacted in 1868, has the force of a levy. The force of a levy is not sufficient to destroy a right of exemption from restraint or accountability for the enjoyment of the profits of a homestead short of wanton or malicious destruction, derived directly or by implication from the constitution. Moreover, it is settled that, even where the judgment has been rendered on a debt contracted prior to the passage of the homestead law, the sheriff is required to lay off the homestead in the judgment debtor's land, and levy execution on the excess. A judgment upon an old debt, therefore, does not operate as a specific lien, and defeat the homestead right, if the excess sells for a sum sufficient to satisfy the debt. Arnold v. Estis, supra. The effect of the ruling of this court is either to treat the owner of a homestead as a life-tenant, or to invite thousands of judgment creditors to establish a systematic espionage upon the debtors, and bring them into court to determine in the future, and as cases arise, when the "homesteader" shall cross the line of accountability in the exercise of dominion over his land. Uncertainty as to rights in property is next to a want of security in its detrimental effects upon the public, and this fact furnishes another reason for adhering to the well-marked line, and holding that the "homesteader" could only be restrained from wanton or malicious waste, while the ordinary life-tenant is entitled to destroy no more timber upon the land outside of that necessary for fire-wood and repairs of house and fencing than a prudent owner in fee-simple, following the customs of the neighborhood, and in the exercise of good husbandry, would use.

SMITH, C. J., (*concurring.*) It is with some reluctance, after a full discussion in the separate opposing opinions of the other members of the divided court, that I feel constrained to enter into the controversy and express my concurrence in the reasoning and the results of those which thereby, in this diversity of views, become the rulings, and constitute the adjudication in the cause. This duty, undertaken, not because the prevailing opinions are not sufficiently self-vindicated and require other and further supporting argument, becomes imperative in view of the tendency of the dissents, one of which comes from a thorough and elaborate examination of the authorities, reaching back to the introduction of the new subject of land exemption from final process for debt, since a prolific source of controversy, to unsettle adjudications, and to impair confidence in their integrity and permanence, which have been considered as a final determination of the questions presented and decided. I can scarcely deem any evil in the administration of judicial functions in declaring and defining the law—and especially that in ascertaining the meaning of constitutional and statutory legislation in its effect upon existing law—greater than that which springs from conflicting decisions, and a want of regard shown in the latter in departing from the rulings made in those that precede, thus rendering personal and property rights acquired insecure and uncertain. Except in decisions palpably erroneous, and, left untouched, leading to serious and disastrous consequences, as well as disturbing the equilibrium of the system, the maxim *stare decisis* imposes an obligation to adhere to former adjudications. When the attention of the court was early directed to a consideration of the effect and extent of the changes produced by the introduction into the organic law of the exemption of the debtor's real estate, of limited value, and for a limited time, from the reach of final process for debt, analogies were sought in the principles of the common law that apply to a divided estate—one present and one future, and perhaps contingent—and the respective rights of each to the land, with a view of deducing from them some rule applicable to the nondescript designated as a "homestead." It was called "a determinable fee," "a quality annexed to land whereby the estate is exempted from sale under execution;" and the interest beyond the period of exemption, "a reversion,"—terms appropriate to estates separated into parts owned by different persons, but wholly unsuited to a mere freedom from liability for sale at the instance of a creditor. The dissenting opinion seems to go back and revive the use of these obsolete terms, and to derive from them rules that govern the relations of owners of separate estates by the common law in respect to their interests in the land, with a view to their adaptation to the homestead. It was useless to do this in support of the argument that denies any relief under the circumstances of the present case to the restrained creditor, for if the debtor's estate undergoes no change by reason of the exemption and the assignment of its boundaries,—as declared in the case of Bank v. Green, decided in 1878, and since uniformly upheld,—the debtor, having, as before, the same full and unabridged estate, could exercise at least as much, if not more, control over the land taken, if it had been lessened, as indicated by the inappropriate terms to which reference has already been made. It was not necessary for the purpose of the argument, therefore, to recall the cases anterior to that decided in 1878, which is perspicuous and clear as an exposition of the constitution, and, in the language of Brother SHEPHERD, has "swept away by convincing logic" the confused and inconsistent interpretations put upon the constitution as implied in the employment of terms drawn

Digitized by Google

from the common law in causes previously before the court.

The true mode of arriving at the meaning of the provisions relating to the exemption of land as a homestead is to look at its terms and the purpose to be attained. The primary object was to secure a home to the unfortunate and insolvent debtor and his family, and to this end the prohibitory mandate is addressed to the creditor and the officer of the law, acting in his behalf, forbidding the sale of so much of the land as is exempted, either under execution or other final process for the enforcement of a debt, except it be for taxes or the purchase money due for the land itself thus exempt. This is for the relief of the debtor, and to prevent the expulsion of himself and family from their home, or such land as he may choose to make his home on. It secures the home or "homestead," which designates the exempt land on which he has or may make his home, to his and their use for its full and undisturbed enjoyment for the time being, with all the privileges incident to such enjoyment, as a prudent and unfettered owner would use it in expectation of its indefinite continuance as his own home. This secures all the beneficent purposes of the law, and all it is intended to accomplish. I cannot for one moment assent to the suggestion that the expression found in section 5 that gives the surviving widow, when a debtor dies childless, "the rents and profits thereof" during widowhood, enlarges the estate in her beyond that which her husband had, or that these words, which define her interest in the land when the estate, if an inheritance, has descended to heirs, and in no sense vests in her unless under a claim of dower, do more than define her rights therein. The purpose in their use is to bestow an enjoyment and use of the land commensurate with that of her deceased husband, when undisposed of by their joint deed of alienation. No argument which interprets the words as equivalent to a conveyance of the land for her life or widowhood can derive any force from their effect in a deed from one person to another. The expression means to confer upon her the right to appropriate to her own use the accruing profits and fruits of the possession and use, leaving the descended inheritance in those to whom the law gives it when undevised. It rather furnishes a reason for circumscribing the enjoyment of the owner in respect to creditors whose rights are in abeyance.

It is conceded in both dissenting opinions that the court might intervene, and restrain the owner and occupant of the exempt land from committing wanton and malicious waste when endangering the judgment debt, and thus they admit the interest of the creditor who has a docketed judgment in the land under its lien sufficient to authorize him to ask the exercise of an interposing power to prevent such waste as this, and this would be an interrupted possession of the debtor, or rather the putting a restriction upon the use he is making of it. But this is not a voluntary interference with the rightful and legitimate enjoyment secured to him. It is brought on by his own improper and unlawful use of the land, against which the law does not give him protection; and it follows that he is not in the same position as to the property, though full owner, as he would be were there no debt or no judgment lien to secure it. It thus becomes a question as to how far and when the equitable power of the court will be put forth to restrain the defendant from acts that are not done in reasonable and full enjoyment of the homestead, but from spoliation, and to convert the substance into money at the debtor's absolute disposal, and endangering the debt itself. It seems to me plain the limit is properly fixed in the opinions with which this is in harmony; and if the exempt land consists entirely or largely of forest trees, and valuable only in being worked into lumber, a right to cut down for the purpose of use or sale is possessed to a reasonable extent, as would be the working of mines by the owner; because in such case there would otherwise be no means of enjoyment, or not a full enjoyment, of the land.

But it must not be forgotten that creditors have some rights that ought not to be lost sight of and disregarded in giving efficacy to these provisions in behalf of the debtors, nor are they, in my view of the law. The statute in express terms gives the lien to the docketed judgment by the amendatory act of 1885, c. 359, changing the law as it previously existed in Code, § 501, subsec. 4, as interpreted in Markham v. Hicks, supra. Rankin v. Shaw, 94 N. C. 405. This enactment not only gives the lien, but it arrests the running of the statute of limitations during the continuance of the exemption while the creditor is disabled from enforcing it. This lien is created by the act of docketing, and *eo instanti* attaches to the debtor's estate in the land, and there is nothing else to which it can adhere; but its enforcement is deferred by the law until the exemption expires. There is no undefined shadowy interest springing into existence in the future, to which the lien then attaches itself, meanwhile awaiting its advent, but it fastens at once upon the estate of the debtor in the land, to be enforced at a future uncertain time. This gives the creditor a present interest in the land as a security for his debt, and leaves the debtor free to do whatever an owner not in debt by docketed judgment could do with his own property, with the single proviso that he must not carry his spoliations, not necessary to the full enjoyment of the premises, so far as to impair the security they afford to his debt. If the legitimate use of the land impairs the value of the security, or if a reasonable portion of that which could only be used and enjoyed by a destruction be taken and appropriated, as in a forest growth or mineral bed, thus making

Digitized by Google

a partial denudation, the creditor must submit; but when such is not necessary to the enjoyment of the land as a whole, the creditor ought not to be, nor in my opinion is he, left remediless. Surely when the sovereign —the state—says to the creditor: "You shall not take the home of your debtor, and put him and his family out into the world, houseless and penniless, and you must therefore wait for your debt; but you may secure it by prosecuting your demand to judgment, and enforce payment hereafter,"—it did not mean to say to him: "Your debtor may use the property in any way he may deem most to his own advantage in the mean time; he may remove the houses; he may destroy all the timber, and convert it to his own use, leaving the premises, it may be, well-nigh worthless; and you cannot be allowed to complain, unless he was prompted by mere wantonness, or a malicious motive, and did not do the act for personal advantage only." It is said the lien gives no interest in the land to be protected by the court. It is not necessary to review the authorities to the contrary, cited in the opinion of Brother MERRIMON, sharply criticised in the dissenting opinion, but whose authority remains in my view unshaken, of which I will only say that of Webb v. Boyle, 68 N. C. 271, is directly in point, and conclusive of the question of right; for there can be no stronger claim for protection to a creditor, who has obtained a lien by the levy of an execution on the land, than to the creditor to whom the law gives it in a docketed judgment. The correctness of the rule admits of illustration in the case of land devised to one charged with a legacy in favor of another or an annuity payable at intervals. Can the devisee commit waste *ad libitum*, when for his own benefit, without incurring a liability to be restrained, and thus be allowed to impair the value of the property in a degree rendering the security insufficient or precarious? and must the legatee, with no power to interfere, submit in silence to the wrong, and lose the annuity, or a part of it, because of the action of the devisee? and, if the annuitant has a *status* in court, and may ask its assistance, may not the creditor do so under like circumstances? Is there any essential difference in the cases?

It is intimated that the construction insisted on, which prevents a sale of timber trees, though unnecessary to a full enjoyment of the farm, would be a promise in the constitution to give bread, while the court would be, by construction, giving a stone, to the helpless insolvent. But the case may wear another and quite different aspect if the dissenting views obtain; and it could be as well said that the constitution gives bread to the debtor, a stone to the creditor. It does neither. It undertakes to do justly by both, and so to adjust their relations that while one retains his home for a time, and wife and infant children are cared for, the creditor is made meanwhile to wait with the security the law gives him, and permitted to proceed to collect when the time expires. This is the administration of impartial justice, and there ought to be no conflict of interest arising therefrom. If the creditor may harass the debtor, (and this he cannot do when the latter keeps within the prescribed limits in the use of the land,) so may the possession of the homestead, carrying with it a right to destroy, as well as enjoy, its substance, if for his supposed benefit, and not wanton or malicious, enable the debtor to wrong the creditor, if so disposed to act. It is said in the dissenting opinion that the ruling of the court will tend to unite thousands of judgment creditors to establish a system of espionage upon the debtors to determine in the future, and as cases arise, when the homesteader shall cross the line of accountability in the exercise of dominion over his land. The same disastrous consequences might follow the recognition of the rule that admits the creditor's interference in any case, even to put a stop to wanton or malicious waste, the only escape from which is in denying the right to interfere in any case. If the only limitation put upon the debtor in his possession and use of the premises be that his waste and spoliation will be only stopped when they proceed from a wanton or malicious spirit, then may he leave to his creditors but a fleshless carcass, stripped of what gave it value, to be subjected to his debt. This cannot be the intent of the law. What difference can it make to the creditor in what spirit, or for what purpose, the despoiling may be done? It is the needless waste and despoiling of which he complains,—the fact of impaired value of the land to his hurt, — and this not less when done for a personal benefit than if prompted by malice or wanton. If the creditor is to suffer loss in the impaired value of the security, resulting from the acts of the debtor done in the furtherance of his supposed personal interest, yet needless to the full enjoyment and use of the premises as a present and protected home, what matters it to the former that it is not from wantonness nor the promptings of ill-will? The injury and damage are the same to the creditor, and it is against these that he is enabled to be protected, if protected at all. The rule that marks and defines the rights of parties during this relation in respect to the property is considerately and equitably laid down in the opinion of the majority of the court, and, passing between extremes, adapted to secure repose in the preservation of the rights of each.

Some criticism—in my opinion not merited—is made upon the case of Gordon v. Lowther, 75 N. C. 193, of which it is only necessary to say that, as a correct assertion of the law, it has been approved and followed in a case decided but a year ago. Cowand v. Meyers, 99 N. C. 198, 6 S. E. Rep. 82.

But if there were no direct authority to be found, the right to be protected against

Digitized by Google

the lawless and injurious misconduct of one possessed of a present estate by one who has a remote interest therein, is clearly and distinctly recognized as an important function of a court of equity, interposing to prevent a wrong for which the strict rules of law afford no redress, and the principle has been so uniformly declared that no references are needed in its support. The idea that this concession will warrant the appointment of a receiver, and take the homestead away from the occupant, finds no support in the doctrine of interference to prevent abuse of the premises, for the debtor has the right to the occupancy and enjoyment of his secured home, with all its proper incidents, and is restrained from going beyond the assigned limits, nothing more; and precisely the same difficulty will be encountered when it is sought to confine him within the limits fixed by the opposing view. In either case it is simply a restraint against unauthorized misuse. It is a source of deep regret that the divergent views entertained by my brethren upon the point discussed could not be brought in harmony, tending, as they do, to impair confidence in the soundness and permanence of the decisions of the court. So seriously has this been felt that it has been thought and suggested that it would be better, to avoid such injurious consequences, that no dissenting opinions be filed. Without concurring in this, it is of the highest importance that the court of last resort, whenever practicable without the surrender of strong convictions, should arrive at a common conclusion in declaring the law.

(103 N. C. 296)

FLAUM v. WALLACE *et al.*

(*Supreme Court of North Carolina.* April 29, 1889.)

HUSBAND AND WIFE—CONTRACTS—EVIDENCE.

1. A married woman, with her husband's written consent, (which by Code N. C. § 1826, is required, with certain exceptions, to contracts affecting her property,) may bind her statutory personal separate estate by her engagements in the nature of executory contracts expressly charged thereon in the instrument creating the liability, though the consideration is not for the benefit of herself or her estate.[1]

2. Plaintiff and defendants agreed in writing that defendants should retain certain money of plaintiff deposited with them as security for the price of goods sold to another. Afterwards defendants gave their note to plaintiff for an amount equal to that of the deposit. In an action on the note, *held*, that testimony that the note was intended merely as evidence of the deposit, and that there was no other consideration, was admissible.

3. It was proper to refuse to charge that the execution of the note was a waiver of the lien on the deposit.

Appeal from superior court, Iredell county; BROWN, Judge.

[1] Concerning the power of married women to contract under the various "married women's acts," see Jones v. Holt, (N. H.) 15 Atl. Rep. 214, and note; Greig v. Smith, (S. C.) 7 S. E. Rep. 610, and note; Speier v. Opfer, (Mich.) 40 N. W. Rep. 909, and note; Tribble v. Poore, (S. C.) 8 S. E. Rep. 541, and note; Livingston v. Shingler, Id. 842, and note.

Action by Anna Flaum against Wallace Bros. on defendants' promissory note to plaintiff, dated March 5, 1886, for $540.88. The execution of the note was admitted, and there was no evidence that plaintiff, who was married, was a free trader. Defendants relied on the following instrument: "We, Wallace Brothers, have this, the third day of March, sold to Flaum Brothers, of Hickory, N. C., the goods bought of A. Flaum, February 22, 1886, for the amount of A. Flaum's indebtedness to us, $996.25, on 12 months' time, at eight per cent. interest from date. Flaum Brothers are to give us a deed of trust on entire stock, which is to be recorded. The said A. Flaum agrees to indorse note, if required. If within or at the expiration of the 12 months the above amount shall have been settled in full, then we are to allow A. Flaum to draw the money she has now on deposit with us, if she desires to invest in real estate, which real estate, if bought, the said A. Flaum agrees to convey to us in some way as a security against whatever Flaum Brothers may owe us otherwise than for real estate purchases; the said amount to remain in our hands as security or collateral, unless Flaum Brothers shall have reduced their account with us to $750.00. Then the said A. Flaum may withdraw amount at pleasure. In testimony whereof," etc. The instrument was signed and sealed by A. Flaum, Julius Flaum, and Wallace Bros. Defendants' testimony, delivered for the most part by defendant William Wallace, tended to show that at the time the instrument was executed they had in their hands, as a general deposit, $540.88, belonging to the plaintiff; that, though the note sued on was made a day or two after the above instrument, it was intended simply as an evidence of said deposit, and this was its only consideration; and that the deposit was the subject of the agreement set forth in the instrument. It was also in evidence that Flaum Bros., the sons of plaintiff, obtained about $2,400 worth of goods, including the $996.25 stated in the instrument, on the faith of the agreement. The evidence was received over plaintiff's objection. Plaintiff asked the court to charge, in effect, that, the deposit having been pledged, the execution of the note sued on was a waiver of the lien conferred by the instrument; and contended that, plaintiff being a married woman, the instrument was not binding on her. The court held otherwise. Verdict and judgment for defendants, and plaintiff appeals.

Code N. C. § 1826, provides that "no woman, during her coverture, shall be capable of making any contract to affect her real or personal estate, except for her necessary personal expenses, or for the support of the family, or such as may be necessary in order to pay her debts existing before marriage, without the written consent of her husband, unless she be a free trader, as hereinafter allowed." By section 1828, a free trader is "authorized to contract and deal as if she

Digitized by Google

were a *feme sole.*" Sections 1831, 1832, 1835, 1836, make provision for cases of women living separate from or abandoned by their husbands, and of idiocy and insanity of the husband, and also provide for contracts between husband and wife.

D. M. Furches, for appellant. *W. M. Robbins*, for appellees.

SHEPHERD, J. For the first time, we believe, in this state, is the important question presented whether a married woman may, with the written consent of her husband, expressly charge her statutory separate estate by an engagement in the nature of an executory contract, where the consideration is not for her benefit or for the benefit of her estate. As the writing relied upon by the defendants in this case relates only to money, our decision is applicable to the separate personal estate alone. It is well established, except in the cases mentioned in Code, §§ 1828, 1831, 1832, 1835, 1836, that "at law a *feme covert* is incapable of making a contract of any sort, and any attempt of hers to do so is not simply voidable, but absolutely void. If, however, she be possessed of separate property, a court of equity will so far recognize her agreement as to make it a charge thereon. But, even in that case and in that court, her contract has no force whatever as a personal obligation or undertaking on her part. Nor was there any change wrought in this particular by the alterations made in our court system under the constitution of 1868, or by the adoption of the statute known as the 'Married Women's Act.' It was in reference to these very alterations and the effect of the statute that the court declared in Pippen v. Wesson, 74 N. C. 437, and Huntley v. Whitner, 77 N. C. 392, that no deviation from the common law had been produced thereby, as respects either the power of a *feme covert* to contract, in the nature of her contract, or the remedy to enforce it; that, as a contract merely, her promise is still as void as it ever was, with no power in any court to proceed to judgment against her *in personam.*" Dougherty v. Sprinkle, 88 N. C. 300. The limits imposed by the constitution and statute show clearly, says RODMAN, J., in Pippen v. Wesson, supra, "that the separate estate given [by the constitution] was such as it had previously been defined to be, to which neither an absolute power of disposition, nor the general power to contract, were necessary incidents. The statute was intended to take the place of a deed of settlement, and must be construed as such deeds had been, as conferring on married women no powers beyond those expressly given or implied. * * * The draughtsman evidently had in mind the existing law, as above stated, that no married woman could make any personal contract, but only one to affect or charge separate estate; and the object was to require the consent of the husband in lieu of the consent of the trustee, which the law required when the separate estate was created by a deed of settlement. The meaning was not that a married woman may make contracts, which by existing law she had no power to make, but that she shall not make such contracts as by existing law she had power to make without the consent of her husband. The intent was not to enlarge her special power of contracting into a general power, but to abridge the special power, by requiring the husband's consent."

This restrictive interpretation of the constitution and statute, and the assimilation of the statutory to the equitable separate estate, in respect to the incurring of liabilities and their enforcement, have been too long recognized by our decisions to be now regarded as open questions. Whatever doubt may have existed as to the correctness of this construction, it is well sustained by the weight of American authority. Bisp. Eq. § 103; 2 Bish. Mar. Wom. 211; 3 Pom. Eq. Jur. § 1098; and many other authorities upon the subject. The principles declared in Pippen v. Wesson, supra, and approved by the court in Dougherty v. Sprinkle, supra, establish the proposition that wherever a *feme covert*, under the former law, in the absence of any special provisions in the deed of settlement, could, with the consent of her trustee, bind her equitable estate, she may now, with the written consent of her husband, bind her statutory separate estate. Where the case falls within the exceptions mentioned in the Code, § 1826, the consent of the husband is not required.

This leads us, therefore, to the consideration of the married woman's capacity to charge, and the manner in which she may charge, her separate estate, where there is no specific provision in the deed of settlement. Mr. Bishop (volume 1, § 847,) well says that "since the confusion of tongues at the tower of Babel, there has been nothing more noteworthy in the same line than the discordant and ever-shifting utterances of the judicial mind on the subject. * * * True, there has been sometimes a language which, though limited in its sphere, was tolerably plain, but, no sooner was the language in the way of becoming understood, than lo! some conquering power of another sort came in, and all was confusion once more." It would be unprofitable, for the purpose of this discussion, to trace the history of judicial decision in England upon this subject. Still less beneficial would it be to attempt to reconcile the conflicting decisions of the American courts. It is but just, however, to remark that, as many of these decisions are based upon dissimilar statutory provisions, their inconsistencies as to general principles are often more apparent than real. MANLY, J., in Knox v Jordan, 5 Jones, Eq. 175, says that "this subject has undergone much discussion, and has been variously settled elsewhere, but in North Carolina it is still considered an unsettled question in many respects. No case has yet gone to the extent of sanctioning the doctrine that, as to the separate property, the married woman is regarded as a *feme sole* in all respects. This

Digitized by Google

seems to be the English doctrine. * * * As we have said, however, we recognize as settled law the principle upon which the case of Frazier v. Brownlow, 3 Ired. Eq. 237, stands, viz., that a wife may, when not restricted by the deed of settlement, with the concurrence of the trustee, specifically charge her separate estate with her contracts and engagements. She may incumber expressly, but not by implication." The implication spoken of by the learned judge means that which, according to the English doctrine, arose simply from the mere fact of contracting a debt; the theory being that, inasmuch as she could make no personal contract, it logically followed that she must have intended to contract with reference to her separate estate. "The words 'not by implication,' though found in the decisions, are not to be understood in the strictest sense, as excluding necessary implications, (Withers v. Sparrow, 66 N. C. 129,) arising out of the nature or consideration of the contract, showing that it was for her benefit." Pippen v. Wesson, supra. So then it was settled that, where there was no such "necessary implication," in order to bind the estate the debt must have been expressly charged upon it.

This brings us to the important question which was left open by Judge RODMAN in Pippen v. Wesson. He says: "We put our decision on the ground that a married woman has no power to contract a personal debt, or to enter into any executory contract, even with the written consent of her husband, unless her separate estate is charged with it, either expressly or by necessary implication, arising out of the nature or consideration of the contract, showing that it was for her benefit. Whether the contract would be good if it did expressly charge the separate estate, but was not for the wife's benefit, it is unnecessary to say." Upon this point we have no direct decision, but there are *dicta* on both sides. In Withers v. Sparrow, supra, it is said that there is now no reason why the English doctrine should not prevail. On the other hand, in Dougherty v. Sprinkle, supra, it is said that the consideration must be beneficial to the *feme covert*. The only question before the court was whether a justice of the peace had jurisdiction, and the remark was unnecessary to its determination. No authority is cited in support of the proposition. There is also a *dictum* in the same direction in Rountree v. Gay, 74 N. C. 447, decided at the same term when Pippen v. Wesson was before the court, the opinion being delivered by the same justice. There may be found in other cases general expressions of similar import, but an examination will disclose that they were unnecessary to the decision of the particular questions presented. To the same effect is the intimation of Mr. Malone in his valuable work on Real Property Trials. All of these intimations, it is conceived, were suggested by RODMAN, J., in Pippen v. Wesson; for none of the previous cases furnish any ground for such a proposition. The learned judge suggests (for it is but a suggestion) that, inasmuch as resort must be had to a court of equity to enforce the indebtedness, that court will not enforce it unless it was for the benefit of the married woman. No authority whatever from our decisions is cited, for none, we believe, can be found; but he relies upon Owens v. Dickenson, 1 Craig & P 48, and the leading American case of Yale v. Dederer, 18 N. Y. 265, 22 N. Y 450. We suppose that these cases were cited in support of the principle that, the contracts of a married woman being void, they could only be enforced in equity. So far from laying down the doctrine that the consideration must be "beneficial," they clearly establish the contrary. The English case did not involve the question, nor was it discussed, the consideration appearing to have been for the benefit of the *feme covert*; but Lord COTTENHAM takes occasion to approve of Lord THURLOW'S ruling in Hulme v. Tenant, 1 White & T. Lead. Cas. *481, where the doctrine is broadly laid down that a married woman can bind her separate estate by her general engagements, and that equity will enforce them. This jurisdiction by the courts of chancery was not exercised, we think, for the purpose of enforcing merely equitable claims against her, but to give the same effect to her general engagements, *quoad* the separate estate, as the law would have given had she been *feme sole*.

The other case referred to (Yale v Dederer) has been the subject of much comment, and occasionally severe criticism. The court held that, where the consideration was not for the benefit of the wife, the debt must be expressly charged upon her separate estate, and in the same instrument creating the obligation. There was much excitement in the legal mind both in New York and other states as to this departure from the English rule, and the case was three times before the court of appeals,—the first appeal having been decided in 1858, and the last, as far as we are informed, in 1877, after Pippen v. Wesson was decided. The defendant, Mrs. Dederer, executed a note as surety for her husband for the purchase of some cows, but she did not in the note expressly charge her separate estate. CHURCH, C. J., in 68 N. Y. 329, thus summarizes the questions involved and the points decided: "The first time it was decided that, in order for a married woman to charge her separate estate with a debt not contracted for the benefit of her estate, it was necessary that there should be evidence of an intention thus to charge it, and that a note or other obligation was not sufficient evidence. 18 N. Y 265. On the next trial it was found that the defendant did intend to charge her separate estate, and this court held that, when the obligation was in writing, such intention must be expressed in the instrument creating the obligation. 22 N. Y 450." "This," he says, "was the precise point decided when the case was last

Digitized by Google

before the court." He then affirms the previous ruling, to the effect, as stated in the syllabus, "that, in order to charge the estate of a married woman with a debt not contracted for the benefit of her separate estate, the intent to charge such estate, where the obligation is in writing, must be expressed in the instrument." It is difficult to conceive how such a decision is authority for holding that, when such a debt is expressly charged in writing upon her separate estate, it is not binding. Mr. Schouler (Dom. Rel. § 143) says: "The principle of the decision was this: That, in order to create a charge upon the separate estate of a married woman, the intention to do so must be declared in the very contract which is the foundation of the charge, or else the consideration must be obtained for the direct benefit of the estate itself. Later New York decisions follow the rule of this case, and require a distinct written obligation to bind the wife where the debt is not contracted for the direct benefit of the estate." In Insurance Co. v. Babcock, 42 N. Y. 613, the wife indorsed as surety the husband's promissory note, as follows: "For value received, I hereby charge my individual property with the payment of this note. [Signed] ARMINIA BABCOCK." The court held that this was a charge upon the separate estate, and Yale v. Dederer was cited as an authority in support of the decision. Mr. Schouler further says that "the tendency on both sides of the water is towards the conclusion that the debts of a married woman, having separate property, are only to be surely charged by a court of equity upon that separate property, and payment enforced out of it, when it was contracted by her for its benefit, or expressly made a charge thereon, or expressly contracted on its credit, and of course to the extent only to which the wife's power of disposal may go. * * * Benefit is not the sole test, but, to the extent of her power of disposition over her separate estate, the wife may charge it with such engagements as she sees fit to make, provided the evidence of intention be satisfactory, (upon which point states differ;) and provided, of course, that the transaction was voluntary on her part, and not fraudulently procured." Mr. Bishop (volume 1, § 872,) quotes with approval the language of HARRIS, J., in Yale v. Dederer, 18 N. Y. 265, 283: "What will constitute a charge on the estate 'is' simply a rule of evidence. All agree that, when the wife has expressly charged the payment of a debt upon her separate estate, whether it be her own debt or the debt of another, such charge is valid, and will be enforced." In Stephen v. Beall, 22 Wall. 329, the supreme court of the United States says that "the doctrine that a married woman has the power to charge her separate estate with the payment of her husband's debts, or any other debt contracted by her as principal or as surety, has been uniformly sustained for a long period of time. Hulme v. Tenant, 1 Brown, Ch. 16; Stanford v. Marshall, 2 Atk. 69; Bullpin v. Clarke, 17 Ves. 365; Jaques v. Methodist Church, 17 Johns. 548; Yale v. Dederer, 22 N. Y. 456, 18 N. Y. 276; Insurance Co. v. Babcock, 42 N. Y. 615; 2 Story, Eq. Jur. §§ 1396–1401. The question has been in respect to the manner in which the conceded power should be exercised, and in respect to the requisite evidence of its due execution." To the same effect is Radford v. Carwile, 13 W. Va. 572, which is an able and exhaustive review of all the authorities upon the subject; Hall v. Eccleston, 37 Md. 510; Elliott v. Gower, 12 R. I. 79; Woodson v. Perkins, 5 Grat. 345; Heburn v. Warner, 112 Mass. 271; Williams v. Hugunin, 69 Ill. 214; Willard v. Eastham, 15 Gray, 328; Hodson v. Davis, 43 Ind. 258.

These authorities, and many others which could be cited, abundantly show that a "beneficial" consideration is not necessary where the wife expressly charges her separate estate. As we have said, we have in this state no decision directly in point. In Frazier v. Brownlow, 3 Ired. Eq. 239, the English rule was approved. RUFFIN, C. J., says "that Lord ELDON approved of the decree in Hulme v. Tenant, supra, on the ground that the intention to contract with reference to the separate estate of the wife was to be implied from the circumstances of her joining the husband in one bond and giving another solely. And he lays down the doctrine, which seems to have been generally adopted in succeeding cases, that the separate property is liable only to a person 'contracting with her, not as a married woman merely, but as a married woman having a separate estate.' In other words, the engagement must be contracted in reference to the separate property, either expressed or presumptive. All admit that, if clearly so contracted in reference to the separate property of a *feme covert* and upon the faith of it, her engagements must be answered out of her separate personal property." The doctrine thus laid down is distinctly approved, as we have seen, in Knox v. Jordan, supra, with the modification that the estate cannot be charged by "implication" merely. It is there distinctly said that "she may aliene or incumber it [the separate estate] in the execution of powers conferred on her by the terms of the trust, and, if not restricted by the terms, may, under the authority of Frazier v. Brownlow, charge the income or profits with the payment of debts, or appropriate them to any selected object, provided such charge or appropriation be specific and unequivocal, and concurred in as before stated." In that case (Knox v. Jordan) the wife signed a note as surety for her husband, and the bill was dismissed because there was no express charge upon the separate estate. No point was made as to the consideration, and we think from what was said by the court that, had the debt been "specificially" charged with the consent of her trustee, the court would have enforced its payment. Indeed, the

Digitized by Google

reasoning of the court, in view of the authorities, can lead us to no other conclusion. The words "specifically charged," as used in the opinion, are synonymous with "expressly charged." They cannot mean that the charge must be upon specific property; for such was not the character of the charge in Frazier v. Brownlow, which case was approved with the modification mentioned in Knox v. Jordan. Sustained, as we are, by this great weight of authority, we conclude that the wife may, with the written consent of her husband, expressly charge her statutory personal separate estate by her engagements in the nature of executory contracts, although the consideration does not inure to her benefit, or that of the estate. The intent to so charge must in such cases appear in the instrument creating the liability. This applies also to the equitable separate estate, which may, with the concurrence of the trustee, where such concurrence is required, be charged to the extent of the power of disposition conferred by the deed of settlement.

Of course, where there are limitations, or other special provisions, these must be strictly pursued. Hardy v. Holly, 84 N. C. 661. In the enforcement of these charges, no peculiar efficacy is given to writings under seal, as at law the *feme covert* is incapable of making such executory contracts. The court will in all cases look into the consideration, and, if it be such as would sustain an action upon a contract made by a person *sui juris*, it will be sufficient. The complaint should allege that the wife has a separate estate subject to the charge, and the execution can issue against that alone. Dougherty v. Sprinkle, supra. The wife can claim the same exemption as she would be entitled to if she were *feme sole*. We are not authorized by the facts of this case to say what effect such executory engagements may have upon the separate real estate of the wife, where there has been no specific charge by way of mortgage or other conveyance. This point was not passed upon in Arrington v. Bell, 94 N. C. 248, and is still an open question.

The application of the principles we have laid down to the case before us is quite clear. Much was said in the argument about the money in the hands of the defendants having been pledged, and it was contended that the execution of the note sued upon was a waiver of the lien. The "deposit," it appears, was general, and could not be the subject of a pledge, in the strict technical sense. The writing signed by the plaintiff and her husband, therefore, was an executory agreement, upon sufficient consideration, that the defendants should retain the money in their hands as a security for the goods sold to the sons of the *feme* plaintiff. It was an express charge upon the money on deposit. Whether the transaction amounted to a pledge or not, the giving of the note could not have the effect of defeating the defendants' rights, if, as they contend, it was intended merely as an evidence of the "deposit." Such was the effect of the testimony of William Wallace, apparently the only witness examined, and we think that the testimony was properly admitted. The note is a simple contract, and, as between the parties, the consideration was open to inquiry. The testimony was clearly competent to show either that there was no consideration or that the consideration was the deposit,—the subject of the agreement relied upon by the defendant. It was also competent, as we have remarked, to show that the note was given simply as an evidence of the deposit. When the consideration was thus impeached, it was incumbent on the plaintiff to have shown some other sufficient consideration. Aldrich v. Stockwell, 9 Allen, 45. This she failed to do, and, as the only consideration shown, has been found by the jury to be the subject of the agreement mentioned, it follows that the plaintiff is not entitled to recover. If the instrument sued upon had been a bond, a more difficult question would have been presented. The view we have taken disposes of the exceptions to the admission of testimony, and to the failure of the court to instruct the jury as requested. The charge of his honor was perhaps more favorable to the plaintiff than she was entitled to, and we are of the opinion that there is no error.

(103 N. C. 226)

RICE v. JONES *et al.*

(*Supreme Court of North Carolina.* April 20, 1889.)

SUPPLEMENTARY PROCEEDINGS — NEGOTIABLE INSTRUMENTS—INTEREST—COSTS.

1. Where the maker of a negotiable note, on proceedings supplementary to execution against the payee, instituted after the payee has transferred the note, the transferee not being a party to the proceedings, admits that he owes the note to the payee, and the court orders him to pay part of the amount to the judgment creditor, such order is no defense to an action by the transferee of the note. The maker should have put the ownership of the note in issue, when no order could have been made, but the receiver would have been compelled to sue under Code N. C. § 497, and to prove the ownership of the payee.

2. The mere fact that the transferee of the note was required to answer concerning his indebtedness to the payee did not make him a party, or compel him to take notice of what others might do in the proceedings.

3. In such case, the maker never having paid or offered to pay the money into court, though he had it in bank ready for the purpose, and received no profit on it, and made no use of it, the transferee is entitled to interest, he not being in default.

4. The transferee was entitled to costs, also, though an issue of fact was irregularly made and tried, it having been found in his favor.

Appeal from superior court, Buncombe county; MERRIMON, Judge.

Action by J. Marion Rice against R. R. Jones and others. R. R. Jones died pending suit, and his administrator, J. R. Jones, was substituted. Defendants appeal.

F. A. Sondley, for appellants. *Moore & Merrick*, for appellee.

MERRIMON, J. The following is a copy of the material parts of the case settled on appeal:

"On the 11th day of December, 1882, R.

Digitized by Google

R. Jones, the intestate of the defendant J. R. Jones, executed his promissory note, under seal, to John S. Rice, for three hundred dollars, to be due on the 1st day of August, 1883. In July, 1883, certain judgment creditors of John S. Rice instituted proceedings supplementary to execution against said John S. Rice, and caused to be issued from the superior court of Buncombe county, wherein the same had been begun, a notice of an order therein made requiring said R. R. Jones to appear before the clerk of the superior court of Buncombe county, at a time and place named, to answer concerning his indebtedness to said John S. Rice, and said notice to be immediately served upon said R. R. Jones; and in obedience to said order said R. R. Jones appeared before said clerk on the 21st day of August, 1883, and on oath made answer in writing as follows: 'That he borrowed from the said John S. Rice, on or about the 11th day of December, 1882, the sum of three hundred dollars, for which he gave his note secured by deed of trust, to be due the 1st day of August, 1883, and that the same has not been paid, and that he is ready to pay the same according to order of court; * * * that since he has been summoned in this cause [the supplemental proceedings] the note has been presented to him by Marion Rice, [plaintiff in this action,] brother of John S. Rice, claiming it to have been transferred to him, the said Marion Rice.' Afterwards, on the 31st day of August, 1887, said R. R. Jones amended his said answer in said supplemental proceedings by adding thereto the following: 'By leave of the court, R. R. Jones, amending this his answer in these cases, demands that if it shall be adjudged that R. R. Jones pay to any person or persons in these actions, or in either of them, any sum or sums of money, his (the said R. R. Jones') note, in the answer mentioned, may be delivered up to him, and a deed of trust given by himself and wife to secure the same may be ordered to be canceled, and that such other orders may be made by the court as are necessary for his protection; and alleges that he has now, of the money mentioned in his answer, only two hundred and one and 45-100 dollars, heretofore condemned.' Before said R. R. Jones made this amendment to his said answer the clerk of the court had made an order based upon his original answer, in words and figures following, to-wit: 'It is considered by the court, upon the examination of R. R. Jones, and it is hereby adjudged, that the sum of two hundred and one dollars and forty-five cents, of this three hundred dollars due from the said R. R. Jones to the said John S. Rice, be, and the same is hereby, condemned to the use and satisfaction of the judgments, and that said R. R. Jones is hereby directed to satisfy the said judgments as herein stated, and that he is prohibited from paying a sum sufficient to satisfy the said judgments to any other person. August 21st, 1883. E. W. HERNDON, Clerk Superior Court.' From this order John S. Rice appealed, in words and figures following, to-wit: 'From the foregoing judgment John S. Rice appeals to the superior court in term, before the judge. Notice of appeal given in open court, August 21, 1883. E. W. HERNDON, Clerk Superior Court.' But such appeal was not heard until the present term of this court, when, upon an issue submitted to a jury in this action, it was found that said note was the property of said J. M. Rice, having been assigned to him before said supplemental proceedings were begun. Upon this verdict the order made by the clerk on the 21st of August, 1883, was vacated and set aside. The issue as to the title to the note was one between a receiver, appointed by consent in the said supplemental proceedings, at this term, and the plaintiff in this action. J. M. Rice, by consent of the receiver, was allowed to intervene in this action, and to make up an issue as to the ownership of the note sued on; this to be without prejudice to defendant. After this issue was determined by the jury in favor of the plaintiff, the defendants in this action agreed that the plaintiff was the owner of the note.

"On the 27th of August, 1883, said R. R. Jones paid said J. M. Rice (Marion Rice) all of said note, except the sum of two hundred and one and forty-five hundredths dollars, and this amount so paid was entered by said J. M. Rice as a credit upon the back of the note. It was set forth in said entry that the sum thus paid was the principal and interest of said note, except the amount for which R. R. Jones had been garnished in said supplemental proceedings. On the 6th day of March, 1885, J. M. Rice began the present action in this court, against said R. R. Jones and wife and S. H. Reed, the trustee in the deed of trust made to secure said note to John S. Rice, which deed of trust was executed on December 11, 1882, to compel the trustee to sell the land in said deed of trust mentioned, in order to the payment of the remainder of said note. R. R. Jones was at all times ready to pay the said note, always keeping in bank for that purpose the amount of money, upon which he received no interest or profit, and of which he made no use, but his money was at all times under his own control and subject to his own order. He never paid or offered to pay said money into court, otherwise than as stated in his affidavit in said supplemental proceedings and in his answer in this action; nor did he take any steps in said supplemental proceeding to have J. M. Rice, the plaintiff in this action, who he knew claimed to be the owner of said note, substituted in his place; nor did he at any time, in this action, seek to have the creditors, at whose instance said supplemental proceedings were begun, substituted in his place. J. M. Rice was never made a party to said supplemental proceedings at the instance of R. R. Jones, but he was summoned in said proceedings on the 27th day of May, 1885, after this action was begun, to

Digitized by Google

answer concerning his indebtedness to John S. Rice. When this action was called for trial the defendants insisted that it ought to be dismissed—*First*, because the plaintiff could not maintain such action pending such supplemental proceedings and injunction; *secondly*, because the court had not jurisdiction of the action; and they contended, further, that the plaintiff was not entitled to interest during the injunction, nor to recover costs. The court was of opinion that the plaintiff was entitled to bring his action; that the court had jurisdiction; and that, as the defendants did not insist upon having any issues tried by a jury, but consented that the court might act upon the facts found by the court, the plaintiff was entitled to recover, and gave judgment accordingly. The defendants except to the judgment as follows: '(1) Because the court gave judgment in favor of the plaintiff, and against the defendants, as set forth. (2) The plaintiff cannot maintain such action begun pending such supplemental proceedings and injunction. (3) The court had not jurisdiction of the action. (4) The court should not have allowed the plaintiff interest on said sum of money during the injunction. (5) The court should not have allowed the plaintiff costs herein. (6) The court should have dismissed said action.' "

There was judgment for the plaintiff, from which the defendants appealed.

It appears that the promissory note sued on was indorsed to the plaintiff before it matured, and that he was the owner thereof. He was therefore entitled to recover the balance of the money due upon it, more than $200, in this action, unless, as contended by the appellants, the proceedings had affecting the maker thereof, in the proceeding supplementary to the execution mentioned, interfered with and obstructed the plaintiff's right to maintain the action. Hence it is necessary to ascertain what relation the maker of the note sustained to this proceeding, how he was affected by it, and how, through him, it affected indirectly, if at all, the rights of the plaintiff. Now, John S. Rice was the payee of the note sued upon, and he was also the judgment debtor and defendant in the proceeding supplementary to the execution. The maker of this note, as his supposed debtor, was required to appear before the proper court at a time and place specified, to answer concerning his indebtedness to the payee thereof, as allowed by the statute. Code, § 490. The purpose of such appearance and answer was to ascertain whether he owed such judgment debtor the note mentioned, or any sum of money. If it appeared that he did, then the court might have ordered that such indebtedness, or so much thereof as might have been necessary, should be applied to the satisfaction of the judgments against the judgment debtor, as allowed and required by the statute. Code, § 493. If, however, he denied in his answer that he owed the judgment debtor the note, or any sum of money, then the receiver appointed, or to be appointed, in the proceeding against the judgment debtor in such cases, as prescribed by the statute, (Code, § 494,) might have brought his action to recover the money alleged to be due upon the note or otherwise. Coates v. Wilkes, 92 N. C. 376, 94 N. C. 174; Turner v. Holden, Id. 70; Vegelahn v. Smith, 95 N. C. 254.

In an action thus brought by the receiver, he could not recover, against an alleged debtor of the judgment debtor, money alleged by him to be so due upon a promissory note, unless he should allege and prove that the note outstanding was still due and owing at the time he brought his action to the judgment debtor, because, as the note was negotiable, it might in good faith have passed into the hands of some other person before the order forbidding the transfer of the judgment debtor's property. Indeed, this would be so as to any debt that might be assignable by indorsement or otherwise. The receiver could only recover debts due and owing to the judgment debtor, and the burden is upon him to show that the debt he demands judgment for is so due, whether the same be due by promissory note or otherwise. If the maker of such note is sued upon the same by a receiver, he should be careful not to admit incautiously that it is due and owing to the payee thereof, or the judgment debtor, because it may be that the latter has sold it to some other person, and he is not bound to give the maker notice that he has done so. If the maker should make such admission, and judgment should be obtained against him by the receiver, it would not at all protect him against a recovery on the same account by the owner of the note in an action brought by him for that purpose, unless he was a party to the action of the receiver. The real owner of the note could not be prejudiced, much less concluded, by a judgment against his debtor founded upon his note, in an action to which he was not a party, nor do orders of restraint or injunction in such action affect him, unless in some way he is a party to it, except so far as to prevent him from interfering with property of any kind *in custodia legis*.

The maker of the note, the subject of this action, who is the intestate of the defendant, and appellant J. R. Jones, administrator, in his answer made in his life-time in the proceeding referred to, did not deny that he owed the note in question to the judgment debtor therein. On the contrary, he, in substance and effect, admitted that he did owe it to him; and thereupon the court made an order applying so much of the money due upon it as was necessary to the satisfaction of the judgment against the judgment debtor specified in the proceeding. He made such admission at his peril. He seems to have done so supposing that the court could and would protect him at all events against the plaintiff and the real owner of the note whoever he might be. This was a serious mis-

Digitized by Google

take. The cautionary course open to him was to put the ownership of the note in issue by his answer, and in that case no order could have been made to his prejudice, but the receiver would have been driven to his action as allowed by the statute, (Code, § 497,) and to prove that the judgment debtor was the owner of the note, as pointed out above. The maker of the note, when required to answer, was to a large extent affected by the principles of law applicable to and much on the footing of a garnishee in attachment proceedings. Myers v. Beeman, 9 Ired. 116; Ormond v. Moye, 11 Ired. 564; Shuler v. Bryson, 65 N. C. 201; Ponton v. Griffin, 72 N. C. 362.

The plaintiff was not a party to the proceeding mentioned, and was not bound by it in any respect, so far as appears. The mere fact that he was required to answer concerning his indebtedness to the judgment debtor did not make him a party. He was not required or summoned to appear for such purpose, nor was he required or expected to take notice of what others might answer or do in the proceeding. Indeed, it was not the purpose of the proceeding to litigate the rights of persons required to appear and answer as to property of the judgment debtor and debts alleged to be due to him, and this denied by the alleged debtors. This could and should be done in proper actions brought by a receiver appointed in part for that very purpose. Code, §§ 494, 497. The order directing the maker of the note to apply so much of the money due upon it as might be necessary for that purpose to the satisfaction of the judgments specified in the proceeding, and forbidding him to pay such sum "to any other person," applied to him, and was founded upon his admission that he owed the note to the judgment debtor. It did not purport to apply to the present plaintiff, or to prohibit him from asserting any right he might have against the maker of the note, nor, indeed, could it affect him, if so intended, as he was not a party to the proceeding. The court had not jurisdiction of himself, nor control of his note, the subject of this action. Moreover, the statute pertinent (Code, §§ 494, 497) did not authorize the court to make such order applicable to and embrace property other than that of the judgment debtor. It is not its purpose to interfere with the property or rights of persons other than such debtor, or to delay or obstruct the enforcement of their rights, unless incidentally, in cases where the court had taken jurisdiction of the property, and placed it *in custodia legis*. Of course, a person claiming property properly alleged to be that of the judgment debtor would interfere with it, in the face of an order of the court forbidding interference with it, at his peril. If his claim were unfounded, he might be treated as in contempt of the court, and he would also be exposed to an action by the receiver appointed or to be appointed in the proceeding in aid of its purposes.

We can see no just reason why the plaintiff is not entitled to interest on his debt. The note sued upon was his, and he was in no default. The maker of it, when required to answer in the proceeding, should not have admitted that he owed the judgment debtor. He did so at his peril, and it was his folly that he did. He should have put the ownership of the note in issue, and, if the court had in that case made unwarranted orders, he should have appealed to the proper court, and had the errors corrected. In case of an action by the receiver, as pointed out above, he might have required the present plaintiff to be made a party, and had his rights settled and him concluded; and besides, in that case, the court could and would, if need be, have afforded the maker of the note ample protection in some way allowed by law.

The maker of the note seems to have thought that, inasmuch as he was required by the court to answer in the proceedings against the judgment debtor, the court could and ought, in any case or contingency, to afford him protection in all respects against the owner of the note, whoever he might be. This was a mistaken view of his right, liability, and duty. It was his duty to himself to require the judgment creditors in the proceeding, in the way prescribed by law, to establish his indebtedness to the judgment debtor, and it was his default, if he failed to do so. Pending the litigation, he continued to have the money not yet paid. It was his, and, if he failed to use it profitably, it was because of his neglect or his misfortune, and the plaintiff should not be prejudiced by his default or neglect as to interest. It is a part of the burden of every debtor to pay his debt; certainly to him to whom it is due, and entitled to have the money in discharge of the same. If sometimes, in the complicated course of business, he finds it difficult and troublesome to ascertain to whom it is due, and to get a valid discharge of it, this may be his misfortune, and a necessary evil incident to business transactions. Any incidental loss is his, if the creditor is in no default. In the present case the creditor was in no default. The maker of the note had notice of who he was, and, instead of paying the debt to him, improperly admitted that the debt was due to the judgment debtor; believing, no doubt, that the order of the court would be his sufficient protection. And so it would be, in the case presented, but it could not be in another and very different case. The court is faithful, true, and just in the enforcement of its orders and judgments in every case, but the extent and compass of these orders and judgments, and their effect, depend materially upon the facts upon which they are founded and rest. If the facts admitted or made to appear from evidence produced are, indeed, not facts, then the court cannot make the order or judgment apply to and embrace other and different facts or cases.

Nor was there the slightest reason why the plaintiff was not entitled to costs. He had a

Digitized by Google

good cause of action, and was properly allowed to recover. No sufficient reason was shown why he should not, and he was entitled to costs as a lawful consequence. An issue of fact, by consent of parties, was irregularly interjected into the case, and tried, but the finding upon it was in favor of the plaintiff. So far as appears, there was nothing in this that deprived the plaintiff of costs in the regular course of the action.

We think that the numerous authorities cited and relied upon in the interesting brief of the counsel for the appellants are not applicable to this case. Those of them deemed most nearly pertinent are cases where the property in question was certainly in the custody of the law; in some there had been levies upon it in attachment proceedings. In some such cases, the owner of the property could not be allowed to interfere with it pending such custody, unless in some cases he might intervene by appropriate proceeding. In this case there was no levy upon the property; nor was the note, the subject of this action, in the custody of any party to the proceeding; nor did or could the appropriate order of the court, in the proceeding against the judgment debtor, apply to persons who did not have property of the latter; nor did or could it properly forbid the owners of promissory notes, properly and in good faith indorsed by the judgment debtor when he might do so, from suing upon the same,—certainly not, unless such persons were in some way made parties to the proceeding. Perhaps the plaintiff might have intervened in the proceeding mentioned. Perhaps he might have been brought into it in some way that might have brought about a settlement of his rights, or have concluded him as to the note, but he was not bound to assert his right in and by it. He had possession, and was the owner of his note sued upon in this action, and there was no imperative reason why he should seek his remedy against his debtor in the proceeding simply because the latter had been required to appear in it, and answer as to his indebtedness to the judgment debtor. It was the duty of the maker of the note to himself to take care in the proceeding, and be sure to require the receiver to establish his indebtedness to the judgment debtor, or fail in his action. There is no error, and the judgment must be affirmed.

(102 N. C. 408)

STATE v. OAKLEY.

(*Supreme Court of North Carolina.* May 8, 1889.)

FALSE PRETENSES—FINDINGS.

On indictment for obtaining money under false pretenses, a special verdict finding facts, but failing to find an intent to defraud or not to defraud, is therein defective, and should be quashed, and a new trial ordered.

Appeal from superior court, Guilford county; J. H. MERRIMON, Judge.

The Attorney General, for the State.

MERRIMON, J. The defendant is indicted for obtaining money by false pretense, in violation of the statute. Code, § 1025. He pleaded not guilty, and on the trial the jury rendered a special verdict, finding facts, but omitting to find that he had the intent either to defraud or not to defraud. The court held that, upon the facts found, he was not guilty. That verdict was entered, and thereupon there was judgment for him, from which the solicitor for the state appealed to this court. The intent to defraud is an essential element of the offense charged in the indictment, and, as it was not found by the special verdict that the defendant had or had not such intent in connection with the other material facts charged, the court could not properly decide upon the facts found that he was guilty or not guilty, and hence it erroneously directed the verdict of not guilty to be entered. The special verdict was void because the jury failed to find by it a material fact, and the court should have quashed it, and directed a new trial; or it might, before the jury was discharged, have directed them to find the fact omitted from their verdict as part of it. A special verdict must always embrace all the facts material to the determination of the issue of fact raised by the pleadings; otherwise it is imperfect and void, and the court cannot apply the law. In such case the material facts do not appear. The issue raised by the plea of not guilty has not been tried, in contemplation of law, and therefore there must be a new trial. This is well settled by numerous decisions of this court. State v. Bray, 89 N. C. 480, and the cases there cited. The judgment and verdict must be set aside, and a new trial awarded. To that end let this opinion be certified to the superior court. It is so ordered.

(103 N. C. 315)

CONANT *et al.* v. BARNARD *et al.*

(*Supreme Court of North Carolina.* April 29, 1889.)

PLEADING—DEMURRER—AMENDMENT.

1. Under the North Carolina practice, a demurrer by two or more defendants to a complaint, on the ground that it does not state a cause of action, will be overruled, where it appears that the complaint states a cause of action as to one defendant.

2. A sum exceeding that demanded in the complaint cannot be recovered, without amendment.

Appeal from superior court, Buncombe county; BOYKIN, Judge.

Action by J. A. Conant and G. R. Conant, his wife, against W W. Barnard and others. The complaint demanded judgment that a deed of trust executed by certain of the defendants to the plaintiff G. R. Conant be reformed in a specified manner, and declared a first lien on the land therein described. Defendants demurred on the ground that the complaint did not state facts sufficient to constitute a cause of action. Demurrer overruled, and defendants appeal.

T. H. Cobb, J. S. Adams, W. R. Whitson, T. A. Jones, Moore & Merrick, Chas. A.

Digitized by Google

Moore, and *Jones & Shuford*, for appellants. *F. A. Sondley*, for respondents.

AVERY, J. The complaint states facts sufficient to constitute a cause of action as to T. I. Van Gilder. Counsel for all parties represented in this court concede that this is true. When the defendants united in a demurrer on the ground that the complaint did not state facts sufficient to constitute a cause of action, they all placed themselves in the same boat, and must sink or swim together. The current of authority is in favor of this just and salutary rule of pleading, when the new system has been adopted. "A demurrer by two or more, if there is a cause of action against one of them, will be overruled." Bliss, Code Pl. § 414, and note. This view is supported by other authorities. 2 Till. & S. Pr. 127; McGonigal v. Colter, 32 Wis. 614; Shore v. Taylor, 46 Ind. 345; 2 Whitt. Pl. 169; People v. Mayor, 28 Barb. 240; Goncelier v. Foret, 4 Minn. 13, (Gil. 1;) Christian v. Crocker, 25 Ark. 327; Peabody v. Insurance Co., 20 Barb. 339. Pomeroy, in his work on Remedies and Remedial Rights, distinctly states the rule that where a demurrer is filed to several causes of action, or to more than one defense, on the ground that no cause of action or no defense is stated, if there is one good cause of action in the one case, or one sufficient defense in the other, the demurrer must be overruled. The author adds, in connection: "The same rule also applies to a demurrer for want of sufficient facts, by two or more defendants, jointly. It will be overruled as to all who unite in it, if the complaint or petition states a good cause of action against even one of them." Section 577. The author adds that a different rule prevailed in some states, but cites only a case from Nevada[1] sustaining the view that a demurrer may in such case be sustained as to some, and overruled as to others, of the parties uniting in it. This rule seems to have prevailed in courts of equity under the former practice. The defense that a bill did not state facts sufficient to constitute a cause of action was set up in a court of equity by a demurrer for want of equity to the whole bill. Under the practice that prevailed in courts of equity in this state, where a defendant filed a demurrer to the whole bill, and the bill showed the plaintiff's right to any relief, if true, the demurrer was overruled; "for," said the court, "it cannot be held bad in part and good in part." Thompson v. Newlin, 3 Ired. Eq. 338. In Barnawell v. Threadgill, 5 Ired. Eq. 86, the suit was brought against six defendants, all of whom joined in the demurrer. Chief Justice RUFFIN for the court says: "We say the demurrer must be overruled at all events, because enough appears to entitle the plaintiff, if true, to a decree as to the 'several negroes' conveyed or sold to Thomas and Gideon B. Threadgill, and therefore this joint demurrer of the defendants to the whole bill (except the formal charge of combination) will not lie; for it is the general rule that a demurrer must be good throughout, and that, if it cover too much, it must be overruled *in toto*." The demurrer on the ground that a complaint does not state facts sufficient to constitute a cause of action "is a substitute for the old general demurrer, and is still generally called a 'general demurrer.'" Bliss, Code Pl. § 413. The general rule seems to be that the Code practice rejects pleadings at law, and adopts those in equity by demurrer and answer. Ransom v. McClees, 64 N. C. 17. But the practice is, of course, modified by express provisions of the Code, not declaratory of any rule formerly followed in either court. In Cowand v. Meyers, 99 N. C. 198, 6 S. E. Rep. 82, this court reiterates the principle that, where there is only one cause of action stated in the complaint, "a demurrer must be to it as a unity, or it will be disregarded." This construction of the Code (section 246) proceeds upon the same principle on which it has been held, in affirmance of the old practice, that one who demurs on the ground that the complaint does not state facts sufficient to constitute a cause of action must fail, if it appear either that the cause of action is sufficient as to one of many defendants joining in the demurrer, or that one of several causes of action embodied in the complaint is sufficient as to one or more of those joining in the demurrer. The same defendants may demur on this ground to one, and answer as to another, of two or more causes of action in one complaint; or, as to a single cause of action, some defendants may answer and some may demur, and the issues of law will in either event be so raised as to require the court to pass upon them.

The plaintiff cannot recover a sum in excess of that demanded in the complaint, without amendment. Apart from this restriction, any relief may be granted consistent with the case made by the complaint and embraced within the issues. Jones v. Mial, 82 N. C. 252. As the complaint, uncontradicted, would entitle the plaintiff to a judgment against Van Gilder, we deem it unnecessary to decide the points discussed in the briefs of counsel, and it would not be proper to do so after cutting short the discussion by a suggestion that the cause, as now constituted in this court, must depend upon the single question whether the complaint, if admitted by Van Gilder, would entitle the plaintiff to judgment against him. There is no error. The judgment is affirmed.

[1] Wood v. Olney, 7 Nev. 109.

Digitized by Google

(103 N. C. 364)

STATE v. WEDDINGTON.

(*Supreme Court of North Carolina.* April 29, 1889.)

JURISDICTION—CHANGE OF VENUE—MURDER.

1. Code N. C. § 196, gives the right of removal for trial "to some adjacent county." Section 198 provides that the clerk shall transmit to the court to which the cause is sent a transcript of the record, etc. Laws 1885, c. 63, establishes the criminal court of Mecklenburg county, and gives it (section 4) the right to try criminal offenses committed within the county, and which "might have been tried in the superior court." Section 24, providing for removals, authorizes "placing on the docket of Mecklenburg and New Hanover counties." *Held*, that the Mecklenburg criminal court has jurisdiction to try a criminal cause removed from another county, and which would have been triable in the superior court.

2. It is immaterial that the transcript of the record, certified for removal, was first certified to the superior court, and by the clerk of that certified to the criminal court, and that the order of removal required the case to be docketed in the superior court, as such part of the order may be treated as surplusage, and could not affect the jurisdiction of the criminal court.

3. In a murder trial, the indictment having charged killing with a piece of plank, testimony of a witness that he saw deceased in the afternoon before the night of the killing wearing a brown wool hat, and that on the morning after the killing he found on a stick picked up where the killing occurred, and shown by other evidence to have been used in giving the fatal wound, several strands, like fine brown wool, caught in splinters of the wood, was properly admitted.

4. Where an indictment alleged that a murder was committed with a piece of plank, and the proof showed that it was a piece of iron, the variance is not material.

5. A witness having testified to a conversation with defendant after the killing, and when no one else was present, in which conversation defendant in effect admitted that he committed the crime, counsel for the state stated to the jury in his argument that no one had contradicted the testimony, and that they must accept it as true. *Held* not improper, as an invasion of the right given by Code N. C. § 1353, providing that no presumption shall be created against a defendant by his failure to testify.

Jones & Tillett, for appellant. *The Attorney General*, for the State.

AVERY, J. This was an indictment for murder, found in the superior court of Union county, and moved to the criminal court of Mecklenburg county, where it was tried before MEARES, Judge, at December term, 1888. The defendant was found guilty of murder, and judgment was entered accordingly.

Adopting the order in which the exceptions were discussed by counsel, we will consider, first, whether the criminal court of Mecklenburg county had jurisdiction. If that court had no right to try the prisoner, it would be useless to extend our investigation further than is necessary to reach that conclusion. The prisoner was indicted with two other defendants, who were found guilty as accessories, and have been sent to the state-prison. The following is a copy of the motion, and the material portions of the order of removal, made in the superior court of Union county, as appears from the record: "State vs. Will Weddington, John Weddington, and Sam Reid. Murder. The defendants in this case, Will Weddington, John Weddington, and Sam Reid, being charged in the bill of indictment with the murder of one John Pearce, and being brought to the bar of the court, in open court, in their own proper persons, by J. P. Horne, sheriff of Union county, and being represented by their counsel, T. D. McAuley and J. J. Vann, move, upon affidavit, that the cause be removed from the county of Union to some adjacent county for trial, for reasons assigned in an affidavit duly filed by them. And thereupon, upon the motion of the defendants, based upon the said affidavits, it is ordered by the court that the said cause be removed from the superior court of Union county to the criminal court of Mecklenburg county for trial. And it is further ordered that the clerk of this court certify the record to the superior court of Mecklenburg county, to the end that it may be there docketed, and from there certified to the criminal court of Mecklenburg county, to the end that it may there be tried." It is admitted that a duly-certified copy of the record of the case was forwarded by the clerk of the superior court of Union county to the solicitor of said criminal court, who handed it to the clerk of the superior court of Mecklenburg county. The clerk of the latter county entered the case on the docket of the superior court of Mecklenburg, and annexed to the said copy of the record a certificate that it had been transmitted to him from the clerk of the superior court of Union county, and transmitted it to the criminal court. The case was thereupon docketed in said criminal court, and, after one continuance, tried there.

The motion in arrest of judgment, for want of jurisdiction in said criminal court, is upon the ground that the act creating the court (chapter 63, Laws 1885) does not confer upon it jurisdiction of any criminal offense committed outside of Mecklenburg county even after removal, or, if the said act gives the right to try cases on removal from other counties at all, the jurisdiction of the criminal court does not attach till after the cases are certified to the superior court of Mecklenburg county, docketed there, and a new transcript of the record sent thence to said criminal court. The argument in support of the motion in arrest of judgment is predicated upon the idea that the power of the criminal court to try must depend upon the construction given to sections 4, 21, and 24 of the act establishing the court. We think that the court below properly refused the motion in arrest of judgment. The right of the general assembly to establish criminal courts is derived from sections 2, 30, art. 4, of the constitution. There can be no doubt that, in the exercise of the power given in these sections, the general assembly has created a criminal court, with general jurisdiction of all criminal offenses that were cognizable before the passage of that act in the superior court of Mecklenburg county, and that the latter court no longer has such general jurisdiction of criminal offenses. Code,

Digitized by Google

§ 196, provides that, "in all civil and criminal actions in the superior and criminal courts, in which it shall be suggested on oath or by affirmation on behalf of the state or the traverser of a bill of indictment, * * * the judge shall be authorized to order a copy of the record of said action to be removed to some adjacent county for trial," etc. A subsequent section (198) provides that, "when a cause shall be directed to be removed, the clerk shall transmit to the court to which the same is removed a transcript of the record of the case," etc. These sections empower the judges of superior and criminal courts to order the record to be sent to some adjacent county, not to any specified court; but the clear implication is that it must be sent to the court having general jurisdiction of criminal offenses in such adjacent county, and direct the clerk of the court in which the order of removal is made to transmit a transcript of the record to the clerk of the court to which, by the order, it is to be removed. There being nothing in the act of establishing the criminal court, that is, in our opinion, repugnant to the sections of the Code referred to, we hold that it had jurisdiction of this case. It is admitted, as it also appears from the record, that the transcript was certified in proper form by the clerk of the superior court of Union county, and was ultimately delivered to the clerk of the court that tried the prisoner. If duly certified, it was not material through how many or whose hands it passed *in transitu*. The criminal court had proper evidence that it was a record, and in that record was an order that could be interpreted and treated only as an order of removal to it for trial. The attached certificate of the clerk of the superior court of Mecklenburg county did not impart or destroy the character of the paper as a record. The order of removal to the criminal court of Mecklenburg gave to that court the right to try, so soon as the record containing that order should reach its clerk duly authenticated, and so much of said order as required the case to be docketed in the superior court of Mecklenburg must be treated as surplusage. The fact that it was so docketed did not affect its authenticity as a record. No such addition to the order, already sufficient, could affect the power of the criminal court to try.

The sections of the act establishing the court, cited by counsel as bearing upon the extent of the jurisdiction conferred upon the court, are not in conflict with the provisions of the Code, and our construction of their meaning may be summarized as follows: (1) Section 4, in effect, vests in the criminal court the right to try any and all criminal offenses committed within Mecklenburg county, and which might have been tried in the superior court of that county but for the establishment of the criminal court. The word "originating" is evidently used in the sense of "committed." (2) Section 21 makes it the duty of the clerk of the superior court of Mecklenburg county to transfer properly certified records of all indictments and all proceedings by *scire facias*, then pending in said court, to that established by the act. (3) Section 24 was evidently drawn without adverting to provisions of the Code, and with the view of giving to the new court the right to try criminal causes, not already removed, but which might thereafter be removed, from other counties. The language is somewhat ambiguous, but we see no reason why placing "on the docket of Mecklenburg and New Hanover counties" should not be construed to refer to the docket of the criminal court having jurisdiction of criminal offenses in those counties, especially when considered in connection with sections 196 and 198 of the Code.

The deceased, John Pearce, was a public officer, and on the night of May 12, 1888, had arrested one McMillan in the town of Monroe for a criminal offense, and, while holding McMillan by one arm, received a blow that fractured his skull, making an aperture of less than a half inch in width, and caused his death. The deceased had pursued McMillan into a room where a number of negroes were holding a festival, and there arrested him. On coming out of the house with his prisoner, deceased was surrounded by a large and turbulent crowd of negroes, who were making a great deal of noise at the time of the killing. The prisoner was in the crowd, and there was evidence tending to show that the prisoner, as well as a number of other negroes present, had declared, while deceased and McMillan were in the house, that the latter should not be arrested. On the morning next after the killing, a piece of plank was found in the immediate vicinity of the spot where deceased was killed, which was about three and one-half feet in length and six inches in breadth, and exactly three-fourths of an inch in thickness. It was further in evidence that at the very moment when the fatal blow was stricken a piece of iron was heard to fall upon the pavement, and immediately afterwards a piece of iron was found at the place, which was some two and a half feet in length and one-half inch in thickness, having a sharp edge. The evidence was that the edges of the fracture on the top of the skull of deceased were sharply defined, as if made with a sharp instrument. The charge in the indictment was that the killing was done with "a certain piece of plank." There was evidence tending to show that the deceased had been killed by the prisoner with the said plank; that the prisoner had had the piece of plank, or one very similar to it, only a few moments before the killing; but there was other evidence tending to show that he had dropped it about a half a minute or a minute before the killing. There was other evidence tending to prove the killing by the prisoner. The theory upon which the defense was conducted was that the prisoner did not do the killing, and that the fact of killing by pris-

Digitized by Google

oner was not proved. The state then introduced one Gaither, who testified that on the next morning after the killing he found a piece of plank in the street near where the deceased had been struck, and that he walked around using it for a walking stick for more than an hour, when he left it at the house of one Blakeley. The state then introduced one Ferrill, who was allowed to testify, after objection on the part of the prisoner, that the plank in question came into his possession after it had been left at Blakeley's, and that on the morning of the coroner's inquest he noticed several strands like fine brown wool, which had been caught under some small splinters of the plank. The objection was overruled, and the prisoner excepted. The witness was then asked by the counsel for the state what sort of a hat the deceased was wearing on the night of the killing, to which question the witness answered that he did not know what sort of a hat he was wearing on the night of the killing, but he did know what kind of a hat he had on at 4 o'clock in the afternoon, immediately previous to the killing. After objection by the prisoner, the witness was allowed to testify further that, at the hour mentioned, (4 o'clock P. M. of the afternoon before the killing,) the deceased was wearing a brown wool hat. The prisoner excepted.

The two first exceptions to the testimony are stated together, because in fact one exception might have been made to answer instead of two. The competency of the testimony admitted by the court cannot be considered and passed upon intelligently, except as raising the question whether the facts that witness saw the deceased wearing a brown wool hat at 4 o'clock P. M. in the afternoon before the night of the killing, and that on the morning after the killing he found upon a stick that had been picked up where the killing was done, and with which there was evidence tending to show the fatal wound was inflicted, a strand like fine wool, were relevant, and tended to show that the killing was done by the prisoner with the plank. We think that the testimony was properly admitted by the court. We cannot agree with counsel for the prisoner that, if the evidence in this case shows that the killing was done with the piece of iron instead of with the plank, there would be a fatal variance. "Where the instrument of death laid in the indictment and that proved are of the same nature and character, and the method of operation is the same, there is no variance." State v. Gould, 90 N. C. 658. "And where the offense was charged to have been committed with a sharp instrument, and the evidence was that the wound was partly torn and partly cut, and was done with an instrument not sharp, it was held that the charge in the indictment was proved, and the degree of sharpness was immaterial. Rex v. Grounsell, 7 Car. & P. 788." The state introduced as a witness the colored man, Moses McMillan, who was in the grasp of the deceased at the time of the killing. He testified that he could not see who struck the blow, but that in the excitement following it he escaped, and that in a short time afterwards he met the prisoner on one of the streets of Monroe, and that there was no one present but himself and prisoner, and then and there the prisoner said to witness: "Didn't I tell you I would relieve you from that man? I got the damned son of a bitch." The prisoner did not offer himself as a witness, nor did he introduce any evidence. One of the counsel for the state in his argument to the jury, after repeating the testimony of McMillan, said: "Now, gentlemen of the jury, no one has contradicted the testimony of Mose McMillan, and you must accept it as the truth." Defendant's counsel took no exception to the remark at the time, nor was the attention of the court called to it. Counsel afterwards excepted, on the ground that the remark of the solicitor was in effect a comment on the fact that the prisoner had not testified in his own behalf, and therefore such a gross abuse of privilege and invasion of the right granted to the prisoner, (by section 1353 of the Code,) that no presumption shall be created against him by his failure to testify, as to entitle him to a new trial, even though no objection was made to the language at the time. If the witness McMillan had testified to any fact that by his evidence appeared to be within the knowledge of others besides the prisoner and himself, it would not have been contended that counsel could not insist before the jury that he had not been contradicted; no evidence having been offered for the prisoner. If such were the effect of the section referred to, the solicitor in this case would not have been at liberty to contend before the jury that any one of the witnesses to the facts connected with the killing, or to any occurrence witnessed also by the prisoner, was entitled to credence because he had not been contradicted, lest the argument might suggest the idea to the jury that the law allowed the defendant the privilege of testifying, and he had not availed himself of it. If no such right had been given to the prisoner by law, counsel would have been free to comment upon the fact that this witness was not contradicted or impeached as to declarations of the prisoner. When the rules of evidence were changed by the section mentioned in this respect, an important privilege was extended to defendants, guarded by the provision that a failure to exercise it should raise no presumption of guilt against them. But it was not the purpose in enacting the law to restrict the officer prosecuting for the state from making a comment upon the testimony that would have been legitimate before the passage of the act, and in which no direct reference was made to the right of the prisoner or his failure to exercise it. The prisoner's personal privileges are enlarged by the provisions of the law. The right of the state to conduct the prose-

Digitized by Google

cution according to the usual practice, through its officers, so as to aid the jury in arriving at the truth, was not intended to be and is not abridged in consequence of his refusal to become a witness on his own behalf. No error.

(103 N. C. 13)

JONES *et al.* v. WILSON *et al.*

(*Supreme Court of North Carolina.* May 9, 1889.)

APPEAL-BOND.

Under act N. C. Feb. 16, 1889, authorizing the supreme court in its discretion to allow an undertaking on appeal to be filed after the expiration of the statutory period, an undertaking filed within a few days after the time agreed on will be treated as valid where it appears that the appeal was in good faith; that appellant made diligent effort from time to time to give the undertaking, but was prevented by the absence of the clerk; and that the delay was without prejudice to appellee. Harrison v. Hoff, 8 S. E. Rep. 887, followed.

Appeal from superior court, Chowan county.

On motion to dismiss appeal.

W. D. Pruden, for appellants. *Batchelor & Devereux*, for appellees.

MERRIMON, J. The appellees moved at the present term to dismiss the appeal, upon the ground that the undertaking upon appeal was not filed within the time prescribed by law, nor within 30 days next after the term of the court at which the judgment appealed from was given,—the time within which it was agreed by the parties the appeal might be perfected. We are satisfied from affidavits produced that the appeal was taken in good faith. It was taken at once, upon the entry of the judgment appealed from by counsel; the appellants having left the court, and gone to their homes in a county adjoining that in which their case was tried. At once the counsel sent them an undertaking upon appeal to be executed by them. They executed and returned the same promptly, and in apt time, to their counsel to be filed. The latter promptly went to the clerk's office to file it, but found that the clerk was absent, and he continued to be for several days at a distant point, and they could not then file it. They went for the like purpose a second time, and the clerk was not at his office. He was sent for, came, and the undertaking was filed within a few days after the lapse of the time within which it was agreed by the parties the appeal might be perfected. It appears that the appellants themselves were diligent in respect to the undertaking, and their counsel made reasonable effort to file it in apt time. They failed to do so because of the absence of the clerk from his office, and the fault was largely, if not altogether, his. The appellees suffered no substantial harm by the delay of a few days to file the undertaking, and there seems to have been reasonable excuse, certainly, on the part of the appellants for such failure. We think the case comes fairly within the statute cited and interpreted in Harrison v. Hoff, 8 S. E. Rep. 887, (decided at the present term.) That case is substantially like the present one, and must govern it. The motion to dismiss the appeal must be denied.

(103 N. C. 323)

STATE v. GOLDSTON.

(*Supreme Court of North Carolina.* May 6, 1889.)

RAPE—INDICTMENT—CONVICTION OF ASSAULT.

1. In a prosecution for an assault with intent to commit rape, under N. C. Code, § 1102, providing for the punishment of such an offense, an indictment which simply alleges that the defendant "did make an assault, and did then and there unlawfully attempt," etc., not charging the intent with which the assault was made, is not sufficient.

2. But such indictment, charging that the defendant, "with force and arms, * * * did make an assault * * * against the peace and dignity of the state," is sufficient to sustain a conviction of a simple assault; the words with reference to the crime sought to be prosecuted being treated as surplusage.

Appeal from superior court, Moore county; MERRIMON, Judge.

The Attorney General, for the State. *A. P. Gilbert* and *W. E. Murchison*, for respondent.

MERRIMON, J. The indictment charges that the defendant, "with force and arms, at and in," etc., "on," etc., "in and upon one Mittie McKay, she being a female child under ten years of age, unlawfully and willfully did make an assault, and did then and there unlawfully attempt to carnally know the said Mittie McKay, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the state." Upon the plea of "not guilty" to this indictment, on the trial, there was a verdict of guilty. The court, on motion, arrested the judgment, upon the ground that the indictment was fatally defective, in that it failed to charge that the defendant assaulted the child therein named "with intent feloniously to carnally know," etc. The court further decided that the defendant was by the verdict found guilty of that offense, and not of a simple assault, and that the indictment was not framed with a view to charge, nor did it charge, a simple assault, because it did not charge that force was used, or that there was an attempt to use it. The solicitor insisted that it sufficiently charged "an assault with intent to carnally know," etc. The case settled on appeal states "that there was no evidence that he [the defendant] used any violence," and that "there was evidence tending to show that she [the child] consented." The solicitor for the state, having excepted, appealed from the order arresting the judgment to this court.

The statute (Code, § 1101) prescribes that "every person who is convicted of ravishing and carnally knowing any female of the age of ten years or more, by force and against her will, or who is convicted of unlawfully and carnally knowing and abusing any female child under the age of ten years, shall suffer death." It is a settled construction of the latter clause of this statute that to carnally

Digitized by Google

know and abuse any female child under ten years of age, whether she consents to such carnal knowledge and abuse or not, is rape. State v. Johnston, 76 N. C. 209; State v. Dancy, 83 N. C. 608. The same statute (Code, § 1102) further prescribes that "every person convicted of an assault with intent to commit a rape upon the body of any female shall be imprisoned in the penitentiary not less than five nor more than fifteen years." The defendant is indicted under this section of the statute, "for the assault with intent to commit a rape." The indictment does not charge that offense sufficiently, because it fails to charge the intent with which the assault was made. It is essential that such intent shall be charged. The offense is not complete without it, and the indictment is bad when it fails to charge all the essential elements of the offense intended to be charged. State v. Moore, 82 N. C. 659; State v. Russell, 91 N. C. 624.

The indictment seems to have been prepared hastily and incautiously. It does not charge an "assault with intent," etc., but it charges that the defendant "did make an assault, and did then and there unlawfully attempt," etc.,—that is, did some act towards committing a rape; but the act is not the intent, though it may be evidence of it. The intent is the fixed purpose of the mind in connection with the assault. This the statute makes an essential element of the offense, and it, not the evidence of it, must be charged. It is possible that some word or expression would suffice as a substitute for the word "intent" as employed in the statute, but it is an expressive, precise, word, well understood, and much used in statutes, and it is not at all safe for pleaders to omit it in all proper connections. The charge should be "with intent feloniously," etc. State v. Martin, 3 Dev. 329; State v. Scott, 72 N. C. 461; State v. Jesse, 2 Dev. & B. 297.

The court therefore properly held that the indictment did not sufficiently charge an "assault with intent to commit rape." But we are of opinion that it erred in holding that it did not sufficiently charge a simple assault, and that the defendant could not, upon it, be convicted of that offense, if the evidence should satisfy the jury of the defendant's guilt. It is charged that the defendant, "with force and arms, at," etc., "on," etc., "in and upon one Mittie McKay, * * * did make an assault, * * * against the peace and dignity of the state." Thus an assault is charged. The words of the indictment omitted may be treated as—indeed, they are—surplusage,—mere redundant matter,—serving no material purpose, nor do they materially, if at all, embarrass the defendant in making his defense in this action, nor could this, in case of a subsequent prosecution for the same offense. The court and the defendant can see that an assault is charged, and no other offense is charged sufficiently. The term "assault," in the connection as charged *ex vi termini*, implies the offense without additional words explanatory of how the force was manifested or employed. 2 Bish. Crim. Proc. § 65; 1 Whart. Prec. Ind. 114, and notes; People v. Pettit, 3 Johns. 511; State v. Burt, 25 Vt. 373; Bloomer v. State, 3 Sneed, 66; Stout v. Com., 11 Serg. & R. 177. What we have thus said rests upon the ground that a simple assault is charged. But if the indictment had sufficiently charged an assault with intent to commit a rape, the defendant might have been convicted of a simple assault, if the evidence would have warranted such conviction. The offense of assault with intent to commit a rape is but an aggravated misdemeanor, and, if the evidence failed to warrant a conviction for that offense, the defendant might, in the same action, on the single count in the indictment, be convicted of the offense included in it,—the simple assault. State v. Upchurch, 9 Ired. 454; State v. Clark, 7 Jones, (N. C.) 167; State v. Durham, 72 N. C. 447; State v. Perkins, 82 N. C. 681. It would be otherwise, however, if the principal offense were a felony, embracing others of a less grade. State v. Arrington, 3 Murph. 571; State v. Durham, supra; State v. Perkins, supra. The reason for the distinction seems to be that an acquittal of a felony is no bar to another indictment for the same act, charging it as a misdemeanor. If, therefore, in the present case, there was evidence of an assault, the court should have instructed the jury that they might find the defendant guilty of that offense. The case settled states that there was no evidence that the defendant used any violence, and that there was evidence tending to prove that the child consented to what he did, whatever that was. What he did to or towards the child does not appear. The statement that there was no evidence that the defendant used violence seems to imply that there was no evidence that he seized the person of the child. Still, there may have been evidence of an assault, and the fair inference is that there was, as the jury rendered a verdict of guilty; and it may be that the jury did not believe the evidence tending to prove that the child so consented. Moreover, there may have been evidence to the contrary,—the case does not state that there was not. Indeed, it is apparent that the court did not regard or view the evidence as tending to prove a simple assault, nor did it deem it proper to submit it to the jury for that purpose. The clear opinion of the court was that the defendant could not be convicted in this action for an assault. There is therefore error. As the court discovered on hearing the motion to arrest the judgment that the indictment failed to charge the more serious offense intended to be charged, if there was evidence produced on the trial from which the jury might have found the defendant guilty of a simple assault, as it seems there was, it should have set the verdict aside, and directed a new trial, to the end that the issue whether the defendant was guilty of a simple assault or not might be

Digitized by Google

tried, and the case disposed of according to law. To that end the order arresting the judgment must be set aside, and likewise also the verdict of guilty, and a new trial directed and had. Let this opinion be certified to the superior court. It is so ordered.

(103 N. C. 413)

STATE v. WALKER.

(*Supreme Court of North Carolina.* May 6, 1889.)

INTOXICATING LIQUORS—ILLEGAL SALES.

One cannot be convicted, under Code N. C. § 1077, of selling or giving intoxicating liquors to a minor, on proof that the liquor was delivered to the minor for his father, and on the direction and order of the father; that the son was simply a messenger; and that these facts were known to defendant.[1]

Appeal from superior court, Beaufort county; MACRAE, Judge.

J. H. Small, for appellant. *The Attorney General*, for the State.

DAVIS, J. The defendant was indicted under section 1077 of the Code. The indictment contained two counts,—one for selling, and the other for giving, intoxicating drinks and liquors to one Fred Gardner, who was under 21 years of age, and unmarried. The evidence was, in substance, that Fred Gardner, an unmarried youth, about nine years of age, was the son of John Gardner; that John Gardner sent Fred to one Bergeron, who was admitted to be a liquor dealer, and for whom Walker was clerk, for whisky, and that Walker delivered it to Fred, for his father, by the direction and upon the order of the father. The son testified, among other things: "I do not drink. The defendant knew that all the liquor was for papa, and I did not buy for myself. I was messenger for papa," etc. The father testified, in substance, that he sent his son Fred, either with an order or the money, for whisky, and that it was for his (the father's) own use, and that prior to his instruction to the defendant he had refused to send him whisky by the son. The defendant asked the court to instruct the jury: "(1) That if the defendant knew the liquor was for the father, and not for the minor, and that the minor was only a messenger for the father, defendant is not guilty. (2) That the father had the right to use his son as a messenger to carry liquor to him. (3) That if the father purchased liquor for himself, and the defendant knew this, under the facts as testified in this case, it would be a sale to the father, and not to the son, and defendant would not be guilty." These instructions were declined, and "the judge instructed the jury that if they believed the evidence the defendant was guilty." Defendant excepted. There was a verdict of guilty, judgment, and appeal.

We are unable to see how this, upon the facts stated, can be regarded as either a sale or a gift to the minor. It was not a gift to anybody. It was a sale to the father, and the son was only a messenger It was not a sale to the son. The cases of State v. Lawrence, 97 N. C. 492, 2 S. E. Rep. 367, and State v. McBrayer, 98 N. C. 619, 2 S. E. Rep. 755, relied on by the attorney general, are not applicable to this case. In those cases the sales or gifts were made to minors, and for the use of the minors. In the former case the father had given the liquor dealer permission to give spirituous liquors to the son, and it was properly held that the permission of the father could not "suspend the statute," and authorize a sale or gift of intoxicating drinks to the son. In the case before us the sale was to the father, and for the father, and it was only sent by the son as messenger for the father. The court can only pass upon the law applicable to the facts, and the very forcible argument of the attorney general was addressed rather to the moral than the legal aspects of the case. Prior to the emancipation of slaves it was unlawful to give or sell liquor to slaves without the written consent of the owner or manager of the slaves. In State v. McNair, 1 Jones, (N. C.) 180, the defendant was indicted, and the proof was that the defendant had delivered liquor to a slave upon the order and for one Higgs, who was the overseer. The court held a conviction and judgment upon this evidence to be erroneous, and NASH, C. J., said: "The act under which the indictment is found had no intention to abridge the legitimate use of his slave by the owner. It is still left him. It is not denied he may use him as his agent." Fred Gardner was but the agent or messenger of his father. The sale was to the father. There is error.

(103 N. C. 27)

MILLHISER v. ERDMANN *et al.*

(*Supreme Court of North Carolina.* May 7, 1889.)

SALE—WHEN TITLE PASSES.

A dealer in leaf tobacco, in reply to a written request for samples, expressed the samples, and sent a letter in which the terms were stated to be "3, 4, and 5 months' notes." An order was given, which was filled, the shipment being made by express, and blank notes, drawn as above, forwarded by mail, with a request to "return signed in settlement at earliest convenience." The vendee proposed payment by time drafts, which the dealer declined, longer time, however, being offered on the notes. *Held*, that plaintiff was not bound by a clause at the head of a bill rendered to the vendee, to the effect that all sales not settled in 10 days should be subject to draft, especially as the vendee, in agreeing to sign the drafts, did not in any way signify his assent to the terms at the head of the bill, and that the contract of sale was not complete until the notes were delivered.

Appeal from superior court, Craven county; GRAVES, Judge.

This was an action of claim and delivery, tried before GRAVES, J., at the February term, 1888, of Craven superior court. The plaintiff testified that during the year 1885

[1] Concerning the illegal sale or delivery of intoxicating liquor to a minor, see Topper v. State, (Ind.) 20 N. E. Rep. 699, and cases cited; Blair v. State, (Ga.) 7 S. E. Rep. 855; People v. Welch, (Mich.) 39 N. W. Rep. 747, and note; Page v. State, (Ala.) 4 South. Rep. 697, and note.

Digitized by Google

and since he was doing business in Richmond, Va., as dealer in leaf tobacco for the manufacture of cigars, and that during said time the defendant Erdmann was doing business in New Berne, N. C.; that on or about the 28th of November, 1885, the plaintiff received from said defendant a postal-card as follows:

"Newbern, Nov. 27th, '85. Dear Sir: Are you still in the leaf business? If so, send me samples of some binders; good stock; and samples of Havana and Havana wrappers, if you have some real nice stock on hand. You may also send me samples of Hustorick wrapper, if you have nice goods. Yours, &c., C. ERDMANN."

To which plaintiff replied as follows:

"December 1st, 1885. Dear Sir: In reply to yours of the 27th, I have sent you the following samples per express: Veg. 20 Havana @ $1.10; do. Genuine V. A. @ $1.25; 6 do. wrappers @ $1.25; 876 No. 488–89 wrappers @ 25c.; 242 No. 466–86 wrappers @ 35c.; 151 No. 488–83 wrappers @ 35c.; 11 No. 486–86 binders @ 12c.; 16 No. 487–87 do. @ 12c. Terms, 3, 4, and 5 months' notes. I have put these goods down very low, and hope to receive your order, as I feel sure the goods will give you entire satisfaction. Awaiting your prompt reply, I remain, Yours, &c., CHAS. MILLHISER."

Not hearing from Erdmann in the mean time, the plaintiff, on December 13, 1885, sent to him a letter as follows:

"Please let me hear from you in regard to samples 'leaf' sent you December 1st, from which I hope you have been able to make a selection. Trusting to hear from you, and soliciting your kind favors, which shall have prompt and best attention, Yours, &c., CHAS. MILLHISER."

That Erdmann received the samples in due course, and also the letters above set out; and on December 27, 1885, the plaintiff received a letter from Erdmann as follows:

"New Berne, Dec. 25th, 1885. Dear Sir: You can send me the following goods: Case 242 and 151; the two best bales Havana No. 16 and 6; and the binders I don't like. I must have better ones. If you have better, you may send me one case, and I would like to have a nice case of cheap cigars at about $10 per thousand, put up 50 in a box. Hoping business is good with you, I am, &c., C. ERDMANN. P. S. You send the tobacco. Be sure and give me weight for government book."

That on December 28, 1885, the plaintiff mailed to Erdmann the following letter, which contained the invoice and the three promissory notes therein mentioned, all of which were received:

"Dear Sir: Your favor 25th received, and I hand you inclosed invoice of two cases wrappers and two bales Havana, shipped by steamer as per your order. Am sorry the binders do not suit you. As I do not handle any Penn. cigars, I turn your order over to Messrs. H. Brownheld & Bro., who said they would send you samples. Inclosed I hand you three notes at three, four, and five months, which please make payable at your bank and return signed in settlement at earliest convenience, and oblige. Yours, truly, CHAS. MILLHISER."

On the same day the plaintiff shipped by steam-boat the tobacco as set forth in the letter, and it was admitted that the same was duly received by Erdmann, and that the value thereof was as stated in the complaint, to-wit, $400. The defendant Erdmann did not execute and send to plaintiff his notes; and on January 16, 1886, plaintiff received from said defendant a postal-card as follows:

"Dear Sir: I just received the goods. Send drafts to acceptance; as long time on them as possible. I will accept and return. That is the way I do with the rest of the dealers. Yours, truly, C. ERDMANN."

On the same day the plaintiff replied:

"Dear Sir: Your favor of the 15th is received, and in reply will say that when I sent you samples I wrote you on December 1st, giving you price and terms,—notes at three, four, and five months. It is with this understanding you ordered the goods, and on these terms I shipped the goods. More than half your bills is Havana, on which the duty is 35 cents per pound, and must be paid in cash before goods can be removed, and the balance of time is never over 90 days on Havana; but I have put all this in your bill, as agreed upon, at three, four, and five months, which is an average of four months' time to all; but you can either send me the notes at three, four, and five months, or, if you prefer, you may make five notes at two, three, four, five, and six months from date of shipment, December 28th. This is the best I can do. I cannot regulate my business by what some other houses do. The regular terms of some of the best and largest New York firms are four months' note on seed leaf, and duty cash, and ninety days' note for balance on Havana tobacco; but I gave you more liberal terms. I gave you prices and terms as per my letter of December 1st at three, four, and five months' notes, and it was on these terms you bought the goods, and you should make settlement accordingly; but I inclose you five notes at two, three, four, five, and six months, and you can take your choice,—either send the first three notes or these five notes, which I trust will be satisfactory. But if you are not satisfied you will please return me the entire lot of goods, and send me shipping receipts, and oblige, yours, &c., CHAS. MILLHISER."

That Erdmann did not reply to this letter, and did not send his notes as therein requested, nor any notes. Plaintiff, failing to get the notes, or a return of the tobacco, came to New Berne, and on February 7, 1886, made a demand on W. W. Clark and all the defendants for the tobacco aforesaid, the delivery of which was refused. It was admitted that the tobacco was in the actual possession of the defendant John Schissler at the time

Digitized by Google

of demand. Plaintiff further testified that he had contracted to sell the tobacco for the negotiable promissory notes of the defendant Erdmann, as set forth in the above correspondence, and only on the terms therein stated; and that said defendant had not complied with said contract; that said notes, such as taken in the course of trade, are of value to the plaintiff as commercial paper. The defendants introduced the following evidence: An assignment of defendant Erdmann of a stock of goods, which included the said lot of tobacco, to W. W. Clark, for the benefit of creditors, recorded on the 28th of January, 1886; that said assignee at once took charge of said stock, and placed it in the hands of defendant Schissler, as his agent. It was admitted that no part of the contract for the purchase of said tobacco was ever registered. The defendant introduced a bill for the goods in controversy, which was sent to the defendant C. Erdmann at the time of the shipment of the goods by the plaintiff, of which the following is a copy:

All sales not settled in Ten Days from date of purchase subject to Draft with Current Exchange on New York or Richmond.

All settlements of accounts to be made direct with the firm. | All claims must be made within five days after receipt of goods.

RICHMOND, VA., Dec. 28, 1885.

MR. C. ERDMANN, New Berne, N. C.,
Bought of CHAS. MILLHISER,

Manufacturer of Fine Cigars, Packer of Seed Leaf, and Importer of Havana Tobacco.

Interest will be charged on all accounts not paid at maturity.

Terms: 3, 4, and 5 Mos. Notes.

No. 15 South 13th Street.

No. 151.	1 Case Wrappers, 483—88—400 lbs.,	@	33c.	$132.00
No. 242.	1 Case Wrappers, 466—86—380 lbs.,	@	33c.	133.00
Vega. 16 No.	1 Bale Havana, 1,077 No. 120—12— 107 lbs.,	@	$1.15	122.05
Vega. 6 No.	1 Bale Havana, 1,055 No. 134—12— 121 lbs.,	@	1.25	151.25
		Drayage,		.50
				$539.80

O. D. Line, via Norfolk.

The defendants insisted that an issue should be submitted to the jury as to the waiver of the condition upon which the goods were agreed to be sold, arising from the delivery of the goods to the defendant Erdmann by the plaintiff before the performance of the condition, and the circumstances attending the delivery. The court held that there was no question of fact for the jury, and gave judgment for the plaintiff. The defendants excepted and appealed.

W. W. Clark, for appellants. *Clement Manly*, for respondent.

AVERY, J. This case was before this court at the September term, 1887. 98 N. C. 292, 3 S. E. Rep. 521. A new trial was then awarded to the plaintiff, and the court said: "No sale of the tobacco was consummated or made effectual under the contract. There was only an agreement to sell, which was not perfected. The plaintiff did not agree or intend to part with the title to his tobacco until he received the notes, and Erdmann had no right to expect to get title to it until he sent the notes." The case comes up now on the defendants' appeal; but the facts are precisely those stated in the former case, except that a copy of the account rendered by the plaintiff, including bill-heads, and dated December 28, 1885, is put in evidence. It is plain, as decided by this court, that the letters of the parties written December 1, December 25, December 28, 1885, and two of January 16, 1886, establish a contract between the parties, slightly modified by the indulgence of the plaintiff, extended at defendant's request, but still an agreement, assented to by both, that the contract should be complete, so as to pass title to the tobacco, on the return to the plaintiff of the notes signed by the defendant. We cannot agree that the plaintiff shall be bound, and this express contract abrogated or varied, by an implication arising out of a note at the top of his bill-head, especially when the defendant agreed to sign the drafts, but did not in any way signify his assent to the terms printed at the head of the bill, and was in no way bound by a proposal to buy on such terms. If there had been no correspondence in reference to terms, and the goods had been ordered, shipped, and received with no allusion to the time or manner of payment, except that contained in the account rendered, we would have deemed it our duty to give grave consideration to the argument of the learned counsel for defendant and the authorities cited by him. There is no error. The judgment must be affirmed.

(86 Va. 109)

NOEL'S ADM'R *v.* NOEL'S ADM'R *et al.*

(*Supreme Court of Appeals of Virginia.* May 2, 1889.)

WILLS—CONSTRUCTION—DECREE.

1. Testator, after devising certain land to his wife, directed all the residue to be equally divided among his children. The will referred to a memorandum book of advancements, which testator wished to accompany the will "in order that an equal distribution of my estate may be made." Having survived his wife, he added a codicil, devising to a son certain land, and reciting that the death of his wife and other considerations induced him to modify his will. The codicil referred to the fact that the son had lived with him, and been of great service and comfort to him. It then revoked so much of the will as was inconsistent with it. The land was not valued in the codicil, nor was there any entry concerning it in the memorandum book. *Held*, that the son took the land, in addition to his share under the original will, without any accountability therefor.

2. A decree construed a will and adjudged that a devisee was entitled to certain land, but to no other property of the testator, unless he would bring into hotch-pot and account for the land, and in that event that he might share in other property. The value and boundaries of the land had not been ascertained. The residue of the estate had not been sold, nor the debts ascertained, nor any account taken of advancements. *Held*, that the

Digitized by Google

decree was interlocutory, and not final, as concerning the devisee.

3. A later decree confirming a survey made under an order in the former decree, and adjusting costs in the suit, did not, together with the former decree, constitute a final adjudication, so as to bar a petition for rehearing, not filed within a year after the entering of the later decree.

4. The fact that the devisee had filed and withdrawn with leave of court a petition for a rehearing of the decree does not estop his administrator from filing a similar petition.

Petition by James P. Noel's administrator for a rehearing of a decree construing the will of Richard Noel. The rehearing was denied, and the petitioner appeals.

W. B. Pettit, for appellant. *Shepherd & King* and *Thomas S. Martin*, for appellees.

LEWIS, P. This is an appeal from sundry decrees rendered by the circuit court of Fluvanna county in a suit which was brought to obtain a construction of the will of Richard Noel, deceased, and to have the proper accounts taken, and the estate administered under the supervision of the court. The will is dated September 16, 1853, and, after devising certain property to his wife for her life, the testator directs that all the rest and residue of his estate be equally divided among his children, of whom, at the date of the will, there were six. The will also refers to a certain memorandum book kept by the testator to show the advancements made by him to his children, and "which book," he says, "I intend to accompany this will, in order that an equal distribution of my estate may be made after my death." The testator survived his wife, and on the 20th of October, 1880, he added a codicil to his will, whereby he devised to his son, James P. Noel, a portion of his mansion-house tract of land in fee-simple, reciting that the death of his wife and other considerations had induced him to desire to make certain modifications of his will, which he thereupon proceeded to specify. And in the third item of the codicil he said: "I hereby revoke and annul so much of my will aforesaid as may in any wise be inconsistent with the provisions of this codicil." The principal question in the court below upon the merits of the case was as to the effect of the devise to the said James P. Noel of the land mentioned in the codicil. By a decree entered on the 13th of September, 1884, the circuit court held that he was "entitled to have and to hold in fee-simple the specific parcel of land mentioned in the codicil, but that he is not entitled to share, and shall not be allowed to share, in any other estate, real or personal, of which the said Richard Noel died seised or possessed, unless he is willing to bring, and does bring, into hotch-pot, and account for the value of the said land mentioned in the codicil." In November, 1885, James P. Noel filed a petition for a rehearing of the above-mentioned decree, which petition, at a subsequent term, was, by leave of the court, withdrawn, and at the April term, 1887, a petition to the like effect was presented by the administrator of the said James P. Noel, who in the mean time had died. But the court, being of opinion that the decree of the 13th of September, 1884, was a final decree, so far as the said James P. Noel was concerned, and therefore that the petition was not filed in time, entered a decree, and dismissed the petition, whereupon this appeal was taken.

The first question, therefore, to be determined is whether the decree of the September term, 1884, is, as the circuit court held, a final decree; for, if it was, then the application to rehear it was not made within the time prescribed by the statute for a bill of review to be filed, and the decree dismissing the petition is right, and must be affirmed. The characteristics of a final decree, as contradistinguished from an interlocutory decree, have been so often pointed out by this court, and are now so familiar to the profession, that little need be said upon the subject in this opinion. "According to the uniform decisions of this court, a decree which disposes of the whole subject, gives all the relief that is contemplated, and leaves nothing to be done by the court, is only to be regarded as final. On the other hand, every decree which leaves anything in the cause to be done by the court is interlocutory as between the parties remaining in court." Ryan v. McLeod, 32 Grat. 376. If anything, no matter what, remains to be done by the court in the cause, and the parties, nor any one of them, are not put out of court, the decree is not final, but interlocutory. No case has been decided by this court, said Judge BALDWIN in Cocke v. Gilpin, 1 Rob. (Va.) 22, in which the decree has been held to be final, where the judicial action of the court in the cause has not been exhausted. He used the expression "further action of the court in the cause," he said, to distinguish it from that action of the court which is common to both final and interlocutory decrees, and which may be regarded as not in, but beyond, the cause, namely, such measures as are necessary to carry the decree into execution, and which do not affect the merits of the case as previously adjudicated. See, also, Ryan v. McLeod, 32 Grat. 367; Rawlings v. Rawlings, 75 Va. 76; Jameson v. Major, ante, 480, (decided at the present term,) and cases cited. Tested by this rule, the decree of the September term, 1884, is not final, but interlocutory. It did not put the appellant's intestate out of court, nor was the judicial action of the court in the cause exhausted as to his rights. It did not profess to end the case as to him, leaving nothing further to be done, so far as he was concerned. On the contrary, the option was given him to accept an entirely different measure of relief from that indicated in the provision of the decree declaring him to be entitled to hold in fee-simple the specific parcel of land mentioned in the codicil to the will, which was to bring the land into hotch-pot, and in that event to share in "the other estate, real and personal, of which the said Richard Noel died

Digitized by Google

seised or possessed." Moreover, neither the value nor the boundaries of the land had been ascertained, which was a necessary preliminary to bringing the land into hotch-pot; nor had the residue of the estate been sold, the debts ascertained, nor any account taken of advancements; all of which was necessary to be done to enable the said James P. Noel to intelligently act in making the choice given him by the decree. The court could hardly have intended by its decree to require a choice to be made before it furnished the necessary light by which to make it, and hence it did not intend to enter—at all events it did not enter—a decree prematurely exhausting its judicial action in the matter. It is not disputed that a decree may be final as to one party and not as to another in the same cause. Royall's Adm'rs v. Johnson, 1 Rand. (Va.) 421. But it cannot be final as to any party who is not put out of the cause. As to any party remaining in the court, it can, in the nature of things, be only interlocutory. It is clear, therefore, that the decree in question is of that character. The said James P. Noel was not put out of the cause, for the election tendered him by the decree could only be made in the cause; and, if it could only be made in the cause, and not until after the court had put it in his power to elect intelligently, as cannot be successfully denied, then he remained in the court, and the decree was not final, but interlocutory. The decree undoubtedly settled the principles of the cause, so far, at least, as he was concerned, but that does not make it in its character any the less interlocutory. Further action by the court, in order to finally determine his rights in the cause, was necessary and contemplated, and that is decisive of the matter.

The appellees, however, contend that the decree of April term, 1885, taken in connection with the decree of September term, 1884, constitutes a final adjudication of the cause, and that, as both of those decrees were entered more than one year before the petition for a rehearing was filed, the petition was rightly dismissed. We think this position also is untenable. The decree of September term, 1884, in order to ascertain the proper boundary lines of that portion of the mansion-house tract of land devised to James P. Noel, directed the county surveyor to make a survey of the land according to the directions contained in the decree, and to make report to the court. This was done, and by the decree of April term, 1885, the surveyor's report was confirmed, and in the same decree the costs of the suit were ordered to be paid by the administrator *c. t. a.* of the testator, Richard Noel, deceased. But this action of the court accomplished only a part of what remained to be done by the court when the decree of the previous September term was entered. It appears that the question as to the proper boundaries of the land, as described in the codicil of the will, was in dispute, and of course it was necessary to determine that matter, as well as to take the accounts already indicated and to settle the estate, before the case could be gotten in a condition to enable the said James P. Noel to act under the decree last mentioned. And the fact that costs were decreed does not at all determine the character of the decree, as this court has repeatedly decided. "As to the disposal of the costs," said Judge BALDWIN, in Cocke v. Gilpin, "that is a matter (as concerns this question) altogether equivocal; for the court has undoubtedly the power to dispose of the costs which have accrued, from time to time, at any stage of the cause, or not to dispose of them at all, according to its discretion." Accordingly, a decree in that cause, which disposed of the costs, was nevertheless held to be an interlocutory decree.

It need only be added, in this connection, that the right to a rehearing was not affected by the withdrawal of the petition which was filed by James P. Noel in his life-time. The petition was withdrawn by leave of the court, and its withdrawal can in no way be construed as an adjudication upon the merits of the case, or as constituting an estoppel. It was nothing more, in effect, than a sort of nonsuit in equity, which worked no injury to any party to the cause.

Upon the merits, also, we think the case is with the appellant. The decree of the September term, 1884, decided that the said James P. Noel was not entitled to share in the distributable estate of his deceased father, unless he should bring into hotch-pot the land specifically devised to him by the codicil to the will. This, we think, is not the true construction of the will, construing, as we must, the will and the codicil as one instrument. The purpose and scheme of the original will undoubtedly was exact equality in the distribution of the testator's estate among his children. Indeed, the will in express terms so declares. But the purpose thus unmistakably manifested was changed when, nearly 30 years after the date of the will, the codicil was written. His wife was then dead, and this and other considerations, he declares in the codicil, induced him to desire to modify the disposition of his real estate which had been made in the will. And then he goes on to devise unto his son, James, in fee-simple, so much of his mansion-house tract of land as was comprised within certain described boundaries, without any conditions or qualifications whatever, and expressly revokes and annuls so much of the will as may in any wise be inconsistent with the provisions of the codicil. We think the language of the codicil and the surrounding circumstances show clearly a purpose on the part of the testator to so far change the scheme of the original will as to give to his said son, in addition to what had been given him by the will, a portion of the mansion-house tract of land, without any accountability therefor. His partiality in this regard is manifested by the reference in the codicil to the fact that his son

Digitized by Google

and his wife had for a number of years lived with him, and the accompanying declaration that they had been "of great service, as well as a great comfort and protection," to him. Besides, the land is not valued in the codicil, nor is there any entry concerning it in the memorandum book of advancements, which the testator in the original will declared to be the repository of the evidence of such advancements as, after his death, he desired to be charged against his children respectively. We think, in short, that the decree, in the particular mentioned, is erroneous, and must therefore be reversed and annulled.

As to the interest in the estate devised to Mrs. Maxwell, a daughter of the testator, who died without issue in the life-time of the latter, we say nothing, because we do not understand that the matter has been, as yet, adjudicated by the circuit court.

The decrees complained of will therefore be reversed in so far as they are in conflict with this opinion, and the cause will be remanded to the circuit court for further proceedings, in order to a final decree. Decree reversed.

(30 S. C. 499)

ANDERSON *et al.* v. PILGRAM.

(*Supreme Court of South Carolina.* March 30, 1889.)

MORTGAGES—FORECLOSURE—CONCURRENT REMEDIES.

1. Under the modern practice, which allows the mortgagee in an action to foreclose to obtain a personal judgment for any deficiency remaining after a sale of the premises, the rule that a suit in equity to foreclose and an action at law on the debt may be maintained at the same time is not applicable.

2. Where a mortgage secures several notes due at different times, an action to foreclose, based on the non-payment of the first note, and brought before the others have become due, is not an action on any but the first note, though all the notes are casually mentioned in the complaint, in stating the nature of the mortgage.

Appeal from common pleas circuit court of Spartanburg county; WALLACE, Judge.

Bomar & Simpson and *Thompson, Nicholls & Moore*, for appellant. *Carlisle & Hydrick*, for respondents.

McIVER, J. This was an action on a note dated 9th September, 1885, whereby defendant promised to pay to the plaintiffs, on the 1st of November, 1887, $200, with interest from date until paid at the rate of 10 per cent. per annum, and it was commenced on the 12th of January, 1888. The only defense set up was that, at and before the commencement of this action, another action was pending for the same cause between the same parties. To support this defense a record of another action, commenced 3d February, 1887, and still pending, was introduced, wherein the present plaintiffs were plaintiffs, and the present defendant, together with one J. D. Epps, to whom the mortgaged property had been conveyed by the defendant herein, were defendants. The complaint in that action alleged: "(1) That on the 9th of September, 1885, the defendant made and delivered to the plaintiffs six promissory notes, bearing that date, for amounts as follows: $350, $200, $200, $250, $200, and $200; and set out a copy of the note first to be paid, to-wit, the note for $350. (2) That on the same day the defendant, to secure the payment of the said notes, executed a mortgage on certain real estate described. (3) That on the 18th of January, 1886, the mortgage was duly recorded. (4) That the said note, of which a copy is above set forth, is due and payable, and no part thereof has been paid. (5) That the condition of said notes and mortgage has been broken, and there is due and remaining unpaid on said notes and mortgage the sum of three hundred and fifty dollars, with interest," etc. It was admitted that the condition of the mortgage is that, if the defendant "should pay the said debt according to the terms of the said notes, the conveyance should be null," etc., and that the prayer was "for the foreclosure of the mortgage; equity of redemption to be barred; the premises ordered to be sold; the proceeds to be applied to the payment of said debt; and execution awarded for the balance against S. M. Pilgram; and for other and further relief." It was also admitted that the note now sued on is one of the notes mentioned in the complaint for foreclosure, and that at the time the action for foreclosure was commenced the note for $350 was the only one of the six which had then become payable.

The circuit judge instructed the jury that, even if the note now sued on was included in the action for foreclosure, the plea of pendency of another action between the same parties, for the same cause, would not avail the defendant, because, under the authorities cited, a creditor who holds several notes secured by the same mortgage may sue at law on the notes, or any one of them, and at the same time prosecute his action in equity for a foreclosure of the mortgage; that he may resort to both remedies at the same time, though he will be entitled to only one satisfaction. He also, on request, instructed the jury that, under his construction of the record of the action for foreclosure, the note now sued on was not included in that action, as it only embraced the note for $350, set out in the complaint, and did not include any of the other notes.

Under these instructions, the jury having rendered a verdict in favor of the plaintiffs, and judgment having been entered thereon, the defendant appeals upon the several grounds set out in the record, which substantially raise but two questions, to-wit: (1) Whether a creditor holding a note or bond secured by a mortgage may, while prosecuting an action on the equity side of the court for foreclosure of his mortgage, in which he asks that execution may be awarded him for any balance left unpaid by the proceeds of the sale of the mortgaged premises, at the same time maintain an ac-

Digitized by Google

tion on the law side of the court on such note or bond. (2) If not, whether the note sued on in this case was included in the action for foreclosure.

The circuit judge says, in discussing the first question, that his own impressions of the law had been otherwise, but the authorities cited required him to charge as he did. We think his honor was misled by these authorities, and that his first impressions were correct. The authorities relied on are 2 Jones, Mortg. § 1215, and the case of Burnell v. Martin, 2 Doug. 417, decided by Lord MANSFIELD. But owing to the radical change in the nature of a mortgage, effected by our act of 1791, we do not think these authorities are applicable. We can very well understand that, where a mortgage is regarded as a conveyance, and not as mere security for a debt, there is no objection to allowing a mortgagee to proceed at the same time to foreclose his mortgage and bring an action at law to recover judgment on the debt; for there the action for foreclosure would not afford a complete remedy, as it did not contemplate a judgment for any balance left unpaid by the mortgaged property. There the mortgagee held the legal title to the mortgaged premises, subject to the mortgagor's equity to redeem; and the object of the action to foreclose was simply to cut off—bar—such equity, and not to recover the amount of the debt. Here, however, there is, properly speaking, no such thing as a strict foreclosure; for the legal title remains in the mortgagor, and not a mere equity to redeem. Hence the remedy of the mortgagee here is not to foreclose or bar an equity which does not exist, but to enforce the payment of his debt by a sale of the property pledged as security therefor. The phrases, "foreclosure of a mortgage," and "equity of redemption," were imported here from England along with the body of the common law, and are yet in constant use; but it must always be remembered, in order to avoid being misled, that they have acquired a totally different meaning here from that which they bore in England. A mortgagor at common law, having parted with the legal title by the mortgage, could only regain it by paying the mortgage debt, and demanding a reconveyance from the mortgagee. This was a mere equity, called the "equity of redemption," and the real object and effect of judgment of foreclosure were simply to cut off this equity, and confirm the legal title in the mortgagee free from such equity. Here, however, the remedy of the mortgagee is by an action for the sale of the mortgaged premises, and an application of the proceeds of such sale to the mortgage debt; and, although usually called an action to foreclose, it is totally different in its character, and results from a strict foreclosure. This being the nature of the mortgagee's remedy, to enforce which it was necessary to ascertain judicially the amount of the mortgage debt, the practice gradually and very naturally sprang up of allowing the mortgagee in such an action to obtain, not only an order for the sale of the mortgaged premises, and an application of the proceeds to his debt, but also a judgment, enforceable by execution, for any balance which might remain unpaid by the proceeds of the sale. This practice, though for some years after the passage of the act of 1791, not recognized or acted upon, as it would seem from what is said by WARDLAW, Ch., in Wightman v. Gray, 10 Rich. Eq. 532, has now become well settled, and very generally, if not universally, acted upon, in this state, at least. This being the case, we see no reason why the mortgagee should be permitted to harass his debtor by two suits at the same time, both tending to the same result. The doctrine laid down by the authorities relied on by the circuit judge, as well as those cited by the counsel for plaintiffs in the argument here, can only be sustained where the action to foreclose a mortgage is regarded in a different light from what it is here. The reason given by KENT, Ch., in Jones v. Conde, 6 Johns. Ch. 77, why a mortgagee is allowed to sue at law on the bond, and at the same time prosecute his action for foreclosure in the court of equity, is that one is a proceeding *in rem*, and the other *in personam*, and the same learned chancellor, in Dunkley v. Van Buren, 3 Johns. Ch. 330, refused to allow a judgment for the deficiency in an action to foreclose a mortgage, upon the ground that "such a suit is not intended to act *in personam*," but that the mortgagee in such an action "is confined in his remedy to the pledge." But in this state, where the mortgagee, in an "action to foreclose," as it is called, is not confined in his remedy to the mortgaged property, but may also obtain a personal judgment, the proceeding being *in personam* as well as *in rem*, the doctrine of those authorities is not applicable. The conclusion to which we have arrived is supported by what is stated to have been the opinion of the equity court of appeals in Gray v. Toomer, 5 Rich. Law, 266, where the law court of appeals deemed it necessary to take the opinion of the court of equity.

Among the authorities cited in the argument here to support the ruling below there is one case in this state which requires some notice. It is the case of Hatfield v. Kennedy, 1 Bay, 501. That case was decided in 1793, long before the practice of allowing a mortgagee, in an action to foreclose his mortgage, to obtain a personal judgment for any balance that may remain unpaid, after application of the proceeds of the sale of the mortgaged premises had been established, and cannot now be regarded as authority under such practice. Indeed, the question seems to have received but little consideration in that case, and the decision was rested solely on Lord MANSFIELD'S ruling in Burnell v. Martin, supra, which, as we have seen, is not applicable here, owing to the radical change effected by our statute in the nature of a mortgage, and the marked difference between an action for strict foreclosure and an action to

Digitized by Google

enforce the payment of a mortgage debt by a sale of the mortgaged premises.

As to the second question, we agree with his honor, Judge WALLACE, in holding that the note sued on in the present action was not included in the former action to foreclose the mortgage. While it may be true that two or more notes given by the defendant to the plaintiff may be regarded as constituting but a single cause of action, as in Holland v. Kemp, 27 S. C. 623, 3 S. E. Rep. 83, and Latimer v. Sullivan, 8 S. E. Rep. 639, it does not follow that they must necessarily be so regarded in every case. When the notes are payable at different times, and the holder desires to sue as soon as the first one matures, and before the others become payable, they must necessarily be treated as separate causes of action, as no action can be maintained on a note until after it becomes payable, except under the special circumstances provided for by statute, which have no application here. In this case the note now sued on was not payable until the 1st day of November, 1887; and as the former action was commenced on the 3d of February, 1887, we do not see how it could have been included in that action. Suppose that at the hearing of the action for foreclosure of the mortgage the defendant should be able to prove that the note for $350, specially set out in the complaint in that action, was a forgery, or that the note had been paid or otherwise extinguished, how could any judgment be recovered in such action? The plaintiffs could not, in such event, have claimed judgment upon any of the other notes, casually mentioned in the complaint, as representing part of the debt which the mortgage was intended to secure; for, besides the fact that the complaint contains no such allegations in regard to the other notes as would entitle the plaintiffs to demand judgment upon them, the more material difficulty would be that, as these other notes had not become payable at the time of the commencement of the former action, the action as to them would fail, for, as is said by Mr. Chief Justice SIMPSON in Moon v. Johnson, 14 S. C. 436, upon the authority of Bank v. Manufacturing Co., 3 Strob. 190: "No party can recover in an action which was commenced when the cause of action had not accrued."

It is true that where a mortgage is given to secure a bond, with a penalty, conditioned for the payment of a certain sum of money at a future day, with interest payable annually, or in several installments, at different times, an action may be commenced as soon as there is a default in payment of the first year's interest or first installment, and provision may be made in the judgment for the payment of the subsequent annual interest or subsequent installments as they respectively become payable, (Brinckerhoff v. Thallhimer, 2 Johns. Ch. 486,) but that is upon the theory that the obligor is liable to judgment for the penalty so soon as there is default in performing any one of the conditions of the bond. What would be the proper mode of proceeding to render the mortgage available security for the payment of such of the notes as had not become payable when the action was commenced, in a case like the present, where the mortgage was not given to secure a bond with a penalty, but was given to secure sundry notes, some of which had not become payable when the action was commenced, we are not now called upon to consider, as no such question is presented in this case. The judgment of this court is that the judgment of the circuit court be affirmed.

SIMPSON, C. J., and MCGOWAN, J., concur.

(30 S. C. 530)

MOORE *et al.* v. BARRY *et al.*

(*Supreme Court of South Carolina.* April 4, 1889.)

DRAINAGE—ASSUMPSIT.

1. Gen. St. S. C. § 1183, provides that county commissioners may, upon the petition of one-third of the land-owners for a distance of five miles along a stream, make contracts for the drainage of the lands, and assess the expense thereof on the lands benefited. Certain land-owners filed a petition, upon which the commissioners contracted with plaintiffs to do certain draining, which was done. The commissioners, in a special proceeding, to which the commissioners, the petitioning land-owners, and the other interested land-owners who had been cited to answer the petition were parties, decided that no one was benefited by the work, but assessed the cost on the petitioners. On appeal this assessment was vacated. Thereupon plaintiffs sued for the labor done, making the commissioners and the land-owners of both classes defendants. *Held* that, the petitioning owners having set in motion the proceedings under which the work was done, they were liable under an implied promise to remunerate plaintiffs therefor.

2. Neither the non-petitioning land-owners nor the county commissioners are liable for the work so performed.

Appeal fom common pleas circuit court of Spartanburg county; B. C. PRESSLEY, Judge.

Action by Thomas E. Moore and James J. Caldwell against C. A. Barry and others, county commissioners of Spartanburg county, and S. M. Snoddy and others, to recover for certain drainage. Judgment for defendants on demurrer, and plaintiffs appeal.

J. S. R. Thompson and *Nicholls & Moore*, for appellants. *Bomar & Simpson* and *Duncan & Sanders*, for appellees.

MCGOWAN, J. In December, 1880, S. M. Snoddy, W. H. Bush, L. L. Wingo, J. W. Bush, H. W. Ballenger, W. J. Bright, and Joseph L. Howell, defendants, petitioned the then board of county commissioners for Spartanburg county to take the necessary steps to have the swamp lands on "Jordan's Creek" drained under section 1183 of the General Statutes, alleging in said petition that they constituted a majority of the land-owners on said stream, and that the land sought to be drained was unfit for cultivation. The then county commissioners proceeded under the statute to have the other landholders on said stream served with a

Digitized by Google

copy of the petition, and to employ an engineer to report upon the feasibility of the desired drainage and to make specifications for the work. After receiving the report of the engineer, the county commissioners contracted with the plaintiffs to do certain ditching and other work for the purpose of the said drainage, and furnished them with specifications therefor. The plaintiffs undertook and completed the work according to the specifications, and it was so received by the county commissioners. Thereafter the county commissioners, in a special proceeding to which all the defendants herein were parties, found that no one was benefited by said work, though through no default of the plaintiffs. But nevertheless they "assessed" the original petitioners to pay the account rendered for said services, $416.62. From this decision the petitioners appealed to the circuit court, which decided that said "assessment" "was made without authority of law," and set it aside. Thereupon the plaintiffs instituted this action, making parties defendant (1) the original petitioners; (2) the other land-owners on the creek who were notified; (3) and the county commissioners now in office, as well as their predecessors, who were commissioners when the work was done. Each of the three classes of defendants interposed an oral demurrer as to the liability of themselves, that the complaint did not state facts sufficient to constitute a cause of action. The court sustained all of the demurrers, and dismissed the complaint. From this order the plaintiffs appeal, and insist that it was error to dismiss the complaint, because the plaintiff proved a valid and just claim, and that the defendants, or some of them, must certainly be liable therefor.

The law under which the proceedings were instituted to drain "Jordan's Creek," is as follows: "That the county commissioners be, and they are hereby, authorized, in addition to the duties now imposed on them by law, to act as commissioners of 'health and drainage,' and they are hereby empowered as such commissioners of health and drainage to act as follows, to-wit: That in cases where one-third of the land-owners upon any water-course, for a distance of not less than five miles up and down the stream in said county, shall desire to drain the lands upon such water-course, the said county commissioners shall, upon petition, personal service, and the testimony of one or more competent engineers, be empowered to make contracts for such drainage, and impose the proper assessments upon the various properties benefited by the same, and the said assessment shall have the force of a legal judgment:" provided, that each party has the right of appeal. It is not denied that the commissioners made a contract with the plaintiffs to do certain specified work in order to drain the bottoms of the creek, or that the work was done satisfactorily according to the specifications; but it is denied that any one is liable to pay for it. The commissioners, by the act, have authority to impose the proper assessments upon the various properties benefited by the same; but it seems to have been ascertained that the work "benefited" nobody, and therefore Judge PRESSLEY held that the power of "assessment" given by the act was never called into existence, as the work done did not "benefit any properties." The whole project seems to have been a failure as to the purposes intended. Assuming that those who put the proceedings in motion—the original petitioners—cannot be "assessed" under the terms of the act, we suppose, of course, that neither the non-concurring landholders, nor the county commissioners, nor the county itself, can be "assessed" under the act for the expenses incurred. But does it necessarily follow that the plaintiffs have no remedy against any one to recover for their labor done under a lawful contract? They took no risks in the results of the enterprise, but agreed to perform specified labor for a money consideration, and did perform it to the satisfaction of the contracting parties. It is the boast of the law, as Lord Chief Justice HOLT expressed it in Ashby v. White, 2 Ld. Raym. 953: "If the plaintiff has a right, he must of necessity have a means to vindicate and maintain it, and a remedy, if he is injured in the exercise or enjoyment of it; and, indeed, it is a vain thing to imagine a right without a remedy, for want of right and want of remedy are reciprocal." It is true that there is another principle,—that when a statute creates a new right, and at the same time prescribes a special proceeding for enforcing the right, that course must be followed by any one claiming that right. But is this a proceeding of that kind? The plaintiffs were in no way parties to the drainage proceedings, and are not asserting any right under a special proceeding. The drainage act does not undertake to make any change in the manner in which strangers to it may enforce their contracts for work and labor, but, as among the parties concerned, provides the means to compel unwilling land-owners to pay their share of beneficial drainage. If the act purports to go no further than that, then, as to the expenses for unsuccessful drainage, there was certainly a perfect "*casus omissus*,—a case unprovided for by statute, in which event the common law prevails." 1 Rap. & L. Law Dict. 178. The principle was clearly stated by the Chief Justice in the case of Ex parte Lewie, In re Geiger v. Drafts, 17 S. C. 155, as follows: "The court of common pleas is the general fountain of justice, and where the rights of a citizen, either derived from the common law or the statutes, are invaded, and the power to protect is conferred upon no special jurisdiction, he may seek redress in that court." Wherever work is performed at the instance of A., unless a special remedy can be enforced, A. is liable on an implied promise in every case to pay the same. See Blount v. Guthrie, 5 S. E.

Digitized by Google

Rep. 890; Howze v. Howze, 2 S. C. 232; 2 Bl. Comm. 443. We cannot say that the allegations of the complaint were not sufficient to sustain proof tending to show that the county commissioners, in making the contract with the plaintiffs, acted as the agents of those defendants, who, as the original petitioners in the matter of the drainage, put the proceedings in motion, and in that way procured the work to be done. We concur with the circuit judge in sustaining the demurrers interposed by the county commissioners and by the non-petitioning land-owners, but we think it was error to sustain the demurrer and dismiss the complaint as to the original petitioners, who put the proceedings in motion. The judgment of this court is that the judgment of the circuit court be affirmed, except as to the defendants who were original petitioners; and as to them that it be reversed, and the cause remanded for a new trial.

SIMPSON, C. J., and MCIVER, J., concur.

(30 S. C. 549)

CHAPMAN *et al.* v. CITY COUNCIL OF CHARLESTON *et al.*

(*Supreme Court of South Carolina.* April 6, 1889.)

EXECUTORS — POWERS AND DUTIES — MUNICIPAL BONDS.

1. Testator directed his estate to be accumulated until his three daughters should attain their majorities or marry, when the sum of $25,000 was to be given to each, to be preferred legacies. He provided that the sums should be taken in the most secure investments he had, such as the bonds of the state, or the city of C., and placed in the hands of trustees, for their benefit. If any of the daughters should die without issue, the sum intended for her should be divided among testator's other children. He gave his executors power to sell any of his estate in their discretion, excepting such public securities as he had directed should constitute the $25,000 legacies for his daughters. A provision was made for the setting apart of a sum in securities for his wife's benefit, and such securities were not excepted from the power of sale. All of the daughters died without issue, one of them before testator's death. At his decease testator owned nearly enough state and city bonds to make up the three sums for the daughters, had they all lived. After the death of the daughters, one of the executors transferred some of the city bonds. *Held*, that the will did not take away the common-law right of the executor to sell the bonds, the restriction as to the securities intended for the daughters being only intended for their personal benefit, and, as the time for placing them in the hands of trustees never arrived, the exception did not apply.

2. Such bonds are but choses in action, and unless restricted by the will the executor has full power of disposition over them.

3. One of several executors can sell and transfer such securities, the act of one being, as to the administration of personal assets, the act of all.

4. The burden of proving that the particular securities transferred by the executor was excepted from the power of sale is upon the person alleging the invalidity of the sale.

5. Though the securities in question were, in a suit among the parties interested under the will, allotted to the widow, that fact not having been brought to the notice of the city council, which was not a party to the suit, the decree therein would not bind the council, and, the securities being allowed to remain on the books of the treasurer without any effort being made to transfer them to the widow, the city authorities had the right to regard the executors as empowered to transfer them.

6. The court in the suit mentioned had no jurisdiction to discharge the executors, even with their consent, so as to deprive them of power to transfer the stock.

Appeal from common pleas circuit court of Charleston county; J. J. NORTON, Judge.

Action by Robert Chapman and others against the city council of Charleston and others, to compel said council to deliver certain securities, or to account therefor. Judgment for defendants, and plaintiffs appeal. For opinion on appeal from order overruling a demurrer to the complaint, see 6 S. E. Rep. 158.

Lord & Hyde, for appellants. *Charles Inglesby*, for respondents.

MCIVER, J. On the 31st of January, 1859, James Chapman departed this life, having first duly made and executed his last will and testament, with a codicil thereto, the one bearing date the 27th of May, and the other 5th of July, 1856. By his will the testator appointed his three sons, Thomas E., James, and Robert B., executors, and his wife, Isabella, executrix, and by the codicil he appointed two additional executors, John W. Caldwell and James H. Wilson. The will was admitted to probate on the 7th of February, 1859, and on that day Robert B. Chapman, John W. Caldwell, and James B. Wilson qualified as executors, and on the 4th of February, 1860, James Chapman also qualified. The other two persons named for the purpose never qualified, though the records do not show that they ever formally renounced the executorship. The several clauses of the will as set out in the "case" are not numbered, but for convenience of reference we have numbered them in regular order. By the third clause the testator gives to each of his three daughters, naming them, the sum of $25,000, saying: "This bequest to each of my said daughters I do not intend shall in anywise abate or contribute, in case of any deficiency of my estate, but shall be held as a provision made for my said daughters, and to be preferred over all others." But he goes on to provide that if, from any unforeseen contingency, the balance of his estate should not yield a sufficient income to afford an adequate support for his widow, then the annual income from each of the sums given to the daughters shall be charged with a contribution in equal portions with so much as may be necessary to make up a sum sufficient for the proper maintenance of his widow during her life or widowhood. He then directs "that the said sum of twenty-five thousand dollars shall be taken in the most secure investments I have, such as stocks or bonds of the City of Charleston, or stocks of the state of South Carolina;" and further provides that the sums thus given to the daughters, as well as any other portion of his estate to which they become entitled on the final division of his estate, "shall be taken and held by trustees hereinafter to be named, and in

Digitized by Google

the manner hereinafter to be provided." In the fifth clause the testator directs that the whole of his estate shall be kept together by the executors until the youngest daughter shall attain the age of 21 years, unless all of the daughters shall marry before that period. "And then and in that event I desire and so devise that my estate be divided in the following manner: *First*, that from it shall be taken, as is hereinbefore directed, for each of my said daughters, the sum of $25,000, in the manner hereinbefore directed, which shall be transferred to trustees for my said daughters hereinafter named, and which shall be held by the said trustees subject to the following uses, trusts, and purposes,"—going on to declare the same; providing that, in case any of his daughters should die leaving no issue, "then, and in such case, the share or portion of my estate to such daughter or daughters given under this my last will and testament, shall cease and determine, and the same and every part thereof shall be divided among my other children, share and share alike." In the eleventh clause the trustees of the daughters are named, and in the twelfth, after naming the executors, the testator says: "And I give them power to sell and dispose of such parts of my estate as they may think expedient, except such public securities as I have directed should constitute the sum of twenty-five thousand dollars for each of my said daughters, and my dwelling-house, with the furniture, plate, servants, and other appurtenances of the same." In the fourth clause the testator makes provision for his wife during her life or widowhood, giving her, among other things, so much of the income of his estate as may be necessary to maintain her and such of his children as may require it, in the style to which they were accustomed during the testator's life-time; and directs that any surplus of such income shall be invested annually by the executors in approved public securities, "which shall be considered as part of my estate in the division of the same, which I hereafter direct." In the sixth clause the testator provides for his widow, in case a final division of his estate shall become necessary, by reason of the marriage of all the daughters, or from any other unforeseen cause, before the youngest daughter shall attain the age of 21 years, and his wife shall then be alive and continue a widow, by which, after giving his dwelling-house and certain other property to his wife for life or during widowhood, he directs his executors, in making the division of the estate, to "set apart the sum of thirty thousand dollars in secure public investments," the annual income from which shall be paid to the wife during her life or widowhood, and upon her death or marriage this provision, as well as every other made for the wife, "shall thereupon cease and determine, and the same and every part thereof shall be immediately thereupon divisible among my children in equal parts or shares," to be held by them on the terms prescribed, which it is not important to state. The seventh clause makes provision for testator's sons, the particulars of which we do not deem it necessary for the purposes of this inquiry to state, further than to say that the plaintiffs' claim that under the limitation found in this clause they succeeded to the share of their father. The eighth and ninth clauses of the will need not be specially noticed, further than to say that they both show that no division of the estate was intended until the youngest daughter married or attained the age of 21 years. So also as to the tenth clause there is nothing in it which can affect the present controversy. The same remark is applicable to the first and second clauses.

The testator left surviving him his widow, two daughters, and three sons; the other daughter having died during his life-time, leaving no issue. Both of the surviving daughters died in 1864, leaving no issue. Thomas E. Chapman, one of testator's sons, died in 1868, leaving two children, who are the plaintiffs in this action; Robert B. Chapman, another son, died in 1868, leaving two daughters, who are defendants herein; and the third son, James Chapman, Jr., died in 1881, leaving five children, who are likewise defendants herein; and finally the widow of the testator died 6th March, 1887. It appears from the inventory of testator's estate that the only public securities held by him at the time of his death were $50,000 of city of Charleston stock, represented by various certificates bearing different numbers, and $23,710 of state stock. The books of the city treasurer, which were offered in evidence, show that all of the city stock has been transferred at different times to different persons, all of these transfers having been made by Robert B. Chapman, executor, except one, where, the original certificate having been lost, it is not known who signed that transfer. These books show that two of the certificates, No. 169 and No. 170, for $10,000 each, were on the 2d of August, 1865, transferred by Robert B. Chapman to the estate of James Chapman, and a new certificate, No. 3,005, in the name of that estate, issued for the sum of $20,000. The stock represented by this last-mentioned certificate was transferred as follows: One-half by Robert B. Chapman and James Chapman, executors, to George W. Williams & Co., on the 5th of July, 1867, and the other half by James Chapman, executor, to George W. Williams & Co. on the 12th of August, 1867. The plaintiffs claim that the stock represented by certificate No. 3,005 had been set apart to testator's widow by the executors under certain proceedings set out in the record, and that upon her death they, as the children of one of testator's deceased sons, Thomas E. Chapman, together with the children of the other two deceased sons, Robert B. Chapman and James Chapman, became entitled to said stock, in the proportions stated in the complaint; that the transfers of said stock made by Robert B. Chapman and

Digitized by Google

James Chapman, executors, to George W. Williams & Co., "were illegal and void, and were made through the carelessness of the officers and agents of the city, and by reason thereof the said stock has been wholly lost to the plaintiffs, and the other parties entitled thereto." They therefore bring this action to require the city of Charleston to deliver the city stock thus illegally transferred to the plaintiffs and the other parties entitled thereto, or account to them for the same; and, as the children of Robert B. Chapman and the children of James Chapman declined to unite in this action as plaintiffs, they have been made defendants.

It is alleged in the complaint, and the fact is so, that on the 25th of May, 1866, a bill was filed in the court of equity by J. W. Caldwell, Robert B. Chapman, and James H. Wilson, as executors of James Chapman, against Thomas E. Chapman, James Chapman, and such of the children of the three sons as were then *in esse*, who were supposed to be remainder-men under the will, for the settlement of the estate of the testator, in which the executors stated that they were ready to account and to set apart the widow's share, but were unwilling to turn over the shares of the testator's sons to them, as they were advised that they were only entitled to a life-estate with remainder to their children, and that it was the duty of the executors to hold these shares for the benefit of those who would become entitled thereto upon the happening of the contingencies mentioned in the will. The chancellor, holding that the period for distribution had arrived, adjudged that the sons were entitled to have possession of their shares, whether their estates were absolute or for life only, and referred it to Master Tupper to inquire, and report a scheme for the settlement of the estate. On the 12th of July, 1886, Master Tupper filed his report, setting forth in detail what property had been allotted to the widow and the three sons, respectively, by the executors, in which he recommended that such allotment be confirmed, and "that upon the delivery to the widow and sons of the real and personal property assigned to them, respectively, the executors be discharged;" and this report was confirmed by consent by an order of Chancellor CARROLL. The allotment to the widow embraced, among other things, $20,000 of city stock, as to which Master Sass, to whom the issue in the present action was referred, found, as a matter of fact, that certificate No. 3,005, above referred to, represented the stock then allotted to the widow, though it does not appear that such stock was ever transferred to the widow, but, on the contrary, it remained on the books in the name of the estate of James Chapman until it was transferred to George W. Williams & Co. as above stated. When the record of the proceedings in the late court of equity was offered in evidence the city council objected, upon the ground that, they not being parties thereto, it was *res inter alios acta*, and in the absence of any evidence that they had notice of such proceedings such record was incompetent evidence against them. The master overruled the objection, and the city council excepted. For the reasons stated in his report, which is set forth in the "case," the master found that the transfers of stock by the executors to George W. Williams & Co., above referred to, were made without authority, and that the city council of Charleston was responsible for the damages resulting to the plaintiffs therefrom. To the report the city council filed exceptions, and the case was heard by his honor, Judge NORTON, upon the report and exceptions, who rendered judgment sustaining the exceptions, overruling the report, and dismissing the complaint. From this judgment the plaintiffs, as well as all the defendants, except the city council of Charleston, appeal upon the several grounds set out in the record.

The fundamental inquiry in the case is whether the executors, all or some of them, had the power to transfer the stock in question. There can be no doubt that at common law an executor had an absolute power of disposal over the whole personal property of his testator, (2 Williams, Ex'rs, 2d Ed. 670;) and while it is true that this absolute power has been restricted by the act of 1824, now incorporated as section 1,976, Gen. St., requiring that he shall first obtain an order of sale from the proper tribunal, unless such sale is directed by the will, it has been settled in this state by the case of Rhame v. Lewis, 13 Rich. Eq. 299, recognized and followed in Reynolds v. Rees, 23 S. C. 438, that such restriction does not apply to the power of an executor to transfer choses in action. So that, if this stock is a chose in action, there can be no doubt of the power of the executors to transfer it, unless forbidden by the terms of the will to do so. It seems to us that this stock must be regarded as a chose in action. It is nothing more than an acknowledgment by the city council of Charleston that there is due to the person named in the certificate or his assigns the sum of money specified therein, which is payable at the time therein stated, with interest at the rate specified, payable at certain stated times, with a stipulation that the same is transferable only at the office of the city treasurer. It is a mere promise to pay a certain sum of money at a time stated, with interest thereon at a specified rate, payable at certain stated periods. Such a paper, signed by an individual, would unquestionably constitute a chose in action, and the fact that this paper is executed by a corporation cannot have the effect of altering its nature and legal effect. It follows then that no order of sale was necessary to render these transfers valid. Inasmuch as the right to transfer this stock does not rest alone upon the power of sale conferred by the will, but might have been lawfully exercised under the common-law powers of the executors, it is scarcely necessary to consider the point raised in the argument that the power was

Digitized by Google

defectively executed because all of the executors did not unite in exercising it, for according to our construction of the clause conferring the power it was given to the executors as such; and when that is the case it is too well settled to admit of question that the power may be exercised by any one or more of several executors, at least so far as personal property is concerned, upon the principle stated in 2 Williams, Ex'rs, (2d Ed.) 683, as follows: "Co-executors, however numerous, are regarded in law as an individual person; and by consequence the acts of any one of them, in respect of the administration of the effects, are deemed to be the acts of all;" quoted with approval in Rosborough v. McAliley, 10 S. C. 246.

Our next inquiry is whether there is anything in the will forbidding the exercise of this power of sale. So far from there being any general prohibition in the will as to the exercise of this power of sale, the testator has, on the contrary, expressly invested his executors with power to sell any part of his estate, except certain specified portions thereof. His language is: "I give them power to sell and dispose of such parts of my estate as they may think expedient, except such public securities as I have directed should constitute the sum of twenty-five thousand dollars for each of my said daughters, and my dwelling-house," etc., which he intended as a home for his wife and children. It will be observed that the testator does not specify any particular public securities as excepted from the power of sale, but he only refers to them in general terms, as such public securities as he had directed should constitute the sum of money intended for each of his daughters. The legacies to the daughters are not specific legacies, and they can scarcely be regarded even as demonstrative legacies, for no particular fund is designated out of which they were to be paid, as in Boykin v. Boykin, 21 S. C. 532, but the direction is simply that these sums of money intended for the daughters "shall be taken in the most secure investments I have, such as stocks or bonds of the city of Charleston, or stocks of the state of South Carolina," but no particular stocks or bonds are designated as the fund out of which they were to be paid. It is clear, therefore, that they might have been paid in United States bonds, or any other public securities, such as city or state stocks. It does not appear what amount of public securities the testator owned at the time he executed his will, though it does appear that at the time of his death he owned city and state stocks to the amount of $73,710, a sum insufficient to make the provision intended for the three daughters. The testator must therefore have expected when he signed his will to acquire additional public securities before he died, or intended that his executors should do so after his death, but the death of one of his daughters during his life-time rendered this unnecessary, as the amount of public securities on hand at the time of his death was much more than sufficient to make the required provision for the two surviving daughters.

It will be observed that by the fifth clause of the will the testator directs that the whole of his estate should be kept together until his youngest daughter married or attained the age of 21 years, "and then and in that event" the estate was to be divided in the manner prescribed: "*First*, that from it shall be taken the sum of twenty-five thousand dollars in the manner hereinbefore directed,"—that is, in public securities,—"which shall be transferred to trustees," etc.; and the same clause goes on to provide that upon the death of any daughter without issue the share of such daughter under the will "shall cease and determine, and the same and every part thereof shall be divided among my other children, share and share alike." So that it is quite clear that until the period fixed for a division arrived the portions intended for the daughters could not be taken out of the estate, and transferred to their trustees; and as all the daughters died without issue before that period arrived it never did become necessary, or even permissible, to separate their portions from the rest of the estate, and hence, in the events which have happened, no portion of the estate was accepted from the power of sale conferred upon the executors except the dwelling-house and other specific articles given to the widow. The whole tenor of the will shows that the testator did not intend to accept public securities from the power of sale conferred upon the executors, because he regarded them as the safest of all investments that could be made, for if that had been his intention it would have been very easy to say so. The most natural way to have expressed such intention would have been to say that the executors are authorized to sell any portion of my estate, as they may think expedient, except such public securities as I may own at the time of my death. But instead of saying this,—instead of excepting all of his public securities,—he only excepts those which he desired should constitute the portions of his daughters, when the time arrived for setting apart such portions, and placing them in the hands of trustees for their benefit; and as that time never arrived, and as this provision according to our view, was manifestly intended for the personal benefit of the daughters, we do not think that, in the events which have occurred, any portion of the estate was excepted from the power of sale, except the dwelling-house, etc. It is significant, in this connection, to notice that the $30,000 in public securities, which in the sixth clause of the will the testator directs, in a certain contingency, shall be set apart for the widow, are not excepted from the power of sale conferred upon the executors, but only such public securities as he directed should be set apart or taken out of his estate for his daughters, and placed in the hands of trustees when the period for division should arise.

Digitized by Google

But, in any view of the case, it was incumbent on the plaintiffs to show that this particular stock represented by certificate No. 3,005, the alleged illegal transfer of which constitues the basis of their claim, was excepted from the power of sale, and this they have failed to do. There is no doubt that, as this stock originally stood on the books of the city treasurer in the name of the testator, and was afterwards consolidated into one certificate in the name of his estate, the city authorities must be presumed to have examined the will before they could properly allow the stock to be transferred; and if they failed to make such examination they must be presumed to have had notice of everything that such an examination properly conducted would have disclosed. Now, if they had made such examination, they would have learned that the executors had full power to dispose of any public securities except such as were necessary to meet the provision intended for the daughters; and as they would also have learned that one of the daughters had predeceased the testator, leaving only two to be provided for, and that the amount of public securities owned by the testator at the time of his death was much more than sufficient to provide for these two, and as they would have learned further that these two daughters had died without issue long before the period arrived when the public securities were to be taken out of the estate and placed in the hands of their trustees it seems to us that the result of their inquiries would have shown that the executors had full power not only to dispose of this particular stock, but also any or all of the public securities.

It is, however, contended that when, under the proceedings in the court of equity above referred to, the stock in question was allotted to the widow in the division then made under the supervision of the court, the power of sale was determined, and any subsequent transfer by the executors was wholly without authority. While that may be so as to the parties to that case or their privies, and would be so as to the city council if they had had notice of such proceedings, yet as they were neither parties nor privies to that case, and had no notice of it, we do not see how they can be affected by anything that was done under that case. There was nothing in the will to indicate that there was any likelihood or expectation of an appeal to the courts for any purpose. On the contrary, the whole tenor of the will, especially the provisions of the tenth clause, indicated that the testator did not intend or expect that any resort should be had to the courts for the purpose of carrying out the provisions of his will. Hence, while the city authorities must be presumed to have had knowledge of the contents of the will, such knowledge, instead of inducing them to inquire whether there were any proceeding in the courts in reference to the estate, would have had rather the contrary effect. The parties to that case took no steps to inform the city council of what had been done, or to transfer the stock to the widow, or to any one for her, but it was suffered to remain on the books of the city treasurer in the name of the estate of the testator, apparently subject to the control and disposition of his executors; and there was nothing whatever done, so far as we can perceive, calculated to excite even a suspicion in the minds of the city authorities that the executors no longer had power to dispose of the stock. The position taken in the argument, that under the proceeding in equity the executors were discharged with their own consent, and therefore had no power to transfer the stock, is fully disposed of by what is said by the circuit judge: *First*, that under the order the executors were to be discharged upon certain conditions, which were never complied with; *second*, that the court had no authority to discharge them. Campbell v. Bank, 3 S. C. 384. The judgment of this court is that the judgment of the circuit court be affirmed.

SIMPSON, C. J., and MCGOWAN, J., concur.

(82 Ga. 667)

WILDS v. BRUNSWICK & W. R. CO.

(*Supreme Court of Georgia.* March 23, 1889.)

ACCIDENT TO PERSONS ON TRACK.

One knowingly and needlessly walking at night upon a railroad track can, by the use of ordinary diligence, avoid being run over by a train, unless it appears that owing to some special fact or circumstance the use of such diligence would prove ineffectual.

(*Syllabus by the Court.*)

Error from superior court, Ware county; ATKINSON, Judge.

The facts set out in the official report, referred to in the opinion, are substantially as follows: Plaintiff's husband, in company with two others, had taken two drinks of whisky and a supper of beans and greens. After supper the three went together to where the jug of whisky had been deposited, and took another drink of whisky around, sat down on the crossing of the railroad and public road, talked a while, and parted. One of them went back to his house, another stepped aside, and plaintiff's husband walked on down the track. The train of defendant came along at a considerable rate of speed, which does not seem to have been checked before it struck the husband of plaintiff, and killed him. He was, when struck, more than 400 yards from the crossing from which he started, and about one-half to three-fourths of a mile from the next public crossing below. There was a private crossing about 40 yards from where he was struck, and near it was an old blow-post lying on the ground, with the initial W on it, and near where the blow-post was lying was an old stump, which had the appearance of being the stump of the blow-post. When plaintiff's husband separated from his companions, he took the jug of whisky with him,

Digitized by Google

and but a short time elapsed before he was struck by the train. At the point where he was struck there were indications that he had leaned over towards the middle of the track, and vomited. It was a very dark night, and the track at the point was level, or nearly level, and straight for some distance. There was evidence that no signals were given in approaching the crossing, and the only evidence to the contrary on this point was that of the conductor of the train, who said that he could not remember positively whether the whistle was blown or not, but thought so, because it was the invariable rule to blow at all the public road crossings. One of the companions, who was standing near the track when the train passed, testified that he saw lights on the train, but was uncertain whether it was a head-light. Thought that it was other lights on the train that he saw. The same witness testified that the deceased had good hearing and sight; but would sometimes get in a study, and not notice anything. The conductor testified that the head-light was burning a short time before and a short time after the killing, though he could not swear positively that the head-light was burning at the point of killing. He also swore that deceased's companion could not have stood where said companion testified he did stand when the train passed, and, looking towards the approaching train, have seen any other light on it except the head-light. It was shown that deceased was 29 years old, left a wife and four children, and earned from 75 cents to $1.50 per day. Mortuary tables were introduced as evidence. The jury found for plaintiff $2,500. Defendant moved for a new trial. The motion was granted, and the plaintiff excepted.

S. W. Hitch, *L. A. Wilson*, and *E. H. Myers*, for plaintiff in error. *Goodyear & Kay*, for defendant in error.

BLECKLEY, C. J. Mrs. Wilds obtained a verdict for $2,500 against the company for killing her husband. The court granted a new trial. We think this was proper. The homicide occurred at night, several hundred yards from any public crossing, and the only reason why there was any such unfortunate calamity was that the company and the deceased were both attempting to use the track at the same time. The company had a right to its use; the deceased had none. There is no explanation whatever as to why he did not avoid the consequences of the company's negligence. That he could have done so by exercising the care of a prudent person is manifest. Would a prudent person have remained upon the track at night, without any business upon it, until stricken and killed by an approaching train? We think not, and doubtless the court below so thought. From the facts set out in the official report, it will be seen that this killing cannot be accounted for except upon the theory that the plaintiff's husband was grossly negligent. Had he been in the use of ordinary care, it seems impossible that he could have been in the way of the train at such an hour and in such a place. Banking Co. v. Smith, 78 Ga. 694, 3 S. E. Rep. 397. Judgment affirmed.

(82 Ga. 606)

BEERS *et al.* *v.* ESTILL.

(*Supreme Court of Georgia.* April 8, 1889.)

DEED—CONSTRUCTION.

Under section 2250 of the Code, as construed in Ewing v. Shropshire, 7 S. E. Rep. 554, a conveyance to three daughters, one of them having a child at the time, and the others none, passes an estate in common to the one daughter and her child, and a sole estate in fee to each of the other daughters.

(*Syllabus by the Court.*)

Error from superior court, Chatham county; ADAMS, Judge.

The facts as shown by the official report are substantially as follows: Rollin A. Beers petitioned the superior court for a partition of certain real estate, alleging that he was the owner of one undivided fourth as tenant in common with Harriet Cazenove Jones, (owning one-fourth,) Harriet C. and Benjamin L. Minor, children of Hubbard Taylor Minor, having as their guardian George W. Owens, (owning one-fourth,) and Henry C., Paul C., and Maria C. Lamar, children of G. De Rosset Lamar, having as their guardian Bryan Cumming, (owning one-fourth;) that no provision, by will or otherwise, was made as to how the lot should be divided between the tenants in common; that a fair and equitable division could not be made by metes and bounds, by reason of improvements; and that a sale was necessary for the purpose of division between the tenants in common. A defense to this application was made and subsequently withdrawn, and an order for public sale of the property by three named commissioners was passed. At the sale the land was knocked off to John H. Estill, the highest bidder, for $5,825, and the commissioners made their return to the court. Upon motion to confirm the sale, Estill objected, and appeals from a confirmation.

Lester & Ravenel, for plaintiff in error. *Geo. A. Mercer*, *Chisholm & Erwin*, *W. R. Leakin*, and *Bryan Cumming*, *contra*.

BLECKLEY, C. J The facts are fully set out in the official report. We are called upon to construe the deed of July 26, 1866, from Gazaway B. Lamar to G. De Rosset Lamar, as trustee. This deed conveyed the property in trust for the use, benefit, and advantage of the said G. De Rosset Lamar and his three sisters, Charlotte A., Anne C., and Harriet G. Lamar, share and share alike; the portions of the sisters to be settled severally and separately upon each of them, so as not to be responsible for the debts of any husband they had or might have, but for the sole use, benefit, and advantage of each of these sisters and their child or children. At

Digitized by Google

the date of the deed, Charlotte A. had one child, who is still living. The material question is whether this child took an interest in the property under the deed. We think it did. Section 2250 of the Code was construed in Ewing v. Shropshire, 7 S. E. Rep. 554, (at the March term, 1888.) According to the construction arrived at and announced in that case, the daughter who had a child or children at the time the deed was executed took an estate in common with such child or children, and the daughters who had no child or children, took an estate severally to themselves in fee-simple. That case was carefully considered, and we have no reason for being dissatisfied with the interpretation of the Code then announced. The result is that the court erred in ruling the present case. Judgment reversed.

(82 Ga. 646)

EQUITABLE LIFE INS. CO. v. MAY.

(*Supreme Court of Georgia.* April 8, 1889.)

ACTIONS—ELECTION.

Executors, acting under a direction in the father's will, having collected a policy of insurance, to the proceeds of which his children were entitled, and the children having procured a decree in chancery against the executors for the whole amount of the collection, one of them cannot afterwards recover against the insurance company in an action on the policy. The obtainment of a decree against the executors was an election to treat the policy as extinguished, and the act of the executors, in collecting the money, was thereby ratified.

(*Syllabus by the Court.*)

Error from city court of Savannah; HARDEN, Judge.

On October 22, 1887, Asa May sued the Equitable Life Assurance Society of the United States upon a certain policy of insurance. The policy was issued by the defendant, insuring the life of Asa May, father of the plaintiff, for $10,000, with participation in profits. It recites that said insurance is in consideration of the payment of $450.90 by Margaret M., wife of Asa May, (who will be called hereafter in this report Asa May, Sr.,) and of the annual premium of the same amount to be thereafter paid during the life of the assured. The policy is by its terms made payable to "said Margaret M. May, and the children of said Asa May, share and share alike, their executors, administrators, or assigns." Defendant pleaded the general issue. Also that Asa May, Sr., died in May, 1878, testate. That by the sixth item of his will he provided as follows: "If, at the time of my decease, any of my children are under the age of 21 years, I give, devise, and bequeath the portion or portions of such infant or infants to the persons herein named as executors, as trustees for such infant or infants, to hold such portion or portions in trust for the use and benefit of such infant or infants until they arrive successively at the age of 21 years, and then to convey and deliver the said portions, with the profits and increase, to such infants as they severally become of lawful age, free from the further operations of the trust, and subject to the terms of this will, as the shares of the older children, and this shall be in lieu and place of the appointment of any guardians of the property of such infants by the courts." That the seventh item of said will provided that, as to the policy sued upon in this case, it was the original purpose of testator that its proceeds should be used for the education of his children; but, so far as he has right and power to control the same, he directs that his executors collect the amount due upon it, and pay out of said amount his debts, so that his lands and other property might be left free from incumbrances, being satisfied that the interest of the legatees and devisees would be thus best advanced and promoted; but the amount thus used of said proceeds to be ultimately made up out of the residue of his estate to his wife and children, according to the terms of the policy; any surplus that might exist after the payment of his debts to be reserved for the immediate expenses of the education of his children, but such amounts to be ultimately made up out of his estate. That said will was duly probated, and three of the executors named therein duly qualified and undertook to execute its provisions, and after the proof of the death of said Asa had been made, said executors made claim on the defendant for the amount due on the policy, as such executors and as trustees for the minor children of said Asa May, Sr., one of whom was plaintiff, and about August 16, 1878, defendant paid the same to said executors, who received it as such trustees. About November 18, 1882, said plaintiff and others, children of Asa May, Sr., brought suit in the circuit court of Jefferson county, Fla., against the executors to recover the amount paid by defendant to them. That said suit is still pending. That plaintiff elected to treat the provisions of the will as valid and binding upon him and to take under its provisions. That he has ratified the act of the executors, and is now estopped to claim that the executors were not authorized to make the collection. Defendant pleaded further that said executors received one-sixth of the amount of the policy in trust for plaintiff, who afterwards, and before the bringing of this case, with full knowledge of his rights and of the fact that the executors had so made the collection, received from them a part of the proceeds of the policy, and is thereby estopped to claim anything from the defendant. Further, that out of the proceeds of the policy so collected the executors paid plaintiff $420.37, for which plaintiff must account to defendant if he is entitled to recover. The defendant amended its pleadings by alleging that on November 12, 1887, a final decree was rendered in said suit in Jefferson county, whereby it was, among other things, decreed that complainants should recover against the executors $10,071.87, with costs, and that said executors should pay to plaintiff in this case $2,256, with interest, said decree being ren-

Digitized by Google

dered for the amount of the policy, and the complainant's share thereof paid to said executors by this defendant. Upon the trial of the case plaintiff introduced the policy sued on, and also testified in behalf of himself to the following effect, in substance: That he was a son of Asa May, Sr. Witness was 25 years old May 10, 1887 One of his sisters, Sue, is two years or more younger than he, and his brother Robert was 21 in December, 1886. No one has ever acted as guardian for witness, and he believes that neither his sister Sue nor his brother Robert have ever had a guardian. Asa May died in 1878, leaving five children, who are still in life. Witness knew of the suit in Jefferson county. Does not claim that no one represented him in that suit. It has been dismissed on his part, not continued. That is, the same parties are not carrying it on. He has ceased to take an active part in it, but does not mean to say he was not a party to it. Since his father's death, he has acted as overseer for his mother. She boarded him during the time he stayed with her, but according to their agreement she was not to charge him for board. He thinks his services as overseer worth $50 per month, and that Asa May, Sr., did not know he was insolvent. Mrs. May did not know that her husband was insolvent, and expected the insurance money to go to the children. If witness ever received any part of this insurance money he did not know it at the time. If he acknowledged the receipt of the $72 as such, he did so through ignorance. Commenced work for his mother about August 17, 1879, and has been running the place for her ever since. Thinks he knew Mr. Pasco collected the insurance money, but considered that he had no right to do it. He understood that it could not be used to liquidate the estate's debts. Always considered that Pasco had the money, and knew of the suit brought against the executors by himself and his brothers and sisters. Went into it with the others, knowing of it. Plaintiff also proved a demand in his behalf upon the defendant, and its refusal to pay, on the ground that it had already paid once.

For defendant the following testimony was introduced: The transcript of record in the case of John E. Morris, in right of his wife, Carrie M. Morris, in her own right, and Asa May, Robert E. Lee May, and S. F. May, minors, by next friend, Joel M. Morris, vs. Margaret M. May, Elliot M. May, and Samuel Pasco, executors of Asa May, Sr. From this record it appears, briefly stated, that on November 18, 1882, the complainants filed their bill in the circuit court of Jefferson county, Fla., against the defendants, seeking, as children of Asa May, Sr., to recover from the defendants the money which they allege the said Samuel Pasco had collected from said life insurance policy, and which, they alleged, said executors and executrix had illegally converted, paying out most of it to the creditors of the said Asa May, Sr. Also the answer filed by Samuel Pasco, for himself and the other defendants, in which he alleges that the proceeds of the policy received by said defendants were properly disposed of, most of it being paid to creditors of Asa May, Sr., of which action the accounts of said defendants were filed in the county court of Jefferson county, and had been approved and confirmed; that there was a residue in the hands of defendants, except some amounts advanced to complainants; that a suggestion of the insolvency of said estate had been filed in the said county court, and the estate was being settled as is customary in such cases, but no order had there been made as to the final disposition of said insurance fund; that Asa May, Sr., was heavily in debt when he took out said policy; that he paid the premiums thereon out of his own property; that in consequence of the debts he then owed, and the obligations he entered into prior to the payment of any of the premiums, his estate became insolvent, and for this reason he made the provisions in his will, which have been heretofore stated. Also a replication to this answer, the appointment of an examiner, and copy of the will of Asa May, Sr., the purport of which, so far as it relates to this case, has already been sufficiently stated. A decree, dated December 3, 1886, that the complainants were entitled to recover from the defendants four-sixths of the proceeds of the policy, and directing a reference to a master that an account might be stated between parties as to how much the complainants had received from the proceeds of the policy, and how much had been paid by the executors for their use or benefit, the amount of such proceeds remaining in the hands of the executors, and the amount used by them in paying the debts of the testator. Also a decree of said circuit court, dated August 5, 1887, that complainants recover of defendants $10,732.42, the money to be paid to defendants out of the proceeds of the policy, and out of the goods, etc., of Asa May, Sr., deceased, which came into their hands to be administered, in preference to the debts due by Asa May, Sr., deceased, and in default of payment that execution should issue, to be levied on the goods, etc., of said Asa May, Sr., deceased, which came into the hands of said defendants to be administered. Also the petition of Samuel Pasco, asking that the last-mentioned decree be set aside, and a rehearing granted for causes therein set forth. Also an order for rehearing, as prayed, dated November 12, 1887. Also decree of November 12, 1887, which is substantially a repetition of the other decree last above mentioned, except that the full sum recovered by the plaintiff is $10,071.87, and except that said Samuel Pasco is ordered to pay the plaintiffs $1,418.50 of the money collected on the said policy then in his custody and control. Also execution, which seems to have issued on said decree, in favor of plaintiffs, for $10,071.87, with interest, and costs to be levied on the goods, etc., of Asa May, deceased, which came into the hands of defendants to be adminis-

Digitized by Google

tered. The defendants also introduced the proofs of loss which were made upon the death of said Asa May, Sr., together with correspondence between it and Samuel Pasco and his co-executor and co-executrix, the three latter claiming the right to receive the money on the policy as trustees for the four minor children for four-sixths interest, said co-executrix and co-executor claiming a one-sixth interest, and tending to show that the amount of $10,036.60 was received by said Pasco with the consent of Mrs. May and E. M. May. The defendants also introduced answers to interrogatories of Samuel Pasco, which, briefly stated, were that Asa May, Sr., was insolvent when he died, and had been for some years before, though he did not seem to fully realize it. That said Asa May, Sr., paid the premiums on the policy. That the money on the policy was collected by the executors and trustees, and the money passed through the hands of Pasco. That it was applied to the payment of the debts of Asa May, Sr., and for making outlays and advances for the benefit of the children, accounts being duly rendered thereof to the county court, and approved and confirmed, an account as to this insurance fund being kept and rendered separate as the will directed. That Asa May, Jr., received money from time to time from the executors and trustees out of the proceeds of the policy, and his acknowledgment for part thereof was on file in the county court. Voucher for this is contained in the answers, showing $72.50 so paid, acknowledged by Asa May, Jr., to be true and correct. That he received from his mother, who had part of the insurance money in her hands, and who boarded and clothed him, and paid large sums on account of his expenses at school, ($430.29,) and in addition was paid $15 by the executors out of this money. That the executors paid out $6,204.65 on the debts of Asa May, Sr., out of the insurance money. And that Mrs. May, in her account with the estate and insurance fund, was behind more than $4,000. In answer to the question as to whether the plaintiff had ratified the action of his father's executors and executrix in receiving and disposing of said insurance money, the witness stated that no objection was ever made by plaintiff before or since he became of lawful age, to the witness, or, so far as he knew, to the others, in regard to such action, and the witness then referred to the litigation in the circuit court of Jefferson county, heretofore sufficiently set forth.

The cause was heard, by agreement, before the judge below, on law and facts, without the intervention of a jury, and he rendered judgment in favor of plaintiff for $1,666.66, with interest thereon from August 4, 1887, (the date upon which it was shown that demand was made in behalf of plaintiff by his counsel of defendant for payment,) at the rate of 6 per cent. per annum, the rate of interest allowed by the state of New York. To this judgment the defendant excepted, and says the court erred—*First*, in rendering the judgment stated; *second*, in not rendering judgment for defendant; *third*, in not rendering judgment for defendant on the ground that the suit brought in the Jefferson circuit court, which was prosecuted to final judgment, was a ratification of the acts of the executors in collecting the money due on the policy; *fourth*, in not rendering judgment for the defendant on each of its pleas.

Chisholm & Erwin and *W. R. Leakin*, for plaintiff in error. *Garrard & Meldrim* and *D. W. Rountree*, *contra*.

BLECKLEY, C. J. May, the father and husband, having a life insurance policy, payable to his wife and children, died testate. In his will he gave directions concerning the collection of the policy, and the application of its proceeds. In so far as he could do so, he conferred authority upon his executors to collect the money, and apply the same in conformity to his testamentary scheme. The executors having made the collection from the insurance company, the children filed a bill against them, claiming the fruits of the collection. That bill was prosecuted to a final decree, and resulted in an adjudication establishing the right of the children to the money which the executors had realized on the policy. While the bill was pending, and before final decree thereon, May, the present defendant in error, one of the beneficiaries, commenced a suit against the insurance company upon the policy. This action was defended in part upon the doctrine of ratification, and by plea duly filed before final judgment the recovery of the decree in the equity cause was set up in bar. The court held it to be no bar, inasmuch as satisfaction thereof had not been obtained. The controlling question for our decision, therefore, is whether, upon the facts of the case, a decree in behalf of the son against the father's executors charging them with the money realized upon the policy will defeat the son's action, founded on the policy itself, against the insurance company.

The son, though a minor when the equity case was commenced, was of full age, and had been so for some years when the decree was rendered. The facts are stated at large in the official report. Certainly the money which the executors derived from the insurance company in satisfaction of the policy could not become the property of the owners of the policy, except by ratification on their part of the act of collection. Otherwise that money would have belonged to the insurance company after its payment to the executors as fully as it did before. The owners of the policy could not have title to it but by election to treat it as their money in the hands of the executors. This they did, and their doing so was essential to obtaining the decree which was rendered in their favor against the executors. The father, by his will, assumed to confer such authority as he could upon his executors to make the collection. In so doing, he might be supposed to have

Digitized by Google

acted in behalf of his children as well as for the general interests of his estate. No doubt the children had the right, had they chosen to exercise it, to repudiate his act; but, instead of doing so, they chose to adopt it, and to claim the fruits of the authority to collect which that act endeavored to create. By the decree the money was adjudged to belong to the children, and that necessarily excludes any title to it in the insurance company. If it belongs to the company, it is still liable on the policy, but, if it does not belong to it, as the decree has adjudicated, the policy is extinguished. A plaintiff may pursue any number of concurrent remedies against different individuals until he obtains satisfaction from some of them. But this rule does not hold touching inconsistent remedies, and remedies are inconsistent when the right to any of them necessarily yields or concedes the right to another; and such is the case here. To found any remedy whatever against the executors for the proceeds of the policy on the theory of contract, it was requisite to treat the policy as extinguished by reason of the payment made by the company to the executors. As the defendant in error continued to prosecute his bill against the executors after he arrived at majority, and as that voluntary act on his part resulted in the obtainment of a final decree against them before his action against the company on the policy terminated, we think he is estopped by his election, and that the court below erred in rendering a judgment in his favor. This is the obvious justice of the matter, since, by lapse of time, the company would now be barred by the statute of limitations, were it to bring an action against the executors for the recovery of the money as having been paid to them without due authority. Judgment reversed.

(81 Ga. 602)

ATLANTA & W. P. R. Co. v. TEXAS GRATE CO.

(*Supreme Court of Georgia.* April 22, 1889.)

PLEADING AND PROOF—CARRIERS—DAMAGES.

1. A declaration by a corporation against a common carrier, alleging an alternative contract to deliver to the plaintiff, or H. M. Beaty & Co. for the plaintiff, is not supported by proof of a contract to deliver to and for H. M. Beaty & Co. Nor does such proof support the more loose allegation of a contract to deliver generally for the plaintiff, without specifying to whom.

2. That H. M. Beaty & Co., the consignees, were agents of the corporation, though their agency was not disclosed to the consignors or the carrier, would entitle the corporation to take the benefit of the contract, and sue upon it in the corporate name, but would not dispense with correctly pleading the undertaking to deliver which was actually entered into, or with proving the same as pleaded. The terms of the contract would not be changed by the element of agency; that element would only vary the legal consequences in respect to parties.

3. Where the testimony (all of it introduced by the plaintiff) can be made consistent by construing the word "We" as meaning H. M. Beaty & Co., but cannot be so harmonized if construed to mean a corporation of which H. M. Beaty is president, the former construction is the one to be adopted.

4. To recover of a common carrier damages for mere delay in performing the contract of carriage, the value of such goods at the place of destination when they ought to have arrived should appear, and also their value when they did arrive; the difference between these values being generally the measure of damages. And to show when they ought to have arrived, the contract being silent, it should appear what length of time was usually required or was reasonably necessary to effect the transit.

5. Under an allegation in the declaration that some of the grates in question were delivered at destination in a broken and damaged condition, evidence that "the grates" were delivered in that condition, will not justify an inference either that all or any particular number of them were broken and damaged. To base any recovery on this part of the declaration, it ought to appear, approximately at least, how many were so injured, and how much the injury impaired or diminished their value.

6. A railroad company whose line extends from Atlanta to West Point, Ga., having received at Atlanta goods for shipment, consigned to Dallas, Tex., and having fixed by contract with the consignor the rate of freight for the whole distance, apportioning a part of the same among these carriers, itself included, to New Orleans, and assessing the balance for the transportation beyond New Orleans, the contract was, *prima facie*, a through contract, and bound the initial company for performance to Dallas, the point of destination. This was so, notwithstanding the named rate was made subject to change without notice, the effect being to limit the agreed special rate to the particular shipments with reference to which the rate was established, but not to allow any change, either along or at the terminus of the route, which would affect these shipments.

(*Syllabus by the Court.*)

Error from superior court, Fulton county; CLARKE, Judge.

Action by the Texas Grate Company against the Atlanta & West Point Railroad Company for damages for delay in transporting freight. Judgment for plaintiff, and defendant appeals.

Bigby & Dorsey and *Calhoun, King & Spalding*, for plaintiff in error. *G. A. Howell, contra.*

BLECKLEY, C. J. 1. The declaration, as framed originally, alleges a contract to deliver, in the alternative, to the plaintiff, or H. M. Beaty & Co. for the plaintiff. The amendment alleges two contracts to deliver for the plaintiff, but without specifying to whom. The evidence wholly fails to establish any contract whatsoever to deliver to the plaintiff or for the plaintiff. The bills of lading designate H. M. Beaty & Co. as consignees; and the evidence of Holland, who made with the railroad official the contract on which they were founded, shows that the understanding was as the documents indicate; that is, to deliver not only to, but for, H. M. Beaty & Co. The plaintiff was not thought of or referred to by either party when the contract was made, and when the consignees were nominated and appointed by the consignors. Whether tested by the parol agreement or the bills of lading, the carrier undertook to deliver to H. M. Beaty & Co. Such is the proof, and there is no suggestion in the evidence that any contract for alternative delivery, or for any delivery in behalf of the plaintiff, was actually made. Though the declara-

Digitized by Google

tion was not based upon alleged bills of lading, but upon contracts not described as in writing, it was not error to admit the bills of lading in evidence as competent testimony, in their character of receipts, to prove delivery to the carrier, and also as tending to prove a contract, of which delivery by the carrier to H. M. Beaty & Co. was one of the stipulations. Had Holland's testimony shown that the preliminary contract out of which the bills of lading arose, though in parol, comprehended a stipulation to deliver to the consignees for the plaintiff, or for the plaintiff's use, the declaration might, in that element of the case, have been supported. But the bills of lading, together with Holland's evidence, demonstrate that what the declaration avers as to the terms of the contract entered into for delivery is not true. The stipulation as to both consignments was to deliver to H. M. Beaty & Co.,—no more and no less. The plaintiff, neither as consignee nor as usee, was within its terms.

2. It is certainly a clear rule of law that where a simple contract, oral or written, is made with an agent in his own name, and the principal is undisclosed, the latter may claim its fruits, and sue upon it, even though the agent also might sue. Dicey, Parties, 138 *et seq.*; Code, §§ 2197, 2204. And this rule applies to contracts of bailment and for transportation. Navigation Co. v. Bank, 6 How. 344; Wood's Browne, Carr. § 604; Ang. Carr. § 494. But under our system of pleading, which requires the plaintiff to fully and distinctly set forth his cause of action, (Code, § 3332,) the agency should be alleged as well as proved, and the contract should be set out as made with the principal through the agent; and if the terms be to pay the agent, or deliver to him, they should be recited as they were in fact. See an instance in Woodruff v. McGehee, 30 Ga. 158. There is no trace in this declaration that there was any agency involved in the matter. The agency is ignored, both in the declaration and in the evidence. The president and two of the stockholders in the plaintiff's corporation were examined as witnesses, and not one of them makes any allusion whatever to H. M. Beaty & Co. by name, or to any agency which they exercised in behalf of the corporation. It is said that, as there is evidence tending to show that this property belonged to the corporation, the agency was circumstantially proved; but, while circumstances are sufficient to establish almost anything, their force is very much weakened when the proof of them comes from a source which must be informed of the direct fact, and which fails to disclose how the direct fact was. Witnesses were examined who know whether there was an agency or not, and who could testify whether there was or not, and yet they say nothing about the agency; and the effort now is to establish it by inference from circumstances to which they have testified. The force of these circumstances is very materially weakened by coming from witnesses who must have known the direct fact as to the agency. The mind keeps constantly repeating the inquiry, if there was an agency, why did the witnesses not say so? Why was it left to be groped after, and collected from circumstances? We think no agency was proved, and certainly none was alleged. If the terms of the contract were to deliver to H. M. Beaty & Co., no matter whether H. M. Beaty & Co. were agents or not, the contract as proved was to deliver to them, and there should have been no alternative averment that it was to deliver to them or to the plaintiff. When the contract is without an alternative, it should not be alleged with an alternative; because the declaration is to give notice of the kind of contract that the plaintiff expects to rely upon.

3. As to the facts depended upon to show that there was an agency, we think this may be said: The proof is positive, by Holland, the man who made the contract with the railroad company, that the grates were consigned to H. M. Beaty & Co; that they were ordered and bought by H. M. Beaty & Co.; and Holland was the plaintiff's witness. No witness testifies that H. M. Beaty & Co. acted as agents. The proof relied upon to show that they were ordered and bought, not by H. M. Beaty & Co., but by this corporation, is the testimony of H. M. Beaty, and of two others, who say that they were stockholders in the plaintiff's corporation. Holland testified that his firm, Withers & Holland, consignors, sold the grates to H. M. Beaty & Co.; that they had no contract with the Texas Grate Company to furnish grates; and that he knew of no connection of that company with H. M. Beaty & Co. H. M. Beaty, president of the Texas Grate Company, testified: "We bought fifty grates from Withers & Holland, and the order was in writing. They drew a draft on us, and we paid it on presentation, at Dallas, Tex. It is not true that we did not buy the grates. We did buy them. It is not true that the plaintiffs have no interest in this suit; the plaintiffs have an interest in it. It arises from the fact that we bought the state right from the patentees, and also fifty grates from Withers & Holland; and the defendant failed to deliver said grates as per their contract. It is not true that we did not give an order for them; we gave an order for them." Mister, a member of the plaintiff's company, testified: "We bought fifty grates from Withers & Holland. It is not true that we did not buy the grates. It is not true that we did not give an order for them." Cummins, another member of the company, testified: "We bought fifty grates from Withers & Holland. Do not know about the order. It is not true that we did not buy the grates. It is not true that we did not give an order for them." A means of reconciling all this testimony, including Holland's, is to consider the word "we" as referring to H. M. Beaty & Co., and not to the corporation. It is true, it will bear either construction, and, apart from the evidence

Digitized by Google

of Holland, would perhaps necessarily have to be referred to the corporation. But Holland's evidence is brought in by the plaintiff, is presented to us as true evidence by the plaintiff; and, if true, the word "we," used in connection with giving an order and the purchase of the grates, must mean H. M. Beaty & Co., and that construction of it, we think, is the one to be adopted.

4. According to the evidence of two of the witnesses for the plaintiff, all the grates were ultimately delivered. One witness testified that one of the grates was short, and was never delivered. The weight of evidence is that they were all delivered. Both shipments were made in March. The first shipment arrived in May, and the second in October. The evidence as to value is, by Beaty and Cummins, that the grates were worth, in March, 1884, at Plano, Tex., $20 each; by Mister, that they sold each at Plano, Tex., in March, 1884, for $25; by Holland, that they were worth about the same price at Plano, Dallas, and other points in Texas. This evidence proves value in March, but makes no sort of disclosure as to the value in May or October. Nor is there any evidence going to show whether the grates, according to the regular course of business, would or ought to have arrived during March. The evidence fails to show how long was usually required to transport from Atlanta to Dallas, Tex., or what time would be reasonably necessary. As to what became of the grates, the evidence indicates that they were all received and distributed to the agents of this company; and there is no evidence that when they were received they were worth less than they were when they ought to have arrived, or that they could not have been sold on the market for that amount or some other, or as to what the state of the market then was with reference to such property.

5. The declaration alleges that some of the grates were delivered at the destination in a broken and damaged condition. Beaty testifies that the grates were in a broken and damaged condition on delivery at Dallas; Mister, that they were in a broken and damaged condition when they arrived at destination; Cummins, that the grates were badly broken up. Such is the evidence as to their condition. The declaration alleges that some of them were broken; the evidence states in general terms that they were broken and badly broken up; but the declaration does not pretend that they were all broken; and the witnesses do not discover to us how many of them were broken, or how much the breakage diminished their value.

6. The point is made that this contract was not a through contract, but that the liability of the receiving company (the plaintiff in error here) was limited to, or at least not extended beyond, its own line. On that question, as the case has to be tried again, we rule: A railroad company whose line extends from Atlanta to West Point, Ga., having received at Atlanta goods for shipment, consigned to Dallas, Tex., and having fixed by contract with the consignor the rate of freight for the whole distance, apportioning a part of the same among three carriers, itself included, to New Orleans, and assessing the balance for the transportation beyond New Orleans, the contract was, *prima facie*, a "through contract," and bound the initial company for performance to Dallas, the point of destination. This was so, notwithstanding the named rate was made subject to change without notice, the effect being to limit the agreed special rate to the particular shipments with reference to which the rate was established, but not to allow any change, either along or at the terminus of the route, which would affect these shipments. Falvey v. Railroad Co., 76 Ga. 597, and cases cited. The evidence, however, did not warrent the verdict. The case made by the declaration was not proved, and the court erred in not granting a new trial. Judgment reversed.

(82 Ga. 719)

RICHMOND & D. R. CO. v. CHILDRESS.

(*Supreme Court of Georgia.* April 13, 1889.)

CONDUCT OF TRIAL—PHYSICAL EXAMINATION.

It is within the discretion of the trial court to require the plaintiff, suing for a physical injury alleged to be permanent, to submit to an examination by competent physicians, at the instance and at the expense of the defendant in the action, to ascertain the nature, extent, and probable duration of the injury, so as to afford means of proving the same at the trial. By Code, § 206, every court has power to control, in furtherance of justice, the conduct of all persons connected with a judicial proceeding before it, in every matter appertaining thereto.

(*Syllabus by the Court.*)

Error from superior court, Fulton county; MARSHALL J. CLARKE, Judge.

Pope Barrow and *Jackson & Jackson*, for plaintiff in error. *Gartrell & Ladson*, and *J. T. Glenn, contra.*

BLECKLEY, C. J. Childress, a lad 18 or 14 years of age, recovered a verdict against the railroad company for $3,500, on account of a personal injury alleged to be permanent. The seat of the injury was the chest. The company made a motion for a new trial on several grounds, the fourth being as follows: "Because the court erred in declining to order the examination of Childress by physicians to be appointed by the court on motion of defendant before the jury was impaneled, but after the case was called for trial, for the purpose of determining whether or not he had been permanently injured as claimed, the said defendant offering to pay the expense of such examination by the physicians selected by the court." The court ruled that it had no power to order the examination without the plaintiff's consent. We understand the court as putting the refusal solely upon the ground of a defect of power. The Code, (§ 206,) declares that "every court has power * * * to control, in furtherance of justice, the conduct of its officers, and all other persons connected

Digitized by Google

with a judicial proceeding before it, in every matter appertaining thereto." It can certainly admit of no doubt that, in a proper case for such examination, the cause of justice would be subserved by it, and the decided weight of modern authority is that courts have such power. A very full and clear statement of the matter is found in 1 Thomp. Trials, § 859. The language of the author is as follows: "In modern trials of civil actions for physical injuries, the question has frequently arisen whether the court has power to order an inspection of the body of the plaintiff or person injured, for the purpose of ascertaining the nature and extent of the injuries. Some of the courts, carrying in their minds no higher conception of a judicial trial than the conception that it is a combat, in which each of the gladiators is permitted, within certain limits, to deceive and trick the antagonist and the umpire, have denied the right of the defendant to have an order for such inspection. Other courts, taking the more enlightened view, that the object of a judicial trial is to enable the state to establish and enforce justice between party and party, have held that it is within the power of the trial court, in the exercise of a sound discretion, in proper cases, upon an application seasonably made, under proper safeguards designed to preserve the rights of both parties, to order such an inspection, and to compel the plaintiff or injured person to submit to it. Another court has held that, where the plaintiff in such an action alleges that his injuries are of a permanent nature, the defendant is entitled, as a matter of right, to have the opinion of a surgeon, based upon a personal examination, unless there is already an abundance of expert evidence; in which case the court, in its discretion, may refuse to order an examination. Another court has ruled that the trial court may require the plaintiff in such an action to submit to a medical examination, and dismiss his action, if he refuses to comply with the order. This conclusion may be placed upon the higher ground that, when a person appeals to the sovereign for justice, he impliedly consents to the doing of justice to the other party, and impliedly agrees in advance to make any disclosure which is necessary to be made in order that justice may be done. The conception of the nature and objects of a judicial trial which denies to the defendant, under proper safeguards, the right of such an inspection, is not higher than that of the old law, which would not even compel a party to produce a deed or private paper in a civil case, where it was intended to be used in evidence against him,—a rule which the court of chancery invaded, to prevent failures of justice, and which has almost entirely disappeared from modern civil jurisprudence." The cases cited *pro* and *con* are: White v. Railroad Co., 61 Wis. 536, 21 N. W. Rep. 524; Walsh v. Sayre, 52 How. Pr. 334; Shepard v. Railroad Co., 85 Mo. 629; Schroeder v. Railway Co., 47 Iowa, 375; Turnpike Co. v. Baily, 37 Ohio St. 104; Railroad Co. v. Thul, 29 Kan. 466; Hatfield v. Railroad Co., 22 N. W. Rep. 176; Sibley v. Smith, 46 Ark. 276; Shaw v. Van Rensselaer, 60 How Pr. 143; Neuman v. Railroad Co., 50 N. Y. Super. Ct. 412; Roberts v. Railroad Co., 29 Hun, 154; disapproving Walsh v. Sayre, 52 How. Pr. 334, and Shaw v. Van Rensselaer, supra. See Sidekum v. Railroad Co., 4 S. W. Rep. 701, and notes.

As to the suggestion made in argument, that the rule would operate hardly upon delicate and modest females, we can only say that they would be safely guarded by the discretion of the trial judge. There would be no danger, we think, in this country, of an examination being ordered needlessly, or where an improper shock to modesty or feelings of delicacy would be likely. We decide simply that the power exists, and that in each case it is to be exercised or not, according to the sound discretion of the presiding judge. We think there ought to be a new trial in the present case. As we deal only with the question of power, we forbear to enter into the nature of the showing which ought to be required as preliminary to its exercise, further than to say that generally there should be a request made of the plaintiff before the trial comes on to submit to the examination applied for; for the plaintiff's refusal to do so should be verified, as also should the probability that examination would likely result in some material discovery or disclosure. When the examination is compulsory, there is obviously propriety in the experts being selected by the court rather than by one or both of the parties. It is likewise obvious that all the expenses should be borne by the party at whose instance the examination is made. Judgment reversed.

(82 Ga. 605)

BEARDEN v. METROPOLITAN ST. RY. CO.

(*Supreme Court of Georgia.* April 8, 1889.)

GARNISHMENT—ANSWER.

A garnishee summons was served on May 9th, returnable to the following June term. No answer was filed during that term, which lasted nearly five months. About the sixth week of the next term the case was reached in its order, when the garnishee asked for "further time to look into the matter," but offered no excuse for the delay theretofore in answering, and was afterwards allowed to file an answer. *Held*, under Code Ga. § 3304, declaring it the duty of the garnishee to answer at the first term at which he is required to appear, and providing that in case of failure to answer at that term the case shall stand continued to the next term, and that, should he fail to appear and answer at the next term, plaintiff shall have judgment, on motion, for the amount of his judgment against defendant, that the court erred in allowing the garnishee further time to answer, and in not striking out the answer after it was filed.

Error from city court of Atlanta; VAN EPPS, Judge.

Dudley Campbell and *A. B. & H. L. Culberson*, for plaintiff in error. *Haygood & Douglass*, for defendant in error.

SIMMONS, J. On May 4, 1887, the plaintiff's attorney made an affidavit for the is-

Digitized by Google

suance of garnishment on a judgment, obtained in Morgan county by the plaintiff, against Hamleiter, of Fulton county. Bond was given, and the constable served J. W. Rankin, president, personally, with a summons of garnishment, on May 9, 1887. The garnishment was made returnable to the June term, 1887, of the city court of Atlanta. The city court was in session nearly five months during said June term. The December term of said court commenced early in December, 1887. No answer was filed during the June term of the court. On the 14th of January, 1888, the case was reached in its order, and there was still no answer filed to the summons. Counsel for the plaintiff moved the court to enter up judgment against the garnishee. Counsel for the garnishee asked for "further time to look into the matter," which was allowed by the court, and he afterwards brought in and filed an answer; whereupon counsel for the plaintiff moved the court to strike the answer of the garnishee, and enter up judgment against him, as in cases of default; which motion was denied by the court, and the plaintiff excepted, and assigned error thereon.

We think the court erred in allowing this answer to be filed at the time it was, and in not striking it on motion of the plaintiff's counsel. The Code, (§ 3304) declares it to be the duty of the garnishee to answer at the first term at which he is required to appear. If he fail to appear and answer at that term of the court, the case shall stand continued until the next term of the court; and, if he should fail to appear and answer by the next term, the plaintiff may, on motion, have judgment against him for the amount of the judgment he may have obtained against the defendant. Here there was a failure to answer at the first term of the court, and a month and a half of the second term had expired, and there was no answer. The case was reached in its order, and the plaintiff was entitled, under the law, to a judgment against the garnishee, unless the garnishee had then and there shown sufficient cause to the court why he had not answered before that time. In this case no cause was shown, or attempted to be shown, why he had not answered; no reason assigned and no explanation given to the court by the garnishee or his counsel. From aught that appears in this record, it was pure neglect, and nothing else. Without some cause assigned, or some reason or explanation given, the court has no discretion to allow the garnishee time to file his answer. We do not think it is within his discretion to delay the plaintiff, in order to give counsel for the garnishee time "to look into the matter." If the garnishee had been present when this case was reached in its order, and had proposed then to file his answer, and the court had allowed it, as was done in the case of Wall v. Shippard, 30 Ga. 923, we would not have interfered with his judgment. But that is entirely different from giving counsel time to look into the matter, and see if he has a defense. The cases of Housmans v. Heilbron, 23 Ga. 187, and Carhart v. Ross, 15 Ga. 188, relied on by counsel for the defendant in error, were decided before the act of 1856; (Code, § 3304.) The case of Harris v. Breed, 38 Ga. 297, cited by counsel for the defendant in error, was a case where the court refused to set aside a judgment entered up against the garnishee for his failure to answer. In the case of Emanuel v. Smith, Id. 602, this court say: "It is the duty of the garnishee to appear at the second term of the court, and file his answer. This should be done before the case is reached in its order on the docket. If the garnishee appears when the case is called in its order, the court may allow him time to file his answer before it is heard. But if he fails to appear and answer, and the case is disposed of in its order on the docket, and the presiding judge refuses to set aside the judgment rendered against the garnishee, this court will not (unless in extraordinary cases) control the discretion of the court below." In the case of McCallum v. Brandt, 48 Ga. 439, the garnishee had failed to answer, but at the time the case was called assigned a good reason to the court why he had not answered, and the court refused to allow judgment against the garnishee. This court held that there was no error in the refusal of the court below to allow judgment against the garnishee, for the reason assigned by the garnishee when the case was called. In the case of Russell v. Bank, 50 Ga. 575, where the trial judge set aside a judgment against the garnishee on the coming in of his answer, showing a sufficient legal excuse, this court held that he did right. All these cases go upon the principle that where the garnishee has failed to answer, but gives a good and sufficient reason for the failure, it is then within the discretion of the court as to whether he will allow judgment against him or not. But there is no case that we can find where the judge has allowed the garnishee time, after the case is called, to look into the matter, and ascertain whether he has a defense or not, without giving any reason or explanation for his failure to file his answer up to that time. In such a case the law seems to us peremptory, and there is no discretion left to the judge. For these reasons we reverse the judgment of the court below.

(82 Ga. 623)

COX v. MURPHY.

(*Supreme Court of Georgia.* April 8, 1889.)

PLEADING—AMENDMENT.

1. A declaration alleged that defendant owned a ferocious steer, and, knowing that it was ferocious and dangerous, attempted to drive it through the streets, and that it attacked and injured plaintiff. *Held*, that an amendment alleging that defendant had in his custody such a steer, and so negligently kept it that it escaped and injured plaintiff, but not alleging that defendant knew of its dangerous character, introduced a new cause of action, and should not be allowed.

2. Amendments alleging that defendant carelessly kept the steer, knowing that it was accus

Digitized by Google

tomed to attack mankind, and, while so keeping it, it attacked plaintiff, etc., and that defendant kept the steer knowing it to be vicious, and, by the careless mismanagement of defendant in attempting to drive it along the street, it was allowed to escape, and to injure plaintiff, without negligence on his part, were germane to the original declaration, and were properly allowed.

Error from city court of Savannah; HARDEN, Judge.

Garrard & Meldrim, for plaintiff in error. *Henry McAlpine* and *Charlton & Mackall*, for defendant in error.

SIMMONS, J. Murphy sued Cox for damages. In his original declaration he alleged, in substance, as follows: On the streets of Savannah he was attacked by a wild and ferocious steer, the property of S. H. Zoucks and D. Cox, or one of them; that it was in the possession of Cox's servants; that the defendants knew that the animal was ferocious and dangerous, and had a propensity for attacking persons, but that they attempted to drive it through the public streets of Savannah. The declaration then shows how the plaintiff was injured and damaged. The plaintiff amended his declaration by alleging that Cox had damaged him in the sum named, because he carelessly kept the steer, well knowing that it was accustomed to attack, gore, and trample mankind, and, while so keeping it, it attacked, gored, and trampled upon the plaintiff. He offered a second amendment, wherein he alleged that Cox was the owner, or had in his custody, care, keeping, or control this animal, and so negligently kept it that it escaped and unlawfully came upon the streets, and injured the plaintiff, who was lawfully walking thereon. In a third amendment he alleged that the defendant knowingly kept a vicious and dangerous steer, which by the careless management of the defendant and his agents, in attempting to drive it along the streets, was allowed to escape and go at liberty, upon which it attacked, gored, and trampled on the plaintiff, who was walking along the street, without any fault on his part. The plaintiff also amended the declaration by striking therefrom two of the defendants, to-wit, Zoucks and the mayor and council of the city of Savannah, leaving Cox the sole defendant. Cox moved to strike the amendments, on the ground that they contained a new and distinct cause of action; that they did not make out, either by themselves or in connection with the original declaration, any legal cause of action against the defendant. The motion was overruled, and the trial was had on the original declaration, and the amendments thereto, and the jury returned a verdict in favor of the defendant. The plaintiff moved for a new trial, on the ground that the verdict was contrary to law and to the evidence. A new trial was granted, and the defendant excepted.

There were two grounds insisted on before us for reversal of the judgment of the court below: (1) That the court erred in allowing the amendments to the plaintiff's declaration, and (2) that the court erred in granting a new trial.

1. We think the court was right in allowing the first and third amendments to the declaration. It will be remembered that the original declaration alleged that this was a wild and ferocious steer, and that the defendant knew that it was ferocious and dangerous, and had a propensity for attacking persons. The first and third amendments, while they go more into detail as to the manner of the plaintiff's injury, both allege that the steer was wild and ferocious, and that this was known to the defendant; and we think, therefore, they were germane to the original declaration, and did not introduce any new cause of action. They simply allege, more particularly than the original declaration did, the escape of the steer, and the fault of the defendant in allowing him to go at large. Both adhere to the vicious character of the animal. The second amendment, however, does not make these allegations, but alleges that the steer was so negligently kept that it escaped, and unlawfully came upon the streets, and injured the plaintiff. We think it was error to allow this amendment, for it alleged an entirely distinct cause of action from the original declaration. As said before, the original declaration and the first and third amendments charged the defendant with knowingly keeping a vicious animal and allowing it to go at liberty. The second amendment does not allege that the defendant knew that the animal was vicious, or even that as a matter of fact it was vicious, but alleges that the defendant kept it so negligently that it escaped and injured him. The plaintiff could not recover, under the original declaration and the first and third amendments, without proving to the satisfaction of the jury that the defendant knew that the animal was vicious, and allowed it to escape or go at large. Under the second amendment he might perhaps recover by simply proving the negligent keeping and escape, and the injury. Under the original declaration and first and third amendments it was necessary to prove the *scienter* of the defendant; under the second amendment this was unnecessary. We therefore think that the second amendment contained a new and distinct cause of action, and should not have been allowed. Taking this view of these amendments, we think the court erred in granting a new trial in this case.

2. We have read the evidence carefully, and there is no intimation in it that the defendant had any knowledge whatever that this steer was vicious or ferocious, or had any propensity to trample upon people. Indeed, the evidence shows that it, with seven others, had been shipped to the defendant by a farmer from a distant county, and had only been received by the defendant in his stockyard a few hours before the plaintiff was injured. We have carefully read the opinion of the learned judge who tried the case be-

Digitized by Google

low, and who granted a new trial, and he puts the grant of a new trial upon the ground that the defendant's servants were negligent in driving this animal through the streets, and allowing it to escape. If we are correct in holding that the second amendment offered by the plaintiff was improperly allowed, of course it follows that the plaintiff could not recover upon this ground. The only cause of action which he had against the defendant was that the defendant knowingly kept a vicious animal, and allowed it to escape, whereby he was injured. As we have shown, he could not recover in this case unless he had proven the defendant's knowledge of the vicious character of the animal. He could not recover upon an allegation of negligent driving or negligent escape. If he had brought his original action for negligently driving an animal through the streets, or for negligently allowing the animal to escape, and had proved it, and his injury, he could have recovered; but as he brought it against the defendant for knowingly keeping a vicious animal, and allowing him to escape, he must recover, if at all, upon that ground, and not upon a new and distinct cause of action, as set out in his second amendment. Entertaining these views, it is unnecessary to discuss the refusal of the court to give in charge the two requests made by the defendant, except to say that they seem to us, under the facts in this case, so far as properly pleaded, to be sound principles of law. Judgment reversed.

(82 Ga. 293)

HAMILTON *v.* PHILLIPS *et al.*

(*Supreme Court of Georgia.* April 17, 1889.)

PARTITION—DOWER—ELECTION.

1. J. and G. bought lots 91 and 124 as partners. On dissolution they divided the assets, and J. took possession of lot 91 and G. of lot 124, and each made improvements, leased, and collected the rent of the lot held by him. J. conveyed part of lot 91, knew that G. collected the rent of lot 124, stated that G. owned the whole of the latter lot, and made no claim to it. After J.'s death G. administered his estate, and the remainder of lot 91 was sold as J.'s property, it not appearing that any objection was made. In ejectment by J.'s heirs, brought for lot 124 after G.'s death, and more than 20 years after the division, *held*, that the facts showed a partition of the lots, J. taking lot 91 and G. lot 124.

2. Code Ga. § 1764, subd. 3, provides that dower may be barred by the election of the widow, within a certain time, to take a child's part of the realty in lieu thereof. *Held*, that where a widow has elected to take dower she cannot recover an interest in the fee in subsequently discovered realty, though she may have her dower therein.

Error from superior court, De Kalb county; RICHARD H. CLARK, Judge.

Code Ga. § 1764, provides that "dower may be barred: * * * (3) By election of the widow, within 12 months from the grant of letters testamentary or of administration on the husband's estate, to take a child's part of the real estate, in lieu of dower.

John S. Candler and *Hillyer & Bro.*, for plaintiff in error. *Candler, Thompson & Candler*, for defendants in error.

SIMMONS, J. It appears from the record in this case that James Phillips and George Phillips were brothers, and were partners in business in the town of Lithonia from 1857 to 1862. As such partners they purchased two lots of lands, Nos. 91 and 124. In 1862, James enlisted in the army. About this time it appears that the partnership was dissolved, and they divided the assets. James was taken sick in the army, and returned home, and died in 1864, leaving a wife and two children. George died in 1870 or 1871, leaving a wife and no children. James's widow intermarried with Norton, and had several children by him. George's widow intermarried with Dr. Hamilton, and died in 1880, leaving no children, and leaving Hamilton as her sole heir at law. In 1887 the two sons of James, and their mother, (then Mrs. Norton,) commenced their action of ejectment against Dr. Hamilton, for an undivided half of lot 124. Subsequently Mrs. Norton, the mother, died. The two sons amended their declaration by striking her name therefrom. On the trial of the case the jury returned a verdict for the plaintiffs for an undivided half of the land and mesne profits. The defendant made a motion for a new trial on the several grounds taken therein, which was overruled by the court, and he excepted. One of these grounds was that the jury had found contrary to the evidence.

1. We think the court should have granted a new trial on this ground. The main question in this case was whether the two brothers, James and George, had made a division of this land prior to their death. We have carefully read this evidence over several times, and are clear in our own minds that the jury did find contrary to the evidence in the case. The evidence shows that James and George were partners in business; that as such partners they bought these two lots of land; that about the time James went to the army they had a division, and that James took possession of lot 91, made some improvements thereon, and held and occupied most of it until his death in 1864; that before he died he sold 50 acres of that lot to his sister, Mrs. Blackburn, and made her a deed therefor. After he died, George administered upon his estate, and had his property appraised. This lot was appraised with the balance of his property, and his brother P. C. Phillips was one of the appraisers. Leave was obtained from the ordinary of the county to sell this land as the property of James Phillips, and it was sold by his administrator, and was purchased by his brother P. C. Phillips. The record does not show that any objection was made by George, the administrator, or the widow of James, or any of his relatives, to the appraisement and sale of this lot (91) as the property of James. It was then fresh in the minds of George, the brother and administrator, and also in the minds of the widow of James, and his brother, P. C.; and it seems to us that if these two lots had then been held in common by the two brothers, something

Digitized by Google

would have been said or done by the parties while all this was going on. In addition to this the record further shows that while James took possession of lot 91, his brother George took possession of lot 124, the premises in dispute; that about the time of the dissolution of the partnership, George went into possession of lot 124, built houses thereon, cleared 30 or 40 acres of the land, paid for the building of the houses and the clearing of the land, and lived thereon until his death in 1870 or 1871. One of the witnesses testified that during this time and in the life-time of James, the witness and George cut and sold from the land a thousand dollars worth of cord-wood, and a quantity of cross-ties, and that George collected the money and paid witness his part of it. Another witness testified that he rented lot 124 for one year from George, and rented for the same year lot 91 from James; that he paid James the rent of lot 91, and paid George the rent of lot 124, and that James knew that he had paid the rent of lot 124 to George, and that James never made any demand on him for the rent of that lot, nor did he ever claim any interest therein. Another witness testified that in 1862 he bargained with George for this land, and subsequently became uneasy about George's title thereto; that he went to see James, and asked him about George's right to make title to the whole lot. James told him that George owned the whole lot. These facts are not denied or contradicted by any witness in the case, and we think that they clearly show that, upon the dissolution of partnership between these brothers, they agreed to divide these two lots, and that they did divide them, James taking 91, and George taking 124. All their acts and declarations, as disclosed by the record, show that this must have been the manner in which it was done. Of course, after the lapse of a quarter of a century, and the death of all the parties, it would be impossible to prove an actual agreement for partition between the brothers, and we must rely upon their conduct and their declarations, and these are all consistent with the idea of a division or partition between them.

2. The only other question made in the motion for a new trial which we deem it necessary to notice is the third ground of the motion. It was contended by the plaintiff in error that Mrs. Norton, the widow, and the mother of the two plaintiffs, should not have been stricken from the declaration, and that the court erred in holding that the two sons could recover the undivided half of lot 124, and that Mrs. Norton could not recover any interest in that lot. It was in proof on the trial that, after the death of James, his widow elected to take dower in his land, instead of a child's part, and that the dower was assigned to her in the lands of her husband. Under this state of facts, we do not think the court erred in holding that she could not recover an interest in the fee in this lot 124. We think that when a widow elects to take dower in the estate of her husband, and it is assigned to her, that election estops her from claiming a child's part in any land which may afterwards be discovered, and which belonged to her husband at the time of his death. She may still assert her right to dower therein, and thus carry out a previous election, but she cannot, in our opinion, take dower in a part of the estate and claim a child's part or interest in other land which may subsequently be discovered to have belonged to her husband at the time of his death. Having once made her election she is bound by it. Judgment reversed.

(83 Ga. 148)

WIGGINS v. NORTON *et al.*

(*Supreme Court of Georgia.* April 22, 1889.)

CRIMINAL LAW—APPEAL—PRELIMINARY HEARING.

1. Where the trial judge is required by law to approve the grounds of motion for a new trial, the approval is insufficient, when qualified by a statement that all exceptions to the action of the court are subject to correction by the record, as made out by the stenographer and in the brief of evidence.

2. Where an officer arrests a prisoner, and there is excitement and danger of a riot at the commitment trial, and the magistrate consents to have the prisoner taken to another district, and before another magistrate, it is within the discretion of the arresting officer to take him there.

3. If a prisoner cannot be brought before a justice on the night of his arrest, the sheriff is authorized to place him for the night in jail, where other prisoners who are not under bond are placed.

Error from superior court, De Kalb county; R. H. CLARK, Judge.

Candler, Thompson & Candler, for plaintiff in error. *Hopkins & Glenn*, for defendants in error.

SIMMONS, J. Wiggins sued Norton and others for damages for false imprisonment. The jury returned a verdict for the defendants. Wiggins moved for a new trial on 14 grounds, which motion was overruled by the court, and he excepted.

1. The grounds from 1 to 11, inclusive, complain of the action of the court in admitting certain evidence. The court, in approving these grounds, qualifies his approval as follows: "All exceptions to the action of the court as to what transpired during the progress of the case are subject to correction by the record of the proceedings, as made out by the stenographer and in the brief of evidence." Counsel for the defendants in error objected to the consideration by this court of these grounds of the motion, because the trial judge had not approved the same, as the law requires. We think the objection is well taken. The law requires the trial judge to approve the grounds of the motion for a new trial as true, either in the motion itself or in the bill of exceptions. In this case he has failed to approve them, either in the motion for a new trial or in the bill of exceptions; the bill of exceptions containing the same qualified approval as above quoted. The judge says in his certificate that these

Digitized by Google

grounds are subject to correction by the record of the proceedings as made out by the stenographer in the brief of evidence. This so-called "brief" of evidence contains 275 pages of closely written and printed matter. The constitution and laws of this state require us to hear and determine every case on our docket at the first term of the court, except in case of inability from providential cause or other exceptions specified by law. It is therefore impossible for us to undertake to read records 275 pages in length for the purpose simply of verifying the grounds of a motion for a new trial. The law does not put this burden upon us, and we shall not undertake to assume it. It is placed upon the trial judges. The law makes it their duty to verify the grounds of the motion for a new trial. Mayor v. Harris, 75 Ga. 761; Maynard v. Ponder, Id. 664.

But it was insisted by counsel for the plaintiff in error that counsel is powerless, where the judge refuses to give an express approval. We do not think so. If a judge refuses to approve the grounds of a motion for new trial as true when the same are true, the law provides a sufficient remedy for the movants to compel such approval. Anderson v. Faw, 79 Ga. 558, 4 S. E. Rep. 920. We therefore decline to consider these grounds of the motion.

2. We also decline to consider in this case the ground that the verdict is contrary to the evidence. As said before, this so-called "brief of evidence" contains 275 closely written and printed pages. It is made up in great part of questions of counsel, colloquies between counsel and the court, wranglings of counsel among themselves, the witticisms and sharp retorts of counsel and the witnesses, remarks of the stenographer, and page after page of repetitions, and of the most irrelevant matter I have ever observed in a record since I have been on this bench. We undertook to read it as a court, but, after reading it for several hours, we had, in justice to other matters, to desist. One of our number managed to glance through it in a hurried way, and it took him over a day to do so. We have repeatedly appealed to trial judges to desist from sending up such records as this to this court. In the case of Chambers v Walker, 6 S. E. Rep. 165, (decided in April of last year,) we made such an appeal, and said that, if counsel should persist in bringing up such records, "we would see if we could not find out a way by which this court could be protected against proceedings of this sort." After this intimation had been made by the court, the present case was tried, and this so-called "brief" was made in the December following. We are willing to work and do every thing it is possible for men to do in the discharge of the onerous duties which the law places upon us, but we are not willing to take up the time which ought to be devoted to other litigants, in spending hours and days of our time in reading such records as this. And we announce now that hereafter, whenever it becomes necessary for us to read a record in order to decide upon the merits of a case, and we find that record made up as this one is, we shall feel at liberty to decline to read it for that purpose. For these reasons we decline to pass upon the merits of this case.

3. The view we have taken of this case leaves only two grounds of the motion to be considered, to-wit, the twelfth and thirteenth. The twelfth ground is as follows: "Because the court erred in the following charge to the jury, to-wit: 'I charge you that if this removal from Lithonia to Decatur was because of excitement which existed there on the subject of this offense and of this arrest, and that there was danger of a riot there from an examination there, that would be a sufficient ground for taking the prisoner elsewhere. It would be a sufficient ground for the exercise of the officer's discretion in taking the prisoner elsewhere.'" We see no error in this charge. We think, with the judge below, that when an officer arrests a prisoner, and there is excitement in the district or village in which he is arrested, and there is danger of a riot at the commitment trial, and the magistrate of the district is consulted about carrying the prisoner to another district, before another magistrate, and he assents thereto, it is within the discretion of the arresting officer to carry the prisoner to another and different district, and we think there is sufficient evidence in this case to authorize the judge to give this principle in charge. Nor did the officer abuse his discretion in this case in carrying the prisoner to the county-seat, 16 miles from the place of the arrest. The magistrate at the county-seat was perhaps more accessible, considering the means of transportation, than the magistrate of an adjoining district, four or five miles off from the railroad.

4. The thirteenth ground complains that the court erred in charging the jury as follows: "If you do not believe from the evidence that they could have got him before a justice of the peace that night; if you do not believe he could have been carried there; and you believe that he was turned over by the constable to the sheriff, and the sheriff had to keep the prisoner until the next morning before he could get a justice of the peace, —then the sheriff would have been authorized to have placed him in a place for safe-keeping where all prisoners are placed who are not under bond. It will depend, therefore, as to putting him in jail, upon this branch of the case, upon the fact as to whether they could have got access to a justice of the peace that night." There was no error in this charge. It is the duty of an arresting officer, when he arrests a prisoner, to carry him without delay before some officer authorized to inquire into the accusation; and if he willfully or negligently fails to do this, and detains the prisoner for an unreasonable length of time without carrying him before the magistrate, he would be guilty of false

Digitized by Google

imprisonment, and would be liable to damages therefor. But if he arrests him, and takes him to the place where the magistrate resides, and arrives there about night, and at a time when the magistrate is not accessible, he has a right to place the prisoner in jail during the night for safe-keeping, and he would not be liable for placing him in jail. These principles were embodied in the above instruction and in the general charge, and we see no error therein. Judgment affirmed.

(83 Ga. 381)

BERRIEN v. STATE.

(*Supreme Court of Georgia.* April 24, 1889.)

FALSE PRETENSES—PROOF—VARIANCE.

On indictment for obtaining credit under false representations, by mortgaging a "dark bay mare mule," and representing it to be defendant's, conviction cannot be had on proof of mortgaging a "mouse-colored mare mule, named Mag."

Error from superior court, Burke county; RONEY, Judge.

R. O. Lovett and *T. D. Oliver*, for plaintiff in error. *Boykin Wright*, Sol. Gen., for the State.

SIMMONS, J. Berrien was tried and convicted in the county court of Burke county on the charge of obtaining credit by false representations of his wealth and respectability, in that he mortgaged a dark bay mare mule to the prosecutor, representing to the prosecutor that the mule was his, (the defendant's,) when in truth and in fact the mule did not belong to him. The defendant sued out a *certiorari* to the superior court, alleging, among other grounds of error, that the verdict in the county court was contrary to law and the evidence, because the evidence introduced by the state did not show that he had mortgaged to the prosecutor a dark bay mare mule. The judge of the superior court refused to sustain the *certiorari*, but affirmed the judgment. We think the court ought to have granted a new trial on this ground. The only evidence introduced on this subject by the state was the mortgage given by the defendant to the prosecutor. That mortgage described the mule as a "mouse-colored mule, named Mag, fourteen years old." It is clear that this proof did not correspond with the description of the mule set out in the indictment. The indictment charges that he mortgaged a "dark bay mare mule," and the proof shows that it was "a mouse-colored mare mule, named Mag." A conviction for mortgaging a dark bay mare mule would not protect the defendant in a future indictment for having mortgaged a mouse-colored mare mule, named Mag. We think that the case of Barclay v. State, 55 Ga. 179, rules this case, and the judgment is reversed.

(83 Ga. 192)

PORT ROYAL & W. C. RY. CO. v. PHINIZY.

(*Supreme Court of Georgia.* April 29, 1889.)

RAILROAD COMPANIES—STOCK-KILLING.

1. That section 708 of the Code may be submitted to the jury when stock is killed at some distance beyond a public crossing, was decided in Railroad Co. v. Jones, 65 Ga. 631. The like rule applies where stock is killed between the blow-post and the crossing, and sections 708 and 710 are to be construed together.

2. It is not negligence, affirmative or negative, for a locomotive engineer to blow the stock-alarm whistle in a town or city, to frighten an animal from the track in case of a sudden emergency, more especially where the scene of the occurrence, though within the corporate limits, is not in a populous quarter, but in the woods or fields adjacent to the city proper.

(*Syllabus by the Court.*)

Error from city court, Richmond county; HARDEN, Judge.

J. Ganahl, for plaintiff in error. *Wm. K. Miller* and *J. H. Phinizy*, for defendant in error.

BLECKLEY, C. J. A mule was killed by the railway company within the corporate limits of Augusta, but some three miles distant from the central portion of the city. The scene of the occurrence was upon territory added by a late amendment to the city charter. The animal was killed upon a trestle, between the blow-post and a public crossing, probably 150 yards from the crossing.

1. It is objected that the court gave in charge to the jury sections 708 and 710 of the Code. According to the principle ruled in Railroad Co. v. Jones, 65 Ga. 631, there was no error in this part of the charge. The two sections are to be taken together. If they are pertinent when stock are beyond the crossing, we can see no reason why they are not so when the stock are on the hither side of the crossing. The sections, and the conduct of the company's employés under them, are simply for consideration by the jury. Their importance is nothing like the same when the injury occurs at a distance from the public crossing, as when it occurs upon the crossing. Still, they have some relevancy in either case.

2. But we think the court erred in deciding as matter of law that it was negligent to blow the stock-alarm whistle. Section 710, as modified by the act of 1875, contains no express inhibition upon blowing the whistle within the corporate limits of a town or city. Ringing the bell is substituted for whistling as to all matters of notice or warning in approaching public crossings; but in this instance the blowing of the stock-alarm had no relation to the crossing, but was aimed alone at the mule, and was prompted by the emergency. We can see no reason why, in case of a sudden emergency, the whistle may not be sounded, even in the very center of a town or city, when such a measure is requisite to save the life of man or beast, and we are sure that the statute never contemplated any inhibition upon such use of the whistle where danger occurs in the woods or fields adjacent to the populated quarters of a city. The merits of the present case, on the facts in evidence, are so close that we think the erroneous charge to the jury may have done mischief, and therefore that a new trial should be granted. Judgment reversed.

Digitized by Google

(83 Ga. 166)

ROBSON v. STATE.

(*Supreme Court of Georgia.* April 22, 1889.)

EMBEZZLEMENT — INDICTMENT — CONTINUANCE — TRIAL.

1. Indictment against a tax collector under section 4421 of the Code, for embezzlement, alleging that the money embezzled was collected by him officially from the tax-payers of the county, sufficiently charges that the money was in his possession, custody, and control at the time of the act of embezzlement.

2. Overruling a demurrer to the indictment is matter for direct exception, not for the motion for a new trial; and time runs against direct exception from the date of the trial, or from the adjournment of that term of the court,—not from the date of denying the motion for a new trial.

3. After the accused has in open court discharged certain of his witnesses from attendance, he cannot afterwards, at the same term, obtain a continuance for the absence of one of these discharged witnesses.

4. All existing grounds for continuance are to be embraced in one and the same motion. After the motion has been overruled, it is no abuse of discretion not to hear a second motion on a known ground, (such as the absence of one of defendant's counsel,) which might have been included in the original motion, but was not.

5. After some of the jurors to try a felony have been selected, and while the court is waiting upon the bailiffs to bring in a new panel, it is not error to proceed with other business, the selected jurors taking no part therein, but being sent out of the court-room, and properly confined elsewhere.

6. While the trial of a felony is in progress, the court may deal with witnesses of the accused for contempt, and hear their excuses for failure to attend promptly in obedience to process. Certainly this may be done during an interval when the jury are not present, the accused not intimating any objection, and his counsel expressly consenting.

7. The offense of embezzlement by a public officer is not the less punishable because the sureties upon his official bond have responded to the state for his default, and he has reimbursed them for so doing, though he be not indicted until afterwards. It follows that a note executed as a part of the settlement between him and his sureties is irrelevant evidence.

8. Unless it appear affirmatively to the contrary, the embezzlement of public money by a tax collector is to be taken as committed in the county of which he is an officer, if committed at all.

9. When one on trial for a felony is at large on bond, and is voluntarily absent when the verdict is returned, the verdict may nevertheless be received and published, especially if his counsel makes an express waiver of the client's right to be present.

10. The verdict was not contrary to evidence or to law.

(*Syllabus by the Court.*)

Error from superior court, Washington county; HINES, Judge.

J. A. Robson and *R. L. Rodgers*, for plaintiff in error. *O. H. Rodgers*, Sol. Gen., *J. B. Evans*, and *R. R. Harris*, for the State.

BLECKLEY, C. J. Robson was indicted, tried, and convicted for embezzlement committed while he was tax collector of Washington county. The moneys embezzled were alleged to be taxes due by the tax-payers of that county to the state, collected by him officially. The section of the Code (section 4421) applicable to the case reads as follows: "Any officer, servant, or other person, employed in any public department, station, or office of government of this state, or any county, town, or city of this state, * * * who shall embezzle, steal, secrete, fraudulently take and carry away, any money, gold or silver bullion, note or notes, bank-bill or bills, shall, on conviction, be punished by imprisonment and labor in the penitentiary for any time not less than two years, nor longer than seven years." A motion for a new trial made by the accused was overruled.

1. There was a demurrer to the indictment, alleging that it failed to charge that the accused had the money in his possession, custody, or control as tax collector at the time of the imputed offense. We think the indictment did allege the equivalent of this, as it charged that the money belonged to the state of Georgia for the general state tax due from the tax-payers of the county of Washington to the state for the year 1886, which had been by said Robson, as tax collector, collected from the tax-payers of the county.

2. Though we have examined the indictment, and ruled it sufficient, the question has not been properly made by the record and bill of exceptions. The overruling of such a demurrer is not proper matter for a motion for a new trial. Griffin v. Justices, 17 Ga. 96; De Barry v. Austin, 76 Ga. 306; Rogers v. Rogers, 78 Ga. 688, 3 S. E. Rep. 451. The bill of exceptions, it is true, does except directly to the ruling of the court on the demurrer. But this comes too late, as time runs against such exception, not with reference to the date at which the new trial was denied, but with reference to the date of the trial, or at all events to the adjournment of the term of the court at which the trial took place. Daniel v. Tarver, 70 Ga. 203. Had exceptions *pendente lite* been filed, then the point would have been saved, and might have been brought up with the general case after the motion for a new trial was overruled. Bradley v. Saddler, 54 Ga. 681.

3. A continuance was moved for and denied. It seems that the accused in open court discharged certain of his witnesses from further attendance, and then applied for a continuance because one of these witnesses was absent. The court, knowing judicially of what had transpired, refused to grant the continuance for that reason. It seems to us that there can be no doubt that the reason was sufficient. Moreover, we are satisfied that, if what was proposed to be proved by the witness was admissible evidence at all, it was so immaterial that the refusal might well have been put upon that ground.

4. The forty-fourth rule of the superior court (Code, p. 1351) requires that all grounds of a motion for continuance shall be urged and insisted upon at once, and declares that after a decision on one or more grounds no others shall be heard by the court. In Brinkley v. State, 54 Ga. 374, it was suggested that this rule might, in the discretion of the court, be made to yield so far as to prevent injustice by mistake, inadvertence,

Digitized by Google

surprise, etc. We cannot hold that it was an abuse of discretion not to relax the rule so as to hear a second motion after the first had been determined adversely; the ground of the second being the absence of one of the prisoner's counsel. It was not pretended that the absence was unknown when the first motion was made. The only excuse given was that it was left out by inadvertence or oversight. It was not stated that the absentee was the leading counsel. If he had been such, or if his presence had been deemed very material, it is altogether unlikely that this cause for continuance would have escaped attention in the first instance. Indeed, it would have been the one topic to present itself ahead of everything else in the mind of one exercising any diligence whatever in preparing a motion for continuance. Granting that the matter was subject to the discretion of the judge, and that, in the face of the rule, he could have considered this new ground, had he been so moved, in the exercise of his discretion, we see in this record no indication of any abuse or mistaken exercise of such discretion.

5. The panel of jurors having been exhausted without obtaining a full jury, the partial jury selected, but not yet sworn, were confined elsewhere than in the court-room, and, while the bailiffs were abroad, engaged in summoning another panel, the court proceeded to try another criminal case. We think there was no error in this. The selected jurors took no part in the proceedings, and were not even present. The case is wholly unlike that of Tribble v. Anderson, 63 Ga. 32, in which some of the jurors engaged on a pending trial were charged with another case.

6. During an interval while the trial was in progress, the court, with consent of the prisoner's counsel, the prisoner himself not intimating any objection, dealt with some of the witnesses who had been summoned in behalf of the accused, for their failure to attend promptly in obedience to the process. They were proceeded against for contempt, and the court heard their excuses. This took place during a recess of the court, and while the jury were not present. Under such circumstances, it was surely no error, nor even any irregularity, to hear the excuses of the witnesses; and, so far as appears, this was all that was done.

7. Before the indictment was found, the comptroller general had issued execution for the taxes due from the collector, and the sureties on the collector's official bond had paid the executions in full; and, as indicated by some of the evidence, the collector had indemnified the sureties by turning over to them certain notes, and conveying to them real estate. The court charged the jury that if they believed from the evidence that the defendant embezzled the sum charged in the indictment, and in the manner charged in the same, he would be guilty of said charge, although a full settlement had been made with the state, and also with the securities on his official bond, before the indictment was found against him. We think this charge was sound law. With or without embezzlement, the state was entitled to its taxes, and discharging the claim as a debt after the money had been embezzled would not cancel the crime. McCoy v. State, 15 Ga. 211; Hoyt v. State, 50 Ga. 325. A note executed by the sureties, and payable to the accused, was a part of the settlement between them, and its exclusion as evidence was proper for the same reason applicable to the charge. That the sureties gave their principal a note as a part of the settlement, or to carry out its terms, would not tend to illustrate his guilt or innocence touching the charge of embezzlement.

8. It is contended that the venue of the offense was not made sufficiently certain by the evidence, but we think otherwise. The accused was a public officer of the county of Washington. He collected the money in that county, from the tax-payers thereof. His office was there; he resided there; and it is not affirmatively shown that any of the money was elsewhere after he collected it. Smiley v. State, 66 Ga. 754. The venue may be established by circumstantial or direct evidence. Davis v. State, 8 S. E. Rep. 184, (October term, 1888.) We think the venue was most amply proved by the evidence in this record.

9. When the verdict was brought into court the accused was at large on bond, and was voluntarily absent. His counsel, being present, consented to the reception and publication of the verdict. We see not why the voluntary absence alone would not be good cause for proceeding with this necessary step in the trial. Barton v. State, 67 Ga. 653. It was the privilege of the accused to be present, but its exercise rested upon his will alone. He was under no restraint or constraint by the action of the court.

10. Touching the general merits of the case, and the sufficiency of the evidence to warrant the verdict, we content ourselves with quoting from the opinion of the able and impartial judge who presided at the trial, and whose opinion in deciding adversely on the motion for a new trial has come to us as a part of the record. He says: "I cannot say that the verdict is contrary to the evidence and law of the case. Neither does it appear to be against the weight of evidence. I cannot come to the conclusion that the jury was not justified in saying he was guilty beyond a reasonable doubt. The defendant made the square issue that the funds of the state in his hands as tax collector were stolen, and not embezzled by him. Was this money stolen by Willie Corneal, or was it embezzled by the defendant? That was the sharp, clean-cut issue which the defendant made with the state. There was no middle ground,—no allegation of extravagance or reckless expenditure, or innocent appropriation of the state's money with

Digitized by Google

intent to account for it at the proper time, and failure owing to misfortune or miscalculation. In reply to the proposition that the money was stolen, there was evidence that the defendant paid a note of his own with money taken from a pile in or on his desk where he was sitting at the receipt of customs, taking in the taxes of the people. The jury might infer that the defendant used the state's money for this purpose. There was the evidence of several witnesses that the defendant stated he had used the state's money in buying land. There was in evidence his statement that he had used the state's money in electioneering and in living. There was his letter of the 5th of May, 1887, to the comptroller general, in which he begged to be bridged over until October; offers to convey to that officer 1,800 acres of land, and pay 20 per cent. interest for indulgence; pleads that he would be ruined if indulgence was not granted him; and yet he does not mention the fact that the state's money was stolen. The defendant kept the robbery secret. From all these circumstances the jury might well infer that the theory that the money was stolen was not true in fact. I would have been glad to have been able to say in my conscience that the evidence failed to show the defendant guilty beyond a reasonable doubt, and thus have been in a position to grant him a new trial, but I cannot so say in good conscience." Judgment affirmed.

(83 Ga. 198)

WATSON *v.* SWANN *et al.*

(*Supreme Court of Georgia.* April 29, 1889.)

TAXATION—LEVY—RETURN.

In order for a constable to make a legal levy upon land under a *fi. fa.*, issued for state and county taxes, it is not necessary that he should make an entry or return of no personal property to be found. (*Syllabus by the Court.*)

Error from superior court, Douglass county; R. H. CLARKE, Judge.

A. L. Bartlett, C. D. Camp, and *W. A. James,* for plaintiff in error. *Thomas W. Latham,* for defendants in error.

BLECKLEY, C. J. The plaintiff in error relied in argument upon the sole ground that the court erred in excluding the tax *fi. fas.*, the entries thereon, and the sheriff's deed. These *fi. fas.* were issued, one of them for the state and county taxes of 1877, the other for the state and county taxes of 1878; one for $72.54, the other for $70.24. They were each levied by a constable, and the sheriff's deed purported to be made in consequence of a sale under these *fi. fas.* and two others, the other two, as recited in the deed, being for taxes of 1879 and 1880. The evidence was excluded on the ground that the constable had no authority to make the levy, there being upon the *fi. fas.* no entry or return that no personal property was to be found. The sharp and clear-cut issue thus made is whether a constable can levy upon land by virtue of a tax *fi. fa.* without a return or entry of no personal property. We think he can. No officer could do so under the tax law of 1804. Cobb, Dig. 1048; Gladney v. Deavors, 11 Ga. 88. Under that law taxes were to be made by distress and sale "of goods and chattels, if any to be found; otherwise of the lands, * * * or so much thereof as will pay the taxes due, with costs." This was changed by the Code, (section 812,) which declares: "Taxes shall be paid before any other debt, lien, or claim whatsoever, and the property returned or held at the time of giving in, or after, is always subject." And see section 1973. Section 886 provides that "executions for non-payment of taxes * * * must be directed to all and singular the sheriffs and constables of this state;" and section 888 declares: "Executions may be levied by either of the officers to whom directed, or other officer who by law may be authorized in their place; but a constable cannot levy a tax *fi. fa.* when the principal amount exceeds one hundred dollars, and if a tax *fi. fa.* for less than one hundred dollars be levied by a sheriff, his fee for said levy shall be that now allowed constables, and if the levy be made upon personalty, the same shall be advertised and sold as is now provided for justice's court *fi. fas.* If the constable levies on land, it must be returned to and sold by the sheriff of the county." The act of February 16, 1876, which is not copied in the Code, provides that "it shall be lawful for the sheriff or his deputy, in any county of this state, to levy and collect a tax *fi. fa.* for any amount: provided, that when said tax *fi. fa.* is for one hundred dollars, or less, the same fee shall be paid as now allowed by law to constables or bailiffs, and all other proceedings as to levy and the time and place of advertisement and sale shall be the same as heretofore governed such levy, advertisement, and sale by bailiffs or constables." In Smith v Jones, 40 Ga. 39, which arose previously to the act last quoted, the question came up whether the marshal of the city of Griffin could levy upon land for municipal taxes without first making the return of no personal property. The court held that he could; and the whole tenor of the opinion goes to support the theory that in executing a tax *fi. fa.*, to which both kinds of property are alike subject, the authority to levy is as ample against one kind as another. The case of Plant v. Eichberg, 65 Ga. 64, arose subsequently to the act of 1876. The levy was for taxes of 1875, amounting to $16.50, and was made by the sheriff without any previous return of no personal property. The court ruled that the levy was legal, the opinion of JACKSON, J., closing with this observation: "Indeed, the point is controlled by Smith v. Jones, 40 Ga. 39, where it was held that to collect a tax *fi. fa.* for city taxes the marshal need not exhaust personalty, and make the entry; and if such be the rule as to city taxes, much more ought it to be as to state taxes."

Digitized by Google

From some expressions in this opinion it might be inferred that the court thought that if the levy had been made by a constable, a return of no personal property would be requisite; but taking the general bearing and reasoning of the opinion, it is, so far as it goes, an authority to the contrary. Sections 3645 and 4172*b* of the Code, which negative the authority of a constable to levy upon real estate, unless there is no personal estate to be found sufficient to satisfy the debt, etc., treat alone of levies under *fi. fas.* from courts, as will be seen by looking at the titles and articles in and under which the sections occur. They have no relation whatever to tax *fi. fas.*; nor does the act of February 16, 1876, supra, or any other statute now of force, prescribe any preliminary return or entry as necessary to a legal levy of a tax *fi. fa.* upon land by a constable. So far from making *fi. fas.* from justice's courts the standard of validity in reference to tax-sales, the Code expressly declares (section 893) that "the deed or bill of sale made by such officer shall be just as valid to the purchaser as if made under the ordinary process of law issuing from the superior court." Here a deed was tendered, made by the sheriff by virtue of tax executions. The levy was made by an officer to whom the executions were directed, and who, by section 888, had express authority to levy them. Consequently the deed was just as valid to the purchaser as if made under the ordinary process of law issuing from the superior court. Another provision of the Code, tending to show that levies by constables under tax executions are not governed by the law applicable to levies under *fi. fas.* from justice's courts, is section 889 of the Code, which says: "The tax collector may place his *fi. fas.* in the hands of any one constable of the county, who shall be authorized to collect or levy the same in any part of the county." As to tax *fi. fas.* not exceeding $100 in amount, the constable has as wide a range territorially as the sheriff, and, we think, as wide a range as to the kind of property to be seized. The truth is that revenue proceedings are wholly separate and apart from proceedings to enforce judicial process, and are not to be conformed thereto, except in so far as express law or necessary implication from express law requires. The exigencies of the state demand that taxes shall be collected promptly, and collecting officers, as the law now stands, are not to pause and hesitate, or to grope and investigate, in order to find out whether one class of property or another might or could be first seized. The tax-payer, by section 891 of the Code, has the privilege of pointing out property upon which to levy the tax *fi. fa.*, but this is all the restriction upon the officer's power to levy in his discretion upon any property whatsoever that may be subject; and even this privilege may be overruled by the tax collector, who has power to direct a levy on other property whenever he deems it necessary. The court erred in excluding the *fi. fas.*, the entries thereon, and the deed, and in not granting a new trial on that ground. Judgment reversed.

(83 Ga. 207)

COLE v. BYRD.

(*Supreme Court of Georgia.* April 29, 1889.)

FRAUDULENT CONVEYANCES.

1. When, pending suit against the son, his mother conveys land to him, and before judgment he conveys it back to her, and after judgment the land is levied upon as his property, and she interposes a claim, upon the trial of the claim case evidence, both parol and in writing, is admissible in her favor to show the facts and circumstances under which both deeds were made, and the causes and considerations moving thereto; the issue being fraud or no fraud.

2. Objections to evidence must specify the ground which was presented to the court below on the trial.

3. The court, without request, need not charge on the credibility of witnesses, or the mode of impeachment.

4. The evidence warranted the verdict.

(*Syllabus by the Court.*)

Error from superior court, Gwinnett county; HUTCHINS, Judge.

Sam. J. Winn, for plaintiff in error. *T. M. Peeples*, for defendant in error.

BLECKLEY, C. J. 1. The defendant in *fi. fa.* acquired title pending the suit, and also parted with title before judgment was rendered. Therefore, whether the judgment had any lien upon the property would depend upon fraud or no fraud. Certainly upon that question evidence, both parol and in writing, was admissible to explain the whole transaction. See first head-note.

2. It appears that a certain bond for titles was admitted in evidence without proving its execution, but it nowhere appears in the record that that objection was presented to the court at the time the bond was offered and admitted. The motion for a new trial does say that the bond was admitted without proof of its execution, but it fails to say that it was objected to upon that ground or any other.

3. Had the plaintiff's counsel desired the court to charge upon the credibility of witnesses, the mode of impeachment, etc., a request to do so ought to have been made. No such request was made.

4. The evidence was very ample to warrant the jury in arriving at the conclusion that the dealings between mother and son were wholly free from any taint of fraud on her part. We think, as did the court below, that the verdict finding the property not subject was correct. Judgment affirmed.

(83 Ga. 278)

RIALS v. POWELL *et al.*

(*Supreme Court of Georgia.* April 29, 1889.)

EJECTMENT—TRIAL.

1. Where an equitable plea in ejectment alleges a contract by plaintiff's grantor to sell the land to defendant, and knowledge thereof by plaintiff when he purchased, and evidence in relation to notice, etc., is given, it is not error to charge on the question of notice.

2. The burden being on plaintiff to establish his

Digitized by Google

right to recover, there is no error in refusing to allow defendant to open and conclude the argument.

Error from superior court, Gwinnett county; HUTCHINS, Judge.

Juhan & Brown and *C. H. Brand*, for plaintiff in error. *S. J. Winn & Son* and T. *M. Peeples*, for defendants in error.

SIMMONS, J. Powell brought complaint for a certain tract of land in the town of Lawrenceville, against Ann Rials. The defendant filed an equitable plea, wherein she alleged that she bargained for the land in dispute with one Vaughan, and, being unable to pay for it, Strickland bought it for her, and agreed to allow her to pay $150 for it in installments; that she paid him $72.50 in money, and the balance in her wages, which, under the agreement between them, Strickland was to retain for that purpose; that the $72.50 and her wages were sufficient to pay the whole amount of the purchase money of the land; that Strickland took the deed in his own name, and afterwards sold it to Powell, the plaintiff; that Powell bought it with full knowledge of her bargain with Strickland; and that she had gone into possession of the place and made improvements thereon. She prayed that Strickland be made a party plaintiff to the suit, and that the deed made by him to Powell be canceled and set aside. On the trial of the case the jury found a verdict for the plaintiff for the premises in dispute, and a verdict in favor of the defendant against Strickland for $38. The defendant made a motion for a new trial, on the grounds (1) that the verdict was contrary to law and to the evidence; (2) that the court erred in charging the jury that if the plaintiff bought the lot with no notice of the defendant's claim of ownership, or right to possession and title as purchaser from Strickland, and no reasonable grounds to suspect it, if true, he would be an innocent purchaser, and would be protected, and in that case it would be the duty of the jury to find for the plaintiff against the defendant; (3) that the court erred in refusing to allow counsel for the defendant to open and conclude the argument before the jury. The motion was overruled, and the defendant excepted.

1. We do not think that the court erred in refusing to grant the motion for a new trial on the ground that the verdict was contrary to law and the evidence. There was sufficient evidence to authorize the finding of the jury in the case. The plaintiff showed a legal title to the premises in dispute. The defendant had no legal title, but relied upon the alleged contract between her and Strickland, which she asserted was that Strickland was to purchase the land from Vaughan, and, when she paid him $150, he was to make her a title thereto. On this point the evidence was conflicting, she testifying that she paid Strickland the $150, and he testifying that she had never paid him a cent on the purchase money, but that the amount she did pay him was for rent of the premises.

2. There was no error in the charge of the court complained of in the second ground of the motion. The objection made to it in the motion for a new trial was that the question as to whether Powell was an innocent purchaser or not was not involved in the case. Upon reading the equitable plea of the defendant it will be seen that she distinctly makes the allegation that Powell, at the time he purchased from Strickland, knew that she had bargained with Strickland for the land, and had paid the purchase money; and the testimony was admitted by the court upon this question. We think, therefore, that there was no error in the charge of the court on this subject.

3. Nor was there any error in refusing to allow the defendant's counsel to open and conclude the argument. Powell was the plaintiff in the court below, and the burden was upon him to establish by proper evidence his right to recover the land. Whenever the burden is upon the plaintiff, he has the right to open and conclude the argument, although the defendant, in his pleas, may take the affirmative upon certain issues in the case.

Judgment affirmed.

(82 Ga. 745)

JONES v. WYLIE.

(*Supreme Court of Georgia.* April 29, 1889.)

JUSTICES OF THE PEACE—LANDLORD'S LIEN.

By the general law of Georgia suit in justice's court must be brought in the militia district in which defendant resides. By Code Ga. § 1991, in a proceeding to foreclose a lien on personalty, affidavit must be made before a judge or ordinary of the county in which the property is or defendant resides, and, if the amount claimed is under $100, the application may be made before a justice of the peace, who shall take all other steps as in other cases in his court, and he shall issue execution as if the case were in his court. *Held*, that a proceeding before a justice to foreclose a landlord's lien must be brought in the militia district in which defendant resides or has property.

Error from superior court, Gwinnett county; HUTCHINS, Judge.

C. H. Brand, for plaintiff in error. *Juhan & Brown*, for defendant in error.

SIMMONS, J. The court below decided that the landlord could not foreclose his lien in a district where his tenant did not reside, and in which the tenant had no property. We are inclined to think that the court was right. The general law in this state is that the defendant must be sued in the county of his residence, and, if the claim is within a justice's court's jurisdiction, it must be sued in the militia district in which the defendant resides. Section 1991 of the Code, in treating of the foreclosure of liens upon personalty, says, in substance, that there must be a demand on the owner, etc., of the property for payment, and a refusal to pay, and such demand and refusal must be averred: that it must be prosecuted within one year after the debt becomes due; and that the person prosecut-

Digitized by Google

ing such lien must make affidavit before a judge of the superior court, or the ordinary of the county in which the property may be or the defendant may reside, showing the facts necessary to constitute a lien. And, "if the amount claimed is under one hundred dollars, the application may be made to a justice of the peace, who may take all the other steps hereinafter prescribed, as in other cases in his court. Upon such affidavit being filed, if before * * * a justice of the peace, * * * it shall be the duty of the * * * justice of the peace, if in his court, to issue an execution," etc. This section seems to contemplate that if the claim is within a justice of the peace's jurisdiction, it shall be made to a justice in the district where the defendant resides. It says that in that event the justice shall take all other steps as in other cases in his court, and that he shall issue execution as if the case were in his court; in other words, the justice is to deal with the case just as if it were an original suit brought in his court against the defendant. If an original suit is brought against the defendant in a justice's court, it must be brought in the district wherein the defendant resides, if there is a justice in that district.

In this case the affidavit to foreclose the lien does not allege that the defendant resided in the district of the justice who issued the *fi. fa.*; nor does it allege that the defendant had property in that district. Counsel for the plaintiff in error cited the case of Tharpe v. Foster, 52 Ga. 79, as analogous to the case under consideration. It will be observed on reading that case that the defendant had property in the county of Bibb, but resided in the county of Morgan; and that the court held that the lien was properly foreclosed in the county of Bibb, because the defendant had property therein, but that it must be returned to the county of the defendant's residence for trial. The case of Hardeman v. De Vaughn, 49 Ga. 596, relied on by counsel for plaintiff in error, is similar in its facts to the case of Tharpe v. Foster, supra. The foreclosure was in Macon county, and the cotton was in that county, but Brown resided in Houston county, and the court held that the issue made in the case should be returned for trial in the county of the defendant's residence. It was likewise argued by counsel for the plaintiff in error that any justice of the peace could issue attachments and distress warrants, regardless of the defendant's residence in any particular district. That is true, and this court has so held. Section 4082 of the Code, in relation to distress warrants, expressly allows it. Section 3265 allows any justice of the peace in the county to issue attachments. A justice's jurisdiction is not limited in the issuance of distress warrants or attachments. But in the foreclosure of liens the justice's jurisdiction is limited, and he has no jurisdiction outside of his district; and if he takes jurisdiction to foreclose a landlord's lien, it must be either in the district where the defendant resides, or where he may have property. Judgment affirmed.

(83 Ga. 177)

McLAWS v. MOORE.

(*Supreme Court of Georgia.* April 29, 1889.)

JUDGMENT—MORTGAGES—CONTINUANCE.

1. A continuance to procure the testimony of an absent witness will not be granted unless diligence to procure the testimony in question is shown.

2. In litigation after judgment of foreclosure of a mortgage the mortgagor cannot plead usury in the mortgage debt, unless it is contended that the judgment was procured by accident, fraud, or mistake, or the usury appears on the face of the judgment.

3. After a mortgage containing a waiver of homestead and exemption was foreclosed, the rule *nisi* and rule absolute also showing the waiver, and execution was levied on the mortgaged land, the mortgagor had a homestead in the land set apart. *Held*, that an affidavit by the execution plaintiff that the land was subject to sale was unnecessary before the sheriff could sell.

Error from superior court, Lincoln county; LUMPKIN, Judge.

J. E. Strother, for plaintiff in error. *M. P. Reese*, for defendant in error.

SIMMONS, J. Sarah T. McLaws purchased a tract of land. In order to pay for the same she executed a mortgage on the land to J. H. Tallman for $3,500, with interest at 8 per cent. In this mortgage she waived homestead and exemption. Tallman assigned the mortgage to Spencer, and Spencer had it foreclosed. A mortgage *fi. fa.* was issued upon the judgment, and was levied upon the land. She sought to enjoin the sale, but failed. She then applied to the ordinary for, and had set apart to her, a homestead in a part of the land. On the day of the sheriff's sale she gave him notice of her homestead upon this land. The sheriff disregarded the notice, and exposed the land for sale, and it was purchased by Moore, the defendant in error. The sheriff demanded possession of the land, which was refused by Mrs. McLaws as to the part covered by the homestead. Subsequently, Moore, through his agent, made affidavit under the intruder's act, and sought to have her removed as an intruder. She filed a counter-affidavit, as required by law, which was returned to the superior court. At the trial term of the case she by consent amended her counter-affidavit, and set up, in substance, in her amendment, that the loan of the money to her by Tallman was infected with a large amount of usury, and that the usury entered into the mortgage and made it void, and therefore she was not bound by her waiver of homestead therein; and that, not being bound by said waiver, she had applied to the ordinary and had a homestead set apart in said land, and that the purchaser at sheriff's sale had notice when he purchased that she had taken a homestead in the land, and notice of the invalidity of the mortgage by reason of its being infected with usury. She

Digitized by Google

therefore claimed that her homestead was valid, and that she ought not to be ejected. On demurrer the court struck out this amendment, and rendered judgment against her, and ordered her to be removed from the premises. She also moved, during the trial, to continue her case, in order to procure the testimony of Spencer, but this was refused by the court. She also complained that the sheriff sold the land after her homestead had been set apart, without an affidavit from the plaintiff that the land was subject to levy and sale, as required by law. The court held that, under the facts in this case, such affidavit was unnecessary. To these rulings she filed her bill of exceptions, and assigned error thereon.

1. The court did not err in refusing to continue the case. There was no diligence shown to procure the testimony of Spencer; nor was a proper and full showing made by her for a continuance.

2. Nor was there any error in striking out the amendment to the original counter-affidavit. This amendment evidently sought to go behind the judgment of foreclosure, and to show that there was usury in the contract between the defendant and Tallman. This she could not do. If there was usury in the contract, she ought to have pleaded it on the trial of the foreclosure of the mortgage. After she had stood by and allowed the mortgage to be foreclosed for the full amount, she could not in a subsequent litigation go behind the judgment, and attack the original contract on account of usury being therein. She is bound by that judgment. She does not allege that there was any accident, fraud, or mistake in procuring the judgment, or that she had no knowledge of this usury when the judgment was rendered; nor does it appear on the face of the judgment that there was usury therein. When a party is sued in a proper court, and is properly served, it is his duty, if he has any defense to the suit, to make it before judgment is rendered against him. It is too late, after judgment goes against him, for him to attack that judgment in a collateral proceeding, for causes which he knew of at the time of the judgment, and which he failed to plead. "If a party is sued at law, and has a legal defense, he must avail himself of it at law pending the suit, and cannot afterwards ask for relief, unless he was prevented from so pleading his defense by fraud, accident, or the act of the adverse party, unmixed with negligence on his own part." Thomason v. Fannin, 54 Ga. 361. See, also, Code, §§ 2897, 3577; Bostwick v. Perkins, 1 Ga. 139; Perry v. McLendon, 62 Ga. 604; Watkins v. Lawton, 69 Ga. 671; Hightower v. Cravens, 70 Ga. 475; Wingfield v. Rhea, 73 Ga. 477. In the case of Cleghorn v. Greeson, 77 Ga. 343, this court held that the homestead was good against a judgment, the judgment showing on its face that there was an usurious rate of interest. In this case the note, the mortgage, and the judgment all show that the rate of interest was legal. The court did not err, under the facts in this case, in holding that it was unnecessary for the plaintiff in the mortgage *fi. fa.* to make an affidavit that the land was subject before the sheriff could sell the same. The levy had been made several months before the homestead was set apart, and the mortgage, rule *nisi*, and rule absolute show that homestead had been waived. McDaniel v. Westberry, 74 Ga. 380. Judgment affirmed.

(86 Va. 67)

BOWDEN *v.* PARRISH.

(*Supreme Court of Appeals of Virginia.* April 25, 1889.)

ACKNOWLEDGMENT—MASTERS IN CHANCERY—HEIRS.

1. The acknowledgment of the grantor in a deed of trust, taken before the trustee as notary public, is void, though the latter has not accepted the trust, as, the deed being for his benefit, his acceptance will be presumed until his dissent is shown, and it will not be implied from the fact of his taking the acknowledgment.

2. When the commissioner to whom a bill attacking the validity of such a deed reports that the trustee and the notary were one and the same person, that fact will be considered established, if no direction is given to the commissioner to return the evidence taken, and he returns none, as he is not bound to return the evidence unless directed to do so.

3. If the commissioner reports the facts as to the deed in question, from which its invalidity as to other lienors appears, it is immaterial that he has not reported specially whether it was in fact a lien, as the effect of the decree overruling exceptions to his report is to establish the insufficiency of the acknowledgment, and the consequent invalidity of the recordation.

4. It is error to decree the sale of the interest of one of several heirs in his ancestor's lands to pay the debts of the heir, before directing a settlement of the accounts of the ancestor's administrator.

Jas. N. Stubbs, for appellant. *T. P. Bagby*, for appellee.

LEWIS, P. This was a suit in the circuit court of King and Queen county, to subject the real estate of the defendant, B. F. Bowden, to the satisfaction of the liens thereon. The suit was brought by the appellee, William M. Parrish, who is a judgment creditor of the said B. F. Bowden, and M. L. Bowden, his wife. The plaintiff's judgment was recovered in April, 1884, and the first question to be determined is whether or not the lien of the judgment is paramount to a certain deed of trust executed by the said Bowden and wife to R. B. Roy, trustee, in January, 1873, and which, as appears from the record, purports to have been admitted to record in the clerk's office of King and Queen county court on the 13th of March, 1873, upon a certificate of acknowledgment signed by the said Roy, a notary public. The bill charges that the deed was improperly admitted to record, and that its pretended recordation is a nullity, because founded upon a void acknowledgment; the said Roy being trustee in the deed, and therefore incompetent to take the acknowledgment; and this position, we think, is well taken. In Davis

Digitized by Google

v. Beazley, 75 Va. 491, the principle was announced that a grantee in a deed or a beneficiary under it is not allowed, as an officer, to take an acknowledgment of the deed by the grantor, with a view to its registration, and that the certificate of such acknowledgment is invalid, as authority to admit the deed to record, and hence a recordation based upon it is without effect as notice by construction under the registry laws. And the conclusive reason assigned was that the act of an officer in taking an acknowledgment of a deed is judicial in its character, and cannot, therefore, be performed by one who is interested in it, since no man can be a judge in his own cause. In that case the grantor in the deed took his own acknowledgment to it, and, as clerk, admitted it to record, and this was held to be invalid. The same principle is applicable to the present case. The trustee was an interested party, and therefore disqualified to take the acknowledgment of the grantors, as much so as if he had been the sole beneficiary in the deed. Any interest in the proceeding whatever, no matter how slight or remote, will disqualify a man from acting as "a judge in his own cause;" and here the trustee was interested at least to the extent of his commissions. And so in similar cases it has been determined in other states. Brown v. Moore, 38 Tex. 645; Stevens v. Hampton, 46 Mo. 404; 32 Amer. Dec. 757, note to Withers v. Baird. Indeed, the general principle is conceded by counsel for the appellant, but he insists that it ought not to be applied in this case, because he says there is no evidence of acceptance on the part of the trustee. But this position is untenable, as the acceptance of a grantee in a deed for his benefit is always implied in the delivery of the deed, and the law presumes that every estate is beneficial to the party to whom it is devised or conveyed until he renounces it. Skipwith v. Cunningham, 8 Leigh, 271; 2 Minor, Inst. 656. And here no dissent on the part of the trustee was expressed, and none can be implied merely from his act of taking the grantor's acknowledgment to the deed.

It is contended, however, that there is no proof that the officer by whom the acknowledgment was certified is the same person who is named as trustee in the deed. But the answer to this is that the commissioner to whom the cause was referred reports that he was, and there is no proof to the contrary, nor was it the duty of the commissioner to return the evidence upon which his report was based, in the absence of any direction so to do, and none was given in the present case. The report, therefore, upon this point is conclusive. Bowers v. Bowers, 29 Grat. 697; Robinson v. Allen, 8 S. E. Rep. 835.

Another objection made by the appellant is that the commissioner did not report as to whether the deed of trust is a lien on the defendant's real estate, "or make any report about it." The commissioner did report the facts concerning it, and, although he did not report in so many words that the deed, in his opinion, had not been legally recorded, and therefore that there was nothing upon which to predicate constructive notice of it to the plaintiff, yet he did impliedly so report, and the effect of the decree overruling the exceptions to the report, and directing the land to be sold, was to determine that the alleged registry of the deed was a nullity. This was a legal conclusion from the facts reported by the commissioner, and hence the appellant has not been prejudiced by the failure of the commissioner to report more specifically and in detail upon the point. Enough appeared to enable the court to pass upon it, and that is all that was necessary. We are of opinion, however, that there was error in decreeing a sale of the interest of the defendant, B. F. Bowden, in the real assets of the estate of his father, Robert Bowden, deceased, before directing a settlement of the administrator's accounts. There are several heirs, and the failure to direct such an account was contrary to the rule in such cases recognized in Hoge v. Junkin, 79 Va. 220, and is error for which the decree must be reversed; and as the case must go back to the circuit court for further proceedings, it is unnecessary to pass upon any other question discussed at the bar. Decree reversed.

MARX v. MILSTEAD.

(*Supreme Court of Appeals of Virginia.* April 25, 1889.)

CRIMINAL LAW — JURISDICTION — JUDGMENT — HABEAS CORPUS.

1. Code Va. § 3799, provides that any person laboring on the Sabbath "shall forfeit two dollars for each offense." Section 745 provides that the word "fine," when used in that chapter, shall include any pecuniary forfeiture; and section 712, in the same chapter, provides that any fine imposed by statute shall, unless otherwise provided, be recoverable by indictment, etc., except when the amount is less than $20, and no corporal punishment may be inflicted, when the recovery may be by warrant. Section 2939 provides that any fine less than $20, recoverable by action at law, may be sued for before a justice by civil warrant. Section 717 authorizes a justice to commit a defendant to jail until the fine and costs are paid, but provides that no execution shall issue therefor. *Held*, under said statutes, that a justice has jurisdiction to impose a fine of $2 for Sabbath violation, and to commit the offender until payment.

2. The justice has no authority to commit such a defendant for a term of one year, unless the fine is sooner paid, or he is sooner discharged, and the defendant will be discharged from imprisonment thereunder by *habeas corpus*.

3. Said section 717, authorizing the commitment by the justice without trial by jury, does not violate the constitutional right of jury trial in criminal prosecutions, as the constitution was only intended to preserve the right as at common-law, which permitted trial without jury in cases of petty offenses.

4. The evidence on which such a conviction was based will not be reviewed on *habeas corpus*, which will only relieve against an absolutely void commitment; and this rule is unaffected by Code Va. § 3035, which provides that in *habeas corpus* proceedings affidavits taken on reasonable notice may be read in the discretion of the court.

5. Where a prisoner is discharged for the invalidity of the commitment in the particular mentioned, he will be returned to the justice by whom

Digitized by Google

he was convicted, to be further dealt with according to law.

Habeas corpus.

Code Va. § 745, referred to in the opinion, provides that the word "fine," when used in the chapter in which said section is found, shall include any pecuniary forfeiture.

Courtney & Patterson, for petitioner. *R. G. Hughes* and *L. C. Bristow*, for Milstead, jailer.

LEWIS, P. In December, 1888, a judgment for a fine of two dollars and costs was rendered by STEPHEN WEST, a justice of the peace of Warwick county, against the petitioner, Oscar Marx, a Jew, for unlawfully carrying on his business as a retail merchant on a Sabbath day. Upon the rendition of the judgment the petitioner expressed to the justice a determination not to pay it, whereupon he was committed by the justice to the jail of the said county. The *mittimus* commands the jailer to receive the said Marx into his jail, "and there him safely keep for the term of one year, unless the said sum shall be sooner paid, or until he be otherwise discharged by due course of law." The petitioner thereupon, by his counsel, applied to this court for a writ of *habeas corpus*, which was awarded, and to which return has been made, setting forth in detail the facts just mentioned. He insists that he is illegally restrained of his liberty on three grounds: (1) Because the justice by whom the judgment was rendered had no jurisdiction to proceed against him, and therefore that the proceedings were *coram non judice*, and void; (2) because the conviction is not warranted by the evidence; and (3) because, even if the justice had jurisdiction of the case, the commitment is void, because it transcends the power of the justice.

1. As to the question of jurisdiction. Section 3799 of the Code provides that "if a person, on a Sabbath day, be found laboring at any trade or calling, or employ his apprentices or servants in labor or other business, except in household or other work of necessity or charity, he shall forfeit two dollars for each offense, every day any servant or apprentice is so employed constituting a distinct offense." The section immediately following, however, excepts from the operation of the law "any person who conscientiously believes that the seventh day of the week ought to be observed as a Sabbath, and actually refrains from all secular business and labor on that day, provided he does not compel an apprentice or servant, not of his belief, to do secular work or business on a Sunday, and does not on that day disturb any other person." The word "forfeit" here used is synonymous with "fine," (section 745,) and the question, therefore, in this connection is, how is such fine to be enforced or collected, if it is collectible by judicial process at all? Section 712 enacts that "where any statute imposes a fine, unless it be otherwise expressly provided, or would be inconsistent with the manifest intention of the general assembly, it shall be to the commonwealth, and recoverable by presentment, indictment, or information. Where a fine, without corporal punishment, is prescribed, the same may be recovered, if limited to an amount not exceeding twenty dollars, by warrant, and, if not so limited, by action of debt, or action on the case, or by motion. The proceeding shall be in the name of the commonwealth." It is also provided by section 2939, which relates to "warrants for small claims," that any claim to a fine, not exceeding twenty dollars, which would be recoverable by an action at law, shall be cognizable by a justice, the proceeding to be by civil warrant, as in the case of other small claims enumerated in the same section. And by section 717 it is enacted that "when any fine is imposed by a justice he may commit the defendant to jail until the fine and costs are paid, or until the costs are paid where there is no fine, but he shall not issue any execution therefor." And this provision must be construed as giving the only means to a justice for carrying into effect a judgment rendered by him for a fine in any case, civil or criminal. In other words, what would seem to be an implied authority to issue a *fi. fa.* upon a judgment for a fine under section 2948, relating to executions on judgments for small claims, is controlled by the express prohibition contained in section 717, which applies to all cases in which any fine is imposed by a justice; the term "impose" applying as well to the rendition of a judgment for a fine in a civil as in a criminal case. By the act of March 14, 1878, (Acts 1877–78, p. 377,) a justice was empowered in certain cases to issue an execution of *fi. fa.* or a *capias pro fine* for fines imposed by him, but that provision has been repealed. It is thus apparent that not only is the statutory fine prescribed for a violation of the Sabbath recoverable before a justice, but there are, in fact, two remedies for such recovery. The first is by warrant of arrest, or a criminal prosecution; for the rule at common law is that, where a statute gives a justice jurisdiction over an offense, it impliedly gives him power to apprehend any person charged with such offense. Bac. Abr. tit. Justices of Peace, E, 5. And the second is by a civil warrant. The latter remedy was pursued in the present case, the proceeding having been commenced by a summons in the form of an ordinary warrant in civil cases, and not by warrant of arrest; so that much of the argument, as to the validity of a conviction in any criminal case where the right of a jury trial is denied the defendant, is not applicable to the case before us. The warrant also set forth with technical precision the charge upon which the proceeding was based,—that is to say, that the defendant, on a certain Sabbath day, did labor at his trade and calling as a retail merchant, etc., which was neither a work of necessity nor charity, etc.; thus following the rule of pleading a statute, which is that, if there is

Digitized by Google

an exception in the enacting clause, the party pleading must show that his adversary is not within the exception, but if there be an exception in a subsequent clause or section, or a subsequent statute, that is matter of defense, and is to be shown by the other party. 1 Chit. Pl. 223; 1 Bish. Crim. Pr. § 378. No point, however, is made upon the form of the warrant.

2. The case, therefore, was not only within the jurisdiction of the justice, but it was brought and conducted in strict conformity with the established rules of procedure in such cases, and hence the petitioner's second ground of objection—namely, that the conviction is not warranted by the evidence—cannot be maintained. The writ of *habeas corpus* is not a writ of error. It deals not with mere errors or irregularities, but only with such radical defects as render a proceeding absolutely void. It brings up the body of the prisoner, with the cause of his commitment, and the court can inquire into the sufficiency of that cause. But, if he be detained in prison by virtue of a judgment of a court of competent jurisdiction, that judgment is in itself sufficient cause. An imprisonment under a judgment cannot be unlawful unless that judgment be an absolute nullity, and it is not a nullity if the court or magistrate rendering it had jurisdiction to render it. Ex parte Watkins, 3 Pet. 193; Ex parte Rollins, 80 Va. 314. The rule is very clearly stated in Ex parte Parks, 93 U. S. 18, as follows: "Where the prisoner is in execution upon a conviction, the writ ought not to be issued, or, if issued, the prisoner should at once be remanded if the court below had jurisdiction of the offense, and did no act beyond the powers conferred upon it. The court will look into the proceedings so far as to determine this question. If it finds that the court below has transcended its powers, it will grant the writ and discharge the prisoner, even after judgment. But, if the court had jurisdiction and power to convict and sentence, the writ cannot issue to correct a mere error." Citing Ex parte Watkins, supra; Ex parte Kearney, 7 Wheat. 38; Ex parte Wells, 18 How. 307; Ex parte Lange, 18 Wall. 163. See, also, Ex parte Siebold, 100 U. S. 371; In re Ayers, 123 U. S. 443, 8 Sup. Ct. Rep. 164, and cases cited.

We are not, therefore, to inquire in the present case as to the correctness of the conclusion drawn by the justice from the evidence before him. In other words, whether the defendant, in point of fact, carried on his business on a Sabbath day, as charged in the warrant, or what was his belief in respect to the observance of a Sabbath, or whether, on any ground, his case came within the exception in the statute, were questions for the justice to pass upon, and hence are not to be re-examined here. The conviction is not void, and, not being void, is conclusive in this collateral proceeding; and the rule which gives it this effect is, as was declared by Chief Justice GIBSON in a *habeas corpus* case in the supreme court of Pennsylvania, absolutely necessary to prevent judicial proceedings from running into a state of incurable disorder. Com. v. Lecky, 1 Watts, 66. In the celebrated case of Crepps v. Durden, Cowp. 640, an action of trespass against a justice was maintained before Lord MANSFIELD on the ground that in the proceeding complained of, which was for an alleged violation of the Sabbath, the defendant had acted without jurisdiction,—that is to say, he imposed several penalties upon the plaintiff for a violation of the statute on the same day,—and this was held to be illegal. But the law is well settled that a conviction by a magistrate, who has jurisdiction over the subject-matter, is conclusive evidence of the facts stated in it when collaterally assailed. 1 Smith, Lead. Cas. 1079, notes to Crepps v. Durden. In Cave v. Mountain, 1 Man. & G. 257, 39 E. C. L. 747, the rule was declared to be this: "That if a magistrate commit a party charged before him, in a case where he has no jurisdiction, he is liable to an action of trespass. But if the charge be of an offense over which, if the offense charged be true in fact, the magistrate has jurisdiction, the magistrate's jurisdiction cannot be made to depend upon the truth or falsehood of the facts, or upon the evidence being sufficient or insufficient to establish the *corpus delicti* brought under investigation." The rule, as thus expressed, was quoted with approval by Lord Chief Justice DENMAN in the subsequent case of Reg. v. Bolton, 1 Adol. & E. (N. S.) 66, 41 E. C. L. 439, whose language, in delivering judgment, is peculiarly appropriate to the present case. He said: "The affidavits, being before us, were used on the argument, and much was said of the unreasonableness of the conclusion drawn by the magistrates, and of the hardship on the defendant if we would not review it, there being no appeal. * * * We forbear to express any opinion on that which is not before us, namely, the propriety of the conclusion drawn from the evidence by the magistrates. They, and they alone, were the competent authority to draw it, and we must not constitute ourselves into a court of appeal, where the statute does not make us such, because it has constituted no other." And to the same effect are numerous authorities. Nor is the rule affected by that provision of the Code relating to the writ of *habeas corpus* contained in section 3035, to the effect that affidavits taken on reasonable notice may be read in the discretion of the court or judge. The affidavits here referred to are such as are introduced to show illegality, or something other than mere irregularity, in the detention of the prisoner. The legislature never intended to give authority to this or to any other court to review upon affidavits on *habeas corpus* the judgment of another court for the purpose of correcting mere errors in that judgment. The solemn judgments of the courts of the commonwealth are not to be collaterally set at naught in that way, and a judgment of a

Digitized by Google

justice of the peace, whose jurisdiction over the case appears, is as secure from collateral attack as is a judgment of a court of general jurisdiction. Both, in this regard, stand upon the same footing, the only difference being that in respect to the former the jurisdiction must affirmatively appear, whereas in the latter case jurisdiction is presumed. Freem. Judgm. § 524; Hurd. Hab. Corp. 367; Comstock v. Crawford, 3 Wall. 396.

3. We are of opinion, however, that the third point made by the petitioner is a good one; that is to say, the commitment is defective. The Code provides that a defendant who is adjudged to pay a fine may be committed until the fine is paid, but prescribes no particular term of imprisonment. The commitment, however, in the present case, commands the petitioner to be kept in jail for a term of one year, unless the fine be sooner paid, etc. This was such a departure from the terms of the statute as to render the commitment invalid. If it be suggested that a commitment for a year, unless the fine be sooner paid, is not less favorable to a defendant than a general commitment until payment be made, and is therefore not to his prejudice, the answer is that the question is not to be determined with reference to any consideration of that sort, but according to the letter of the statute alone. See Jones' Case, 20 Grat. 848. The authority of the justice in such a case is derived exclusively from the statute, and must therefore be strictly pursued, else the commitment will not be valid. It is laid down in a work of high authority that, inasmuch as the power of a justice to convict an offender in a summary way without a trial by jury is in restraint of the common law, the special power given by the statute must be strictly pursued; otherwise the common law will break in upon him, and level all his proceedings. 1 Burn, J. P. tit. "Conviction." And the rule, of course, applies to the commitment. 6 Rob. Pr. 641. The petitioner is therefore entitled to be discharged from custody under the commitment of the justice; but an order will be entered commanding the officer in whose custody he is to again take him into custody, and forthwith carry him before the justice by whom he was committed, to be further dealt with according to law. Authority for such procedure, if anything were needed, may be found in Young's Case, 1 Rob. (Va.) 744.

It is proper, however, to add that we do not concur in the view urged by counsel for petitioner, that, inasmuch as no provision is made for a jury trial before a justice of the peace, section 717 of the Code, authorizing a commitment for a fine imposed by a justice, is unconstitutional. The proceeding in question, as already said, was, in its nature, not criminal, but civil. The commitment is not a part of the punishment annexed to the offense, but is a means provided for carrying the judgment into effect after the trial is over. And, even if the nature of the proceeding were otherwise, the result would be the same. The provision of the constitution relied on—namely, that "in all capital or criminal prosecutions a man hath a right * * * to a speedy trial by an impartial jury"—is not to be construed as extending, any more than restricting, the right of trial by jury as it existed at the time the constitution was adopted. It is the right, as known and enjoyed by the people of the state at that time, that is preserved and guarantied by the constitution. And we know that Sabbath-breaking, and a great variety of petty offenses of the same class, were not only cognizable by a justice at the time our constitution was adopted, but for centuries before. Blackstone, whose Commentaries were published before the Revolution, and whose partiality for the common-law system of trial by jury is displayed throughout his great work, devotes a whole chapter to the subject of summary convictions, in the course of which he says: "Another branch of summary proceedings is that before justices of the peace, in order to inflict divers petty pecuniary mulcts and corporal penalties denounced by act of parliament for many disorderly offenses, such as common swearing, drunkenness, vagrancy, idleness, and a vast variety of others, for which I must refer the student to the justice books formerly cited," etc. 4 Bl. Comm. 280. And in Burn's Justice, referred to by Blackstone, an almost infinite number of such offenses are mentioned and forms given for their prosecution, among them being the offense of publicly crying, showing forth, or exposing to sale any goods, wares, or merchandise (with certain exceptions) on the Lord's day, for which the offender, upon conviction before a justice, was required to pay a fine, and in default of such payment it was directed by the statute that he be ordered to be publicly set in the stocks. 3 Burn, J. P. tit. "Lord's Day." See, also, Bac. Abr. tit. "Justices of Peace" (E;) Cooley, Const. Lim. 410, note; Proff. Jury, § 95. Pomeroy, in his note to Sedgwick on the Construction of Statutory and Constitutional Law, at page 487, well says: "It is the right of trial by jury which exists and is preserved, and what that right is is a purely historical question,—a fact to be ascertained like any other social, legal, or political fact. As a constitution speaks from the time of its adoption, the fact of the right to jury trial, which is ascertained to have existed at that time, must necessarily determine the meaning of the clause which recognizes and preserves that right." The adjudged cases to the same effect are numerous and uniform. Many of them are collected by the learned annotator of the American Decisions (Mr. Freeman) in his note to the case of Steamboat Co. v. Roberts, 48 Amer. Dec. 186, to which we refer. The subject was considered by the supreme court of the United States in the recent case of Callan v. Wilson, 127 U. S. 540, 8 Sup. Ct. Rep. 1301, and

Digitized by Google

while it was there held that the crime of conspiracy, such as was charged against the defendant in that case was not of a class of petty or minor offenses triable without a jury, consistently with the constitution, in the police court of Washington, in the District of Columbia, yet it was conceded, in the opinion of the court, that there is a class of minor offenses which are so triable, and many of the cases so deciding were cited, including Byers v. Com., 42 Pa. St. 89, and State v. Glenn, 54 Md. 572. It was also held in the same case that, where a party is entitled to be tried by a jury at all, he is entitled to be so tried in the first instance, and that, where this is denied, a statute giving a right of appeal to a higher court, in case of conviction where the defendant is accorded a jury trial, does not meet the requirements of the constitution. The question is an important one, and there are decisions the other way; but, as it does not arise in the present case, we express no opinion upon it. An order will be entered in conformity with this opinion.

(103 N. C. 131)

PERKINS *et al.* v. BERRY.

(*Supreme Court of North Carolina.* May 6, 1889.)

EXECUTORS—ACCOUNTING—REFERENCE.

1. A legatee brought suit against executors, and obtained a judgment fixing them with assets sufficient to pay the amount of his legacy, for which he also had a recovery to be made out of the goods of their testator, or, if not so made, then out of the executors' own estate. They borrowed money, giving their note, as executors therefor, with which they paid the judgment, and caused the judgment to be assigned to the lender as collateral security. They afterwards repaid the loan. *Held*, that they were not entitled to recover the amount so paid from their testator's estate, the judgment against them being personal.

2. An exception to the admission of testimony on the ground that it is within the prohibition of Code N. C. § 590, rendering parties to an action against those claiming through a deceased person incompetent to testify as to a personal transaction with the decedent, will not be considered unless so specific as to show that the evidence is objectionable on that ground.

3. An allowance by a referee, in an action to settle a decedent's estate, to "officers of the court" of claims, filed for fees in various actions to which the estate was party, is sufficiently definite as to the person to whom payment should be made.

4. The findings of facts by a referee acting under a consent order giving him power to pass upon all matters of fact or law, reserving only the questions arising under the plea of the statute of limitations, will not be reviewed.

5. Under Code N. C. § 422, providing that a trial by a referee shall be conducted in the same manner as a trial by the court, that they shall have the same power to grant adjournments, to allow amendments of pleadings, etc., a referee may admit new parties to an action pending before him.

6. It is immaterial that an uninterested party is united with the real owner of a claim filed against a decedent's estate, as a payment to either would be by consent of the other, their association being voluntary.

7. An exception to a finding of a partial payment of a judgment within 10 years from its entry, and the subsequent issuing of executions, is not available, since to make the finding self-consistent it will be presumed that the judgment was docketed; after which the issuance of executions will keep alive the judgment without the aid of a partial payment in recognition.

8. Where no application is made to the court to require a referee to report all the evidence taken, and the trial court has acted upon the exceptions to his report, based on the evidence, as though it were all reported, it will be presumed, in the absence of anything to the contrary, that the referee has reported it all, and an exception based on his supposed partial report thereof is not available.

Appeal from superior court, Burke county; WALTER CLARK, Judge.

This action is prosecuted by the plaintiffs on behalf of themselves and all other creditors of John Sudderth, deceased, against the defendant, his administrator *de bonis non* with the will annexed, for an account and settlement of the testator's estate, and the payment of their several debts. The deceased died in February, 1865, leaving a will, which has been admitted to probate, appointing three executors, to-wit, W. S. Sudderth, John R. Sudderth, and Joseph Corpening, all of whom qualified as such and entered upon and proceeded to discharge the duties and trusts imposed. In March, 1874, the executor John R. Sudderth died intestate, and without committing any waste, having properly applied the assets that came to his hands. In like manner the executor, Joseph Corpening died intestate in the year 1883, without having completed his administration, as did the sole surviving executor, two years thereafter, also intestate, leaving the administration incomplete. On the 25th day of May, 1885, after a controversy and final adjudication thereof in regard to the party entitled, letters of administration *de bonis non* issued to the defendant. At fall term, 1888, was entered the following order of reference: "This cause coming on for hearing, a jury trial being waived, it is, by consent of counsel for plaintiffs and defendant, referred to T. G. Anderson, with leave to plaintiffs to amend their complaint within 20 days, and leave to defendant to amend answer in 10 days after filing of amended complaint; the said referee to find and pass upon all matters of fact or law, without prejudice, however, to the defendant's plea of the statute of limitations, all rights of defendant under said plea being reserved, and all other matters by consent referred; said referee to report his findings of fact and conclusions of law to the judge presiding of this court at chambers in Marion, McDowell county, on Tuesday of the first week of the superior court of McDowell county, where the same is by consent to be heard before CLARK, Judge." The complaint and answer were amended accordingly; and, several new parties having been admitted into the action on their application to the referee, he proceeded with the execution of the order, and made his report, so much of which as is necessary to the proper understanding of the rulings of the court and the exceptions thereto, brought up for review, we produce. In the progress of the cause various other creditors were admitted as plaintiffs, all of whom filed evidence of their debts. An object of the suit is also to have the lands left by the intestate, and which are of great value,

Digitized by Google

sold to supply any deficiency in the personal estate to meet the outstanding liabilities of the testator, and to compel the defendant, who has no assets himself, when the indebtedness is ascertained, and the value of the personal estate available for the payment, to institute proper proceedings for the sale of the devised lands, or so much as may be required, for conversion into assets, to be applied to the deficiency. "I find from admissions in evidence and from pleadings: (1) That John Sudderth died in the month of February, 1865, leaving a last will and testament, in which John R. Sudderth, W. S. Sudderth, and Jos. Corpening were appointed executors; and soon thereafter, in the year 1865, they qualified as executors. (2) That John R. Sudderth died on the 1st day of March, 1874; Jos. Corpening on the ——— day of ———, 1883; and W. S. Sudderth on the 18th day of March, 1885,—without having fully administered said estate; and B. A. Berry was appointed administrator *d. b. n.* of said John Sudderth on the 25th day of May, 1885, and no final account has ever been filed or final settlement made of said estate. (3) That there is not, and ought not to be, any personal property whatever in the hands of B. A. Berry, administrator *d. b. n.*, with which to pay debts of said estate; and that John Sudderth died seised of, and there is now in the hands of his devisees, real estate and outlying lands sufficient to pay off all indebtedness of said estate." Then, after enumerating a number of the claimants whose debts are not disputed by the defendant, and whose amounts are specified, the referee proceeds to find the facts and the law arising on each, except the operation of the statute of limitations and the effect of the lapse of time, which we give in the words of his report:

"*Claims of C. A. Little and R. J. Hallyburton.* As to the claims of C. A. Little, administrator of Joseph Corpening, and R. J. Hallyburton, administrator of W. S. Sudderth, which claims are embodied in one, and founded upon the same facts, I find from the evidence and from the records introduced in cases of John Haigler et al. v. Executors of John Sudderth, and T. G. Walton, administrator of Robert Slough, v. Sudderth Executors, the following facts: That in 1882, T. G. Walton, administrator of Slough, brought suit against Jos. Corpening and W. S. Sudderth, surviving executors of John Sudderth, for a legacy of $1,000, bequeathed to said Slough by said John Sudderth, and recovered judgment against said W. S. Sudderth and Jos. Corpening, surviving executors as aforesaid, fixing them with the sum of $1,941.38 as assets in their hands as executors of said estate, and that plaintiff do recover of defendant executors the sum of $1,000, to be paid out of the assets belonging to the estate of John Sudderth found to be in the hands of defendant executors, and that he do recover of defendants individually the sum of $1,000, and that upon failure of defendants to pay said sum and interest out of the assets in their hands belonging to the estate of John Sudderth in ninety days, that plaintiff have execution against the lands and tenements, goods and chattels, of defendants individually, for said amount and for cost. And that thereafter, on the 14th September, 1882, defendant executors borrowed from one Joshua Kidd the sum of $2,000, giving him their note as executors, and authorizing an assignment to him as collateral security of the Slough judgment, which was assigned, said loan being to pay said judgment; and thereafter, on the 12th of June, 1883, (Jos. Corpening having died, and C. A. Little having been appointed his administrator,) Joshua Kidd was repaid said sum and interest by W. S. Sudderth, executor, and C. A. Little, administrator of Joseph Corpening, and the judgment held by Kidd as collateral security was receipted satisfied and discharged by him. And the claim of C. A. Little is for $1,714 of said amount paid by him as administrator; and the claim of R. J. Hallyburton (who has since been appointed administrator of W. S. Sudderth) is for $326 of said amount paid by W. S. Sudderth on said note,—which claims I find as matters of law to be not valid nor subsisting claims, but no claims whatever; the said judgment being absolute, and an individual judgment fixing the executors with assets being *de bonis testatoris, si non de bonis propriis.*

"*Claim of J. R. Martin.* As to the claim of J. R. Martin, I find that a justice's judgment was rendered in favor of W. E. Powe, executor, and against W. S. Sudderth and Jos. Corpening, in the sum of $154.80, with interest from 10th September, 1870, till paid, and costs, on the 10th day of September, 1870, which judgment was assigned to John R. Martin by W. E. Powe, executor, for value received on 17th August, 1875, and on said judgment is a credit of $50 paid to J. R. Martin by W. S. Sudderth, executor, on 15th March, 1880, and on said judgment executions have issued within the space of every three years regularly since 1870. And I find as a matter of law, that said judgment is a valid and subsisting claim for the amount of $104.80 cost against the estate of John Sudderth, unless barred by the statute of limitations, which was not referred to me to pass upon.

"*Claim of E. A. & R. C. Perkins.* As to the claim of E. A. & R. C. Perkins I find that judgment was rendered on 25th of October, 1869, in the superior court of Burke county, in favor of T. G. Walton, and against W. S. Sudderth individually and against W. S. Sudderth and Jos. Corpening and R. C. Pearson's administrators in the sum of $1,129.97, with interest on $728.20 from 25th of October, 1869, till paid, and cost; and, after several credits on the judgment, W. S. Sudderth, the executor, borrowed of R. C. Perkins the sum of $300, and said judgment was assigned to the amount of said sum of three hundred dollars to R. C. Per-

Digitized by Google

kins by T. G. Walton to secure the payment of the same, and said $300 was paid to Walton on said judgment. I find that executions have issued regularly on said judgment within the space of every three years, and sundry payments have been made on said judgment by W. S. Sudderth to R. C. Perkins, as follows: November 17, 1877, $40; April 15, 1879, $25; March 6, 1880, $20; February 5, 1883, $50,—leaving a balance of $165 and cost due on said judgment, which I find as a matter of law to be due and owing said R. C. Perkins, and constituting a valid and subsisting claim against the estate of John Sudderth, deceased, unless the same is barred by the statute of limitations; and I find that E. A. Perkins has one-half (½) interest therein; the two, E. A. & R. C. Perkins, holding all their property in common; and said judgment is *quando*, and on a cause of action arising prior to 1st July, 1869.

"*Individual claim of R. J Hallyburton.* As to claim of R. J. Hallyburton, I find, from the uncontradicted testimony of R. J. Hallyburton, that he was employed by W. S. Sudderth and Jos. Corpening, executors, to do some surveying for John Sudderth's estate, for which he was to receive $2 per day, and that he worked 70 days and received $63.60, and the work was done in 1882, 1883, 1884, and 1885. I further find that part of the work he did for W. S. Sudderth, executor, was for Sudderth partly as agent for the Erwin heirs and Mrs. John McDowell, and that, as executor of John Sudderth, W. S. Sudderth acted agent of the Erwin heirs and Mrs. McDowell, and that all the work he did for Sudderth as executor alone took only one day's time; all of which I find from the testimony of R. J. Hallyburton. And upon the foregoing facts I am of the opinion, and find as matters of law, that the estate of John Sudderth is not liable for the work engaged to be done by W. S. Sudderth, executor, as agent of Erwin heirs and Mrs. McDowell, and therefore find the claim of R. J. Hallyburton to be valid and subsisting for the one day's work, which he did for the estate alone, amounting to $2.

"*Claim of Officers of the Court.*—R. & M. Hennessee v. Sudderth's Executors.—As to the claim of the officers of the court in case of R. & M. Hennessee, I find that judgment was rendered in their favor and against W. S. Sudderth and Jos. Corpening, executors of John Sudderth, for the sum of cost at spring term, 1869, of Burke superior court, and that executions have issued regularly thereon within every three years, and that the sum of $13.25 is now due and owing thereon, which said sum I find as matter of law to be a valid and subsisting claim against the estate of John Sudderth, unless barred by the statute of limitations; and I further find that cause of action on which judgment was recovered as aforesaid arose prior to the 1st day of July, 1869.

"*Allen Berry.* As to the claim of officers of the court in Allen Berry v. Sidney Deal and W. S. Sudderth and Jos. Corpening, executors of John Sudderth, I find the judgment was rendered at spring term, 1881, Burke superior court, in favor of said plaintiff and against said defendants for cost; and the sum of $81.45 is now due on said judgment, unless it is barred by the statute, which sum I find to be a valid and subsisting claim against the estate of John Sudderth, unless barred by the statute.

"*F. & B. Huffman.* As to claim of officers of court in Fannie and Barbara Huffman v. the Executors of John Sudderth, I find that judgment was rendered at November term, 1877, of Burke superior court, in favor of said plaintiffs and against the executors of John Sudderth and J. C. McDowell and wife and J. H. Pearson for costs, and that executions have issued regularly thereon within the space of every three years; and I find from Wakefield's report, page 52, that said cost was admitted by executors, and found to be outstanding against said estate, and the sum of $117.20 is amount now due thereon, which said amount I find to be a valid and subsisting claim against estate of John Sudderth, unless barred by the statute of limitations.

"*Joshua Kidd.* As to the claim of the officers of the court in case of Joshua Kidd, I find that judgment was rendered in favor of said plaintiff and against the executors of John Sudderth for cost, and that execution has issued on said judgment regularly within the space of every three years, and the amount of cost now due is $48.85, which sum I find as matter of law to be a valid and subsisting claim against the estate of John Sudderth, unless barred by the statute.

"*James Harper.* In the claim of officers of the court in case of Jas. Harper's Executors v. John Sudderth's Executors, I find that judgment was rendered in favor of said plaintiffs and against said defendant's executors at spring term, 1869, Burke superior court, for cost; that the amount of costs now due thereon is $25.10, which judgment (as are all the above claims of the officers of court) is acknowledged by the executors to be valid on page 52, Wakefield's report, and which amount I find as a matter of law to be a valid claim against the estate of John Sudderth, unless barred by the statute of limitations; and I further find that the cause of action upon which said judgment is found arose prior to 1st July, 1869.

"*John Woodward.* As to claim of officers of the court in case of John Sudderth's Executors v. Woodward & McNeely, I find that judgment was rendered in favor of said plaintiffs and against said defendants at spring term, 1869, of Burke superior court, for the sum of $ —— and cost, and that executions have issued regularly within every three years from 1874 on said judgment, and returned 'nothing made;' that defendants are insolvent, and nothing can be made out of them; and plaintiffs' cost in said judgment is $10.60, and the cost of the officers of the court

Digitized by Google

is $10.60, which amount I find as matter of law to be a valid and subsisting claim against the estate of John Sudderth, unless barred by statute; and I further find that the cause of action on which said judgment was rendered arose prior to 1st of July, 1869.

"*Leander Powell.* As to claim of officers of the court in Sudderth's Executors v. Leander Powell, I find that judgment was rendered in favor of said plaintiffs and against said defendants at spring term, 1869, of Burke superior court, for cost, and the sum of $11.50 is plaintiffs' cost incurred therein; that executions have issued on said judgment regularly within every three years since 1875, and returned 'nothing made,' and said Leander Powell is insolvent; wherefore I find as matter of law that officers of court have a valid and subsisting claim against plaintiffs for said sum of plaintiffs' cost, $11.50, unless barred by the statute; and I further find that the cause of action upon which said judgment was rendered arose prior to 1st July, 1869.

"*Hunt & Murdock.* As to claim of officers of court in case John Sudderth's Executors v. Hunt & Murdock, I find that judgment was rendered at fall term, 1869, in favor of said plaintiffs and against said defendants for $——— and costs; that executions have issued regularly thereon within every three years, and returned 'nothing made;' that defendants are insolvent; and that the sum of plaintiffs' cost therein is $19.45, which sum I find as matter of law to be a valid and subsisting claim against the estate of John Sudderth, unless barred by the statute.

"*Moses & McNeely.* As to claim of officers of court in Sudderth's Executors v. Moses & McNeely, I find judgment was rendered for plaintiffs and against defendants at spring term, 1869, of Burke superior court; that executions have issued regularly thereon within the space of every three years, and returned, 'nothing made;' that defendants are insolvent; that amount of plaintiffs' cost is $19.70, for which sum I find as a matter of law that said officers of court have a valid and subsisting claim against the estate of John Sudderth, unless barred by the statute; and I find said cause of action on which said judgment was rendered arose prior to 1st July, 1869.

"*W. F. McKesson.* As to claim of officers of court in Sudderth's Executors v. W. F. McKesson, I find that judgment was rendered for plaintiffs and against defendant in Burke superior court, for $——— and costs, and executions have issued regularly thereon within the space of every three years, returned 'nothing made;' that defendant is insolvent; that plaintiffs' cost is $12.50, for which amount I find the officers of court have a valid and subsisting claim against the estate of John Sudderth, unless barred by statute. Said judgment was rendered at spring term, 1882.

"I further find, in regard to the appointment of B. A. Berry, administrator *d. b. n.* of John Sudderth, from examinations of records in C. A. Little et al. v. B. A. Berry, Adm'r, that said appointment was appealed from and went to the supreme court, where it was finally decided in favor of Berry, and judgment rendered in accordance at fall term, 1886, of Burke superior court. I further find, that S. T. Pearson was appointed receiver of the estate of John Sudderth on the 28th day of January, 1885,—W. S. Sudderth having been restrained and enjoined from meddling with said estate, and ordered to file bond as executor, or show cause why he should not be removed; and said W. S. Sudderth died pending the said hearing. All of which is respectfully submitted, this 12th day of October, 1888.

"T. G. ANDERSON, Referee."

Isaac T. Avery and *John T. Perkins*, for plaintiffs. *S. J. Ervin*, for defendant.

SMITH, C. J., (*after stating the facts as above.*) 1. Of the four exceptions taken by the plaintiffs to the referee's report only one, No. 3, is overruled, and that is, in substance, as follows: The finding in reference to the claim of R. J. Hallyburton, that in his charge for surveying he was entitled to charge the testator's estate for one day's work only, is contrary to the evidence, which shows that the entire service rendered during the seventy days while he was thus engaged, was at the instance of the executors, and the estate should pay at least one-half of the sum charged, the testator being a joint owner of the land surveyed with Erwin and McDowell. The findings, under the terms of the consent reference, are conclusive upon all matters of fact, and the referee expressly reports that, while the surveyor's work was done at intervals in four years' time, the executor W. S. Sudderth was at the same time acting as agent of the Erwin heirs and for Mrs. John McDowell, in giving him employment, and that the surveying for the testators' estate took but a single day. This he derives from the testimony of Hallyburton himself. Assuming that the surveyor was employed by the said W. S. Sudderth in the twofold capacity stated, with no proof of a joint contract, the division of the debt was proper.

2. Exceptions of C. A. Little, administrator of Joseph Corpening, and of R. J. Hallyburton, administrator of W. S. Sudderth. These parties, whose claims rest respectively upon the same facts, and whose exceptions are to one and the same ruling, object to the exclusion of their claims from the general indebtedness, for the assigned reason that the judgment rendered against the executors was personal and absolute, and charged them with the possession of assets sufficient to meet it. This, it is insisted, is in conflict with the record produced in the action of Haighler v. Sudderth, in which every heir, devisee, next of kin, and executor of John Sudderth were before the court, and the debt

Digitized by Google

was adjudicated a valid and subsisting debt due from the testator's estate. The facts upon which the ruling complained of was made are set out fully in the referee's report, and his conclusions of law seem reasonable and just. The action was for the recovery of a pecuniary legacy, bequeathed by John Sudderth to one Slough, the plaintiff's intestate, and not for any indebtedness of the testator, and his executors are fixed with assets for its payment. It was adjudged, moreover, that the plaintiff have execution, if the judgment be not paid in 90 days, out of the trust effects, against the individual property of the defendants. The defendants afterwards borrowed the money with which to pay the judgment, giving their note as executors, but in law a personal obligation, to secure which the plaintiff creditors, to whom the money was paid, assigned the judgment. W. S. Sudderth, executor, and C. A. Little, administrator of the deceased executor Joseph Corpening, subsequently discharged the loan note held by Kidd, who thereupon discharged the judgment assigned as collateral security. The claim now preferred is for $1,714 of the amount by Little, and for $326, the residue, by Hallyburton, who has administered since on the estate of W. S. Sudderth. The demand has no support in law, and the action of the court in overruling the exception must be sustained.

3. Defendants' exceptions. These exceptions, eleven in number, are all overruled except two, to amend which leave is granted, and these also, when so amended as to remove the objections entered to their forms.

First Exception. This is directed to the hearing of testimony from the plaintiffs, who instituted the suit, R. J. Hallyburton, an admitted party, and S. T. Pearson, clerk of the court, in regard to personal transactions and communications with the deceased executors, W. S. Sudderth and Joseph Corpening, during their lives. If there be any force in the objection to the testimony as delivered, inasmuch as it is not specific, so that the court can see that it comes within the inhibition of section 590[1] of the Code, and the exception is in form vague and indefinite, it cannot be entertained.

Second Exception. The defendant objects to the allowance of claims for costs incurred, and unpaid, in divers actions decided against the executors and the officers of the court, as made without evidence of the liability of the testator's estate therefor. The exception embraces the series of cases, the referee's findings of fact in which are seen under the words, "Claims of Officers of the Court." The referee bases his findings upon an inspection of the records of the court, in which the present action is depending, and in which are entered up the judgments. We are at a loss to understand the objection that there is no evidence of these claims, unless it be that they cannot be preferred against the testator's estate. The designation of the claimants under the term used, "Officers of the Court," sufficiently points out the clerk to whom payment is to be made, and in some instances the more definite expression is used, "the clerk's office," under which may issue an execution for collection. Clerk's Office v. Allen, 7 Jones, (N. C.) 156, citing several cases; Jackson v. Maultsby, 78 N. C. 174; Clerk's Office v. Huffsteller, 67 N. C. 449.

Third Exception. This has been disposed of in considering the plaintiffs' exceptions.

Fourth Exception. The answer to this exception is furnished in section 422[2] of the Code, which confers upon the referee the power he exercised in admitting new parties to the action.

Fifth, Sixth, and Seventh Exceptions. The amendments allowed remove the ground of exceptions thus numbered, that there is a variance between the allegations and proofs.

Eighth Exception. The same answer applies to this variance, but it is wholly immaterial that an uninterested party is united with the true owner of the debt, since a reception of payment by either would be with the consent of the other, their association, as joint creditors, being wholly voluntary. But if there be any difficulty from misdescription it is remedied by the amendment authorized.

Ninth Exception. The same disposition which is made of the second must be made of this exception.

Tenth Exception. The finding to which this exception is taken is that there is a credit of $50 indorsed on the judgment as paid by the executor W. S. Sudderth to J. R. Martin, on March 15, 1880,—not quite ten years after its rendition,—and that executions have been within the space of three years regularly thereafter issued. If, as we must infer, to make the findings self-consistent, the judgment was duly docketed, the continued issue of executions will preserve the vitality of the debt thus ascertained, without the aid of the effect of a partial payment in recognition; and hence the only consequence is a reduction of the debt, of which the defendant cannot complain.

Eleventh Exception. The last exception is not in a form to be available. The application should have been for an order upon the referee, to be enforced if necessary, to report all the evidence taken; and, if this had been denied it would be error, for some of the exceptions grew out of the evidence. The exception is that all is not reported, not that none has been; and, as this is a matter of fact, not of law, it must be understood that

[1] Code N. C. § 590, provides that a party to or person interested in the result of an action against a person claiming through or under a person deceased at the time of the trial shall not be permitted to testify as to any personal transaction or communication had with the deceased.

[2] Code N. C. § 422, provides that trials by referees shall be conducted in the same manner as trials by the court, and that referees shall have the same power to grant adjournments, allow amendments to pleadings, punish contempts, etc., as the court itself.

Digitized by Google

the exception arises out of a misapprehension of fact that any portion of the evidence has been withheld. At least, as it does not appear that what is reported is not the whole, we must attribute the action of the court to the absence of any evidence of its being partial.

The main essential matter in controversy, withdrawn from the referee, and submitted as a matter of law to the determination of the court, is the defense set up under the statute of limitations, and this is dependent upon the facts reported. It is to be observed that all the judgments disputed were rendered since the limitations prescribed in the Code of Civil Procedure have become operative and controlling. The ruling of the court upon the reserved matter of defense is that the claims of Little and Hallyburton, already decided not to be valid and subsisting against the testator's estate, even if they were so, are barred by the statute of limitations, and cannot for this reason also be now asserted; and that the recovery of none of the other demands preferred by creditors are obstructed by the statute. There are no specific exceptions entered and appearing in the record to the rulings of the judge upon the reserved matter of the application of the statute, as properly there should be, to make the decision reviewable; but instead it is stated in the case on appeal signed by the judge that errors were assigned in the overruling of the exceptions of the defendant and the adverse rulings upon the statutory defense arising out of the lapse of time, and that error is assigned by the appellants Little and Hallyburton in the adverse rulings as to their demand against its validity as such, and in applying the statutory bar to it. In disposing of the application of the statute to the several disputed judgments it will be noticed that as to most of them, leaving out of view the time in which there was no personal representative to sue, there have been issued regularly executions to enforce them within intervals of three years since their rendition, the only exceptions to which are the claims of Hallyburton for surveying work; that of Allen Berry, whose recovery was at spring term, 1881, of the court; and that of James Harper, whose recovery was at spring term, 1869. The first two excepted claims are not within the bar, and, in our opinion, the last is within the bar, and must be rejected. The ruling which applies the bar to the claim of Little and Hallyburton becomes immaterial in view of the ruling against it as a demand for which the estate is not liable.

As the action in its amended form seeks to enforce proceedings on the part of the defendant against those to whom have come the lands of the deceased testator, they, as interested in reducing the demands of creditors, should have been made parties thereto, so that they might interpose any such defenses as could be made against them, and thus diminish the liabilities to which the real estate is exposed; and this should be in order to any ulterior action under the law for the sale of the land. But we are informed by counsel that the defendant has already instituted an independent proceeding for this purpose. Should it get into the same jurisdiction as the present cause, it would be a proper case for a consolidation into one; otherwise, and until the terre-tenants are made parties to this, it must terminate with the adjudication upon the matters herein embraced. With the correction of the error in admitting into the list of debts that of James Harper's executors, which must be stricken out, the judgment must be affirmed.

(108 N. C. 433)

STATE v. ALLEN.

(*Supreme Court of North Carolina.* May 6, 1889.)

LARCENY—INDICTMENT—EVIDENCE.

1. An indictment for larceny, alleging ownership in a certain person, is sustained by evidence that he had the property in his possession and in his own building, and was keeping it for his sister, who was the real owner.
2. An instruction that circumstantial evidence must be as conclusive as if an eye-witness had testified to the fact was properly refused.

Appeal from superior court, Northampton county; MACRAE, Judge.

The defendant was indicted for larceny of bacon and fresh pork. The property was laid in one Deloatch. The defendant asked the court to charge as follows: "(1) The state having proved by the prosecutor, Deloatch, that the property stolen was the property of Polly Parks, the defendant cannot be found guilty. (2) The evidence being entirely circumstantial, it must be as strong and conclusive as if one credible eye-witness had testified to the fact." These instructions were denied, and the defendant excepted. Verdict of guilty, judgment, and appeal by defendant.

W. W. Peebles, for appellant. *The Attorney General*, for the State.

SHEPHERD, J. 1. The first instruction prayed for by the defendant was properly declined. It was in evidence that on Saturday before Christmas the prosecutor's smoke-house was broken open, and 23 pieces of meat were stolen; that on the previous Tuesday the prosecutor had killed five hogs, cut them up, and placed the meat in his said smoke-house. It was also in evidence that the hogs belonged to his sister, Polly Parks, who had been living with him since the death of her husband, in June; that the hogs were brought to the prosecutor's in October, and "that she was to live out of them." The prosecutor stated that he had not spoken of charging his sister with any part of the meat. He further testified that "he had the meat in his possession, keeping it." These circumstances, we think, fully sustain his honor's charge, to the effect that the prosecutor had such a special property in the meat as would sustain the indictment. Whart. Crim. Law, §§ 1824, 1830; State v. Hardison, 75 N. C.

Digitized by Google

203; Owen v. State, 6 Humph. 330; State v. Jenkins, 78 N. C. 478. This latter case was cited by the defendant, but we think is authority against him. There the property was laid in the mere agent or servant of the railroad company, and the court held that it was improperly charged. Judge READE thus tersely illustrates the principle: "A. is the general owner of a horse; B. is the special owner, having hired or borrowed it, or taken it to keep for a time. C. grooms it, and keeps the stable and the key, but is a mere servant, and has no property at all. If the horse be stolen, the property may be laid to be either in A. or B., but not in C., although he had the actual possession and the key in his pocket." In our case the prosecutor was not the mere agent or servant of the owner, but he had the meat in his possession, in his own smoke-house, keeping it, as the evidence tends to show, for his sister. The other authority (State v. Burgess, 74 N. C. 272) cited upon this point is equally inapplicable, the special property in that case being in three persons, and the indictment charging it to be only in one.

2. The second prayer, that, the evidence being circumstantial, it must be as conclusive as if an "eye-witness" had testified to the fact, was also properly refused. State v. Gee, 92 N. C. 756. His honor's charge upon the degree of proof was as favorable to the defendant as the law permits.

3. That there was a general verdict of guilty. This exception is of no force. State v. Jones, 82 N. C. 685, which is directly in point. We have carefully examined the charge of the court, and we are unable to find any error.

(103 N. C. 424)

STATE v. POWELL.

(*Supreme Court of North Carolina.* May 6, 1889.)

LARCENY—INDICTMENT.

1. Defendant snatched up money belonging to the prosecutor, and, when it was demanded, replied: "You ain't going to get this money." His companion held the prosecutor when he attempted to retake the money. When defendant started away with it, and the prosecutor started in pursuit, defendant put his hand to his breast, and threatened to kill him if he pursued. *Held* sufficient evidence of felonious intent to submit to the jury on an indictment for larceny.

2. It is sufficient for an indictment for larceny to lay the property in the bailee of the owner. Following State v. Allen, ante, 626.

Appeal from superior court, Northampton county; MACRAE, Judge.

Robert Powell appeals from a conviction for larceny.

The Attorney General, for the State.

SHEPHERD, J. The defendant contends that he is not guilty, because "there was no artifice to conceal the fact that he had gotten the money in his possession; that there was no effort to conceal the fact of the taking; and that the prosecutor knew who had his money, and against whom to bring his action." For these positions he relies upon State v. Deal, 64 N. C. 270, and State v. Sowls, *Phil.* (N. C.) 157. The proposition is that there can be no felonious intent where the taking is done openly, and there is no effort to conceal.

State v. Deal, supra, is a leading case in this state upon the subject of felonious intent in larceny, and, while the conclusion reached by the court is generally regarded as correct, much that is said in the opinion has been questioned, and the doubts which have arisen have been greatly strengthened by the forcible dissenting opinion of Mr. Justice RODMAN. It will be observed that, in addition to there being no effort to conceal in that case, there was another element, which was sufficient to have entitled the defendant to a new trial. That was, as the learned Chief Justice says, "a seeming excuse for the artifice by which he [Deal] got possession of the note." "The defendant alleged that the title to the land for which he had executed the note was not good, for that it was subject to a dower right, and, being dissatisfied with this state of things, he resorted to a trick to get hold of the note, for the purpose of canceling it." The trial judge did not submit this view to the jury, and the defendant was thus deprived of this "seeming excuse" for his conduct. We think that this feature of the case had much to do with the decision of the court, and in this we are sustained by Wharton's Criminal Law, (volume 2, § 1787,) where the author, speaking of State v. Deal, says: "It was held that this was not larceny, larceny implying stealth, and this being a forcible taking, under color of right." We shall not attempt to "run and mark" the shadowy line between trespass and larceny, but we cannot yield our assent to the inference drawn by the defendant, from the language of the opinion, that there can be no case of larceny unless there is an effort to conceal on the part of the offender. The language of Judge HENDERSON, quoted in the opinion, has never passed into judicial decision, and we have been unable to find in our edition of Foster (cited in State v. Sowls, supra) anything in support of the doctrine that the taking must be done in such "a manner as to show an intent to defraud the owner by concealing from him who took it, so that he shall not know what has become of his property, and against whom to bring his action to recover it." As far as our investigations have extended, we have found no such criterion laid down in any of the books. True, Mr. Wharton, in his Criminal Law, (volume 3, 1876,) states that, where the taking is openly done, it is but a trespass; and perhaps similar expressions may be found in other modern works; but, upon reference to the notes, it will be seen that they are based upon Hale's Pleas of the Crown, 509, where it is said that, if the taking is done openly, it "carries with it an evidence only of a trespass." But these authors fail to add the following language of Lord

Digitized by Google

Hale, used in the same connection: "But, in cases of larceny, the variety of circumstances is so great, and the complications thereof so mingled, that it is impossible to prescribe all the circumstances evidencing a felonious intent, or the contrary; but the same must be left to the due and attentive consideration of the judge and jury, wherein the best rule is, *in dubiis*, rather to incline to acquittal than conviction." "From which it seems," says Judge RODMAN, "that Lord Hale did not think an open manner of taking inconsistent with larceny, but only a circumstance from which the jury might infer the absence of felonious intent." We fully concur with the chief justice and Judge HENDERSON that a prominent feature of larceny is "that the act be done in a way showing an intention to evade the law,—that is, not to let the owner know who took his property;" but we cannot agree that this is the only way the felonious intent may be manifested in larceny, any more than that concealment, as the chief justice suggests, is necessary in robbery. It is true, as Blackstone says, (4 Comm. 232,) that "the ordinary discovery of a felonious intent is where the party doth it clandestinely, or, being charged with the fact, denies it, but this is by no means the only criterion of criminality, for, in cases that may amount to larceny, the variety of circumstances is so great, and the complications thereof so mingled, that it is impossible to recount all those which may evidence a felonious intent or *animum furandi;* wherefore they must be left to the due and attentive consideration of the court and jury." To the same effect is that accurate and discriminating writer, Mr. Chitty, who in his third volume (page 927) of Criminal Law, says that "the openness and notoriety of the taking, where possession has not been obtained by force or stratagem, is a strong circumstance to rebut the inference of a felonious intention, (1 Hale, P. C. 507; 2 East, P. C. 661, 662;) but this alone will not make it the less a felony, Kel. J. 82; Chiffer's Case, T. Raym. 276; Bealy v. Sampson, 2 Vent. 94." On page 926 he says: "Where the taking exists, but without fraud, it may amount only to a trespass. This is also a point frequently depending on circumstantial evidence, and to be left for the jury's decision." 2 East, P. C. 662, after speaking of the evidences of felonious intent, says: "And the circumstance of the party's offering the full value or more at the time ought to be left to them [the jury] to show that his intention was not fraudulent, and so not felonious; for it does not necessarily follow, as a conclusion of law, that, if the value of the thing taken be offered to be paid at the time, the intent is therefore not felonious, though it is, I apprehend, pregnant evidence in the negative." 3 Greenl. Ev. § 157, sustains the view that the mere fact of the taking being without concealment is evidence which should be left to the jury. He says that it "would be pregnant evidence to the jury that the taking was without a felonious intent."

In Vaughn's Case, 10 Grat. 758, the defendant was held guilty of larceny of his bond, under circumstances similar to those in State v. Deal. MONCURE, J., dissented, on the ground that the bond was given for land, that there was a controversy about the boundaries, etc., and that this, in connection with the open manner in which it was taken, showed that there was no felonious intent. He expressly admits that concealment is unnecessary. "It is true," he says, "that secrecy, though a usual, is not a necessary, attendant of larceny, which may be, and sometimes is, committed openly." None of the definitions of larceny require that the taking be done secretly. It must be done, says Fost. Crown Law, 124, (McDaniel's Case,) "with a wicked, fraudulent intention, which is the ancient known definition of larceny. *Fraudulenta obtrectatio rei aliena invito domino.*" Lord Hale (P. C. 508) says: "As it is *cepit* and *asportavit*, so it must be *felonice* or *animo furandi*, otherwise it is not felony; for it is the mind that makes the taking of another's goods to be a felony or a bare trespass only; but, because the intention and mind are secret, the intention must be judged by the circumstances of the fact. * * * The felonious intent or *animus furandi* means an intent fraudulently to appropriate the goods. * * * Whether the intent existed or not is entirely a question for the jury, which, as in all other cases of intent, they must infer from the words or acts of the defendant, or the nature of the transaction." 2 Archb. Crim. Pr. & Pl. (6th Ed.) 366, 367. In his Pleading and Evidence, (3d Amer. Ed. 173,) Archbold thus defines the "felonious intent:" "But 'larceny,' as far as respects the intent with which it is committed, * * * may perhaps be correctly defined thus: Where a man knowingly takes and carries away the goods of another, without any claim or pretense of right, with intent wholly to deprive the owner of them, and to appropriate or convert them to his own use."

These authorities we think conclusively establish that, while secrecy is the usual evidence of the felonious intent, it is by no means the only manner in which it may be proved. In our case every ingredient of Mr. Archbold's definition is present. The defendant knowingly took the goods of another, and he made no pretense whatever of any claim or right to them. It is shown as clearly as any fact can be shown that he intended to wholly deprive the owner of them, and to appropriate them to his own use; and yet it is insisted that, because he showed such a reckless disregard of the consequences of his outrageous act, he could not, as a matter of law, have a fraudulent or felonious intent. The defendant, according to the testimony of the state, "catches up" the money of the prosecutor. When it is demanded, he says to the prosecutor: "Oh, hell! you ain't going to get this money." His companion holds the prosecutor when he attempts to regain the possession. The defendant walks off with the

Digitized by Google

money, and when finally the prosecutor releases himself, and starts in pursuit, the defendant puts his hand to his breast, and threatens to kill him if he continues to follow. We think these circumstances afford strong evidence that there existed in the mind of the defendant a fraudulent, a felonious intent. Such open taking, where there is neither force nor stratagem, is very unusual, and as we have seen is a "pregnant" circumstance in favor of the non-existence of the felonious intent. Strong evidence, therefore, is necessary to sustain a conviction in such cases. The circumstances deposed to by the prosecutor clearly pointed to the existence of a felonious intent, and we cannot but think that, if the facts of this case had been presented to the late distinguished chief justice, he would have unhesitatingly sustained his honor in submitting them to the jury.

The principles we have declared dispose of exceptions 1, 2, 3, and 6. Exception 4 is without merit. The prosecutor, it appears, was the bailee of Mrs. Coker, and therefore had a special property in the money. See State v. Allen, ante, 626, (decided at this term) and the authorities cited. We are unable to see how the rights of the defendant were injuriously affected by the count against Bailey. It seems that he was not tried with this defendant, and there is nothing in the record to suggest that this defendant was in any way prejudiced. There is no error.

(103 N. C. 72)

BAKER *et al.* v. BREM *et al.*

(*Supreme Court of North Carolina.* May 3, 1889.)

SALE—REMEDIES OF VENDEE—INSTRUCTIONS.

1. Plaintiff purchased property of the defendant, and gave a negotiable note for the price. The note was indorsed over by the defendant before maturity. Afterwards the property, not proving to be fit for the purposes intended, was returned to the defendant, under his instructions. Judgment was recovered against the plaintiff on the said note by the indorsee. *Held* that, though such judgment was not satisfied, plaintiff could have judgment against the defendant for the price of the property returned; the issuing of execution being restrained until the defendant was relieved from liability as indorser on the said note.

2. The issues involved being as to whether the property purchased of the defendant was a "first-class article," as represented, and, if not, what the damages of plaintiff were, the jury were to ascertain the facts, but with the results of their findings they had nothing to do, and the refusal of an instruction was proper, to the effect that if the jury believe the evidence the plaintiff is not entitled to recover. The proper method of raising the question of plaintiff's right to recover was by demurrer to the evidence.

Appeal from superior court, Mecklenburg county; BOYKIN, Judge.

Jones & Tillett, for appellants. *Burwell & Walker*, for respondents.

SMITH, C. J. In this action, begun on August 15, 1885, in the superior court of Mecklenburg county, the complaint, filed on oath, alleges that the plaintiffs J. R. Newell, N. W. Wallace, and J. R. Baker, intestate of the plaintiff M. F. Baker, and L. W. Taylor, entered into an agreement with the defendants, H. E. Brem and F. B. McDowell, constituting the partnership firm of Brem & McDowell, agents of the Watertown Engine Company, in this form:

"An agreement made and entered into by and between Brem & McDowell, of Charlotte, N. C., agents for Watertown Engine Co., of the one part, and Baker, Newell & Wallace, of the other part, witnesseth: That the said Brem & McDowell agree to furnish the said Baker, Newell & Wallace the following: One No. 4 mounted engine, for six hundred and ninety dollars; one No. 3-4 wheel separator, for two hundred and ten dollars; one belt, 60 ft., for ten dollars; total, (910.00,) nine hundred and ten dollars,—all guarantied to be first-class machinery, and engine to give full six-horse power; to be ready at Charlotte on or about the 2d day of July, 1883, for the consideration of the payment of nine hundred and ten dollars, as follows: Four hundred and fifty-five dollars, payable October 15th, 1883, without interest, and four hunded and fifty-five dollars, October 15th, 1884, at interest at eight per cent. per annum from July 2d, 1883. Note to bear even date with bill of lading, at interest at eight per cent. per annum from July 2d, 1883. The condition of the above contract is that the legal title and right to the above-described property is to remain to be vested in Brem & McDowell, Charlotte, N. C., until all deferred payments or notes are fully paid; and in default of any or all of the payments for said property, as agreed, you or your agents may, without process of law, take possession and remove said property, and retain any payment that may have been made on account of said property, in lieu of its use, or of charges and damages on same. This order constitutes and contains the only agreements made in relation thereto, verbal statements to the contrary notwithstanding. In witness whereof the parties hereunto have set their hands this 2d day of July, A. D. 1883.

"BREM & MCDOWELL. [L. S.]
"J. R. BAKER. [L. S.]
"J. A. NEWELL. [L. S.]
"N. W. WALLACE. [L. S.]

"Shipping address: ———"

That shortly thereafter N. W. Wallace executed and delivered to Brem & McDowell the two following described papers, to-wit: "$455.00. Charlotte, N. C., July 2d, 1883. On the 15th October, 1883, we promise to pay to Brem & McDowell, or order, four hundred and fifty-five dollars, for value received, negotiable and payable at the Commercial National Bank, of Charlotte, N. C., with interest after maturity, at the rate of eight per cent. per annum until paid, for money loaned. Due Oct. 18, '83. BAKER, NEWELL & WALLACE." "$455.00. Charlotte, N. C., July 2d, 1883. On the 15th October, 1884, we promise to pay to Brem & McDowell four hundred and fifty-five dollars, for value received, negotiable and payable at

Digitized by Google

the Commercial National Bank of Charlotte, N. C., with interest at the rate of eight per cent. per annum until paid, for money loaned. Due Oct. 18, 1884. BAKER, NEWELL & WALLACE."

(4) That J. R. Baker has since died, and M. E. Baker and Z. W. S. Taylor administered on his estate; that the defendants, in pursuance of the said contract, delivered to the plaintiffs Newell & Wallace, and the plaintiffs Baker, and Taylor's intestate, J. R. Baker, an engine and separator, (or threshing-machine.)

(5) That the engine was satisfactory, and plaintiffs paid for it as agreed in said contract.

(6) That the separator or threshing-machine was not satisfactory, but was an inferior machine, and not suited to the work intended to be done by first-class machines.

(7) That the plaintiffs so reported to the defendants, and at their solicitation kept the machine on trial for about eight or ten days, when, finding that it would not serve the purpose or do the work of a first-class machine, plaintiffs, under instruction of defendants, returned the machine to the defendants.

(8) That the plaintiffs paid in full for the engine, under the contract, and have since been sued by the Watertown National Bank, and judgment rendered against them, in a justice's court, for the full amount of the machine, alleging that the paper writing signed by N. W. Wallace was a negotiable paper, and assigned to it, the Watertown National Bank, for value before due, and without notice.

(9) That, by reason of the failure of defendants to comply with their contract, the plaintiffs have been damaged in the sum of three hundred dollars. Wherefore plaintiffs demand judgment (1) for the sum of three hundred dollars' damages, and for costs of action.

The answer of the defendants, also sworn, admits the allegations contained in the first five articles of the complaint, and controverts those made in the residue of the complaint, giving a different version of the facts therein stated; except as to the pleadings, admitting the allegations in article 8, and denying those made in article 9. It also sets up matters constituting a counter-claim, which it is unnecessary to mention, as it is eliminated from the controversy which the defendants' appeal brings up for determination.

At spring term, 1888, after successive continuances, the cause came on for trial before the jury of certain issues raised by the pleadings, which, and the responses thereto, are as follows: "(1) Was the separator described in the complaint a first-class piece of machinery? The jury in their verdict say, 'No.' (2) What damage, if any, have the plaintiffs sustained? The jury respond, 'Two hundred and ten dollars, and interest.'"

The record shows no exception to the admission or rejection of evidence offered or refused during the examination of witnesses, or to the reception of documentary proof; the assignment of error being to the refusal to give the instructions asked for defendants, and in the directions which, instead, were given. There was no complaint as to the machine, but the plaintiffs claimed, and introduced witnesses to prove, that the separator, called by them the "thresher," was not, as guarantied in the contract to be, "first-class machinery," and did not perform its work properly, and that in consequence it had been returned to the defendants. Opposing testimony was offered by the defendants, both as to the quality of the article and its return to and acceptance by them. It appears that the purchase money embraced in the notes has all been paid but the $210, the price of the separator, with the accruing interest; the note containing which was indorsed by the defendants before maturity to their principal, the Watertown Engine Company, and by it to the Watertown National Bank. For this contested balance suit was brought in January, 1885, against the original makers of the note in the court of a justice of the peace, and the liabilities of the defendants to the indorsee denied. Judgment was recovered in the action, from which an appeal was taken, and execution stayed by the filing of a justified undertaking to secure the debt and costs, if recovered in the superior court. It was there tried, and the residue due on the note, $276.74, recovered at the same term at which was tried the action now under consideration.

The defendants requested his honor to instruct the jury as follows: "(1) That if the jury believe the evidence the plaintiffs are not entitled to recover; (2) that the plaintiffs, not having paid the purchase money, are not entitled to recover any damages." These instructions were refused, and defendants excepted. His honor instructed the jury as follows: "That by the terms of the contract set out in the complaint the defendants warranted the machine to be a first-class machine; that if the jury should find that the machine was not first class, and if the machine was returned under the instructions of the defendants, then the plaintiffs would be entitled to recover $210, the amount agreed to be paid for the same; but that, if the machine was not returned under the instructions of defendants, then the plaintiffs would be entitled to recover the difference between the value of the machine as warranted and the value as it was." The court then instructed the jury as to what constituted a first-class machine, as to which there was no exception. The jury responded to the issues in favor of the plaintiffs as set out in the record, assessing the damages at $210. Motion by defendants for a new trial. Motion refused. Judgment for the plaintiffs, from which defendants excepted, and appealed, and assign the following errors: "(1) That his honor refused the instructions prayed for by plaintiffs, as set out above; (2) for error in charging the jury that, by the terms of

Digitized by Google

the contract set out in the complaint, the defendants warranted the machine to be a first-class machine; (3) for error in charging the jury that if the machine was not a first-class machine, and if the defendants instructed plaintiffs to return the machine, then the plaintiffs would be entitled to recover the amount ($210) agreed to be paid for same; (4) for error in charging the jury that if the machine was not a first-class machine, and if it was not returned under instructions from the defendants, then the plaintiffs would be entitled to recover the difference between the value of the machine as warranted and its value as it was."

We again call attention to the form of the instructions, and their inappropriateness to the issues before the jury. The inquiry before them was as to quality of the separator, and its fitness for the purpose of cleansing small grain from the straw, for which it was bought, and whether it was, as represented, a "first-class article," and, if not, the compensatory damages due to the plaintiffs, and to either inquiry of fact the instruction was wholly impertinent. The jury were not to pass upon the plaintiffs' right of action, but to ascertain the facts, and then, upon the whole case, it became a question of law, to be determined by the court in rendering judgment. The proper mode of raising the question as to the right of recovery was to demur to the sufficiency of the evidence adduced, assuming the facts to be as the jury would be warranted in finding them for the plaintiffs, to authorize judgment for them. The practice in the case of such demurrer, not unlike a motion for a nonsuit at the close of the plaintiffs' evidence, is explained in the writer's dissenting opinion in McCanless v. Flinchum, 98 N. C. 376, 4 S. E. Rep. 359. There would be no error, then, in declining to tell the jury that, taking all the evidence together, the plaintiffs could not recover, that is, could not have judgment; for with the results of their finding they had nothing to do, but only to respond to the inquiries submitted. The present practice undertakes, as far as it is practicable, unlike that which it takes the place of, to separate the facts from the law; the jury finding the one when in dispute, the court determining the law upon the facts ascertained by the jury and those admitted.

But the point intended is reached in the instructions given and the exceptions taken to them. If these are correct in law, and the jury not misled, the verdict must stand with the judgment authorized by it. In our opinion, the law was properly expounded, and no error is found in the direction under which the jury were led in arriving at their verdict. If the separator was returned to the defendants as unfit for its intended uses under their instructions, it was a rescission *pro tanto* of the contract, as much so as if it had not been included therein; and the obligation to return the purchase money, if it had been paid, or to enter a corresponding credit upon the note, which would have extinguished the debt if it had not been, would be the result. But the defendants, not retaining possession of the note, transferred it by indorsement before maturity to an innocent holder, unaware of any infirmity, and thus put it out of their power to make the credit themselves, and the power of the plaintiff to be relieved, as notwithstanding resistance to the judgment was determined in the action of the indorsee bank. What remedy, then, have the plaintiffs, if not in the present action? They cannot find relief from the judgment recovered by the bank which discounted the note before it became due, and their only recourse is the payees, who have converted the security to their own use, and subjected the plaintiffs, to whom their money ought to be refunded, to the necessity of meeting the judgment against them. As a transaction between the parties to the contract, the return of the purchase money assumed a legal obligation, created by the very act of the surrender and receiving back of the instrument. The contention of the defendants, based largely on the case of Osborn v. Gantz, 60 N. Y. 540, is not supported by the ruling in that case, which simply decides that, in an agreement concerning stipulations, interdependent and mutual, one cannot recover without performance of his contract, or an offer to do it; and that a warranty of quality is an incident only of an executed contract of sale, passing title to the thing sold.

The instruction applies, and such the verdict shows was the understanding of the jury in rendering it, to the case of an instrument, not such as represented and guaranteed, returned by their direction to the guarantors, and by them received,—in legal effect, a rescission of the contract, so far as it refers to the defective article, restoring it to the defendants, and binding them to restore the sum to be paid for it to the plaintiffs. We do not appreciate the force of the objection based upon the fact that, as indorsers, the defendants became liable as sureties to the holder, to the plaintiffs' whole cause of action. If the distinction prevailed, as formerly, between suits at law and suits in equity, it is obvious that, as an action at law was indispensable in order to show a breach of contract, and the damages consequent on it, and then, if the present plaintiffs were insolvent, the defendants' equity would be to restrain the enforcement of the judgment, until the sureties were exonerated from their liability as such. In such case the defendants would be allowed to retain their indebtedness as an indemnity against loss by reason of their suretyship. The principle which regards the surety as a principal in such case is declared in Williams v. Washington, 1 Dev. Eq. 137; Williams v. Helme, Id. 151; Walker v. Dicks, 80 N. C. 263; Scott v. Timberlake, 83 N. C. 382. It does not appear that, as indorsers, the defendants have been sued, and the judg-

Digitized by Google

ment for the residue of the amount due on the note against the plaintiffs seems to have had the additional security furnished by the *supersedeas* appeal undertaking. But, whatever may be the hazard existing and voluntarily assumed without the plaintiffs' privity, and for the defendants' sole benefit in effecting the discount, the issuing of the execution is restrained, as would a court of equity interfere by an injunction in case of threatened loss, until the defendants are relieved of their liability upon the note. At least the appellants have no just cause of complaint, in that they are fully protected against contingent loss by the stay of execution. This is another instance of the full protection afforded litigants in the double exercise of legal and equitable functions in a single suit which formerly required two. There is no error. Judgment affirmed.

(103 N. C. 356)

STATE v. MASSEY.

(*Supreme Court of North Carolina.* May 6, 1889.)

STATUTES—AMENDMENT.

Code N. C. § 985, which provides for the punishment of any person who shall "unlawfully and maliciously" set fire to any church, mill, barn, etc., with intent thereby to injure or defraud any person, body politic, or corporation, was amended by Laws N. C. 1885, c. 66, which provides that the words "unlawfully and maliciously" appearing in such section shall be struck out, and in lieu thereof the words "wantonly and willfully" inserted; and that the words "with intent thereby to injure or defraud," etc., shall be struck out. *Held* that, there being nothing in the amendatory act from which it could be inferred that the amendments were to affect future offenses only, an offense committed prior to such amendatory act could not be prosecuted to conviction subsequent to the passage of such act under an indictment drawn under the old law, although Code N. C. § 3766, provides that when a part of a statute is amended it is not to be considered as having been repealed and re-enacted in the amended form, but the portions which are not altered are considered as having been the law since their enactment, and the new provisions as having been enacted at the time of the amendment. SMITH, C. J., and MERRIMON, J., dissenting.

This was a criminal action tried at the spring term, 1889, of the superior court of Lincoln county, before MONTGOMERY, J. The indictment was found at the spring term, 1888. The material portions of the first count of the indictment are as follows: "The jurors for the state upon their oath present that W. T. Massey, late of Lincoln county, before the 16th day of February in the year of our Lord one thousand eight hundred and eighty-five, to-wit, on the 1st day of April in the year of our Lord one thousand eight hundred and eighty-four, with force and arms, at and in said county, a mill in the possession of the said W. T. Massey unlawfully, maliciously, and feloniously did set fire to, with intent thereby to injure and defraud the Georgia Home Insurance Company, being then and there a body corporate, contrary to the form of the statutes in such case made and provided, and against the peace and dignity of the state." There were several additional counts, all charging the burning to have been done at the same time, and "unlawfully, maliciously," etc., but with intent to defraud some other corporate body. The last count contained a charge of burning a church unlawfully, maliciously, etc. In an indictment found at the fall term, 1888, the defendant is charged in a single count, with unlawfully, maliciously, etc., burning a mill, etc., with intent to defraud the Georgia Home Insurance Company, etc. The solicitor admitted the fact alleged in a plea in abatement filed by the defendant, that the offense of burning the mill was committed, if at all, on the 1st day of April, 1884. Thereupon, "the court, being of opinion that the statute in existence at the time of the offense charged has been since repealed, and there is now no statute upon which the court could proceed to judgment on conviction," ordered that the indictment be quashed, and the defendant be discharged. The solicitor appealed.

The Attorney General, for the State. *W. A. Hoke* and *W. J. Montgomery*, for respondent.

AVERY, J. The indictment is drawn under section 985, subsec. 6, of the Code, which provides that "whoever shall unlawfully and maliciously set fire to any church, * * * mill, barn, etc., whether the same or any of them respectively shall then be in the possession of the offender or in the possession of any other person, with intent thereby to injure or defraud any person or persons, body politic, or corporation, shall be guilty of felony, and imprisoned in the penitentiary for not less than five nor more than forty years." The act of 1885 was ratified and took effect on the 16th day of February, 1885, and provided that the said section, (Code, § 985, subsec. 6,) shall be amended by striking out "unlawfully and maliciously" where it appears in the section, and inserting in lieu the words "wantonly and willfully;" and by striking out the words "with intent thereby to injure or defraud any person or persons, body politic, or corporation." Chapter 66, Laws 1885. There are several established rules of construction that will aid us in determining whether the last statute cited leaves the section of the Code under which the indictment was drawn still in force as to offenses falling under its inhibition, and committed prior to the 16th day of February, 1885.

1. If a later statute is irreconcilably inconsistent in its terms with one previously enacted, it operates to repeal the older statute, so far as such repugnancy extends, by implication; but where any fair construction will reconcile a seeming repugnancy, it must be adopted. State v. Custer, 65 N. C. 339.

2. When a statute creating a criminal offense is expressly repealed, or any portion of it that is essential to sustain an indictment drawn under its provisions is stricken out by a law subsequently enacted, the former will be held inoperative, even as to offenses

Digitized by Google

committed before the passage of the later act, unless a contrary intent on the part of the law-makers appear from an express saving clause, or by necessary implication from the language in the repealing statute. Lindsey v. State, 5 South. Rep. 99; State v. Long, 78 N. C. 571; State v. Wise, 66 N. C. 120. "The act punished must be criminal, when judgment is demanded, and authority to render it must still reside in the court." State v. Williams, 97 N. C. 455, 2 S. E. Rep. 55. Where the legislature re-enacts in terms or in substance an act then in force, but declares the law previously passed repealed, it is considered a reaffirmance of the old law. State v. Sutton, 100 N. C. 474, 6 S. E. Rep. 687; Bish. St. Crimes, § 181. In such cases the legislative intent is implied from the very words of the repealing act. Our case cannot be brought within this principle, for there is nothing in the repealing act to indicate an intent to leave the old law unrepealed, or to reaffirm it. We cannot concur with counsel that section 3766 of the Code should be so construed as to subserve the purpose of a saving clause to the act of 1885. That section is as follows: "Where a part of a statute is amended, it is not to be considered as having been repealed, and re-enacted in the amended form; but the portions which are not altered are to be considered as having been the law since their enactment, and the new provisions as having been enacted at the time of the amendment." If the indictment could be sustained and judgment pronounced under section 985 (subsec. 6) of the Code, after striking out the words "unlawfully and maliciously" wherever they occur in said section, and also the words "with intent to defraud," etc., the defendant might be convicted and punished of this charge. But in order to sustain that view the indictment must be good under that section, read without the words stricken out, on the 16th of February, 1885. The indictment, however, is plainly framed upon the theory that the Code, § 985, subsec. 6, was still operative in the year 1888, as to offenses committed before the ratification of the act of 1885.

It is contended, however, that the original section of the Code and the act of 1885 are not totally repugnant to each other, but may be construed together, leaving the former in force up to the moment of amendment, and the amended act operative since. It is always presumed that the legislature expresses its intention in clear and explicit terms. Potter's Dwar. St. 219. There is nothing in the amendatory law from which we can even infer the words were to be considered as stricken out as to future offenses only. We find there the simple mandate of the law-making department that the subsection "be amended by striking out," etc. It was so amended on its ratification when it took effect. Where an amendatory law repeals a proviso to a section of a former act, or a whole section of a former act, but the section without the proviso, or the section not affected, will support an indictment, the law referred to (section 3766) will apply. But it is enough to show that it has no application in this case. If this court should attempt to supply the omissions of the legislature, and resort to strained constructions of criminal statutes in order to prevent the escape of men accused of crime and assumed to be guilty, it might prove more dangerous to usurp the power of a coordinate branch of the government than to allow some acknowledged criminals to go unpunished. There is a marked distinction between the case at bar and State v. Putney, Phil. Law, 543, cited by the attorney general. The defendant, Putney, was convicted at the fall term, 1867, of the superior court of Wake county, under an indictment found in December, 1866, of the larceny of a mule. On the 25th of February, 1867, the general assembly, after reciting that "the crime of stealing horses and mules hath of late, notwithstanding the punishment provided by law, become much more common than formerly," etc., enacted "that every person who shall steal any horse, mare, gelding, or mule, and shall be thereof convicted according to due course of law, shall suffer death." Before that time larceny was punishable with whipping, or with fine or imprisonment. The court held that the old and new law would be construed so as to give effect to both, by interpreting "shall" according to its natural import, as referring exclusively to offenses thereafter committed, and the preamble certainly indicated that intent. No law or part of a law was expressly or by necessary implication repealed, and the old and new law were both left operative. Potter's Dwar. St. 133. When by the constitution of 1868 corporal punishment was forbidden, the question was raised, in State v. Kent, 65 N. C. 311, whether one, who was convicted of larceny committed before the law was changed, could be punished by imprisonment in the state's prison. The court held that the law altering the punishment was not an *ex post facto* law, because it did not make punishable an act already committed and not previously criminal, and it did not aggravate the punishment of the crime of larceny previously punishable with whipping. We think, therefore, this case is easily distinguishable from the cases of State v. Sutton, State v. Kent, and State v. Putney, supra, cited by the attorney general. In State v. Rogers, 94 N. C. 862, Mr. Justice MERRIMON, for this court, says, in effect, that the act of 1885, c. 66, repeals the words of the Code, § 985, subsec. 6, that are mentioned in the act.

We think that the law under which the indictment was drawn did not continue in force in its original form up to the passage of the amendatory act, and we therefore concur with the judge below in his ruling. It is not the province of this court to pass upon the guilt or innocence of the accused. If he was not guilty, still he had the right, and it was the duty of his counsel, to have the case

Digitized by Google

disposed of in this summary way. If he was guilty under section 985, subsec. 6, of the Code, we must presume that the legislature in omitting to add a saving clause to the act of 1885, intended to discharge all who have been previously guilty of violations of the section amended. The judgment of the court below is affirmed.

MERRIMON, J., (*dissenting.*) I dissent from the opinion and judgment of the court. It seems to me very clear that the statute (Acts 1885, c. 66) is intended to and does operate only prospectively in all respects. It in no way affects, nor was it intended to affect, offenses already perpetrated at the time of its enactment. It does not in terms purport to do so, nor is there anything in it, or in it taken in connection with the general statutory provision, (Code, § 3766,) that necessarily gives it such effect. That section provides that "where a part of a statute is amended it is not to be considered as having been repealed and re-enacted in the amended form; but the portions which are not altered are to be considered as having been the law since their enactment, and the new provisions as having been enacted at the time of the amendment." That is, the statute stands intact as unamended up to the time of the amendment, and the latter takes effect at the time of its enactment, not having any retroactive effect at all, or any such application; it speaks as amended only from that time. The statute (Code, § 985, par. 6) makes it indictable to "unlawfully and maliciously set fire to any * * * mill," etc. The amendment thereto—the statute first above cited—makes it indictable to "wantonly and willfully set fire to any mill," etc. When? Plainly after the amendment of the statute. The amendment struck the words "unlawfully and maliciously" out of it, not as of the time it was enacted or at all in contemplation of law as to offenses committed before the amendment, but as and only as of the time of its enactment, and substituted the other words, "wantonly and willfully,"—these to operate prospectively and not to have any retroactive effect. The very purpose of these words of the general statutory provision and the new provision as having been enacted at the time of the amendment," is to preclude the interpretation that such amendment should have retroactive effect. The purpose was not to repeal the old statute, but to amend and make it a new one, possessing different requisites, from and after the amendment; otherwise the words last recited, and indeed, the whole statutory provision recited, would have no effect, would be useless and nugatory. It expressly declares that "where a part of a statute is amended it is not to be considered as having been repealed and re-enacted in the amended form," but the part unaffected by the amendment continues, "and the new provisions as having been enacted at the time of the amendment. It is not to be considered as having been repealed." And why? Because it is to be treated as intact as to offenses perpetrated before the amendment. The interpretation I have thus given is strengthened as the correct one, in that it is not to be presumed that the legislature intended to let crimes committed in violation of the statute before the amendment go unpunished in the absence of any declaration to that effect, nor is such purpose to be allowed to appear by mere inference, especially in the face of the general statutory provision cited. The settled purpose to punish severely the perpetrators of such offenses is manifest, and I cannot consent to allow guilty men (not meaning to say that the defendant is or is not guilty) to escape by the observance of a mere technicality, which, it seems to me, is clearly excluded, and intentionally, in the way I have indicated.

SMITH, C. J., (*dissenting.*) I concur in the construction put upon section 3766 in the dissenting opinion and its effect upon the amendatory act of 1885, in leaving offenses committed before its passage exposed to a criminal prosecution. It is well settled that the repeal of a statute that creates an indictable offense withdraws the offense from the jurisdiction of the court and the authority of the court to pronounce judgment. To obviate this seems to be the purpose of the introduction of the terms in which it is declared that when a part is amended "it is not to be considered as having been repealed and re-enacted in the amended form," but the new statute operating thereafter shall consist of the unchanged part of the old enactment as in force from the time of its original enactment, and of the amended portions in connection therewith. Such had been the law for a long space previous to 1868 in reference to civil actions. Section 3764, and the qualifying act of that date embodied in section 3766 of the Code, seems to have been intended to apply a similar rule to criminal prosecutions. I think the defendant is still liable for his criminal misconduct in violating the provisions of the act of 1885, when it was in force, and that act is not abrogated in respect thereto.

(102 N. C. 112)

TYSON *et al.* *v.* BELCHER *et al.*

(*Supreme Court of North Carolina.* May 9, 1889.)

JUDGMENT—COLLATERAL ATTACK.

A sale and conveyance of land, upon petition by devisees thereof, under the decree of a court having jurisdiction of the subject-matter and of the parties interested, cannot be attacked in ejectment by the devisees against persons claiming under the purchaser at such sale for mere irregularities in the proceedings.

Appeal from superior court, Pitt county; A. C. AVERY, Judge.

It appears that Sherrod Tyson died in 1866, leaving a last will and testament, which was duly proven. The plaintiffs are his heirs at law and the devisees of his will, including the executrix thereof, and bring this action

Digitized by Google

to recover the land described in the complaint, and presently to be again mentioned. By his will the testator bequeathed and devised all his property, both real and personal, including the land in controversy, to the plaintiffs, to be owned, used, and enjoyed as by the will provided. Afterwards, at spring term, 1875, of the superior court of the county of Pitt, the present plaintiffs filed their *ex parte* petition in that court, describing the land now in controversy, and, for causes and purposes therein alleged and specified, prayed the court to order and direct a sale of the land, and the application of the money arising from such sale, in lieu of it, for the benefit of the plaintiffs, not inconsistent with the provisions of the will, etc. Some of the petitioners were infants, and sued by their mother, as their next friend, and she, also, was a petitioner. Upon hearing affidavits and inquiry as to the expediency and propriety of a sale of the land, etc., the court granted the prayer of the petitioners, and entered an order directing a sale of the land. This order was expressly approved by the judge of the court. Afterwards the land was sold in pursuance of such order, and William Belcher, under whom the defendants claim, became the purchaser thereof. This sale was confirmed by proper order made by the presiding judge in term time. This order directed the application of the purchase money, and that the commissioner appointed to sell the land make title to the purchaser, which he did by his deed executed on the 20th of December, 1878. On the trial the defendants offered in evidence a transcript of the record of the proceeding, the substance of which is set forth above. The plaintiffs objected to its admission, upon the ground—*First*, that such record was void upon its face for irregularities; and, *secondly*, because the order of sale therein set forth, and the sale of the land in pursuance of it, was contrary to the provisions of the will mentioned above. The court overruled the objection, and admitted the evidence, and the plaintiff excepted. "The court intimated a purpose to instruct the jury that, by virtue of the proceeding to sell the land in controversy, the legal title to it passed to William Belcher, and that the validity of the decree and sale in that proceeding could not be attacked in this action, and that the jury must find the issue submitted for defendant." In deference to this instruction of the court, the plaintiffs suffered a judgment of nonsuit, and, having excepted, appealed to this court.

Don. Gilliam, for appellants. *Batchelor & Devereux*, for appellees.

MERRIMON, J., (*after stating the facts as above.*) From an examination of the transcript of the record of the *ex parte* special proceeding, objected to as evidence, it appears that the court could properly have, and did take in an orderly way, jurisdiction of the parties to, and the subject-matter of, the proceeding. The petitioners were represented by counsel, and the petition was filed as allowed by the statute, (Code, § 284;) and, as there were infant petitioners, the orders and judgment were expressly approved by the judge, as required by the statute, (Code, § 286.) If there were irregularities at all in the course of the proceeding, they certainly were not such as rendered it, or the orders and judgment therein entered, absolutely void; at most they were only voidable, and could not, therefore, be attacked collaterally. In such case the remedy would be by a proper motion in the proceeding itself. If it were affected by fraud, then, as it is ended, the remedy would be by an independent action for the purpose of having the judgment, or the whole proceeding, according as the case might be, adjudged void for fraud.

Nor has the second ground of exception any force. By the will mentioned the land in question was devised to the present plaintiffs, who were parties to the special proceeding referred to. It belonged to them, and they had the right to petition the court to sell the same as they did. Those of them who were of age could sell and dispose of their interest in and title to the same, and bind themselves effectively in a judicial proceeding. As to the infants, they could sue by their next friend, as they did, and the court had jurisdiction of them, and as well of their lands embraced by the proceeding. The court had such jurisdiction of them and their land, and, in contemplation of law, it was careful to see that they suffered no prejudice. These authorities fully sustain what we have thus said: Williams v. Harrington, 11 Ired. 616; Sutton v. Schonwald, 86 N. C. 198; Fowler v. Poor, 93 N. C. 466; Tate v. Mott, 96 N. C. 19, 2 S. E. Rep. 176; Ward v. Lowndes, 96 N. C. 367, 2 S. E. Rep. 591; Edwards v. Moore, 99 N. C. 1, 5 S. E. Rep. 13; Brickhouse v. Sutton, 99 N. C. 103, 5 S. E. Rep. 380. Judgment affirmed.

(102 N. C. 284)

DEVEREUX v. McMAHON *et al.*

(*Supreme Court of North Carolina.* May 11, 1889.)

DEED—OFFICIAL ACTS.

1. The attestation clause of a deed was written thus: "Witness: Signed, sealed, and delivered in presence of ⋈ John Cobb, witness, toward of what was said Thomas Alexander [the grantor] did agree to the deed. SOLOMON DAVIS." *Held*, that Davis was a subscribing witness, and could testify to the execution of the deed before the proper probate officer.

2. It is not a sufficient objection to a deed that one of the subscribing witnesses made his crossmark.

3. By Code N. C. § 1246, a subscribing witness to a deed, who does not reside in the county in which the land is, must prove it in the county where he resides. An attestation clause stated that the deed was signed, sealed, and delivered in the witness' presence, and the certificate of probate, taken in a county other than that in which the land was, stated that "the execution of the annexed deed was * * * proven before me by * * * S., the subscribing witness thereto, who says that the deed was signed and delivered in his presence," etc. *Held*, that the fair inference, and the presumption from the duty of the officer, were

Digitized by Google

that the witness resided in the county in which the proof was taken.

4. The certificate refers with sufficient certainty to the deed and the grantor and grantee.

5. An order of registration that "the foregoing certificate of" the officer taking the probate "is adjudged to be correct. Let the instrument of the certificate be registered," though informal, is sufficient.

Appeal from superior court, Halifax county; MACRAE, Judge.

Action by Basil Devereux against M. McMahon and others. Plaintiff claimed the land in question under an alleged deed by Thomas Alexander to plaintiff. Judgment of nonsuit, and plaintiff appeals.

R. O. Burton, Jr., for appellant. *Thomas N. Hill*, for appellees.

MERRIMON, J. This is an action to recover land, and the pleadings raised issues of fact. On the trial the plaintiff offered in evidence what purported to be a deed of conveyance, to the admission of which the defendants objected. The court, "being of opinion that the probate was insufficient, sustained the objection," and the plaintiff excepted. He thereupon suffered a judgment of nonsuit, and appealed to this court. The following is a copy of so much of the deed mentioned, and the certificates of probate and registration thereof, as it is necessary to report here:

"In witness whereof the said Thomas Alexander hath hereunto signed his name and affixed his seal the day and date above written. ⋈ [Seal.]

"Witness: Signed, sealed, and delivered in presence of ⋈ John Cobb, witness, toward of what was said Thomas Alexander did agree to the deed. SOLOMON DAVIS."

"State of North Carolina, Nash county. I, Jno. T. Morgan, clerk of the superior court, do hereby certify that the execution of the annexed deed was this day proven before me by the oath and examination of Solomon Davis, the subscribing witness thereto, who says that the deed was signed and delivered in his presence January 13th, 1888, to the grantee for the purposes therein expressed. Witness my hand and official seal this 20th day of January, A. D. 1888. [Signed] JNO. T. MORGAN, Clerk Superior Court." [Seal of Nash Superior Court.]

"State of North Carolina, Halifax county. In the Superior Court, February 9, 1888. The foregoing certificate of Jno. T. Morgan, clerk of the superior court of the county of Nash, duly attested by his official seal, is adjudged to be correct. Let the instrument of the certificate be registered. JOHN T. GREGORY, Clerk Superior Court." Registered 9th February, 1888."

It seems that no question was raised on the trial as to the sufficiency of the execution of the deed itself by the maker thereof, on the ground that he simply made his crossmark, and annexed to it his seal. No such question is raised by the assignment of error for our decision. That one of the subscribing witnesses to the deed made his crossmark in identifying himself as such with the deed is no sufficient objection. Though he could not write, he might be eligible for such purpose, and make his mark. Pridgen v. Pridgen, 13 Ired. 259; State v. Byrd, 93 N. C. 628; Tatom v. White, 95 N. C. 453. The awkward and informal form of the attestation of the second subscribing witness to the deed did not render him less such witness. It seems that he intended to say, in subscribing his name, that the maker of the deed acknowledged the execution of it before him; but, whether he so meant or not, he was such a witness, and could testify as to its execution before the proper probate officer.

The land embraced by the deed in question is situate in the county of Halifax. The deed was proved by a subscribing witness thereto before the clerk of the superior court of the adjoining county of Nash, and his certificate as to the proof of the deed does not state that this witness lived in that county. It is contended that, under the statute pertinent, the certificate is therefore void. We do not think so. The statute, (Code, § 1246,) prescribing how deeds shall be proved, provides among other things, that, "when the grantor, maker, or subscribing witness resides in the state but not in the county wherein the land lies, such deed, letter of attorney, or other instrument requiring registration, must be acknowledged by such grantor or maker, or proved by the oath of such subscribing witness before a judge of the supreme or of the superior court or the inferior court, or a notary public or justice of the peace of the county wherein the grantor, maker, or subscribing witness resides." Now the certificate of the clerk of the superior court of Nash states "that the execution of the annexed deed was this day proved before me by the oath and examination of Solomon Davis, the subscribing witness thereto," etc. The fair inference is that the witness thus mentioned was the same, identical person who witnessed the "annexed deed," and that he resided, at the time he so took his oath and was examined, in the county of Nash. The presumption is he did. It is not to be presumed, nothing to the contrary appearing, that the probate officer would take proof of the deed otherwise than in the case allowed by law. The presumption is just the reverse. *Omnia præsumunter solemniter esse acta.* If the certificate had said "the annexed deed was this day proved before me by the oath and examination of," etc., and had omitted the other words, "who says that the deed was signed and delivered in his presence," etc., that would have been sufficient in such respect. The words last quoted were unnecessary, but, as they were used, and are not as full in stating what the witness said as might be desired, still they do not render the proof insufficient. Taking them in connection with other words to which they refer, and with

Digitized by Google

which they have proper relation, they imply, in substance and effect, that the "annexed deed"—the instrument under seal—having a seal, was "signed and delivered" in the presence of the witness. The certificate sufficiently identifies the deed, and the single bargainor and single bargainee therein. It mentions and refers to "the annexed deed." It states "that the execution of the annexed deed was this day proved," etc. What deed? Whose deed? Executed to whom? Executed by whom? Plainly, certainly, the deed annexed to the certificate, executed by the bargainor Thomas Alexander to the bargainee Basil Devereux therein named. The words of the certificate, in their plain meaning and application, as certainly imply and refer to the deed and the persons just named as if these persons had been expressly named in it in their proper relations as bargainor and bargainee, as regularly and properly they should have been, and they cannot refer to any other person or persons; so that in this respect the probate is sufficient. The statutory provision recited above was in force at the time the clerk of the superior court of the county of Nash took the proof of the deed, and expressly conferred on him authority to take such proof, if the subscribing witness to the deed resided in that county at that time; and, as we have seen, it must be taken that he did reside there then. Nothing to the contrary appears. The certificate was properly authenticated by the official signature of the clerk and the seal of the court. The deed, and this certificate thereto attached, being exhibited to and before the clerk of the superior court of Halifax county, where the land was situate, he had authority conferred by a further express provision of the same statute to adjudge thereupon that the deed was proved, and to order the registration thereof, as he did do, substantially and sufficiently, though not in a very formal manner. His order certainly refers to, and is based upon, the certificate annexed to the deed, and it "is adjudged to be correct," that is, that the proof is taken correctly,—and thereupon it is further ordered by him "that the instrument [the deed] of the certificate [the instrument, the deed attached to it, and therefore of it,] be registered." The adjudication of proof of the deed is informal, but the substance of it, and the order to register the deed based upon it, substantially appear. The whole purpose of the deed, the certificate of proof thereof, the adjudication of proof thereof, and the order of registration, and their bearing each upon the other in order and relation, appear, however, informally, and this is sufficient. Where an order or judgment is intelligible, and the essential substance thereof appears, it will be upheld, without regard to mere form. Holmes v. Marshall, 72 N. C. 37; Young v. Jackson, 92 N. C. 144; Evans v. Etheridge, 99 N. C. 43, 5 S. E. Rep. 386. We, therefore, are of opinion that the probate of the deed in question was sufficient. Hence there is error. The plaintiff is entitled to a new trial. To that end let this opinion be certified to the superior court. It is so ordered.

(102 N. C. 206)

LEWIS v. LONG.

(*Supreme Court of North Carolina.* May 11, 1889.)

NEGOTIABLE INSTRUMENTS—SURETIES.

A joint maker of a negotiable note cannot show that he signed only as surety, as against a *bona fide* holder who purchased the note before maturity without notice; and one who purchases from the latter without notice, though after maturity, stands in the shoes of his assignor.

Appeal from superior court, Halifax county; GRAVES, Judge.

This is a civil action, commenced before a justice of the peace on the 2d day of April, 1888, and, upon judgment in favor of the plaintiff, the defendant W. W. Long appeals to the superior court. The action is brought upon a note under seal, which is as follows: "$100.00. On or before the 1st day of November, 1883, we, or either of us, promise to pay, to J. M. Grizzard or order, the sum of one hundred dollars, for value received. Witness our hands and seals this 9th day of June, 1883. AARON PRESCOTT. [Seal.] W. W. LONG. [Seal.]" The said note was indorsed by J. M. Grizzard for value to one Mrs. Alice M. Cooper, and by her indorsed and transferred for value, after maturity, to the plaintiff. The defendant Prescott was principal to the note, and the defendant Long was surety thereto. This was known to J. M. Grizzard, the original payee, but was not known to the plaintiff. More than three years have accrued from the maturity of the note to the bringing of this action. The plaintiff bought the note for value, believing both Prescott and Long were principals, and jointly responsible. "*Judgment.* It is ordered and adjudged that the plaintiff recover nothing of the defendant W. W. Long, and that he go without day and recover his costs. J. F. GRAVES, Judge Presiding." From this judgment the plaintiff appeals.

Batchelor & Devereux and *E. T. Clark*, for appellant. *Mullen & Daniel*, for appellee.

SHEPHERD, J. Whether a joint promisor may show by parol that he signed only as surety has been the subject of conflicting decisions, both in England and America. That he can do so in this state, where the payee has notice, is well settled. Capell v. Long, 84 N. C. 17; Goodman v. Litaker, Id. 10; Welfare v. Thompson, 83 N. C. 279. But such a defense cannot be made against a *bona fide* holder without notice. Rand. Com. Paper, § 907; Daniel, Neg. Inst. § 1338; 2 Edw. Bills & N. 692; Goodman v. Litaker, supra. The note sued upon was under seal, but was indorsed, and is "to be regarded, so far as its negotiability is concerned, and its liability to be governed by the commercial law applicable to promissory notes, as if it were a promissory note not under seal."

Digitized by Google

Miller v. Tharel, 75 N. C. 150; Spence v. Tapscott, 93 N. C. 246. It was indorsed to Mrs. Cooper, and the law presumes that she took "it for value, and before dishonor, in the regular course of business." Tredwell v. Blount, 86 N. C. 33; Pugh v. Grant, Id. 39. Mrs. Cooper, being a *bona fide* holder, and having no notice, would have been unaffected by the defense relied upon in this action. Does the fact that the plaintiff purchased from her after maturity (but without notice) put him in a worse position than that occupied by his assignor? Very clearly it does not. Mr. Randolph (supra, section 987) says, "So a purchaser after maturity from a *bona fide* holder, who took the paper for value, before maturity, is entitled as a *bona fide* holder, before maturity, to the rights of his indorser." To the same effect is Edwards, supra, vol. 2, 692, note; Daniel, supra, § 589. The cases of Harris v. Burwell, 65 N. C. 586, and Capell v. Long, supra, cited by the defendants, do not conflict with this view. In the former case the plaintiff purchased the note after maturity, and therefore took it subject to the defense of "set-off," which the maker had against his assignor at the time of the assignment. In Capell's Case the payee had notice, and assigned after maturity. In both of these cases it was held that the purchasers took subject to any defense which existed against their assignors. In our case, as we have seen, no defense existed against Mrs. Cooper, the plaintiff's assignor, and it is therefore clearly distinguishable. Reversed.

(102 N. C. 126)

HARRISON v. HOFF.

(*Supreme Court of North Carolina.* May 11, 1889.)

REPLEVIN—WHEN LIES.

Plaintiff, in ejectment, after a recovery, cannot maintain claim and delivery for timber severed by defendant while in the actual possession of the land.

This was a civil action, for the recovery of certain timber logs alleged to have been cut and carried by the defendant Hoff from the land of plaintiff, tried before MACRAE, Judge, and a jury, at fall term, 1888, of Washington superior court. The following issues were agreed upon: (1) Are the plaintiffs the owners and entitled to the possession of the personal property described in the complaint? (2) Does the defendant wrongfully withhold the same from the plaintiffs? (3) What damage have plaintiffs sustained? It was admitted that the land upon which the timber was cut had belonged to the minor plaintiffs R. M. and Leola Ausborn; that a petition for partition of said land was filed *ex parte*, and an order of sale for partition was made by the clerk, and the land sold by the commissioner appointed for that purpose, and that defendant J. H. Hoff, as guardian for the other defendants, bid off said land at said sale; that the commissioner reported the sale, and the clerk made an order confirming the sale, and directing title to be made to the purchaser, as guardian of the other defendants, upon payment of the purchase money; that the defendant Hoff paid the purchase money to the commissioner, who made a deed to said Hoff individually for said land, and that thereupon said Hoff went into possession of said land, and has been in possession ever since, and while so in possession cut and carried away the timber described in the complaint, which timber was worth $300; that the judge of the superior court, about four years after the said sale, refused to confirm the same, and said sale has never been confirmed by a judge of the superior court; that at the present term of this court an action by plaintiff against defendants for the recovery of said land, and damages for the wrongful withholding of the same, was tried, and the plaintiff recovered judgment for the possession of said land, and one penny as damages from the defendants. Upon the foregoing facts agreed, the judge instructed the jury to respond in the negative to the first issue, and gave judgment, from which the plaintiff appealed.

C. L. Pettigrew and *Haywood & Haywood*, for appellant. *A. O. Gaylord* and *B. C. Beckwith*, for appellee.

AVERY, J. An action between the same parties, to recover the same land and damages for detention, (including the value of timber cut down or destroyed,) was brought to the fall term, 1887, of the same court in which this cause was tried, and judgment in favor of the plaintiff, for recovery of the land and nominal damages, was rendered at the fall term, 1888. Therefore, if the defendant had set up the estoppel as a defense in his answer, it would have barred the plaintiff's right of action, as plaintiff contended on the argument. Yates v. Yates, 81 N. C. 397; Tuttle v. Harrill, 85 N. C. 456; Gay v. Stancell, 76 N. C. 369. But his failure to plead the estoppel specifically deprives him of the right to avail himself of that defense. Blackwell v. Dibbrell, ante, 192, (at this term.) But the defendant did plead, by way of new matter, that the action of claim and delivery would not lie to recover logs that had been severed from the land while the defendant was in possession, and thereby availed himself of the very same principle that made the judgment in the former action a bar. It was held that fodder which had been severed did not pass to the plaintiff in ejectment, when put into possession under a writ, while growing corn did pass to him with the land, because he could recover the value of the fodder in his action for mesne profits. Moreover, the additional reason for confining the owner to his action of trespass for mesne profits was that, if the action of trover were allowed to be brought for the goods, it would subject to liability every person who bought a bushel of corn from the trespasser, while in possession. Brothers v. Hurdle, 10 Ired. 490; Ray v.

Digitized by Google

Gardner, 82 N. C. 454. The motion for new trial was properly refused. The judgment is affirmed.

(103 N. C. 34)

HILL v. HILLIARD *et al.*

(*Supreme Court of North Carolina.* May 11, 1889.)

LIMITATION OF ACTIONS.

1. That a creditor indulges the debtor at his "special request," having confidence in his integrity, and without apprehension that the debtor will set up the statute of limitations, will not suspend the running of the statute.
2. On mortgage foreclosure the statute is available to a subsequent mortgagee, though the mortgagor declines to plead it.

Appeal from superior court, Halifax county; JAMES C. MACRAE, Judge.

The following are agreed upon as the facts in this controversy: (1) That on the 3d day of March, 1876, the defendant James L. Ousby executed to Maria J. Lowe a mortgage in fee, which was duly registered, on two lots near the town of Halifax, numbered 8 and 9, to secure three notes, all then past due, upon condition that, if Ousby should pay said notes by January 1, 1877, said mortgage deed should be void, and with power of sale in case of default. (2) That on the 5th day of April, 1886, Ousby mortgaged the lots, along with other real and personal property, in fee to the defendant Louis Hilliard to secure a debt of $1,124.35, due 10 months thereafter, with 8 per cent. interest after maturity, which deed was duly registered. There is still due on this mortgage debt $962.52, with 8 per cent. interest from 1st day of March, 1888. All the personal property embraced therein has been subjected thereto, and the real estate, outside of lots 8 and 9, is insufficient to pay said debt. (3) That nothing has ever been paid on the Maria J. Lowe notes or mortgage debt. (4) That Maria J. Lowe died domiciled in Halifax county in the year 1881, leaving a last will and testament, and on the 28th day of March, 1882, R. E. Moseley qualified as her administrator with the will annexed. On the 3d day of July, 1882, said Moseley having died, the plaintiff, Thomas N. Hill, duly qualified as administrator *de bonis non* with the will annexed, on said estate. (5) That Louis Hilliard & Co. had actual notice of the M. J. Lowe mortgage at the time of accepting the mortgage to them. (6) That Thomas N. Hill never had any actual notice of the mortgage to Louis Hilliard & Co. (save such notice as registration confers) till the latter part of January or first of February, 1888. (7) That Hill did not sue upon or foreclose the M. J. Lowe mortgage prior to January 1, 1887, because he was requested to indulge the same by said Ousby, and he did indulge him at his special request. Hill having great confidence in the integrity of Ousby, and Ousby being in straitened circumstances, Hill indulged him without apprehension that he would set up the statutory bar as a defense, or endeavor by any means to prevent his collecting said notes; and Ousby has made no effort to prevent such collection. (8) That Ousby is now, and has been since the execution of the mortgages to the said Lowe and Hilliard & Co., in possession of lots 8 and 9. Under these facts the question whether the M. J. Lowe mortgage is barred by the statute of limitation as against Louis Hilliard & Co., and who plead the same, is submitted for the decision of the court. The court, being of the opinion that the statute of limitations was a plea not favored, and that it was a personal privilege of the defendant Ousby, and could not be set up by the second mortgagee, Hilliard, gave judgment for plaintiff, from which defendants Hilliard & Co. appeal.

R. O. Burton, Jr., for appellants. *A. J. Burton* and *Batchelor & Devereux*, for appellee.

SHEPHERD, J. This action was commenced on the 23d of February, 1888,—11 years after the forfeiture of the plaintiff's mortgage,—and the mortgagor has been in possession of lots Nos. 3, 8, and 9 during this whole period, and has made no payment. About nine years after the forfeiture, Ousby, the mortgagor, executed a mortgage upon his equity of redemption to the defendant Hilliard, and it is admitted that the property "outside of lots Nos. 8 and 9 is insufficient to pay" his debt. Had anything transpired between the plaintiff and the mortgagor before the execution of the mortgage to Hilliard by which the running of the statute of limitations was suspended? We think not. There was no agreement, either express or implied, that the mortgagor was not to plead the statute. The case only shows that the plaintiff indulged him at his "special request," having confidence in his integrity, and "without apprehension that he (Ousby) would set up the statutory bar as a defense." Very clearly this does not bring the case within the principle of Barcroft v. Roberts, 91 N. C. 363, and the authorities there cited. In that case there was a promise not to plead the statute, and the chief justice, commenting upon the decision, said (in Joyner v. Massey, 97 N. C. 153, 1 S. E. Rep. 702) that "it carries the doctrine to its extreme limits, beyond which I am unwilling to go." There being nothing to arrest the statute, the statutory bar was more than complete when the mortgagor executed to the plaintiff a writing by which he promised to pay the debt, and agreed that he would not plead the statute either to the "notes or said mortgage." He now declines to plead the statute, and the question is whether his conduct after the mortgage was barred can have the effect of repelling the statute in so far as it affects the defendant Hilliard. It is true that the plea of the statute is a personal one, but we think with Mr. Wood, in his work on Limitations, § 230, "that where the rights of subsequent mortgagees intervene, or where the mortgagor has sold the premises, an ac-

Digitized by Google

knowledgment or payment afterwards made by the mortgagor after the statute bar has become complete revives [does not revive] the mortgage so as to defeat any of the rights of such subsequent mortgagee or grantee. But, so far as his own interests are concerned, he may revive the mortgage by such acts, but not so as to impair or defeat the rights of other parties, who, previous to such acts, acquired an interest in the premises. * * * It seems that when the statute has run upon a prior mortgage the holder of a subsequent mortgage is entitled to have the prior mortgage canceled as against a mortgagee out of possession; and a court of equity, upon proper proceedings to that end, will direct its cancellation on the ground of such bar." The context fully justifies the negative words inserted in brackets, and the case of Insurance Co. v. Covert, 29 Barb. 441, cited by Mr. Wood, plainly shows the mistake of the author or printer. The opinion in the case says "that, such being the relation between Cornell and the defendants deriving title under him, it would seem to be inequitable and unjust to allow either, by any act or declaration, to affect the rights and interests of the others in regard to the incumbrance, either by a written acknowledgment of the debt or by part payment." Jones, on Mortgages, § 1509, says: "Moreover, it is held that purchasers from the mortgagor, subsequent to the execution of the mortgage, may plead the statute of limitations as a defense to an action commenced after the statute has run against the debt secured." Lent v. Shear, 26 Cal. 361; Grattan v. Wiggins, 23 Cal. 16; Medley v. Elliott, 62 Ill. 532; Schmucker v. Sibert, 18 Kan. 110; Fox v. Blossom, 17 Blatchf. 352. We have no decisions upon the subject in this state, but we think the principles laid down in the authorities cited are consistent with reason and equity, and we therefore adopt them. The judgment below should be modified according to the views expressed in this opinion. Reversed and modified.

(102 N. C. 122)

HODGES *et al.* v. FLEETWOOD *et al.*

(*Supreme Court of North Carolina.* May 11, 1889.)

DEED.

A deed in which "M., wife of I.," was named as party of the second part, granted certain land "unto her, the aforesaid M., wife of I., during her natural life, then to descend to her heirs, the children of the said I., after her demise." The *habendum* was, "to them, the party of the second part, and their heirs, forever." *Held*, that M. took a life-estate only, and her children by I. took a remainder in fee.

Appeal from superior court, Beaufort county; MONTGOMERY, Judge.

Action by Alfred Hodges and others against Henry Fleetwood and others, to recover land submitted on agreed facts, from which the following appear: (1) That on and prior to the 4th day of April, 1857, the title to the land described in the complaint was out of the state, and in one Samuel Boomer. (2) That on the 4th day of April, 1857, Samuel Boomer executed to Mahatabel Pate, the wife of Isaiah Pate, a deed, which described, in addition to other lands, the *locus in quo*. The deed was duly executed and recorded, and was as follows: "State of North Carolina, Beaufort County. This indenture, made the 4th day of April, in the year of our Lord one thousand eight hundred and fifty-seven, between Samuel Boomer, of the town of Washington, county and state aforesaid, of the first part, and Mahatabel Pate, wife of Isaiah Pate, of the town of Washington, county and state aforesaid, of the second part, witnesseth, that I, the said party of the first, for and in consideration of the sum of one hundred dollars, and a further consideration of one house and lot in the town of Washington, say in Bonner's new part, reference being had to said Pate's deed to me of the first part will more fully appear, and myself therewith fully contented and satisfied, hath bargained and sold, and by these presents do bargain and sell, unto her, the aforesaid Mahatabel Pate, wife of Isaiah Pate, during her natural life, then to descend to her heirs, the children of the said Isaiah Pate, after her demise, a certain tract or parcel of land in the district of Washington, butted and bounded as follows, viz.. [description;] containing 16 acres, 3 rods, and 8 poles, together with all and singular the hereditaments and appurtenances belonging, or in any wise appertaining thereunto, with all the profits and emoluments, right, title, and interest whatever, of him, the said party of the first part, to the above-bargained premises,—to have and to hold to them, the party of the second part, and their heirs, forever. And I, the party of the first part, for myself, my heirs, executors, administrators, and assigns, warrant and forever defend the above-bargained premises unto them, the party of the second part, against the claim or claims of all persons whatsoever laying claim or claims thereunto. In witness whereof," etc. (3) That on the 17th day of March, 1868, Isaiah Pate and Mahatabel Pate duly executed and delivered to Henry Fleetwood a deed for the *locus in quo*, which deed was duly recorded. The said deed, by its terms, purports to convey the said land to Henry Fleetwood in fee, and uses words apt and proper for that purpose, and does so convey the same. If said Mahatabel had the power to convey in fee, the said deed is a deed in fee. (4) Mahatabel Pate died on the 9th day of August, 1882, leaving Isaiah Pate, her husband, her surviving, and leaving as her heirs at law her four children, Amanda, Margaret, Lena, and Frank. (5) That the said children were the children of Mahatabel Pate by her husband, the said Isaiah Pate, and some of them were born at the date of the deed from Samuel Boomer referred to, to-wit, Amanda, Margaret, and Frank. (6) Isaiah Pate was living at the bringing of this action. (7) Amanda Pate married Alfred Hodges. Margaret Pate

Digitized by Google

married Ira T. Bishop. Lena Pate married James H. Clark. (8) Frank Pate, before the bringing of this action, had conveyed his interest thereto to Alfred Hodges, one of the plaintiffs. (9) Defendant Henry Fleetwood entered into possession of the land under the deed from Mahatabel Pate, and he and the other defendants have been in possession of the land ever since, claiming to own it in fee. Judgment for plaintiffs, and defendants appealed.

W. B. Rodman, Jr., and *Armistead Jones*, for appellants. *J. H. Small* and *A. D. Jones*, for appellees.

AVERY, J. The first question to be settled in this case is whether the words used in the premises of the deed, "unto her, the aforesaid Mahatabel Pate, wife of Isaiah Pate, during her natural life, then to descend to her heirs, the children of the said Isaiah Pate, after her demise," etc., together with the subsequent words in the *habendum*, "to have and to hold to them, the party of the second part, and their heirs, forever," vested in Mahatabel Pate an estate in fee-simple or only a life-estate. It seems clear that the word "heirs" should be construed as a word of purchase, not of limitation. The words, "the children of the said Isaiah Pate after her demise," following immediately after "heirs," are evidently intended as a more particular description of the persons who are to take at her death, and that portion of the premises should be interpreted as if it had been written as follows: "Unto the said Mahatabel Pate, wife of Isaiah Pate, during her natural life, and after her death to her children, the issue of her marriage with Isaiah Pate." The context shows, therefore, in what sense the word "heirs" was used, and that in fact it was intended to mean, not simply children, but a particular class of children, the issue of that marriage with Isaiah Pate, and must be construed as vesting an estate in the land in those children at her death, as purchasers. Leathers v. Gray, 101 N. C. ——, 7 S. E. Rep. 657; Mills v. Thorne, 95 N. C. 362; King v. Utley, 85 N. C. 59. But the defendants' counsel contended on the argument that the words in the *habendum*, "to have and to hold to them, the party of the second part and their heirs, forever," must be interpreted as qualifying the estate given to Mahatabel Pate; and notwithstanding the fact that the words, "during her natural life," and "after her demise," are used in the premises in reference to her interest, she took an estate in fee-simple under the deed. We cannot treat as surplusage or ignore the significant words used in the premises in order to reach such a conclusion. The words of inheritance were intended to vest in the children a remainder in fee after the death of the mother. While the word "heirs," when plainly constituting a part of the covenant of warranty, will not be transposed and construed as if it were in the premises or *habendum*, it will be construed, when it appears in the *habendum* after the words, "to have and to hold," just as if it had been written after the name of the grantee in the premises; and when deeds have been inartistically drawn, so as to locate the *habendum* after the clause of the covenant of warranty, they have been interpreted by a transposition of the words of inheritance to the premises. Waugh v. Miller, 75 N. C. 127; Allen v. Bowen, 74 N. C. 155; Phillips v. Thompson, 73 N. C. 543; Phillips v. Davis, 69 N. C. 117. We think that the true meaning of the deed is the same as if the language in the premises had been "unto the said Mahatabel Pate during her natural life, and after her death to her children, the issue of her marriage with said Isaiah Pate, and their heirs, forever." We cannot concur with counsel in the view that such a conveyance at common law must be held to have vested in Mahatabel a fee-tail special, which was converted by the statute into a fee-simple estate, and merged with her estate in fee expectant on the determination of the estate-tail. At common law, an estate could have been conveyed to Mahatabel for life, with remainder in fee to such children as might be born of the marriage with her then husband. It would have been a contingent remainder, because it might happen that there would be no issue of the marriage, and, at all events, there would be uncertainty, in contemplation of law, as to the number who would take as remainder-men; but, when the remainder did vest in her children at her death, it would vest in fee-simple, not restrained to any particular heirs, but inheritable by all of their heirs alike. We do not think that it is necessary to discuss or construe section 1329 of the Code, in order to decide the questions presented in this case. We hold that the plaintiffs are entitled to recover, and there was no error in the ruling of the judge below. The judgment must be affirmed.

(103 N. C. 90)

HARDIN v. LEDBETTER.

(*Supreme Court of North Carolina.* May 14, 1889.)

RIPARIAN RIGHTS—EVIDENCE—NEGLIGENCE.

1. In an action for injury to plaintiff's mill by backing water thereon, thus interfering with its operation, the admission of evidence that the mill was not worth more than half as much after the injury as before, and would not do more than half the work, if error, is obviated by an instruction that the jury shall consider, in estimating damages, not the capacity of plaintiff's machinery before and after the injury, but, "in general, the loss of capacity, the amount of business generally done, the loss of business, if any, by the loss of the capacity to do business occasioned by the injury."

2. Plaintiff, in order to take water from a point higher up the creek, had removed his dams at his mill, thus causing the rubbish to fill defendant's pond, whereby the water was raised, and the injury sued for occasioned. *Held*, that evidence was admissible that a former owner of defendant's dam, from whom defendant obtained it, would occasionally raise the flood-gates in such dam, and let the rubbish pass out with the water, thus relieving plaintiff's mill; that defendant had been told this and requested to do the same, and that the pond was filling up faster than ever by reason of the shutting down of the flood-gates.

Digitized by Google

3. The injury sued for being caused by defendant's refusal to open the flood-gates, he alone was in fault, and plaintiff's removal of his dams was not contributory negligence.

Appeal from superior court, Rutherford county; JAMES C. MACRAE, Judge.

Action by W. J. Hardin against R. O. Ledbetter. Judgment for plaintiff, and defendant appeals.

Mr. Forney, *Mr. McBrayer*, *Hoke & Hoke*, *Mr. Jones*, and *Battle & Mordecai*, for appellant. *W. P. Bynum*, for appellee.

SMITH, C. J. This suit, begun on April 21, 1885, is prosecuted by the plaintiff for the recovery of damages sustained in working his water-mill upon Holland's creek by the ponding of the water back upon his wheel by the defendant, who owns and operates a similar mill below and on the same stream. Upon the trial issues were submitted to the jury which, with their findings thereon under the directions of the court, are as follows: (1) Is the plaintiff endamaged by the defendant's ponding water back on his water-wheel? Yes. (2) What amount of annual damages is the plaintiff entitled to recover? One hundred dollars. (3) Is the defendant damaged by the wrongful act of the plaintiff, as alleged in the counter-claim, and, if so, how much? No. The general facts of the case, out of which the controversy grows, may be summarily and sufficiently stated to render intelligible the rulings and the exceptions thereto presented in the appeal, without a tedious repetition of the testimony in detail. The defendant owns and operates a public mill on the creek, below that of the plaintiff, and the complaint is that his dam ponds the water back upon the water-wheel of the plaintiff, so as largely to interfere with its power and driving capacity. The plaintiff at first used a wheel of 18 feet diameter, which, to obviate in some degree the difficulty, he reduced in size by two feet. He had also constructed two dams which, for the same purpose, he removed, and tapped the creek at a point higher up, and brought the water thence down to his wheel, (an overshot wheel,) thereby giving it increased power to do the work. In consequence of the large volume of water descending after the removal of the plaintiff's dam, and carrying with it the accumulated mud, sand, and rubbish above, the defendant's pond became filled therewith to a degree that the raised water in defendant's pond interfered, as before, with the working capacity of plaintiff's mill, for the injurious consequences whereof in the loss of patronage the present suit is brought. It appears that there is a waste gateway on the defendant's dam, which, by opening, would let pass the mud and sand, and was so permitted to be used by the former owner from whom the defendant obtained the property. The plaintiff demanded that the defendant should allow the opening of this outlet for the accumulated dirt, which was refused, the defendant saying that if he did so he would expose himself to a claim for damages from proprietors below him, and he demanded compensation for the injury to his lands from the mud deposit formed in his pond. There was much testimony offered upon the controverted matters and upon the extent of the injury in the value of the plaintiff's property, and from its crippled condition and inability to do its former work.

This brief statement of the case will suffice for a proper understanding of the exceptions taken during the progress of the examination of the witnesses, of the defendant's prayer for instructions, and the instructions under which the jury arrived at their verdict. The instructions asked are as follows: (1) If the jury shall find that the plaintiff is injured by the ponding back of water on his wheel, and the injury results from the concurring acts of each, and proceeds from his tearing down of his dams as the immediate and proximate cause of his damage, he is not entitled to recover. (2) That if the jury find that the plaintiff's mill pond was from 1½ to 2 miles long, and contained accumulations of mud and sand deposited during 25 or more years, and the dams were removed during the limited time mentioned by the witnesses, this would be contributory negligence, and a bar to plaintiff's recovery. (3) That the plaintiff was under legal obligation to use such care and prudence in removing his dams as not to cause the overflow of the banks below; and, if done in such manner as to fill up and close the natural channel of the creek, it would be contributory negligence, depriving him of any right of action for resultant injury. (4) That plaintiff is only entitled to the natural flow and fall of the creek for drainage, and if, in tearing down his dam, an unusual discharge of mud and sand was precipitated, from which the damage proceeded, he cannot recover. (5) That defendant, having a right to maintain his own dam unless he thereby ponded the water, and if no injury would have followed but for plaintiff's removal of his own dam, he cannot recover. (6) That the money, if any, should be measured by the toll lost in consequence of plaintiff's inability to earn it by reason of his being compelled to diminish the size of his water-wheel. (7) That his recovery should be limited to the impairment in value of his mill. (8) That if no such loss occurred plaintiff has suffered no damage, and there is no evidence of such loss.

The court, after presenting the contending claims of the parties, each charging the other with causing damage, proceeds to charge as follows: "Is the plaintiff endamaged by the defendant's ponding water back on plaintiff's water-wheel? There is no question here about any claimed right of prescription or otherwise on the part of the defendant to pond his water as far back as plaintiff's wheel. He says he does not do it, but, if done at all, it is done by plaintiff's own act. To reach the truth and justice of the matter it is necessary for us to consider what the

Digitized by Google

rights of each party are in the premises. These parties, being upper and lower proprietors of the land on Holland's creek, are each entitled to make such use of the water as it passes through his land as he may choose, and then let it pass on to the use of those below; but he must so use it as not to injure another. The defendant has no right to hold such an amount of water as will pond back upon the plaintiff, the upper proprietor, and if by defendant's act the water is caused to so pond back upon plaintiff's wheel the plaintiff is damaged thereby; but if the ponding back is caused by the wrongful act of the plaintiff himself, he cannot be said to be injured by the defendant, and if the plaintiff's act is wrongful, and concurs with a wrongful act on the part of defendant, and both the acts together produced the injury, it cannot be said to have been done by the defendant. What will amount to a wrongful act on the part of the plaintiff? If he has a mill, and keeps up a dam, after his pond is filled the water must be permitted to flow on in its natural and ordinary course; not to withhold from below the usual flow, nor to force upon the lower proprietor a greater flow than usual, as far as this can be done consistently with the carrying on of the ordinary business of his mills. There is no law that requires one who has a mill to continue in the business. He may take down his dam, provided he does so in such a gradual way as not to inject at one time a larger body of water, or what the water carries with it in its natural flow, upon the lower proprietor to his injury. If, however, he takes the proper precaution, and in taking away his dam makes the flow so gradual that the lower proprietor can reasonably take care of his own property, and avoid injury by opening his flood-gates or otherwise, his act is not wrongful, and it is the duty of the defendant to take such precautions on his part that he shall not, by keeping his dam closed, or by failure to make any other provisions, permit the sand and mud to accumulate in his pond, and so prevent the usual and ordinary flow of the stream by plaintiff's mill, and pond water back on plaintiff's wheel; and if plaintiff used the precautions I have described as necessary to be done by him, and if it was by the act or refusal to act of defendant that the water was ponded back, and if you find that it was ponded back on plaintiff's wheel, you will respond to the first issue, 'Yes.' If the plaintiff was in fault and caused the water, sand, mud, and trash to be forced upon the defendant's dam, or into his pond, or caused the sand to accumulate near his own mill, when by proper precaution he might have avoided this result, he cannot be said to have been injured by the defendant, and you should answer, 'No.' You have heard the testimony on both sides as to the manner in which the plaintiff's dam was opened, and it is for you to say whether he did use all necessary precaution to avoid injury to his neighbor below. If you say 'Yes' to the first issue, you will consider the next. What amount of annual damage is plaintiff entitled to recover thereby,—that is, under the statute? What are his annual damages? What is the average yearly damage? It would not be fair for you to measure his damage by the capacity of his machinery before and after the injury. But you must consider in general the loss of capacity; the amount of business generally done; the loss of business, if any, by the loss of the capacity to do business occasioned by the injury; and ascertain what would be a fair assessment of each year's damage from one year before the action up to the time of the trial, or an average yearly loss. The action was brought to spring term, 1885. So you can, if you find any damages, go back and consider what is the average damage for about three years, which will bring you up to the time of the trial. You are to give damages in gross for all the time, but the yearly damage. You may average it so much a year, or you may say, how much for 1885? how much for 1886? how much for 1887, up to this date? If however, you have responded 'No' to the first issue, you will respond to the second issue 'none,' and proceed to the third and last issue." The charge upon the third issue is omitted as unnecessary for the proper presentation of the case. Defendant excepted to the failure of the court to give the instructions asked by him, and to the instructions as given. The jury responded to the first issue, "Yes;" second issue, "$100;" third issue, "No."

The exceptions to rulings upon evidence are these: "The plaintiff, among other things, testifies that the value of his mill some eight years ago, before the action, and after he had put in a new 18-foot wheel, the same size of the old one, was $4,000 or $5,000, and it is not worth now more than half what it was at the start; it will not do more than half the grinding. Defendant objected to the testimony as to the value of the mill, and suggested that the question should be as to the capacity of the mill.

"*First Exception.* Objection overruled, and defendant excepted. Plaintiff, being asked as to the capacity of his mill before the ponding back, said it would then grind from 75 to 80 bushels of grain, and would gin 4 or 5 bales of cotton a day.

"*Second Exception.* Defendant objected; objection overruled; defendant excepted. Plaintiff further testified that he had ground about 12,000 bushels of grain and ginned on an average about 75 bales of cotton a year and that now he did not grind more than 6,000 bushels of grain a year, and about 40 bales of cotton, on account of the loss of power. Objected to by defendant; overruled and defendant excepted.

"*Third Exception.* Plaintiff further testified that he went to see defendant about the water, and told him that it was backing on his (plaintiff's) wheel, and injuring plaintiff, and he would like for defendant to draw his flood-gates, and let off his water, and let the mud and sawdust, etc., which had accumulated in

Digitized by Google

his pond, pass through; that that had been the rule heretofore with plaintiff and Whitesides, the former owner of defendant's mill, that the flood-gates were to be opened, and the water drawn off occasionally; that defendant said he could not do anything of that kind; that plaintiff told defendant that he had better cut a race, like plaintiff had done, and run his mill by the race instead of the pond. Defendant said it would cost him $300 or $400, and he could not afford it. Plaintiff told him that he (plaintiff) would cut it for $100, and guaranty that it would not stop his mill two hours, and that, unless something was done to relieve him, plaintiff would have to sue. Defendant said that if plaintiff wanted to put it in law to go ahead; he could stand it if plaintiff could. To all this conversation with defendant, defendant objected. Objection overruled. Defendant excepted.

"*Fourth Exception.* Plaintiff further testified that Whitesides, the former owner of the mill now owned by defendant, would raise the flood-gates occasionally to let the water and mud and sand out, and it would relieve plaintiff's wheel. Defendant objected to the testimony as to what Whitesides did. Objection overruled. Defendant excepted.

"*Fifth Exception.* Plaintiff further testified that the pond was filling up gradually all the time while Whitesides owned it, but not so rapidly as it had since defendant owned it, on account of the occasional opening of the gates by Whitesides. Defendant objected. Overruled. Defendant excepted.

"*Sixth Exception.* D. O. Hardin, a witness for plaintiff, testified that when plaintiff repaired the mill and put in the new 18-foot wheel, the capacity of the mill was about 76 bushels of grain per day. Objected to by defendant. Overruled. Defendant excepted.

"*Seventh Exception.* John Hardin testified that the capacity of plaintiff's mill before the ponding back upon the wheel was about 75 bushels of grain per day. Objected to by defendant. Overruled. Defendant excepted.

"*Eighth Exception.* David Houser testified for plaintiff that there was considerable difference in power with the 16-foot wheel instead of the 18-foot wheel. It would run two runners with the 18-foot wheel. Witness never saw the 16-foot wheel tried, but the change to the 16-foot wheel would injure the value of the mill.

"*Ninth Exception.* Defendant objected. Overruled. Defendant excepted."

The objection to the testimony embraced in the two first exceptions, if possessed of force, is obviated by the rule for assessing damages laid down by the court, and, as relating to the extent of the capacity of the mill and its operations in connection with their impairment for want of water-power, the testimony was pertinent and proper, and at least rendered so in the effect given to it by the judge in his charge to the jury.

Without specifying the other exceptions to the testimony admitted, a single general answer will dispose of them all. The testimony shows that Whitesides, a former proprietor, would, when owner, raise the flood-gates occasionally, and let the mud pass out of his pond with the water, and thus relieve the plaintiff's wheel, and this was communicated to defendant with a request that he should do the same; that the pond was now filling up faster than before because of the shutting down of the waste water-gates. The other evidence objected to was of the kind mentioned in the first two exceptions. In our opinion, the evidence all bore upon the subject-matter of controversy and was competent. We think the law was correctly laid down by the court in the charge to the jury, and fully meets all the just demands of appellant. The facts were few and simple. The plaintiff had an undoubted right to make the improvement by taking the water of the creek at a higher point, and in order thereto to take away his own dams. The damage from the descending mud and water arose from its stoppage by the defendant, and this could have been avoided by the opening of his flood-gates. His refusal to do this was the cause of the last flow, and he was consequently alone in fault. It was not a case of concurring negligence, but the negligence, if of any one, of the defendant alone. The principle underlying and regulating the relations of adjoining owners of water-power on the same stream is very concisely and truly set out in the directions given to the jury, and is embraced in the Latin sentence *sic utere tuo, ut alienum non lædas.* The defendant, if he could do so without self-injury, should not have needlessly obstructed the passing of the mud and sand that entered his own pond out of it into the current below. We see no error, and affirm the judgment.

We have noticed only the case made out by the judge, but we repeat the remark so often made, that no instruction terminating in telling the jury that plaintiff cannot recover is in form to meet the issues of fact, nor should be given. Judgment affirmed.

(103 N. C. 40)

BOONE *et al.* *v.* LEWIS.

(*Supreme Court of North Carolina.* May 14, 1889.)

WILLS—ATTESTATION BY DEVISEE.

Code N. C. §§. 2136, 2147, provide that all wills shall be subscribed by two witnesses at least, and that bequests to persons who attest the will shall be void, and such persons admitted as witnesses to prove the will. A devisee signed the will in the usual place for witnesses' signatures, under the names of two other witnesses, one of whom signed by mark, but, on probate of the will, devisee was not examined as a witness. *Held*, in an action by the testator's heirs against the devisee for the land, that evidence was admissible to show that the devisee was not requested and did not consent to sign the will as a witness, but simply signed it to attest the signature of that witness who signed by mark.

Appeal from superior court, Halifax county; MACRAE, Judge.

Action by J. J. Boone and others against J. B. Lewis, to recover possession of land.

The plaintiffs, other than J. J. Boone, are the heirs at law of Hardy Carlisle, who died

Digitized by Google

in 1871, leaving a last will and testament, which was duly proven, in and by which he devised to his wife, who survived him, the land in question for her life, remainder in fee to defendant. The life-tenant having died, defendant took and had possession of the land at and before the bringing of this action, and refused to give possession thereof to plaintiffs, upon their demand for the same. The following is a copy of so much of the will as it is necessary to set forth:

"Witness my hand and seal this 7th day of January, A. D. 1871.

his
"HARDY X CARLISLE.
mark

"Witness: W. H. JONES.

his
"DAVID X LEWIS.
mark

"JAMES B. LEWIS."

The plaintiffs allege that the defendant is the same James B. Lewis who purports to be one, and the third in order, of the subscribing witnesses to this will, and insists that, therefore, the devise to him is void, under Code N. C. § 2147. On the trial defendant offered to prove by one W. H. Jones, who testified that the will of Hardy Carlisle was written by him, that witness and David Lewis signed the will of Hardy Carlisle as witnesses in the presence of the testator; that the witness, seeing that David Lewis had signed by making his cross-mark, said it was necessary to have a witness to that cross-mark, and called upon the defendant to sign as a witness to David Lewis' cross-mark, and James B. Lewis, the defendant, signed the paper for that purpose only; that the testator did not request J. B. Lewis to witness his will, but did request W. H. Jones and David Lewis to do so; and that J. B. Lewis did not testify on the probate of said will. On plaintiffs' objection, this evidence was excluded, and defendant excepted. Judgment for plaintiffs, and defendant appeals.

R. O. Burton, Jr., and *David Bell*, for appellant. *Thos. N. Hill*, for respondents.

MERRIMON, J. The statute (Code, § 2147) provides that "if any person shall attest the execution of any will, to whom or to whose wife or husband any beneficial devise, estate, interest, legacy, or apportionment, of or affecting any real or personal estate, shall be thereby given or made, such devise, estate, interest, legacy, or apportionment shall, so far only as concerns such person attesting the execution of such will, or the wife or husband of such person, or any person claiming under such person, or wife, or husband, be void; and such person, so attesting, shall be admitted as a witness to prove the execution of such will, or the validity or invalidity thereof." The obvious purpose of this provision is to prevent incentive to perjury, and ineligibility and incompetency of witnesses of wills, by reason of interest, who consented and undertook to be such at the time the will was executed. Such a witness, in all respects eligible, assumes a serious duty and a legal relation to the will necessary to its validity, if there be but two witnesses to it, and an important one, however many there may be, that he cannot cast off and rid himself of for any cause, at his will and pleasure; certainly not, unless he shall do so with the consent of the maker of the will in his life-time. The statute (Code, § 2136) prescribes that all wills to be proved by attesting witnesses shall be "subscribed in his [the maker's] presence by two witnesses at least," etc. Thus it is made essential to have such witnesses. They consent to be and subscribe the will as such, in the presence of the maker, for all proper legal purposes in that connection. They thus become identified with the will, and the law justly holds them to such relation, and the legal consequences of it. Otherwise a witness might defeat it after he had consented to witness and had witnessed its execution. But such relation with the will must indeed exist. The witness must have consented to be and must have subscribed the will as a witness thereof, in the presence of the maker of it. Otherwise the subscriber is no such witness. It is not sufficient that the subscriber carelessly, or for some other purpose, wrote his name at or about the place where such witnesses usually subscribe their names, although, if he should do so, there might arise a presumption of fact, nothing to the contrary appearing, that he intended to become a witness. There is neither principal nor statutory provision that necessarily makes a person a witness to a will merely because he subscribed his name in the place where such witnesses usually subscribe their names; nor that prevents the person whose name is so subscribed, or any person interested, from explaining how and why the subscription came to be made, and that in fact the person so subscribing was not a witness, as he purported by the writing to be. The subscription, in such connection, would be evidence—strong evidence—that the person subscribing intended to be a witness, but the contrary might be shown. And so, also, where the subscriber, in such connection denied that he was such witness, it might be shown that he subscribed as such. And so, also, if the subscribing witnesses were dead, while the strong presumption would be that they were such, especially if there were a formal attestation clause, the contrary might be shown. Otherwise the grossest injustice might be done to parties claiming under or against the will, and also to persons purporting to be witnesses, but who really were not such, because of facts perfectly explicable. Theob. Wills, 30; In re Wilson, 1 Prob. & Div. 269; Griffiths v. Griffiths, 2 Prob. & Div. 300; In re Sharman, 1 Prob. & Div. 661, Goods of Murphy, 8 Ir. Eq. 300; Old v. Old, 4 Dev. 500; Crowell v. Kirk, 3 Dev. 355; Bell v. Clark, 9 Ired. 239; Hampton v. Hardin, 88 N. C. 592.

It may be that, if one purporting to be a

Digitized by Google

subscribing witness was examined in the course of the probate proceeding of the will, he could not afterwards be allowed to say that he was not such witness, upon the ground that it was settled and adjudged that he was. But certainly this cannot be so when the person purporting to be such witness was not examined, and not before the court, as a third witness to the will need not be, where it is proved in common form. We cannot conceive of an adequate reason why such a witness, not so before the probate court, shall be precluded after the will is proved, from proving before a court having jurisdiction, in a proper case, when it becomes material to do so, that he was not such witness. Not to allow him to do so might do do him grievous injustice. It is true such a witness might have a strong motive, in that the testator devised or bequeathed to him property of great value, to commit perjury or suborn witnesses, but this would weigh against him in addition to the presumption of fact that he subscribed as a witness. The burden of proof is on him, and the greater it will be, if there was a formal attestation clause to the will. Moreover, the motive to commit perjury, and prevent the cause of justice, is not greater in such case than in many others of equal importance. The statutory provision first above recited does not, nor does any other, in terms or by reasonable implication, prevent the person purporting to be a witness to a will from showing in any proper case that he is not such. We are therefore of opinion that the testimony offered by the appellant on the trial,—which was objected to and rejected by the court as incompetent, should have been received. If it had been received, it would have gone directly to prove that the appellant was not requested by the testator, nor did he consent to witness the will under which he claimed; that he simply witnessed the signature of a witness to the will, who identified himself and the signature as his by a cross-mark, supposing that such attestation itself required a witness. The appellant was not examined, when the will was proved, as a witness thereto, or at all. If the facts were as the evidence rejected tended to prove, he was not such witness, and, as we have seen, he had the right to prove that he was not. So far as appears, the evidence was competent, and should have been received.

The learned counsel of the appellees, in his elaborate and well-considered argument, cited and relied upon several English cases, but upon a careful examination of them we do not think they seriously contravene what we have said. The case most relied upon is that of Wigan v. Rowland, 11 Hare, 157, 45 Eng. Ch. 158. In that case there was a complete formal clause of attestation. The witness whose right was in question attested the signatures of two subscribing witnesses to the will, who each made his cross-mark, but he did not subscribe in terms as a witness for that purpose. The vice-chancellor held in an opinion of about half a dozen lines that, "upon the face of the document and of the attestation clause, the defendant Wigan must be held to be a witness to all that that clause contained." He gave no reason for or explanation of the grounds of his decision, nor did he cite any authorities. The case is not a satisfactory one, as it seems to us, and certainly does not harmonize with other English cases, some of which are cited, supra. He admits the case is a hard one, and said that, if the parol evidence was admissible, it would not be sufficient to countervail that which the written document afforded. It would seem that his decision could rest properly only on that ground. In Cozens v. Crout, 42 Law J. Ch. 840, the witness really subscribed his name as such to the will, and the master of the rolls held that, although the witness subscribed as a token of approval of the will, at the request of the testator, such attestation invalidated the bequest; the English statute being almost precisely like that of this state. In Taylor v. Mills, 1 Moody & R. 288, it was held by Lord DENMAN, C. J., that a devise to a subscribing witness to the will was void, although there were other witnesses sufficient in number to prove the will. He said to counsel: "You assume too much. The evidence of the devisee was not wanted on this particular occasion, but it might be wanted on other occasions. Supposing all the other subscribing witnesses should die, would not the evidence of this fourth interested witness then become necessary?" In Randfield v. Randfield, 32 Law J. Ch. 668, the witness really attested the will.

There is error. The appellant is entitled to a new trial, and we so adjudge. To that end let this opinion be certified to the superior court. It is so ordered.

(103 N. C. 285)

ASKEW *v.* ASKEW *et al.*

(*Supreme Court of North Carolina.* May 17, 1889.)

DOWER—ASSIGNMENT—MORTGAGES.

1. Code N. C. § 2103, providing that dower need not be assigned in each distinct tract of land of which a husband was seised, but that it may be allotted in one or more tracts, having due regard to the interests of the heirs as well as of the widow, does not authorize the assignment of one-third of all the lands in value, regardless of the fact that some of the tracts are incumbered by mortgages in which the wife joined. The assignment in such case should be of one-third of each separate tract, the widow's rights being protected by requiring the mortgagee, when he attempts to foreclose, to resort to the residue of the land and the reversionary interest in the part assigned to her before selling her interest in that tract.

2. It is also error, under such circumstances, to allow a life-use in a specific sum of money in lieu of dower in one of the mortgaged tracts not considered susceptible of partition, as until a sale is made the value of the use of one-third of the premises cannot be definitely known, and, if it could, her interest therein is fixed by law, and does not depend on estimates of value.

Appeal from superior court, Wake county: GRAVES, Judge.

Digitized by Google

William F. Askew, residing in Wake county, died in the month of November, 1887, leaving him surviving a widow, Harriet J. Askew, and numerous children, and seised and possessed of a large estate, real and personal, all of which in his will he devises and bequeaths to the said Harriet J. in absolute property. Upon the probate of the will, on the 4th day of January next after his death, she entered her dissent thereto, and thereupon filed her petition for an allotment of dower in the lands owned by the deceased testator, describing them, without mention of incumbrances thereon, against the children and the wives and husbands of such as were married; and such proceedings were had therein that her dower was duly assigned by commissioners, who, instead of separating the paper-mill land, gave to her a fractional interest in the money value thereof as an entirety. Certain creditors were thereupon allowed to intervene and contest the method pursued in making the assignment, and the facts alleged in their petition are agreed upon, and are, in substance, as follows:

(1) That at the February term, 1887, of the superior court of Wake county, to-wit, on the 10th day of March, 1887, in an action entitled the State of North Carolina, on the relation of Annie E. Carr, administratrix of Minnie Moore, deceased, and Albert G. Carr, against William F. Askew and others, the plaintiffs therein recovered judgment against the defendants therein (the defendant William F. Askew being principal and the other defendants being sureties) for the sum of $20,000, to be discharged upon the payment of $10,000, with interest thereon from the 8th day of March, 1887, until paid, at the rate of 8 per cent. per annum, and the costs, which said judgment was duly docketed in Wake county.

(2) That no part of said judgment has been paid, but the same now remains due and unpaid.

(3) That on the 11th day of November, 1887, the said William F. Askew died, leaving a last will by which he devised and bequeathed all his property, both real and personal, to his wife, Mrs. Harriet J. Askew, which said will was probated on the 4th day of January, 1888, and duly recorded; and on the said 4th day of January, 1888, the said Mrs. Harriet J. Askew dissented from the will.

(4) That W. A. Smith, one of the defendants in said above-mentioned judgment, died intestate, and one of these petitioners was duly appointed administrator of his estate, and qualified according to law.

(5) That on the ——— day of ———, 188–, David Lewis, one of the defendants in said above-mentioned judgment, died intestate, and W. C. Stronach and Thomas Johns, two of these petitioners, were duly appointed administrators of his estate, and qualified according to law.

(6) That on the 31st day of March, 1888, Mrs. Harriet J. Askew, widow of William F. Askew, deceased, having dissented from said will, instituted proceedings in the superior court of Wake county entitled as hereinbefore first above, asking that dower be allotted to her, by metes and bounds, in the lands of her husband, describing the same, as will more particularly appear upon reference to her petition filed.

(7) That in her petition for dower the said Mrs. Harriet J. Askew alleged that her said husband, W. F. Askew, at the time of his death, was seised and possessed in fee-simple of certain tracts of land, describing each, and embracing in such enumeration all of the lands of her husband, whether he held the legal estate therein, or only an equity of redemption.

(8) That said petition did not state nor did it appear anywhere in said proceedings that many of the said tracts of land had been conveyed by way of mortgage by W. F. Askew and Harriet J. Askew, his wife, (the latter being privily examined according to law,) in his life-time, to secure large sums of money, which were still due and owing at the time said petition was filed and dower assigned, as will hereinafter more particularly appear.

(9) That such proceedings were had from time to time on said petition for dower as resulted in having allotted to her, the said Harriet J. Askew, as her dower, one-third in value of the entire real estate of her husband; and in estimating such value no deduction was made for the amount of the mortgages then existing, but such value was ascertained as if all of said lands were entirely free from any and all incumbrances.

(10) That on the 1st day of May, A. D. 1882, the Neuse Manufacturing Company sold and conveyed to William F. Askew and his heirs certain lands and personal property, the said lands being as follows: One tract at the Great Falls of Neuse river, and on both sides thereof, and including the falls, containing 113 acres; one tract lying on the north side of Neuse river, containing about 37 acres, being the tract bought of Ellis Garrett by A. M. High, and by mesne conveyances to Neuse Manufacturing Company; one tract adjoining the aforesaid Falls tract, containing about 51 acres; one tract, of which Thomas Garrett died seised, lying on the north side of Neuse river, adjoining the aforesaid Falls tract, and containing 206 acres; one tract adjoining the lands of Nathan Bolton, R. L. Allen, and J M. Crewshaw, containing 50⅛ acres; one tract containing about 1½ acres, adjoining the lands of R. L. Allen, the Falls of Neuse Manufacturing Company, and D. D. Fort; one tract adjoining the lands of R. L. Allen, the Falls of Neuse Manufacturing Company, and D. D. Fort, known as the "Gin Lot,"—all of said lands being in Wake county. And the said W. F. Askew paid a part of the purchase money therefor, and on the said 1st day of May executed his notes for the balance of the purchase money, as follows: For the sum of $12,000, with interest at the rate of

Digitized by Google

8 per cent. per annum from the 1st day of July, 1882, payable semi-annually, evidenced by his 12 notes under seal, each for the sum of $1,000, payable 10 years after date; and to secure the payment of said purchase money notes he, the said William F. Askew and Harriet J. Askew, his wife, made out, executed, and delivered to the said the Falls of Neuse Manufacturing Company a deed of mortgage, contemporaneous with said deed of sale, conveying all of said lands which he, the said Askew, had purchased of the Falls of Neuse Manufacturing Company, which said deed of mortgage was duly acknowledged and recorded. That no part of said balance of purchase money has been paid, and the interest is now due thereon from the 1st day of July, 1887, and was so due and unpaid at the time said dower was allotted, as hereinbefore stated. That the notes for the purchase money as aforesaid were transferred and indorsed for value by the Falls of Neuse Manufacturing Company to Harriet J. Askew and her daughter, Maggie Moore Askew, and they are now their property, subject to a claim of the National Bank of Raleigh, N. C.

(11) That all of the lands mentioned in the preceding paragraph were embraced in the petition for dower, and in which the dower for the most part was allotted.

(12) That on the 6th day of November, 1879, William F. Askew, being indebted to Mildred Cameron in the sum of $4,000, evidenced by his bond payable on the 6th day of November, 1882, bearing interest from date at 8 per cent. per annum, payable semi-annually, evidenced by six coupon bonds to secure the payment of such indebtedness, he and his wife, Harriet J. Askew, conveyed by way of mortgage to John W. Graham, trustee, the lot of land mentioned and described in the petition for dower as lying in the city of Raleigh; being lot No. 36 and part of lot 20, as shown by Shaffer's map of said city. That said deed of mortgage was duly acknowledged by both W. F. Askew and Harriet J. Askew, his wife, and duly recorded in the register's office of Wake county. That no part of said indebtedness has been paid, and the interest is now due thereon from the 6th day of May, 1887, and was so due and unpaid at the time said dower was allotted, as hereinbefore stated. That the land mentioned in this paragraph was embraced in the petition for dower.

(13) That these petitioners had no notice of the proceedings to have dower assigned, and were not parties thereto.

(14) That they are informed by counsel learned in the law that the dower assigned to Harriet J. Askew, as hereinbefore mentioned, was allotted contrary to law, in that the commissioners should have, in estimating the value of the real estate upon which the mortgages above stated rested, deducted the amount thereof, and only given dower in its equity of redemption.

(15) That, by reason of the allotment of dower as aforesaid, these petitioners believe, and so aver, that the balance of the real estate of W. F Askew, not covered by the dower and the mortgages aforesaid, will prove insufficient to pay off and discharge the judgment particularly set forth in the first paragraph of this petition, and said balance will fall upon the estates represented by them.

(16) That Spier Whitaker, who is the administrator with the will annexed of William F. Askew, deceased, has filed a petition in the superior court of Wake county, asking for a sale of the real estate of his intestate with which to pay debts; and among other allegations contained in his petition is that the personal estate of the said William F. Askew, deceased, according to the best of his opinion and judgment, is worth about $500.

Whereupon these petitioners ask (1) that the judgment made on November 24, 1888, in the proceedings for dower, as in this cause entitled, confirming the report of the jury allotting dower to Harriet J. Askew, be set aside; (2) that these petitioners be allowed to come into said suit as parties defendant, file answers to said petition for dower, and except to the report of the jury as filed therein; (3) and for such other and further relief as the nature of the case and the cause of justice demands.

Judgment was rendered against the petitioners, and they appeal.

Geo. H. Snow and *A. W. Haywood*, for appellants. *J. N. Holding*, for appellee.

SMITH, C. J., (*after stating the facts as above.*) The complaint made by appellants to the manner in which dower is assigned, in respect to the lands under mortgage, lies in the fact that one-third of each as a whole, and as if free from any incumbering debt, was allowed, instead of one-third in value of the equity of redemption; that is, of the full estate reduced by the amount of the incumbrance. Upon the ground of this alleged error, and for its correction, redress is sought in the appeal to this court. The commissioners have placed a money estimate upon the several parcels of land left by the deceased, without distinguishing between such tracts as are and such tracts as are not charged in deeds of trust with the payment of debts, and have assigned to the widow the whole of the three-acre lot at Chapel Hill, estimated to be worth $2,500, for her life; have assigned to her no part of the lot in Raleigh, valued at $5,500, and subject to the incumbrance of a secured debt due to Mildred Cameron of $4,000, by note payable November 6, 1882, and bearing interest at the rate of 8 per cent. per annum,—how much remains still due being principal and interest from May, 1887. The remaining tracts, which are many in number, and are grouped together as a body, not admitting of separation into parts without impairment in value, are put at a valuation of $27,500, and, to assure

Digitized by Google

the remaining dower, an interest therein of $7,833.33 is assigned as a charge thereon. It thus appears that the aggregate value of the dower is made up of an estimate of the different tracts, as if all were free from incumbering liens, and apportioned in the manner stated. This seems to have been done under the statute which declares that the jury or commissioners "shall not be restricted to assign the same [dower] in every separate and distinct tract of land, but may allot her dower in one or more tracts, having a due regard to the interest of the heirs as well as to the right of the widow." Code, § 2103.

The rule is well settled in this state, whatever may be the decisions elsewhere, under our statute and the interpretation put upon it, that a widow is entitled to dower in lands held by her deceased husband under a bond for title, whether the purchase money has been paid or part of it remains due, and also in any equity of redemption in lands which have been conveyed to secure a debt or liability. The widow's right in such case, as against the heir or devisee, to have her dower assigned in the entire tract, and the remaining two-thirds, as well as the reversionary interest in the part covered by the dower, sold in exoneration, when the personal estate is not sufficient, and her dower only sold when needed, after these appropriations, to pay the secured debt or discharge the liability, is equally well settled. In Thompson v. Thompson, 1 Jones (N. C.) 430, it is decided that a right to dower existed in lands held under a contract to convey, when paid for, though part of the purchase money was due, but without regard to its diminished value in consequence thereof, and that the personal estate applicable to the debt must be employed in relieving the land of the burdening liability. In the opinion a doubt is expressed as to whether the residue of the estate in the land should, in case of failure of the personal property, be also thus applied in relief of the dower. The doubt was resolved in favor of the widow in Caroon v. Cooper, 63 N. C. 386, and the result is announced in these words: "Our conclusion is that the widow is entitled to have dower assigned out of the whole tract, and cannot be called upon until it is ascertained that the remaining two-thirds and the reversion in the one-third, covered by her dower, are insufficient to pay off the incumbrance of the purchase money." In Creecy v. Pearce, 69 N.C. 67, the doctrine is extended and made to embrace an equity of redemption in lands conveyed in trust, and, while the residue of the estate outside of the dower must be put in the forefront of liability in discharging the incumbrance, its full amount per equity has no priority over other debts of the same class, out of the personal assets. Its residue, after the reduction by the said funds, must share with other debts in the distribution of assets in the hands of the administrator. In like manner it is held that the bankrupt must take, when there are none but incumbered lands, his exempt real estate out of the lands estimated as if unincumbered. Burton v. Spiers, 87 N. C. 87. If necessary, however, to meet the debt or liability resting upon the land, the dower must also go, for it is allotted in subordination to the claim of the creditor to full satisfaction of his debt.

It is obvious that the doctrine prevails only in reference to a single tract of land, or several conveyed by the same deed, or included in the same contract, and determines the relations and rights of parties thereunder. The decisions proceed no further. In order to the enforcement of the widow's equity, the dower must first be laid off in the manner directed by law, and when the creditor seeks, by a specific performance, to subject the land to his debt, the equity of the widow springs up to have all outside of her dower estate in the premises sold, and the proceeds thereof first applied in discharge of the debt; so that, if found to be sufficient, she may have her dower exonerated or reduced to a sum she may be able to meet, and thus have full and absolute relief. It is plain that the value of the dower is the allotted part diminished by the sum necessary to be raised for its relief, after exhausting these resources first applicable, and this value would depend upon the further sum to be raised out of the dower land itself.

It would be manifestly unjust to take the full value of incumbered lands, as if they were free from incumbrance, and assess other lands held under a different title with the entire sum in awarding dower therein; nor do the adjudications referred to warrant any such course. It might be, as perhaps it was so considered by the commissioners, that the lots in Raleigh were burdened to their full value, and no practical benefit would be secured by assigning dower therein, and surely one-third of that portion of the testator's estate ought not to be allowed to swell the aggregate value of the dower, and be imposed on other lands. It is equally plain that the whole lot at Chapel Hill should not be assigned, in the absence of any evidence that her dower in all the lands would be of equal value with that lot. The statute which authorizes the assignment of the dower in part of the lands, instead of upon each separate tract, has reference to the rights and interests of others as well as that of the widow, and the exercise of the power must be in the sound discretion of the commissioners, and when no wrong is thereby done to others. But it cannot be exercised upon the basis of the rulings appropriate to lands held under one title, and subject to the same incumbrance. In the present case the application is a simple one, for the allotment of dower, and its purpose is attained by an assignment of dower in each separate parcel. It is impossible to tell the value of the dower in the incumbered estates, until there has been a sale of the outside parts and the reversion; nor is this possible before an assignment and

Digitized by Google

'ocation of the dower have been in fact made, and the price they will bring ascertained. If the whole tract were sold, as by consent it may be, the fund could be apportioned between the creditors and the widow; but this would not be an assignment of dower, or a specific appropriation of land as such, but a division of the money; and she not only does not assent to this, but demands to have her dower defined and set apart in all the lands. It is plain that the doctrine established in the adjudications, and which is limited to lands under one and the same trust, cannot, with any justice, be carried so far as to embrace lands under different trusts, and subject to liens of different proportionate sums, with the necessary uncertainty as to how far the dower in each may be exonerated by the application of the widow's equity in reference to each, separately considered. To secure the benefits of the principle, so far as the incumbered lands are involved, the widow must, as she has done here, ask an assignment of her dower in all the lands, and then she works out her relief by asserting her equity against the creditor when he seeks to specifically enforce his contract or foreclose by a sale.

We think there is error in the manner in which the commissioners dispose of the petitioner's claim upon the series of tracts which are consolidated and treated as one body. Besides, the rectification of the error in not allowing the petitioner an interest—that is, a life-use—in one third of the estimated value of the whole, but a smaller sum, if undivided and to be held in common, the allotment should have been of one-third of the premises in value, as the law awards, and not the use of any specific sum; for that sum may not be realized by the sale, and, whether more or less, her share therein is fixed by the law, and does not depend upon estimates then made. There would be no difficulty in putting the dower derived from several tracts upon one or more, when all are unincumbered; for this is both allowed by the statute, and is consistent with the rights of other interested parties. For the reasons stated, the judgment must be set aside as erroneous, and a new allotment of dower ordered to be made, to which end this will be certified to the court below.

(20 S. C. 539)

SOUTH CAROLINA STEAM-BOAT CO. *v.* SOUTH CAROLINA RY. CO.

(*Supreme Court of South Carolina.* April 6, 1889.)

NUISANCE—PLEADING.

A complaint alleged that plaintiff, a corporation, was a carrier of passengers on a certain navigable river; that defendant, a railway company, had erected a bridge over such river, obstructing its navigation, and on demand had refused to remove such obstruction, or to alter the bridge so as not to interfere with navigation; that by reason of said obstruction plaintiff had been prevented from freely navigating said stream in the ordinary course of business; that it had been compelled to remove a portion of one of its boats in order to pass such bridge, and rebuild it above, and had sustained loss in its business. *Held*, that such complaint did not allege such special injury to plaintiff, different from that to the public generally, as to constitute a cause of action.

Appeal from common pleas circuit court of Richland county; J. H. HUDSON, Judge.

Action by the South Carolina Steam-Boat Company against the South Carolina Railway Company. Complaint dismissed, and plaintiff appeals.

Smythe & Lee, for appellant. *Brawley & Bamwell* and *John C. Haskell*, for respondent.

MCIVER, J. This was an action to recover damages for the obstruction of a navigable stream, and, as the only question raised by the appeal is whether sufficient facts are stated in the complaint to constitute a cause of action, it will be necessary to make a condensed statement of the allegations found in the complaint. After stating the corporate character of both plaintiffs and defendants, the allegations are that the plaintiffs are engaged in the transportation of passengers and freight on the rivers and waters of this state by means of steam-boats, of which they own a large number; that the Congaree river is a navigable stream, and is now, and has been for some time past, actually navigated by steam-boats from a point near the city of Columbia to its junction with the Santee river; that the defendants are engaged in running a railroad, and in the prosecution of that enterprise have erected a bridge across the Congaree river, whereby the navigation of that stream is obstructed; that by reason of such obstruction the plaintiffs have been and are deprived of the free navigation of said stream; that upon demand the defendants have refused to remove said obstruction, or to so alter and arrange the bridge constituting such obstruction as to permit the free and unobstructed navigation of said stream; and in the eighth paragraph of the complaint the allegations are as follows: "That by reason of said wrongful and unlawful obstruction the plaintiffs have been prevented from freely navigating the said stream in the usual and ordinary course of their business; have been unable freely to transport freight and passengers on and along the same, as was their right; have been compelled to remove a portion of the upper works of one of their boats in order for it to pass under the said bridge, and then rebuild on the other side; have been forced to keep and maintain one of such boats permanently above the said bridge, and have sustained loss and other great injury in their business, to their damage ten thousand dollars." The circuit judge held that the facts stated in the complaint were not sufficient to constitute a cause of action, and upon that ground rendered judgment dismissing the complaint.

From this judgment the plaintiffs appeal upon the several grounds set out in the record, which need not be repeated here, for, as we shall see, there is really but a single

Digitized by Google

question raised by the appeal. There can be no doubt that the Congaree, being a navigable river, is a public highway, the obstruction of which constitutes a public nuisance, the remedy for which is by indictment, and that remedy, it seems, has already been applied in the case of this obstruction. State v. Railway Co., 28 S. C. 23, 4 S. E. Rep. 796. It is, however, true that an individual who has sustained any particular, special injury over and above that sustained by the public generally, as the direct result of such obstruction, may also sustain a civil action to recover damages for such injury. In this respect the plaintiffs, though a chartered corporation, stand upon precisely the same footing as any private individual. Their rights are no greater and no less than those of an individual, and are to be tested by the same principles. While it seems to be very generally, if not universally, conceded that in order to sustain such an action as this the plaintiff must allege and prove some special, particular, or peculiar injury beyond that sustained by the public generally, yet it is not to be denied that there is a considerable conflict in the authorities elsewhere as to what will constitute such special, particular, or peculiar injury. Without going here into any detailed examination of the cases in England and other states, many of which we have examined, it seems to us that the true rule to be deduced from them is that the injury must be particular,—as several of the cases express it, "special or peculiar,"—must result directly from the obstruction, and not as a secondary consequence thereof, and must differ in kind, and not merely in degree or extent, from that which the general public sustains. This rule is fully supported by what few authorities we have in this state upon the subject. The case of Carey v. Brooks, 1 Hill, (S. C.) 365, upon which the circuit judge rested his conclusion, seems to be the leading case in this state. There, as here, the action was brought by a private individual to recover damages for a public nuisance in obstructing the navigation of a navigable stream, under the allegation that the plaintiff had incurred expense in clearing out the channel of the stream, and had suffered loss in transporting his lumber to market, under a special contract to deliver it within a specified time. But the court, per HARPER, J., held that the action could not be sustained, because the damage complained of was not such as would justify such an action, quoting the rule as laid down in Bacon's Abridgment, that "a particular damage, to maintain this action, ought to be direct, and not consequential;" adding that "this seems to be the settled law founded on the inconvenience of allowing a separate action to every individual who suffers an inconvenience common to many." This case, so far from having been modified or shaken by any subsequent case, as contended by the distinguished counsel for appellants, has, we think, been expressly recognized, and must be regarded as furnishing the settled rule in this state.

The first case to which our attention has been called as modifying Carey v. Brooks, is McLauchlin v. Railroad Co., 5 Rich. Law, 583, but that case, so far from modifying, expressly recognizes and affirms it. WARDLAW, J., in delivering the opinion of the court, says, (italics being ours:) "His complaint is of an unauthorized obstruction of public streets, and *to sustain such a complaint a particular direct damage must be shown;*" citing, among other authorities, the case of Carey v. Brooks; and we are unable to find a single expression in McLauchlin's Case which shows the least dissatisfaction with the rule as laid down in Carey v. Brooks. It will be observed in McLauchlin's Case that he claimed that his property lying adjacent to the obstruction complained of had been injured thereby, and, if he had succeeded in showing this, he might possibly have recovered upon the ground that this was a special and peculiar damage to his adjacent property, differing in kind from that sustained by the general public, and resulting directly from the obstruction complained of, and not a secondary consequence thereof. It seems to us that Judge WARDLAW, in those portions of his opinion specially relied upon by counsel for appellants, was speaking of this aspect of the case, and the language used by him cannot be regarded as any modification whatever of the case of Carey v. Brooks, which he had just cited as laying down the rule upon which such an action as this rests.

The next case relied on by appellants is Windham v. Rhame, 11 Rich. Law, 283. In that case the only question before the court, and the only one considered, was whether vindictive damages could be recovered in an action on the case for special damages incurred by plaintiff by the obstruction of a public highway. Although the defendant did give notice that he would renew his motion for a nonsuit on the ground that the damage proved in the case was not such as would sustain a private action, yet he abandoned that motion in the court of appeals, and hence that court had no occasion to consider, and did not consider, the question, and, so far as we can discover, there is not a word in the opinion which indicates the slightest dissatisfaction with the rule as laid down in Carey v. Brooks.

The last case relied on is Crouch v. Railway Co., 21 S. C. 495, but that case is so wholly different from the present that it is difficult to understand how any analogy can be drawn between them. In that case the action was to recover damages for certain injuries sustained by the plaintiff's steamboat called the "Silver Star" in passing through the draw of a bridge erected by defendant across a navigable stream. No such question as is here presented either did or could have arisen in that case, for there the injury was the direct result of the obstruc

Digitized by Google

tion, the plaintiff's boat having struck against the bridge in passing through the draw, which was alleged to be insufficient. That case, therefore, fell clearly within the rule. The injury complained of was special and peculiar to the plaintiff, different in kind from that sustained by the public generally, and was the direct result of the obstruction, and not a mere secondary consequence thereof. Indeed, the only controversy really made in that case was whether the owner and officers of the Silver Star had been guilty of contributory negligence in attempting to pass through the draw of the bridge. That case was like the case of a traveler who, in attempting to pass an obstruction in a public highway, is thrown from his horse, or has his vehicle upset and broken, or his horses injured, in which case a private action may unquestionably be maintained to recover damages for such injuries, for they are different in kind from those suffered by the general public, and are the direct result of the obstruction.

It is clear, therefore, that the only question in this case is whether the complaint contains any allegation of such special or particular injury to the plaintiffs, resulting directly from the obstruction of the Congaree river, as, under the rule we have stated, is necessary to enable the plaintiffs to maintain such an action as this is. We agree with the circuit judge that there is no such allegation to be found in the complaint. The wrong of which it complains is a wrong done to the public generally in stopping the navigation of the river, and the plaintiffs have no more right to demand redress for that wrong than any other individual. They do not allege that any particular injury has been done to them by the defendants, different in kind from that done to the public generally. The utmost that can be said is that they allege, in the eighth paragraph of their complaint, that with a view to obviate the injury which they, in common with the public, suffer from this public wrong of the defendants, they have voluntarily incurred certain expenses, and for this they claim damages from the defendants. But this is not the direct result of the obstruction, and at most is only a secondary consequence thereof, and cannot therefore be regarded as a sufficient basis for this action. If the fact that Carey had incurred expense in attempting to remove the obstructions caused by the act of Brooks, was held insufficient to enable him to maintain his action, we do not see how the fact that plaintiffs have incurred expense in refitting their boats can entitle them to recover in this action.

The point raised in the argument as to the effect of the act of 1852 is not properly before us, as no such point was presented to or considered by the circuit judge. The only question which he was called upon to decide was whether the facts stated in the complaint were sufficient to constitute a cause of action, and his judgment upon that question is all that we are entitled to review. We may add, however, that, even were the point properly before us, we do not think it would avail the plaintiffs. The case as made by the complaint is not such a case as would entitle the plaintiffs to the special remedy provided by the act; and certainly there is nothing in the act which would give these plaintiffs any rights superior to those of any private individual in bringing such an action as that now under consideration. The judgment of this court is that the judgment of the circuit court be affirmed.

SIMPSON, C. J., and MCGOWAN, J., concur.

(30 S. C. 505)

BETSILL v. BETSILL *et al.*

(*Supreme Court of South Carolina.* March 30, 1889.)

DESCENT AND DISTRIBUTION — ARBITRATION AND AWARD — SETTING ASIDE.

1. The widow, heirs, and distributees of an intestate agreed in writing to submit the division of the estate to three named arbitrators, who should make an inventory and appraisement of the estate, take into account all advancements, and divide and allot an equitable proportion to each. They were to settle all questions arising among the parties, and a forfeit of $500 was to be paid by any one refusing to abide by their decision. An award was made, which one of the heirs brought an action to set aside, alleging that the arbitrators had previously made an award which was unsatisfactory to him, for the reason that the intentions of intestate were not carried out; whereupon they afterwards, by agreement of all parties, made a second award,—the one sought to be annulled. He alleged that the latter award was void, for the reason that the authority of the arbitrators ceased when the first was made. *Held* that, as the agreement provided for a written award, and the complaint did not allege the first to be in writing, only one award was shown.

2. The review of the first decision being by consent, the plaintiff cannot allege the want of authority of the arbitrators to make the final award.

3. A demurrer to the complaint would not admit the truth of allegations as to the verbally expressed wishes of intestate as to the disposition he desired to be made of his estate, because the measure of the arbitrators' power to act would be the submission, and for the further reason that such verbal wishes could not be respected in the distribution, which would be controlled by the intestate laws.

4. The facts that one of the arbitrators never was aware that their duties extended to the assignment of the lands to the heirs, but supposed they were only authorized to appraise them, and that another never knew that the intestate intended certain lands to be assigned to plaintiff at a valuation excluding from the estimate the buildings thereon, are insufficient to set aside the award, though plaintiff knew nothing of the alleged mistakes under which the arbitrators acted until he had accepted the award.

Appeal from common pleas circuit court of Union county; J. B. KERSHAW, Judge.

Action by William T. Betsill against Robert J. Betsill and others, to set aside an award and for other relief. The complaint is as follows: "The complaint of the above-named plaintiff respectfully shows to this court: (1) That his father, Joel Betsill, late of Union county, died intestate on the 22d day of June, 1881, seised and possessed of considerable real and personal estate, and left as his sole heirs at law and distributees

Digitized by Google

his children, the plaintiff herein, Wm. T. Betsill, and the defendants herein, Robert J. Betsill, J. Fincher Betsill, Joseph A Betsill, James L. Betsill, Anna M. Gore, Eugenia Davis, and Pauline Moore. (2) That frequently in his life-time, and especially just before his death, the said Joel Betsill gave full and explicit directions as to the manner in which he wished his estate divided among his children aforesaid, and directed, especially, that the land on which the plaintiff herein, Wm. T. Betsill, lived, be assigned to him at a valuation made without the buildings, for the reason that said Wm. T. Betsill had erected said buildings at his own expense. (3) That in pursuance of said request and direction on the part of the said Joel Betsill, and in order to carry out his wishes and intention, his children, after his death, all being of age, entered into a written agreement, dated 12th November, 1881, by which they chose W. S. Gregory, G. S. Gregory, and R. F. Ray as arbitrators to divide said estate among them, the said children, a copy of which is hereto annexed as a part of this complaint, and marked 'Exhibit A.' (4) That subsequently the said arbitrators entered upon discharge of their duties, but before doing so were fully informed, as was then supposed, as to the intention, wishes, and directions of the said Joel Betsill in regard to the division of said estate. (5) That thereafter, to-wit, on the 15th December, 1881, the said arbitrators made an award, against which the plaintiff protested, on the ground that said arbitrators had not carried out the intentions of his deceased father in regard to the land awarded to him. (6) That thereafter, to-wit, on the 7th day of February, 1882, the said arbitrators made and published their second decision or award, a copy of which is hereto annexed as a part of this complaint, marked 'Exhibit B,' by which they assigned to the said Wm. T. Betsill the plantation intended for him by the said Joel Betsill at a valuation of 6¼ dollars per acre, and in accordance with and in furtherance of their said award the said arbitrators did, on the 12th June, 1882, make their final award, that the said Wm. T. Betsill pay to R. J. Betsill $750.25, the excess of the valuation placed on the said tract of land, and made the said sum a first lien on said land, a copy of which is hereto annexed, as 'Exhibit C.' (7) That said valuation was too high, and otherwise erroneous, in this: that it did not express the joint or several opinion of the three arbitrators, inasmuch as G. S. Gregory never at any time knew that it was the intention of the said Joel Betsill that said land should be valued and assigned to Wm. T. Betsill without the buildings, and when he gave his consent to the said valuation of 6¼ dollars per acre he consented to such valuation, and the award of seven hundred and fifty and 25-100 dollars to R. J. Betsill, as including the buildings on said land; otherwise he would not have consented to the said valuation and award. That, furthermore, the said Robert F. Ray never at any time was aware that it was the duty of the said arbitrators, in the premises, to assign lands to the individual heirs at law of the said Joel Betsill, but supposed that their duty and labor ended when the valuation thereof had been made, and that in any act done by him beyond said valuation he acted under a misconception of his duties in the premises. (8) That the said Wm. T. Betsill, the plaintiff herein, was not aware of this misunderstanding on the part of the said Robert F. Ray and the said G. Sandford Gregory as to the duties as arbitrators as aforesaid until long afterwards, to-wit, on sales-day in December, 1884. (9) That by the said unreasonable and erroneous valuation and assessment of said land, and the consequent award of the said sum of $750.25, against the said Wm. T. Betsill, great injury was done to him, and an unfair division of said estate was made. (10) That the said Wm. T. Betsill protested against said valuation and assignment to him of said land at said valuation, and at the said award of $750.25, and refused to accept it, or abide by it, and proposed to pay the forfeit fixed and set forth in 'Exhibit A' of this complaint, though he was not aware at that time of the misapprehension under which the arbitrators labored. (11) That said land is and was at the time of said valuation and assessment and assignment not worth more than $1,200, with buildings. (12) That on the ——— day of September, 1884, Robert J. Betsill instituted an action in the court of common pleas for Union county, aforesaid, against the plaintiff herein, for the said sum of $750.25, awarded as set forth in the sixth paragraph of this complaint, with interest; that the plaintiff herein, unaware of the misapprehension under which the said arbitrators, G. Sandford Gregory and Robert F. Ray, had labored, as aforesaid, and being unable to obtain that information except by accident, and therefore ignorant of the defense which he might and would otherwise have interposed to said action on that ground, and relying on the belief that the said arbitrators had acted throughout with a full and proper understanding of their duties in the premises, did not defend said action, but, on the contrary, allowed the same to go by default, and judgment for eight hundred and ninety-six 32-100 dollars, and costs, was obtained in said action, and duly entered up against the plaintiff herein in said court on ——— day of October, 1884, and is No. 6,072 on the judgment roll of said court; and that on sales-day in December, 1884, the land assigned to plaintiff by said arbitrators was sold under said judgment, and purchased by the said R. J. Betsill for $800, who received a deed thereto from the sheriff of said county, and still owns the same. (13) The plaintiff alleges, further, that, being unaware of the said misapprehension of the said arbitrators, and of his rights in the premises, and of his liability to lose his rights thereby, and being

Digitized by Google

without counsel, and relying on the belief that the arbitrators had acted throughout with a full and proper understanding of their duties in the premises, he signed his name to some, if not all, of the deeds, which the said heirs at law of the said Joel Betsill interchanged among themselves, but alleges that he would not have done so had he known of the mistake under which the said arbitrators were laboring at the time as to their duties respecting said valuation, assessment, assignment, and award; that is, the misapprehension of the said arbitrators, as already set forth. (14) That on account of the misunderstanding under which the said two arbitrators labored, and the mistake made by them in consequence thereof, the said arbitration was without foundation, and was null and void, and, if not set aside, will entail great loss and injury and injustice on the plaintiff, and the defendants refuse to modify the same. Wherefore the plaintiff demands judgment (1) that the said arbitration, and all the proceedings had by said arbitrators, be adjudged null and void, and that the same be set aside and vacated; (2) that said judgment and the said sale be set aside and vacated, and the said deed be canceled; (3) that the said real and personal estate be partitioned, according to law and the practice in this court, among the parties who are entitled thereto; (4) for such other and further relief as may be just; (5) for costs." A demurrer to the complaint being sustained, plaintiff appeals.

D. A. Townsend, *C. H. Peake*, and *Mr. McKissick*, for appellant. *Munro & Munro*, for respondents.

McGOWAN, J. In June, 1881, Joel O. Betsill departed this life intestate, and in November thereafter his children, the plaintiff and defendants, being his distributees and all of full age, entered into a written agreement, whereby they appointed three arbitrators or distributors to make distribution of the estate among said distributees, as follows: "Whereas, we are all of lawful age, and capable of looking to our own interest, and are desirous (as far as practicable) of carrying out the often expressed desire of our said parent with regard to dividing his estate without recourse to law: now, therefore, be it known that we, the children, sons and daughters of said deceased, do hereby agree that W Simpson Gregory, Robert F. Ray, and G. Sandford Gregory, all disinterested neighbors, shall have full power and authority to make an inventory and appraisement of the whole estate, to take into account the portion each one has already had, and to divide and allot to each one such portions of the real estate, etc., and by all means at their command, to make an equitable and fair distribution of the estate, so that all the distributees shall have equal and equitable shares," etc. The arbitrators were to decide and settle all questions arising among the parties, and the agreement provided a forfeit of $500, to be paid by any party failing to abide the decision and written award of the arbitrators.

The arbitrators named undertook the duties assigned them, and on December 15, 1881, announced their decision to the distributees. Upon the announcement the plaintiff was dissatisfied, and gave notice that he would pay the forfeit rather than take the land "allotted" to him at the price placed upon it. The defendants were unwilling to exact the forfeiture, and it was agreed that the arbitrators should again carefully examine and appraise the same. They did so, and on February 2, 1882, made their award in writing, which is also in the brief. Upon the final award being made, (June, 1882,) the distributees interchanged deeds among themselves, and the plaintiff signed "some, if not all, of the deeds." In assessing the amounts to be paid for equality, the arbitrators assigned to the defendant Robert J. Betsill (who received no land) the amount due by the plaintiff, viz., $750.78. The plaintiff neglected to pay the same and in September, 1884, Robert brought suit, upon the submission and award, and at October term, 1884, obtained a judgment by default against the plaintiff thereon for $896.32 and costs, and on sales-day in December, 1884, the tract assigned to the plaintiff was sold under said judgment, and purchased by the said Robert, who received sheriff's titles therefor. This action was brought by William T. Betsill against the other distributees on April 27, 1888. Among other things, the complaint (seventh paragraph) alleges "that the said valuation [of the tract assigned to the plaintiff] was too high, and otherwise erroneous, in this: that it did not express the joint or several opinion of the three arbitrators, inasmuch as G. S. Gregory never at any time knew that it was the intention of the said Joel Betsill (the intestate) that said land should be valued and assigned to William T. Betsill without the buildings, and, when he gave his consent to the said valuation of 6½ dollars per acre, he consented to such valuation and the award of $750.25 to R. J Betsill, as including the buildings on said land; otherwise he would not have consented to the said valuation and award. That, furthermore, the said Robert F Ray [another arbitrator] never at any time was aware that it was the duty of the said arbitrators in the premises to assign lands to the individual heirs at law of the said Joel Betsill, but supposed that their duty and labors ended when the valuation thereof had been made, and that in any act done by him beyond said valuation, he acted under a misconception of his duties in the premises," etc.; and upon these allegations chiefly prayed the court "to set aside the said arbitration, and all the proceedings had by said arbitrators be adjudged null and void; and that the judgment against himself be set aside, and the sale of the land under it declared null," etc. The defendants answered, and at the trial interposed an

Digitized by Google

oral demurrer, that the complaint did not state facts sufficient to constitute a cause of action, and the demurrer was sustained.

From the order dismissing the complaint the plaintiff appeals, upon the following grounds: "(1) For that his honor erred in deciding that Exhibit A of the complaint (the agreement of submission) embraced all the matter that could be submitted to the arbitrators for their consideration, and that the verbal instructions of Joel Betsill alleged in the complaint in relation to the division of his estate, and especially to the valuation of the place where his son William [rented] without the buildings, and its assignment to him, were badly pleaded," etc. "(2) For that his honor erred in deciding that the verbal instructions of Joel Betsill, in regard to the valuation of the place where his son William resided, were badly pleaded, and could not have been proved, inasmuch as they varied from Exhibit A of the complaint. (3) For that his honor erred in not deciding that when the arbitrators amended their first award some time prior to February, 1882, (and referred to in the award of February, 1882,) their power was exhausted, and they had no right to make another, or to do anything else in regard to the matter. (4) For that his honor erred in not deciding that, in afterwards making the second award, they did not act under the compact embraced in Exhibit A of the complaint, but upon a verbal agreement of only a part of the heirs, and that the verbal instructions of Joel Betsill, in regard to the valuation of the place where his son William resided, and its assignment to him, could have been introduced in evidence. (5) For that his honor erred in deciding that all the heirs agreed that the arbitrators make a second award. (6) For that his honor erred in deciding that there was an arbitration, when there was no matter in dispute. (7) For that his honor erred in deciding that William T. Betsill ratified the action of the arbitrators, after the first award, by 'signing some, if not all, the deeds,' which were interchanged among the heirs of Joel Betsill. (8) For that his honor erred in sustaining the oral demurrer interposed by the defendants. (9) For that his honor erred in deciding that allegations in regard to the newly-discovered evidence, relating to the judgment by default, were not properly made, and did not allege enough," etc.

We think there was only one award. The agreement required that each and all of the "parties should stand to abide by and carry out the decision and written award of the said arbitrators or distributors." There is no allegation that the tentative conclusion announced December 15, 1881, was in writing. Indeed, the award was not perfected and finally signed and sealed by the arbitrators until June 15, 1882. Besides, the arbitrators or referees consented to review their conclusion as to the value of the land,—to "carefully examine and appraise" the tract allotted to the plaintiff,—and it does not lie in his mouth to claim that there were two awards.

The demurrer did not have the effect of admitting as true the allegations of the complaint as to the alleged wishes of the intestate, expressed verbally in his life-time, for several reasons: *First*, the agreement of submission necessarily contained all the matters referred, and beyond that neither the plaintiff nor the referees had any authority to go,—it was their commission; and, *second*, from the character of the verbal declarations of the intestate, they were not well pleaded. Every man has the right to make a will, which may express what he desires done with his property after his death, provided he conforms to the formalities required by law; that is to say, such wishes must be expressed in writing, and signed by the testator himself, in the presence of three witnesses. If, however, he does not desire to make a will, but prefers to die intestate, he cannot control, as to the valuation or distribution of his property, by merely verbal declarations in his life-time of his wishes upon the subject. He has the right to die testate or intestate, but, if the latter, the law directs as to the valuation and distribution of his property, without regard to any wishes of the intestate not put in the form of a will. As Chancellor JOHNSTON in Youngblood v. Norton, 1 Strob. Eq. 128, said: "Any act by which a decedent exercises a control in the disposition or distribution of property belonging to him at his death is essentially a testamentary act, and requires the formalities of a will. In the absence of a testamentary disposition, the statute controls the distribution of the property as intestate property; and it is not competent for a party to give any other direction than the statute gives, unless, by a will, he deprives the property itself of the character of intestacy, in virtue of which the statute assumes the disposal of it," etc.

But if the verbal statement of the wishes of the intestate were admissible to control the valuation of the tract assigned to the plaintiff, still we do not think that the allegations of the complaint as to subsequently discovered testimony were sufficient to set aside the award and the judgment by default rendered upon it. The complaint states that the plaintiff did consent to the valuation of the land assigned to him, and acquiesced in the same, until subsequently he discovered two facts, neither of which, nor both together, as we think were sufficient to open the award, and set aside the judgment and sale of the land based upon it. First, it is stated that plaintiff subsequently discovered that one of the arbitrators, Robert F. Ray, "never was aware that it was the duty of the arbitrators to assign lands to the heirs, but he supposed that their duty and labors ended when the valuation thereof had been made." The agreement of submission itself declared that the "shares were to be allotted by the arbitrators, or a majority of them." But, suppose the arbitrators did not understand

Digitized by Google

"allot" to mean the same thing as "assign," the plaintiff never complained of the allotment of the tract of land, but only as to the valuation placed on it. The second fact claimed to have been subsequently discovered was that another arbitrator, G. S. Gregory, "never at any time knew it was the intention of Joel Betsill (the intestate) that said land should be valued and assigned to William T. Betsill, without the buildings, and when he gave his consent to the said valuation of $6.25 per acre he consented to said valuation as including the buildings," etc. Suppose this to be so, there is no allegation of the same kind as to the other two arbitrators; and, as we have seen, the allotment could be made by the arbitrators, "or a majority of them." It seems to us that it would require much stronger allegations and proof than this case affords to set aside an award or distribution, and a judgment based upon it, after it had been accepted and acquiesced in for six years. The judgment of this court is that the judgment of the circuit court be affirmed.

SIMPSON, C. J., and MCIVER, J. concur.

(30 S. C. 594)

RYNERSON *v.* ALLISON *et al.*

(*Supreme Court of South Carolina.* April 4, 1889.)

APPEAL—REVERSAL—NEW TRIAL—FINDINGS.

1. A judgment of the supreme court reversing a decree in a chancery proceeding, and remanding the case, is equivalent to an order for a new trial.
2. Findings made upon issues ordered before the first trial, may be used upon the new trial, where the decree is not reversed for error in the trial of the issues themselves.
3. But such findings cannot be used on the new trial, on the certificate of the stenographer merely, without the sanction and signature of the judge who presided at the trial of the issues.

Appeal from common pleas circuit court of Laurens county; KERSHAW, Judge.

W. H. Martin, (*Ball & Watts*, of counsel,) for appellants. *Cunningham & Harris*, for respondent.

MCGOWAN, J. This case has been in this court once before. See 28 S. C. 83, 5 S. E. Rep. 218, where the nature of the case is fully stated. It seems that it was an action to foreclose a mortgage against Calvin Allison, given to secure a note for $150, to which the other defendants were sureties. The note was given for a horse, which was alleged to have been unsound at the time of the sale. The case originally came on for trial at the June term (1886) before Judge HUDSON, who ordered certain issues to be submitted to a jury, and continued the case. At the next term of the court there was a mistrial upon the "issues." At the next term of the court the issues submitted were tried on calendar No. 1, before Judge ALDRICH and a jury. The "issues" were found generally for the plaintiff, and the judge ordered a foreclosure of the mortgage bond upon the verdict on the issues. Upon appeal to this court, it was held that, the circuit judge having based a decree of foreclosure wholly upon the verdict of the jury on certain issues in chancery submitted to them, without rendering his independent judgment upon the facts so found, the decree was reversed, and the case "remanded." Accordingly it went back, and upon the call of the "issue" on docket No. 1, in which a verdict had been rendered before the appeal, the defendants' attorney insisted that the reversal of the judgment set aside also the verdict on the issues, and that they should be tried *de novo*. But Judge KERSHAW, on hearing the opinion of the supreme court, "ordered the stenographer to prepare and file with the record in the case all the testimony taken on the trial of the issues of fact, and all questions that were raised on the trial of said issues, together with the rulings of Judge ALDRICH thereon, and his charge to the jury on the trial of said issues, to be certified by him officially, and filed with the clerk, and the expenses thereof be allowed as disbursements of the plaintiff," etc. This order is made on the grounds that the findings of the jury on the issues submitted stand as facts found by them, subject to be reviewed by the court on the hearing of the cause on the equity side of the court, etc. When the case was reached on calendar No. 2, the judge proceeded, as he states, "to hear the case upon the findings of the jury, the testimony taken on the trial of said issue, and such other testimony as the parties desired to offer, and, after argument of counsel and due consideration thereof, the same conclusions were reached as previously arrived at by the jury. The verdict is in accordance with the preponderance of the evidence. There was therefore no unsoundness of the animal for which the note was given," etc.; and he decreed foreclosure.

The defendant appeals upon the following grounds: "(1) His honor erred in refusing to allow a trial *de novo* before a jury on calendar No. 1. (2) He erred in granting the order of September 20, 1888, requiring the stenographer to prepare and file with the clerk the testimony and proceedings of a former trial, and that the costs be allowed as disbursements, and that the findings of the jury on the issues submitted stand as facts found by them. (3) He erred in holding that this case is to be heard on the stenographer's report. (4) He erred in holding that no additional testimony was admissible, except *ex gratia*. (5) He erred in admitting in evidence the stenographer's notes of testimony taken on a former trial. (6) He erred in not allowing a trial *de novo* before the court on calendar No. 2."

Is this an action at law or in chancery? So far as the sureties are concerned, it would seem to have been a simple action at law upon a note; but as the principal obligor, Calvin Allison, had executed a mortgage of land to secure the note, and the main object of the proceeding was to foreclose the mortgage, it seems to have been regarded and

Digitized by Google

treated by the parties themselves as a case in chancery. See the opinion in the former appeal. Thus considered, what was the effect of the reversal of the first decree and "remanding" the case. New trials in equity proceedings are not very common. As the whole judgment is in writing, and the precise ground of error is disclosed, the usual practice, we think, is to modify, by correcting the error, and allowing what is not erroneous to stand. The judgment of the supreme court in this case did not in express terms order a new trial, but it reversed the decree, and "remanded the case," and we will consider that as equivalent to such an order.

Then, what was the effect of that as to "findings" made upon issues ordered before the first trial? The plaintiff insists that, as the decree was not reversed upon errors touching those "findings," which were really nothing more than evidence of a particular character,—not controlling, but to be considered along with the other evidence,—they were not necessarily set aside by the reversal of the decree, but remained for use upon the second trial, like evidence taken in writing by commission before the first trial. Pulaski v. Ward, 2 Rich. Law, 119. Such would seem to have been the course pursued in Gadsden v. Whaley, a case in chancery. There had been a former trial of the case, in which Judge REED ordered an issue, and erroneously based his decree on the verdict; for which error (as here) the decree was set aside, and "the case remanded for further proceedings." See 9 S. C. 147. Upon the second trial the "findings" on the issues ordered by Judge REED were not reopened and retried, but "Judge HUDSON, upon the evidence taken at the first trial, decreed for the plaintiff the identical sum which had been found by the jury," and the decree was affirmed. Gadsden v. Whaley, 14 S. C. 214. As the "findings" on issues from chancery are not treated as conclusive of the matters submitted, but are really nothing more than evidence of a particular character in writing, I incline to think that, when once made in a case, they should stand, unless the decree is reversed for error in the trial of the issues themselves. "New trials on issues out of chancery are granted by the court directing the issue." Thomasson v. Kennedy, 3 Rich. Eq. 448; Woolfolk v. Manufacturing Co., 22 S. C. 336. As was said by Chancellor WARDLAW in the case first above cited. "Issues to the court of law are directed for the purpose of informing the conscience of the chancellors; and, if this purpose be a channel, we do not examine the process very narrowly."

But the defendant insists that, upon another ground, it was error to refuse a trial *de novo*, viz.: that the proceedings, evidence, and "findings" upon the issues were not properly before the circuit judge acting as chancellor, for the reason that the stenographer had not the authority to "certify" such proceedings to the equity side of the court. The judge, who, as chancellor, heard the new trial, was not the judge before whom the issues had been tried, and of course could not consider the "findings" until they were properly before him. We know of no express law upon the subject, but we think the old practice in such cases was, as indicated in the case of Taylor v. Mayrant, 4 Desaus. Eq. 514, that "the court of common pleas [we suppose the judge] should certify the verdict," etc. Peake v. Peake, 17 S. C. 422. It does not appear that the judge before whom the issues were tried made any such "certificate," but the trial judge directed the stenographer to make it. If he could not legally do so, then there was no alternative but to try the case *de novo*, with or without issues, as the judge might determine. The stenographer is a new officer, unknown until lately in our judicial history. It is true that he is a sworn officer of the court, whose duty it is "to take full stenographic notes of all pleadings, including the testimony, rulings, and charge of the court, and every trial had thereat," but it will be observed that this must be done "under the directions of the presiding judge of the court;" and in a matter of so much importance we cannot, in commencing a new practice, venture to hold that the mere statement of the stenographer, without the sanction and signature of the judge who presided at the trial of the issues, was a formal and proper "certificate" of the proceedings and findings had upon the trial of the issues. The judgment of this court is that the judgment of the circuit court be reversed, and the cause remanded for a new trial.

SIMPSON, C. J., and MCIVER, J., concur.

(30 S. C. 609)

SWEYGERT *et al.* v. SWEYGERT *et al.*

(*Supreme Court of South Carolina.* Jan. 4, 1889.)

APPEAL—PRACTICE.

Rule 1, supreme court S. C., requires the return on appeal to be filed within 40 days after the completion of the record constituting it. The parties agreed on a case, and that it should be filed by a day named, but appellant, finding that he could not do this, asked for further time, which respondent refused. *Held*, that the appellant should then have filed the return as required by rule 1, he having had power to do so, and, not having filed it, the appeal was properly dismissed.

Appeal from common pleas circuit court of Richland county.

Action by G. A. Sweygert and others against J S. Sweygert and others. Plaintiffs' appeal was dismissed by the clerk, under rule 1 of the supreme court, and they move to restore it to the docket on the grounds of surprise, mistake, inadvertence, and excusable neglect.

W. S. Monteith, for appellants. *Mr. Douglass*, for respondents.

PER CURIAM. The clerk dismissed the appeal in this case under rule 1, for failure on the part of appellants to file the return,

Digitized by Google

as required by said rule. Rule 2 prescribes what shall constitute the return, and rule 1 requires that the same shall be filed in 40 days after the completion of the record constituting the same. The parties may waive these rules, and agree on a case. Such was done in this case, with an agreement that this case should be filed in the office of the clerk of the supreme court by the 15th November. The appellants, finding that they could not do this, asked for further time, which, however, the respondents refused to grant. The appellants should have then filed the return, as required by rule 1, which they could have done. This they failed to do. The agreement was no longer binding, and the respondents were entitled to have the appeal dismissed under rule 1. The clerk was not in error in dismissing the appeal. Motion refused.

(30 S. C. 609)

TALBOTT *et al.* *v.* GLADNEY *et al.*

(*Supreme Court of South Carolina.* Jan. 11, 1889.)

APPEAL—PRACTICE.

Though respondent, by retaining the case on appeal in his possession, waived the time of filing, still, where appellant could have filed the case at a following term, but did not do so, and neglected to file it until the time required by rule of court expired, and the appeal was dismissed, he was not entitled to a reinstatement.

Appeal from common pleas circuit court of Fairfield county. Motion to reinstate appeal dismissed, under rule 1.

W. S. Monteith, for appellant. *McDonald & Douglass*, for respondents.

PER CURIAM. Certain rules have been prescribed by the court for taking an appeal, step by step, which, if followed, will remove all difficulty in the matter of appeals, but, if not observed, subject the appellant to liability to have his appeal dismissed for want of prosecution. In cases of mistake or inadvertence, the court may relieve the appellant, and restore the appeal. Parties can dispense with these rules, and agree to a case to constitute the return. In such cases the question is as to the agreement. In this case there was an agreement to make up a case, which, as the return, was to be filed in the supreme court on or before the 1st day of September. On failure to do so, the appeal was to be regarded as abandoned. The return was not filed in the supreme court by September 1st, and hence the agreement was not complied with. The appellant contends that the respondents kept the "case" for some time, and thereby waived the time. Assuming that there was thereby a waiver on the part of the respondents, still there was noncompliance on the part of the appellant. The case could have been filed by the November term, so that the case could have been docketed and heard during the present term; but the appellant did not file the return until December 8th, after the time required by rule of court. Under the circumstances, the appellant has no right to claim a reinstatement of the appeal. He is in the hands of the respondents. If the papers are printed and ready, so that the case can be heard at this term, perhaps the respondents should consent to its being reinstated on the docket for that purpose; but, if not, there is no reason why the appeal should be restored.

(30 S. C. 611)

CUMMINGS *v.* WINGO *et al.*

(*Supreme Court of South Carolina.* Jan. 19, 1889.)

APPEAL—PRACTICE.

Act S. C. Dec. 24, 1880, § 2, provides that when any party shall omit, through mistake or inadvertence, to do any act necessary to perfect an appeal, the supreme court may, in its discretion, permit such act to be done on such terms as may be just, if satisfied that the appeal is *bona fide*, and if notice of appeal has been given as required. *Held* that, where the return was not filed within the required time, because appellant's attorney supposed that the "case" was part of the judgment roll, the mistake was excusable, and, the appeal having been dismissed, appellant's motion for leave to perfect the appeal should be granted. Following Tribble v. Poore, 6 S. E. Rep. 577.

Appeal from common pleas circuit court of Spartanburg county.

Action by Anson W. Cummings against William J. Wingo and others. Plaintiff moves for leave to perfect his appeal.

Bomar & Simpson, for appellant. *Duncan & Sanders*, for respondents.

PER CURIAM. This is a motion on the part of the appellant, on affidavit and the case, for an order allowing appellant to perfect his appeal, by having the return previously filed in the clerk's office, which appeal had been dismissed by the clerk under rule 1, for want of prosecution, marked filed as a proper return, or allowing him to file such other or additional return as may be necessary, and allowing him further time to have said cause placed upon the docket of the supreme court for hearing at the present (November) term, and to do such other acts as may be necessary to perfect or reinstate his appeal, and to get the same heard by the supreme court. The motion is made under and in accordance with the provisions of an act entitled "An act to facilitate appeals from the circuit courts to the supreme court," approved December 24, 1880, the second section of which is as follows: "That when any party shall omit, through mistake or inadvertence, to do any act or acts necessary to perfect an appeal or to stay proceedings, the supreme court may, in their discretion, permit such act or acts to be done at any time to perfect the appeal on such terms as may be just; provided, that the court shall be satisfied that the appeal was taken *bona fide*, and provided that notice of the same was given as now required by law." The supreme court, upon examination, decides that the return in this case was not filed within the time required on account of an excusable mistake on the part of appellant's attorneys in supposing that the case constitutes a part of the judgment roll. The motion falls under

Digitized by Google

the principle announced in the case of Tribble v. Poore, 6 S. E. Rep. 577, (May 14, 1888.) Motion granted.

(30 S. C. 611)

HARLE v. MORGAN *et al.*

(*Supreme Court of South Carolina.* Jan. 19, 1889.)

APPEAL—PRACTICE.

Where appellant fails to serve his exceptions within the 10 days from the rising of the trial court, as required, but seeks to excuse the default, a motion to dismiss the appeal will be granted, but without prejudice to his right to move for leave to perfect his appeal on the ground of excusable neglect, provided the motion be in time to have the case ready for hearing at the next term; and enforcement of the judgment will be stayed until the next term under Code Proc. S. C. § 846.

Appeal from common pleas circuit court of Spartanburg county.

Action by James W. Harle against A. J. Morgan & Co. Plaintiff moves to dismiss defendants' appeal. Code Civil Proc. S. C. § 846, provides that notice of appeal from a money judgment "shall not stay the execution of the judgment unless the presiding judge before whom the judgment was obtained shall grant a stay of execution, but" plaintiff shall not enforce a sale of property without giving security; nor if defendant gives an undertaking as therein prescribed.

Calvert, Hydrick & Wilson, for appellants. *Thomson, Nicholls & Moore*, for respondent.

PER CURIAM. The motion to dismiss this appeal is based upon the ground that the appellants failed to serve their exceptions within the time prescribed by law, to-wit, 10 days after the rising of the court at which the case was tried. The fact of this default is conceded in the affidavits submitted at the hearing of this motion, but appellants seek to excuse such default by the circumstances stated in such affidavits which need not be specified here. It seems to us, therefore, that the motion must be granted, but without prejudice to the right of appellants to move for leave to perfect their appeal upon the ground of excusable neglect in failing to serve their exceptions within due time, provided such motion be made in time, if successful, to have the case ready for hearing at the next term of this court; and for this purpose leave is hereby granted to submit such motion, after due notice thereof, on the first day of the next term of this court, instead of the first day assigned for the call of the docket of the Seventh circuit. It is further ordered that the enforcement of the judgment sought to be appealed from may be stayed until the next term of this court, under the provisions of section 846 of the Code of Procedure.

(30 S. C. 610)

WALLACE v. CARTER.

(*Supreme Court of South Carolina.* Jan. 17, 1889.)

APPEAL—REQUISITES—NOTICE OF APPEAL.

Failure to serve notice of appeal within the time required by law cannot be corrected by the supreme court.

Appeal from common pleas circuit court of Union county.

Action by Edwin R. Wallace, administrator *c. t. a.* of Mary A. Wallace, deceased, against M. Sophia Carter. Judgment for plaintiff, defendant appealed, and plaintiff moves to dismiss the appeal.

Munro & Munro and *J. C. Wallace*, for the motion. *Thompson & McKissick, contra.*

PER CURIAM. The plaintiff, respondent, moved before the supreme court for an order dismissing the appeal herein, on the ground that the notice of appeal was not given or served within the time limited by law, and the supreme court has no jurisdiction. This motion was made upon the record in the case, including the summons and complaint, the answer, the decree, and the acceptance of notice of filing indorsed thereon, the original notice of appeal, and the sheriff's indorsements thereon, notice of the return of the notice of appeal, and affidavits. The supreme court rules that the failure to serve notice of appeal within the time required by law is one of those matters which cannot be corrected by the supreme court. The act requires notice of appeal to be given within a certain time, and the supreme court has no discretion in the premises. The agreement between appellant's attorney and the clerk to serve a copy of the decree on the next day on appellant's attorney is not binding on the respondent. Motion granted.

(30 S. C. 526)

MILLER v. GEORGE.

(*Supreme Court of South Carolina.* April 2, 1889.)

ABATEMENT—DEPOSITIONS—JURISDICTION.

1. Where misnomer is pleaded in abatement by defendant, the service of summons will not be set aside on motion, on the pleadings, but the issue is one of fact, to be sustained by evidence.

2. Under Gen. St. S. C. § 725, providing that a commission to take testimony may be issued and tested by a deputy-clerk, one signed, "F. M. TRIMMIER, Clk., by T. R. TRIMMIER, D. C.," is properly tested.

3. Where a commission is issued to three commissioners, two of them may legally execute it, and defendant cannot object that the commissioner named by plaintiff was not notified of his appointment, nor of the time and place of taking the testimony.

4. An objection to the question when "defendant became indebted to you," as asking for a conclusion of law, is not well taken.

5. Where defendant, sued by the name of "Jane," pleads in abatement that her name is "Jennie Augusta," proof that she is known in the community where she lives as "Jane" will sustain plaintiff's complaint.

6. By act S. C. 1886, (19 St. 654,) the court of common pleas for Spartanburg county was required to be held March 21, 1888, but, the business of the court of general sessions not having been finished by that day, the court of common pleas, as appears by its journal, was not opened, unless by operation of law, until March 23d, when this cause was heard. *Held*, that an objection to the court's jurisdiction could not be sustained. It appearing that the judge, attended by the court officers, was at the appointed place at the appointed time, it would be assumed that the court was prop-

Digitized by Google

erly opened; and the failure of the records to so show does not negative the fact, as there is no statute requiring an entry to be made, and the failure of the clerk to make the entry would not oust the court of jurisdiction. Following Hardin v. Trimmier, ante, 342.

Appeal from common pleas circuit court of Spartanburg county; WALLACE, Judge.

D. E. Hydrick, for appellant. *S. Wilson*, for respondent.

MCGOWAN, J The plaintiff sued the defendant on a small account of $18, for board, fuel, etc. She was sued as Jane George, and she pleaded a misnomer; her real name, as she alleged, being Jennie Augusta George. On the call of the case for trial, the defendant's attorney moved to dismiss the complaint, on the ground of the alleged misnomer. The motion was refused. The plaintiff offered in evidence to prove her case testimony taken by commission. The defendant objected to its admission, on the grounds that the commission was tested and signed, "F. M. TRIMMIER, Clerk, by T. R. TRIMMIER, D. C." At the time F. M. Trimmier was clerk and T. R. Trimmier, deputy clerk. And also on the ground that the commission was executed by only two commissioners, and it did not appear that the third commissioner had been notified of his appointment, or of the time and place of taking the testimony. It appeared that the commissioner who did not act was not the commissioner of the defendant, and the judge allowed the testimony to be read in evidence. The second interrogatory was: "State whether, at any time during the month, the defendant became indebted to you; and, if so, what amount." The defendant objected to reading the answer to this question, on the ground that "indebtedness" is a "legal conclusion," and not a fact. The objection was overruled, his honor saying: "Oh, no; that is too hard to discriminate. That is a fact. If one man owes another, it is a fact, and no doubt about that." The fifth interrogatory was: "By what name did the defendant pass,—was generally known by, and called herself?" Defendant objected to this question, and to the answer, on the ground that the issue was as to the true name of the defendant, and that proof of the name by which she passed or was commonly known was "irrelevant." Objection overruled. The Wednesday following the third Monday in March in 1888 was March 21st, but, the business of the court of general sessions not having been finished by that day, the court of common pleas, as appears by the journal, was not opened, unless by operation of law, until March 23d. His honor, the judge, charged that "a name is a word to designate a person or thing. That word by which a person is commonly designated in the community in which he lives is, for all practical purposes, his name. He can be indicted by it, and he can be sued by it, and bound by the judgment. Now, the defense to the action here is that the defendant is not named 'Jane,' but 'Jennie A.' If you are satisfied, by the preponderance of the evidence, that she was known in the community in which she lived as 'Jane,' why, then, the plaintiff's case is made out. If you are not so satisfied, it is not made out," etc. The jury found in favor of the plaintiff a verdict for the whole amount of the account, and the defendant appeals upon the following grounds of alleged error: "(1) In refusing motion to set aside the service and dismiss the complaint; (2) in holding that the commission was properly signed and issued; (3) in holding that it was not necessary that all the commissioners should be notified of their appointment, and of the time and place of taking the testimony, and that only the commissioner of the other side must be so notified; (4) in admitting the answer to the second interrogatory of the plaintiff; (5) in admitting the answer to the fifth interrogatory of the plaintiff; (6) in charging the jury: 'That word by which a person is commonly designated in the community in which he lives is, for all practical purposes, his name. They can be indicted by it, and they can be sued by it, and bound by the judgment.' (7) In charging the jury: 'If you are satisfied, by the preponderance of the evidence, that the defendant was known in the community in which she lived as "Jane," why, then, the plaintiff's case is made out.' (8) Because said judgment is void, in that the court was not convened at the time appointed by law, and had no jurisdiction to try the action. (9) Because the complaint does not state facts sufficient to constitute a cause of action."

The matter of the last exception was not presented to the judge below, and therefore cannot be considered here.

1. The plea in abatement, though presented in the answer, makes an issue of fact, which must be sustained by evidence. It is not a case for setting aside the service on motion, upon the unsupported pleadings.

2. A commission to take testimony may be issued and tested by the deputy-clerk. See section 725, Gen. St. No law prescribes the manner in which he should sign, and we see no just objection to the manner adopted here, "F M. TRIMMIER, Clk., by T. R. TRIMMIER, D. C."

3. Two commissioners may legally execute a commission to take testimony. The third commissioner was appointed at the instance of the plaintiff, and it does not appear that he was notified either of his appointment, or of the time and place of taking the testimony.

4. In the question to the witness, the meaning of the word "indebted" could not possibly be misunderstood. In ordinary use, the word indicates a fact; a disagreeable fact; something more than simply a "conclusion of law." As Dr. Worcester defines it, "being in debt;" "having incurred a debt;" "owing; with 'to' before the person to whom the debt is due."

5, 6, and 7 make the point that it was error to hold and to charge the jury that, "if you

Digitized by Google

are satisfied, by the preponderance of the evidence, that the defendant was known in the community in which she lives as 'Jane,' why, then, the plaintiff's case is made out." It seems that there was no evidence at all that the defendant's name was "Jennie Augusta." It seems that the rule is very much more exacting as to a misnomer of the plaintiff than of the defendant; for, as Judge WARDLAW said on the circuit, and Judge O'NEALL said upon appeal to the old "appeal court," in the case of Norris v. Graves, 4 Strob. 32: "The plaintiff is legally presumed to know at least his own name, and hence he must state it. A defendant sued by a name, and pleading in abatement that it is not his true name, may very well be answered in the plaintiff's replication that he is known by the name sued as well as the other. For, in such a case, the plaintiff is not presumed to know what is the real name. See Bull v. Franklin, 2 Speer, 46; Woodberry v. Dye, 10 Rich. Law, 34.

8 alleges that the judgment is void, for the reason that, the day fixed by law for the opening of the court of common pleas for Spartanburg county having been allowed to pass, the judge had no power to do so afterwards. This court has very recently had occasion to consider and decide this identical point in the case of Hardin v. Trimmier, ante, 342, (filed 19th March, 1889,) to which reference is made for the grounds upon which the court held that the judgments rendered at the March term of the court (1888) for Spartanburg county are not void for the alleged want of the regular opening of the court of common pleas on the day appointed by law for that purpose. The judgment of this court is that the judgment of the circuit court be affirmed.

SIMPSON, C. J., and MCIVER, J., concur.

(30 S. C. 579)

STATE *ex rel.* CHARLESTON, C. & C. R. Co. *et al. v.* WHITESIDES, Chairman, *et al.*

(*Supreme Court of South Carolina.* April 15, 1889.)

CONSTITUTIONAL LAW—AID TO RAILROADS—TAXATION—MANDAMUS.

1. Act S. C. Dec. 1888, entitled "An act to provide for the payment of township bonds issued in aid of railroads in this state," the object of which is to aid in the construction of certain railroads which certain townships had, without authority of law, contracted to aid, is constitutional, as the legislature had a right to assume, from the fact that the townships had voted aid to the railroads, that a public purpose existed, warranting the exercise of the taxing power.

2. Such act is for a public purpose, though the aid given by it is confined to certain townships.

3. *Mandamus* will not lie to compel the chairman and clerk of the board of county commissioners to sign and attest a certificate of the completion of a railroad for a certain distance, to aid in the construction of which a township in the county had voted a subscription for the payment of which subscription the county commissioners had issued bonds and agreed to deliver them to the relator on such a certificate, where it appears that the township had no power to vote the subscription, and that the commissioners had no authority to issue the bonds, or make officially the contract relied on.

4. The act of December, 1888, does not validate such bonds and legalize the proceedings under which they were executed, and thus warrant the *mandamus*, though it takes the amount proposed to be subscribed by the township, and represented by the bonds, as a basis of the aid to be given, and declares it a debt on the township.

5. The constitutionality of the act cannot be sustained on the ground that it is a validating statute.

Petition for *mandamus* by the state of South Carolina *ex relatione* the Charleston, Cincinnati & Chicago Railroad Company, the Massachusetts & Southern Construction Company, and the Boston Safe-Deposit & Trust Company, against Robert W. Whitesides, chairman of the board of county commissioners of York county, and James B. Allison, clerk of said board.

Jas. F. Hart, Robert W. Shand, and *Sheppard Bros.,* for relators. *C. E. Spencer, Wm. B. McCaw, Wilson, Wilson & McDow, N. W. Hardin,* and *D. E. Finley,* for respondents.

SIMPSON, C. J. The inhabitants of Broad River township, in York county, under the provisions of the amended charter of the Georgetown & North Carolina Narrow-Gauge Railroad Company,—1883,—which company afterwards became the Charleston, Cincinnati & Chicago Railroad Company, voted a subscription of $24,000 to said road, payable in 7 per cent. coupon bonds, upon the authority of which the county commissioners of said county executed the necessary bonds for the payment of said subscription. These bonds, by an arrangement between the parties, were placed in the possession of the relator the Boston Safe-Deposit & Trust Company, to be held until the road was completed, as follows, to-wit, five miles from the township line between Cherokee and Broad River; when, upon a certificate of that fact by the engineer of the Massachusetts & Southern Construction Company, indorsed by the chairman of the county commissioners,—his signature, attested by the clerk of the board,—being presented to said trust company, $12,000 of said bonds were to be delivered to the Massachusetts & Southern Construction Company, and, upon a similar certificate that the road had been completed through said township, the remaining $12,000 were to be delivered to said construction company. This arrangement was reduced to writing and signed by a majority of the county commissioners; and, in accordance therewith, the $24,000 of bonds were placed in the hands of the trust company. Upon the completion of the road through the township the engineer executed the required certificate, as above, but the respondent Whitesides, county chairman aforesaid, declined to indorse it,—for other reasons, however, than that said road had not been completed,—and the clerk of the board also declared that he would not, in any event, attest the signature of the chairman. Under these circumstances the relators commenced the proceeding now before us in the original jurisdiction of this court, praying that a *mandamus* do issue, commanding said chairman to indorse the cer-

Digitized by Google

tificate of the engineer, and said clerk to attest his signature to said indorsement, as stipulated, so that the said trust company might be authorized to deliver the bonds mentioned to the said construction company.

There is no serious dispute as to the main facts of the case, and these are sufficiently stated above. The difficulty, however, grows out of the legal questions raised, and these involve, *primarily*, a discussion of the law of *mandamus*, and its application to these conceded facts; and, *secondly*, the constitutionality of the recent act of the legislature, known as "An act to provide for the payment of township bonds issued in aid of railroads in this state. Approved December, 1888." These questions will be considered in their order.

The principles which govern in *mandamus* cases, especially where the proceeding is against a public officer, are very plain and simple, and are within a very narrow compass; so much so as to need no elaboration here, nor the citation of authorities. They may be briefly stated thus: Where a party has a legal right to the enjoyment of which the discharge of a ministerial duty on the part of a public officer is necessary, and he has no other adequate remedy, in case the officer refuses to discharge this duty, *mandamus* is the proper proceeding. High, Extr. Rem. § 34 et seq. This writ was once a prerogative writ, and in England was supposed to issue at the instance of the crown, to meet and remedy otherwise remediless cases, at his discretion. But in this country it has lost its prerogative character, and, though issued in the name of the state, yet it belongs to the courts, and has become a form of action, governed by established rules, and applied for and issued under established forms. Upon an application for this writ against a public officer, the questions to be considered are, (High, Extr. Rem. § 10:) *First*. Is the duty claimed a ministerial duty? *Second*. Has the petitioner a legal right, for the enjoyment, protection, or redress of which the discharge of said duty is necessary? *Third*. Has he no other adequate and sufficient remedy? And these are the questions before us. The petitioners ask that the chairman of the county commissioners of York county shall be required to indorse the certificate of the engineer, supra, and that the clerk of the board shall attest his signature. Can the performance of these acts be ordered as ministerial duties? What is a ministerial duty on the part of a public officer? We think it may be defined briefly, yet fully, to be some duty imposed expressly by law, not by contract, (Id. § 25,) or arising necessarily, as an incident to the office, involving no discretion in its exercise, but mandatory and imperative, (Id. § 42.) Now, is the duty claimed here by the petitioners at the hands of the respondents a duty of that character? There is, certainly, no act or law of force, expressly imposing this duty upon them. Nor is it a duty necessarily arising as an incident to the offices which they hold. Nor was it contracted in furtherance of any legal duty attempted by them, and which cannot be now compelled without the performance of this. Possibly it might be, if the act of assembly under which Broad River township subscribed to the railroad had been constitutional and valid. In such case, the county commissioners having been declared the corporate agents of the township, charged with the duty of issuing the subscription bonds, and of otherwise seeing to the proper protection of said township, the delivery of the kind mentioned above, to be performed upon the completion of the road, could be urged as a ministerial duty. But such is not the state of facts in the case. On the contrary, under the recent case of Floyd v. Perrin, 8 S. E. Rep. 14, Broad River township had no power to vote the subscription in question. Nor had the county commissioners any power to to issue the bonds mentioned, nor to make officially the contract relied upon. The whole transaction, from beginning to end, was *ultra vires*,—a nullity,—because not in pursuance of any duty imposed by law upon said commissioners. If there be any duty at all, it is one arising out of individual contract. This being so, we do not see how any ministerial duty, in the sense as defined above, could attach.

It is said, however, that the recent act, supra, has validated these bonds, and has legalized all the proceedings under which they were executed, and the conditions upon which they were to be delivered to the railroad, including the contract to have the certificate of the engineer indorsed by the chairman and attested by the clerk. We think this is a mistake. We do not understand that the act of 1888, supra, has had that effect, nor was such its intention, in so far as the proceedings of the different townships were concerned. That act, as we suppose, was intended to authorize the levying of a tax in aid of certain railroads which certain townships in the state, by the action of their inhabitants, had substantially expressed a desire should be aided, and it was enacted, not to validate previous illegal legislation and acts done under such legislation, but as an independent act, for a public purpose, and within, as was supposed, the unquestioned power of the general assembly, to-wit, to authorize taxation for a public purpose; and the amount proposed to be subscribed by the townships in furtherance of this purpose, represented by the bonds issued, was taken as a basis of the aid to be given, and was declared as a debt upon said townships, as indicative of the source from which the tax was to come, affording the aid granted.

It is urged, however, that this act is unconstitutional; and the argument on both sides has been mainly addressed to this question. In fact, it is obvious that the principal object of this proceeding is to obtain a deliverance from this court upon that precise question. From our view of the pur-

Digitized by Google

pose of the act, as stated above, we do not think that this question, whether decided the one way or the other, would determine the issue whether or not the writ prayed for should be granted; and therefore we do not regard the adjudication of this question as absolutely essential to the surface object of this proceeding. It is, however, raised in the case, and, under the constitution, it is, perhaps, our duty to adjudicate it; and especially we have so felt in consideration of its importance to our people and of the large interests involved. We have, therefore, declined to pass it by, and have carefully considered it, reaching the conclusion that it is constitutional and valid. Not, however, on the ground urged and contested so elaborately and ably by counsel, to-wit, that it was a validating act, but upon another ground, which we will now state. We think that there can be no doubt that the general assembly has the power to authorize taxation for any public purpose. In fact, that, in the absence of a constitutional inhibition, this power is inherent and unlimited, with no check except the intelligence of the representative, and the ballot-box of the elector. Cooley, Const. Lim. (5th Ed.) 603, 604, and the cases there cited; Feldman v. City Council, 23 S. C. 57. Now, was the act in question passed to promote a public purpose, and within the domain of legislative action? Was this the object the tax authorized? The object of the tax was to aid the building of certain railroads in the state, which certain townships had, without authority of law, contracted to aid. Now, railroads have been declared by the courts in most of the states, our own included, and by the supreme court of the United States, as improved highways, and therefore as much entitled to be aided by the taxing power as ordinary highways. 1 Dill. Mun. Corp. (3d Ed.) § 158; Cooley, Const. Lim. (2d Ed.) c. 4. This may have been doubted once, and, if it was an open question, might still be doubted, but the decisions in that direction have been so numerous and so uniform that, to use the language of Judge Dillon, "if they have not terminated doubt, they have at least ended judicial discussion." The subject-matter, then, of this act was within the range of a public purpose, and so far legitimate; but it may be urged that the purpose here, being confined to mere townships, limited localities, and not extending to the public at large, could not fall within the doctrine above. What is the meaning of the term "public?" This term is opposed to the term private, and, according to the best lexicographers, means "pertaining to, or belonging to, the people; relating to a nation, state, or community." But to make a matter a public matter it need not pertain to the whole nation or state. It is sufficient if it pertains to any separate or distinct portion thereof, or community. For instance, the state is divided into counties, and there may be matters affecting one county and not others, as the building of a jail, a court-house, and such other matters; yet it could not be said that for this reason they were not public matters. So, the counties have been divided into townships, which at one time, for a short period, were municipal corporations for certain purposes. These corporations, it is true, have been vacated, but the territorial divisions, with names and defined boundaries, have been retained, thus separating the counties into distinct communities, which have been frequently recognized as such in legislative enactments. Now, the inhabitants of many of these townships having voted, as distinct communities, subscriptions to railroads proposed to be constructed through or near them, not for the private interests of particular individuals, but for the general good, we think the general assembly was warranted in assuming that here was a public purpose, which, in accordance with the expressed wish of these communities, could be sustained by its taxing power. And, even without this expressed desire, there is high authority for saying that such legislation would be valid with or without the consent of the people, the only check to an unwise exercise thereof, as we have said above, being, not the courts, but the intelligence of the general assembly and the ballot-box. But here the people of the townships had given their consent, and had declared by their votes that a public purpose was present that deserved support. This, it seems to us, was a sufficient foundation for the passage of the act. For these reasons, we think the act in question is constitutional and valid. But, conceding this, we do not see how it warrants the *mandamus* prayed for. There is, certainly, nothing in this act expressly commanding the respondents to perform the stipulations of the contract upon which this proceeding is based, nor is there any duty imposed thereby upon the respondents, to which the suggested acts are necessary incidents; and, therefore, there is no ministerial duty in this regard attaching to them, to be enforced by the writ prayed for.

We have not found it necessary to discuss fully the question whether the recent act could be sustained as a validating act, as contended by the petitioners, but we have considered it under the light of the argument and the numerous cases cited: and we think the position is untenable. The pivotal point in a healing or validating statute is that it must be confined to acts which the legislature could previously have authorized. This is wanting here. The legislature can under no circumstances authorize the violation of the constitution or validate an unconstitutional act. Duke v. Williamsburg Co., 21 S. C. 419; Cooley, Const. Lim. 382.

The petition must, therefore, be dismissed, and it is so adjudged and decreed.

McIver, J., concurs.

McGowan, J. I concur; the meaning of the opinion of the court being that there

Digitized by Google

is no necessity for the issue of any new bonds, but "the debt" fixed upon the several townships by the act of 1888 shall be represented by the bonds heretofore issued, to be paid according to the provisions of the act; and I am authorized to say that such is the view of the other members of the court.

(30 S. C. 586)

STATE *ex rel.* CHARLESTON, C. & C. R. Co. *et al.* *v.* HARPER *et al.*, Commissioners.

(*Supreme Court of South Carolina.* April 16, 1889.)

Petition for *mandamus* by the state of South Carolina, *ex relatione* the Charleston, Cincinnati & Chicago Railroad Company, the Massachusetts & Southern Construction Company, and the Boston Safe-Deposit & Trust Company, against James H. Harper, Henry Clyburn, and Minor C. Gardner, board of county commissioners for Lancaster county, and Ira B. Jones, clerk of said board. *James F. Hart, R. E. Allison, Robert W. Shand,* and *Sheppard Bros.*, for relators. *Jones & Williams*, for respondents.

SIMPSON, C. J. The application for a *mandamus* in this case was based upon facts substantially the same as those of the recent case of State v. Whitesides, ante, 661, and the questions of law involved are the same. Upon the authority of that case, therefore, the petition herein is dismissed,—upon other grounds, however, than the alleged unconstitutionality of the act of 1888, entitled "An act to provide for the payment of township bonds issued in aid of railroads in this state," which we hold constitutional. See Id. Also, State v. Neely, infra.

(30 S. C. 587)

STATE *ex rel.* DICKINSON *v.* NEELY, County Treasurer, *et al.*

(*Supreme Court of South Carolina.* April 15, 1889.)

CONSTITUTIONAL LAW—RAILROAD AID—TAXATION—MANDAMUS.

1. Act S. C. Dec. 1888, entitled "An act to provide for the payment of township bonds issued in aid of railroads in this state," is constitutional. Following State v. Whitesides, ante, 661.

2. Section 2 of the act provides "that no tax shall be levied under the provisions of this act to pay the interest on any township bonds until the railroad in aid of which they were subscribed shall be completed through such township, and accepted by the railroad commissioners," and that any taxes collected before that time shall be refunded to the tax-payers. The return to a petition for *mandamus* to compel the payment by the county treasurer of a coupon on a bond issued by a certain township under the act showed, without contradiction, that the road was not completed through the township, and accepted by the railroad commissioners, until a certain date, and it did not appear that any tax had been levied or collected since that date. *Held*, that it appeared that the county treasurer had no funds in his hands applicable to payment of the coupon, and *mandamus* would be refused.

Petition for *mandamus* by the state of South Carolina, *ex relatione* P P Dickinson, against H. A. D. Neely, county treasurer of York county, and Robert W. Whitesides, James B. Allison, and E. R. Mills, county commissioners of York county.

James F Hart, Sheppard Bros., and *Robt. W. Shand*, for relators. *C. E. Spencer, Wilson & Wilson & McDow, W B. McCaw, N. W. Hardin*, and *D. E. Finley*, for respondents.

MCIVER, J. This is an application, addressed to this court in its original jurisdiction, for a writ of *mandamus* to compel the respondents to apply funds alleged to be in the hands of the respondent Neely, as county treasurer, to the payment of a coupon which matured on 1st of January, 1889, on a bond held by the relator, purporting to have been issued by the county commissioners of York county, as the corporate agents of Cherokee township, under the provisions of an act of the general assembly of this state, approved 21st December, 1883, as well as under the provisions of an act approved 22d December, 1888, entitled "An act to provide for the payment of township bonds issued in aid of railroads in this state." There are other appropriate allegations in the petition, which it is not deemed necessary to repeat here, as we think it would be well for the reporter, in preparing the report in this case, to set out the petition as well as the return, of which we shall make only a brief statement. The term of office of the persons named as county commissioners in the title of this case having expired, the return is made by their successors in office to-wit, T. G. Culp, Robert W. Whitesides, and William Ross, together with the respondent Neely. The return sets forth, among other things, as reasons for declining to comply with the demand of the relator, that Cherokee township has never been constituted a township in accordance with law, inasmuch as certain provisions of the act defining the powers and duties of county commissioners have never been complied with, to-wit, that the lines and boundaries of the townships in York county have never been established "by the erection of permanent monuments of stone, brick, or iron to designate the respective boundary lines of said townships 'at every angle thereof,' nor have the county commissioners of York county in any other way definitely established the territory and boundary lines of any of the townships in said county;" that the circuit court never made "any order or directed any measure looking to the division of said county into townships," as provided for by law, nor did the county commissioners ever report their acts and doings to the general assembly for confirmation. It is also alleged that the act of 1883, above referred to, has been adjudged unconstitutional by this court, and respondents say that they have been advised that the attempt of the legislature, by the recent act of 22d of December, 1888, to validate the bonds issued under the act of 1883, and to provide for the levy of a tax to pay the same, is likewise unconstitutional and void. It is further alleged that the Charleston, Cincinnati & Chicago Railroad, in aid of which the bonds in question purport to have been issued, was not completed through Cherokee township and accepted by the railroad commissioners until the 21st of December, 1888; and that, even under the provisions of the act of 22d of December, 1888, no taxes in the hands of respondent Neely, as

Digitized by Google

county treasurer, can be applied to the payment of the coupon held by the relator, though it is admitted that there are certain sums, the amounts of which are stated in the return, in the hands of Neely as county treasurer, arising from taxes levied and collected prior to the completion of the road through Cherokee township, which, for the reasons stated in the return, cannot be applied to the coupon held by the relator. This brief and condensed statement of the allegations in the petition and return is deemed sufficient, under the view which we take of the case, to present the real questions involved, though there are several other matters mentioned which we do not think it material to notice, as we shall confine ourselves to what we regard the real questions in the case.

The material questions raised by the pleadings in this case are: *First.* Whether Cherokee township has ever been created a township according to law. *Second.* Whether the act of 22d December, 1888, entitled "An act to provide for the payment of township bonds issued in aid of railroads in this state," is constitutional. *Third.* If so, whether the respondent Neely has in his hands, as county treasurer of York county, any funds applicable to the payment of the coupon held by the relator. As to the first question, in view of the repeated instances in which the legislature has recognized the division of counties into townships, and especially in view of the legislation in which the particular township of Cherokee has been recognized as such, it seems to us too late now to inquire whether the regulations in respect to the marking the corners of the townships, reporting to the court and to the legislature the action of the county commissioners, have all been complied with. Indeed, the counsel for the respondents have laid so little stress upon this point that we do not deem it necessary to consider it further.

The real question in the case is the second, as to the constitutionality of the act of 1888. This question having just been considered and determined in the recent case of State v Whitesides, ante, 661, (decision filed April 15, 1889,) we do not propose to go into any extended discussion of it. Indeed, but for the importance of the question and the large interests involved, we would not undertake to add anything to what is there so well said. We do not regard the act in question, which for convenience will be designated as the act of 1888, as in any sense a validating act, and hence any discussion of it in that aspect would be out of place. It has none of the features of such an act. It does not purport to declare any previous legislation valid which had been decided by the tribunal invested with jurisdiction for that purpose to be unconstitutional and void, nor does it purport to legalize any acts done under such unconstitutional legislation. On the contrary, it is an exercise of original legislative power, and the real question is whether there is anything in the constitution of the state forbidding the exercise of such a power. As we understand it, the legislature has been invested by the people with unlimited power of taxation, except as restrained by some constitutional provision; and it has also been authorized by section 8, art. 9, to delegate this high power of taxation to certain specified subordinate agencies, for certain specified purposes. It may then be said that, in respect to taxation, the legislature has been invested with two distinct classes of powers, —one which it exercises at its own sovereign will, the other which it delegates to some subordinate agency, to be exercised by such agency at its will, within the prescribed limits. Now, while there are limitations to both of these classes of powers, the limitations are not the same. In the former the only limitation is some constitutional provision, while in the latter there may be, and usually are, additional limitations prescribed in the act delegating the power. But the more material distinction between these two classes of powers is (so far as concerns the present discussion) that in the former the only limitation imposed by the constitution, so far as the purpose for which the tax is imposed is concerned, is that it shall be a public purpose, while in the latter the limitation is that it shall also be for a corporate purpose. Bearing these distinctions in mind, it must be obvious that when this court decided in Floyd v. Perrin, 8 S. E. Rep. 14, that the act purporting to delegate power to a township to levy a tax for a purpose other than a corporate purpose was unconstitutional, it did not touch the question whether the legislature might not, by the exercise of its own power, impose a tax for the same purpose for which it had, without constitutional authority, attempted to delegate the power to certain townships. That decision rested on the ground that, as the purpose for which the legislature attempted to delegate to the townships the power of taxation was not a corporate purpose, the act purporting to delegate such power was without constitutional authority. No such question is presented or can arise in this case. The only question here is whether the legislature can, by the original exercise of its own power of taxation, impose a tax on the property within the boundaries of Cherokee township, for the purpose of contributing to the construction of a railroad which passes through said township. The proposition that the construction of a railroad is such a public purpose as to warrant the levy of taxes to aid in building it is too well settled by the very decided weight of authority to admit of further discussion, although, if the question were an open one, its correctness might well be disputed. So, too, it seems to be settled by the weight of authority that the legislature may not only delegate this power of levying taxes to aid in the construction of a railroad to municipal corporations, but may also, by the exercise of its original power of taxation, directly impose such tax upon any territorial

Digitized by Google

division of the state, to aid in the construction of a railroad supposed to be of special advantage to the people residing within such territorial division, provided a majority of those people have signified their assent to the imposition of such a tax. Indeed, some of the authorities hold that the tax may be imposed without the consent of the inhabitants of the territorial division upon which the tax is imposed. But we are not prepared to go to that extent. What is said in the opinion of the chief justice in the case of State v. Whitesides, supra, is not to be regarded as a decision that such a tax may be imposed directly by the legislature, without the consent of the people of the particular locality to be affected thereby, but simply as a statement of the fact that some of the authorities go to that extent. Except for governmental purposes proper, we do not think that the legislature has the power to impose a tax upon the people of any particular locality or territorial subdivision of the state without their consent. In this case, however, such consent was given, and that is the avowed basis upon which the act of 1888 rests. It is argued, however, that such consent has only been manifested by an election held without authority of law, and hence should not be regarded. It seems to us that it is not at all material how the assent of the people has been given. All that was necessary was that the legislature should be satisfied that consent had been given, and the terms of the act, especially the preamble, show plainly that they were satisfied of that fact.

The only remaining inquiry is whether the respondent Neely had in his hands, as county treasurer, any funds applicable to the payment of the coupon held by the relator. By the second section of the act of 1888 it is provided "that no tax shall be levied under the provisions of this act to pay the interest on any township bonds until the railroad in aid of which they were subscribed shall be completed through such township and accepted by the railroad commissioners;" and the section goes on to provide that it shall not be construed to authorize the levy or collection of any tax to pay any interest which had accrued prior to the completion of the road through any township and its acceptance by the railroad commissioners, and, if any such tax had been collected, it should be refunded to the tax-payers. In the return it is stated, and this fact is not traversed, that the road was not completed through Cherokee township and accepted by the railroad commissioners until the 21st day of December, 1888; and, as it is not alleged and does not appear that any tax has been levied or collected since that date, we do not see how it is possible for any funds to be in the hands of the respondent applicable to the coupon held by the relator, under the terms of the act. Any taxes that may have been collected by the county treasurer under the provisions of the act of 1883 were illegally collected, as that act has been declared unconstitutional; and this is plainly recognized by the legislature in passing the act of 1888, as it is therein required that the taxes thus illegally collected shall be refunded to the tax-payers. The act of 1888 does not purport to validate the previous illegal action of the corporate authorities of the townships, but the legislature then, by the exercise of its own legislative power, fixed upon the townships a debt, merely referring to the bonds previously issued without authority as a convenient means of designating the amount of such debt, with the time when it should become payable, the rate of interest and the times when such interest should become payable, and provided then for the levy and collection of taxes to pay the same, with the express provision that no such tax should be levied until after the completion of the road, as above stated. It is quite clear, therefore, that when these proceedings were instituted the respondent had no funds in his hands which, under the provisions of the act of 1888, could be applied to the payment of the coupon held by the relator, and upon this ground the application for the writ of *mandamus* must be refused.

The judgment of this court is that the rule to show cause be discharged, and the petition be dismissed.

SIMPSON, C. J., concurs.

MCGOWAN, J. I concur; the meaning of the opinion of the court being that there is no necessity for the issue of any new bonds, but "the debt" fixed upon the several townships by the act of 1888 shall be represented by the bonds heretofore issued, to be paid according to the provisions of the act; and I am authorized to say that such is the view of the other members of the court.

(82 Ga. 616)

FOUNTAIN *et al.* v. HENDLEY *et al.*

(*Supreme Court of Georgia.* March 28, 1889.)

HOMESTEAD—INJUNCTION.

A widow, both in the character of the head of a family and the guardian of her minor children, having, in 1872, applied for and obtained a homestead in the real estate of her husband, who died after the constitution of 1868 was adopted, the effect of so doing was to obtain a homestead as the head of a family in her own undivided share, and a homestead as the guardian of her minor children in their undivided shares. All the children having attained their majority, the latter homestead has terminated, and the children are not entitled to enjoy their respective shares of the premises; but, under the facts of this case, the judge below did not abuse his discretion in refusing to grant an injunction and appoint a receiver.

(*Syllabus by the Court.*)

Error from superior court, Pulaski county; KIBBEE, Judge.

On April 12, 1872, Edna Hendley filed with the ordinary a petition for a homestead in the property of her husband, John A. Hendley, (who had died in December, 1871,) for the benefit of herself and her minor children, naming them. In this petition the land from which the homestead was sought

Digitized by Google

to be set apart is referred to as the home place, and the numbers of the land lots are given. The minors having become of age or married, a petition to the superior court for injunction, receiver, and division of the estate was filed by all of them except W L. Hendley, who was made a party defendant with Edna Hendley. The prayers are that the homestead be declared void and of no further force; for injunction against collecting rents, selling timber, further renting, etc.; for account by defendants for the use, rents, and profits of the land; for receiver to take charge of and rent the land, under direction of the court, until disposed of; that the land be sold for partition and division; and for general relief. The injunction and receiver were refused, the court holding as follows: "The homestead right is not severable, and where, after the death of the husband, the widow applies for and obtains a homestead out of the estate of her husband for herself and children, all of whom are minors at the time of the application, the homestead estate did not expire upon the last child coming of age. The widow occupies the double position of a *quasi* trustee and also a beneficiary, and the homestead remains during her widowhood. The heirs at law in this case were all minors,—all parties to the homestead proceedings. They continued as beneficiaries until they arrived at age, and the widow as long as she remains a widow. To divide out the homestead would, in effect, partially destroy it." The plaintiffs excepted.

Martin & Smith, for plaintiff in error. *Jordan & Watson, contra.*

BLECKLEY, C. J The facts are stated in the official report. Mrs. Hendley, in 1872, obtained a homestead in all of the realty of which her husband died seised. She applied for it both as the head of a family and as guardian for her minor children. There were various irregularities and omissions in the proceedings, but we treat them as substantially sufficient. We differ, however, from the court below in the construction of their legal effect. The constitution of 1868, and the statutes carrying the same into effect, gave the right of homestead both to the heads of families and to the guardians and trustees of minor children. Code 1873, §§ 2002, 2039, 5135. The husband of Mrs. Hendley having died after the homestead system was established, although his lands descended to her and the children as heirs at law, she might, according to several decisions of this court, (see cases cited below,) have taken a homestead as the head of a family only; but she did not elect to pursue that course. She applied in both characters, to-wit, as the head of a family and as guardian. We think the effect of so doing was to take a homestead in the former character in her own share of the land,—her own undivided interest therein,—and, in the latter character, in the shares of the children,—their undivided interest as co-heirs with her. This construction gives effect to her whole act and makes her application consistent. No other that we can think of will harmonize the two characters in which she made the application and obtained the homestead There is quite as much reason for holding that she got no homestead as the head of a family, as there is for holding that she got none as guardian. It appears from the petition that the minors have all attained their majority; and, this being so, the homestead in their behalf is terminated, and their respective shares in the property are now subject to their own control and no longer to her control. The homestead which she took as the head of the family still, perhaps, subsists, but it is restricted, as we have seen, to her undivided share in the property. The petition alleges that a partition in kind of the land cannot be made; and, if so, we see no obstacle to rendering a final decree, at the proper time, to make partition by sale For this purpose the petition is still pending, and we discuss the subject only for the purpose of expressing our dissent from the reasoning upon which the judge placed his denial of the injunction and the appointment of a receiver. While we overrule his reason, however, we leave his judgment to stand; for, as these parties are all kindred, and as no great length of time will probably elapse until a final decree can be had, we think there is not such irreparable mischief to any of them likely to happen as to make such an extreme measure as the appointment of a receiver, etc., appropriate to the case. As to the right of widow to take homestead as the head of a family, see Hodo v. Johnson, 40 Ga. 439; Faircloth v. St. Johns, 44 Ga. 603; Raley v. Ross, 59 Ga. 862; Gerding v. Beall, 63 Ga. 561; Hodges v. Hightower, 68 Ga. 281; Groover v. Brown, 69 Ga. 60; Bridwell v. Bridwell, 76 Ga. 627; Lee v. Hale, 77 Ga. 1; Deyton v. Bell, 8 S. E. Rep. 620, (last term.) In Madden v. Jones 75 Ga. 680, the right was limited to the distributive share of the widow; but the death of the husband occurred before the laws of descent were modified by the homestead system. As to the right of minor children to have homestead on separate application in their behalf, see Roff v. Johnson, 40 Ga. 555. Judgment affirmed.

(82 Ga. 637)

YONN *et al.* v. PITTMAN *et al.*

(*Supreme Court of Georgia.* March 28, 1889.)

DEED—CONSTRUCTION.

1. An action of complaint for land cannot be dismissed on demurrer to the abstract of title annexed to the declaration. The object of the abstract is not to show title in the plaintiff on the face of the pleadings, but only to give notice of what will be relied upon at the trial.

2. A deed of gift conveying the premises to a woman during her life, or until her son arrives at 21 years of age, she not to be troubled or disturbed as long as she lives on the premises, but, if she moves and leaves the land, then her title to be null and void, and the land to belong to the donor or his heirs; but, should she die before her son becomes

Digitized by Google

21 years of age, then it is discretionary with the donor whether he shall enter and take possession or not,—passes title to the donee for a term not exceeding the duration of her own life; and, she having outlived the minority of her said son, the clause touching the donor's discretion to enter in case of her death before such event, is of no materiality. The donor having died, his heirs at law became entitled to enter when the donee also died, the estate conveyed being then terminated by its own limitation.

3. The donee having, with her children, entered into possession under the deed, and the children, on being sued for the land after her death, having produced the deed under notice, and showing no other claim or color of title or right to the possession, her declarations, made while in possession, as to the land being a gift to her from the donor, were admissible in evidence to affect them, the deed being also in evidence.

4. Though a charge of the court touching prescription be irrelevant, a correct verdict will not thereby be vitiated.

5. As the mother of the defendants below entered under the ancestor of the plaintiffs below, and as no right or title in the defendants to retain possession after the death of their mother appeared, the evidence was sufficient to warrant a verdict for the plaintiffs, without showing any other title in their ancestor than that implied by his execution of the deed of gift, and by her entry and holding under the same.

(*Syllabus by the Court.*)

Error from superior court, Dooly county; KIBBEE, Judge.

Mrs. Odom, Mrs. Pittman, and D. F. Gunn in their declaration alleged that they are the sole heirs of Archie Gunn, who died intestate in 1864; that as such they claim title to a certain lot of land which is in the possession of James, Mary, Silvey, and Chesley Yonn, who have enjoyed the rents, issues, and profits thereof since 1884, of the value of $200 per annum, and on demand refuse to deliver up [the] premises to petitioner, or to account for the profits. On the trial plaintiffs put in evidence a deed to the land in dispute, produced by defendants under notice, made November 20, 1859, by Archie Gunn to Rebecca Yonn. The consideration of this deed was "Love and affection" for Rebecca Yonn. The *habendum* clause was "to have and to hold the aforesaid described lot of land unto her, the said Rebecca Yonn, during her life-time, or until her son Chesley Yonn comes to the age of twenty-one years; and the said Rebecca Yonn is not to be troubled nor disturbed as long as she, the said Rebecca Yonn, lives on the said lot of land; but if the said Yonn moves and leaves the said land, then her title is null and void, and the said land is then to belong to the said Archie Gunn, or his heirs and estate; but, if the said Rebecca Yonn should die before her son Chesley is twenty-one years of age, then it is discretionary with the said Archie Gunn whether he, the said Archie Gunn, moves the said Yonns and takes possession of the said land or not. The said Archie Gunn binds himself * * * unto the said Yebecca Yonn for the time aforementioned." The other testimony introduced by the plaintiffs tended to show that they are the only heirs at law of Archie Gunn, who died in 1864; that prior to the date of the deed Archie Gunn was in possession of the land; that Mrs. Rebecca Yonn, with her children, including defendants, moved upon the land shortly after the execution of the deed by direction of said Archie; that Mrs. Yonn died in 1884; and that defendants are in possession of the land. Sumer Adams testified, for plaintiffs, that he heard Mrs. Yonn say she thanked Mr. Gunn for giving her that great gift, and giving her a house for her and her children in her life-time. She never named any paper. Dr. Stovall testified, for plaintiffs, that Mrs. Yonn told him that Mr. Gunn gave her the lot during her life-time. "I don't think she said anything about any deed." The defendants seem to have introduced no testimony. The verdict was for plaintiffs for the premises in dispute; no mesne profits. Defendants moved for a new trial. In a note to the motion the court says that the question whether plaintiffs could recover under color of title, with adverse holding seven years, or on twenty years' possession, was not in issue, and the court, in charging the law of prescription, did not think it necessary to qualify or explain fully the law on this branch of ejectment, but to draw the attention of the jury to the fact that recovery could be had other than upon complete title. The court construed the deed to be one conveying the land to Mrs. Yonn for life, and that at her death all the property passed or reverted to the estate of Archie Gunn; and that it did not operate as a conveyance to Chesley Yonn to any extent. The motion was overruled, and defendants excepted.

J. H. Martin, for plaintiffs in error. *G. W. Buzbee* and *Duncan & Miller*, for defendants in error.

BLECKLEY, C. J. The facts are stated in the official report. 1. There was no error in overruling the motion to dismiss the action founded on the abstract of title annexed to the complaint. The sole object of the abstract is to apprise the defendant of the nature of the title claimed, and of the specific documents which will be introduced on the trial. It is not necessary that the documents indicated shall in and of themselves constitute a perfect chain of title, but their relevancy may be made apparent at the trial by any admissible evidence adduced for that purpose. It is not required that the abstract shall be so clear and complete as to withstand the force of a demurrer. We are aware of no instance in which it has heretofore been the subject-matter of demurrer. The case cited by counsel, (Harrington v. Gabby, 52 Ga. 537,) was not a demurrer, but a nonsuit; it did not turn upon any deficiency in the abstract of title, but upon the want of sufficiency in the evidence adduced at the trial.

2. The suit being by the heirs at law of Archie Gunn, who died in 1864, the plaintiffs relied upon a deed made by Gunn in 1859 to Rebecca Yonn, the mother of the defendants below, plaintiffs in error here. The terms of that deed limited the conveyance to the life of Rebecca Yonn. In the event she died

Digitized by Google

before her son Chesley arrived at the age of 21 years, the deed provided that Archie Gunn, the grantor, might re-enter or not, at his discretion. Her death, however, did not take place until 1884, which was long after her son Chesley attained his majority; and consequently this provision of the deed never took effect. The court correctly construed the instrument, in the light of the actual facts, as conveying to Rebecca Yonn an estate for her life, and as passing no title whatever to Chesley or any of her children.

3. The evidence showed, inferentially at least, that Rebecca, with her children, entered under that deed, and the evidence admitted, proving her declarations that she was put in possession by Archie Gunn, or that the land was a gift to her from him, was competent. The defendants, being her children, and exhibiting no title or claim of title otherwise than through her, and they having produced under notice the deed by which she held, her declarations while in possession will affect them. The case of Hendricks v. McDaniel, 5 S. E. Rep. 194, (October term, 1887,) does not militate against this position. There the effort was to show title in one out of possession, by the declarations of a person in possession. Here, on the contrary, the defendants are in possession, and the declarations proved against them were made by their mother while she was in possession and holding under the very deed which they had produced, and which constitutes the only title or color of title which has been exhibited as a foundation for their possession. On what ground the evidence was objected to does not appear.

4. The charge of the court touching prescription was irrelevant, but did no harm.

5. The verdict was not only warranted, but demanded, by the evidence, and there was no error in refusing to grant a new trial. Judgment affirmed.

(83 Ga. 115)

RODGERS v. FURSE.

(*Supreme Court of Georgia.* April 10, 1889.)

JUDGMENT—ATTORNEY'S LIEN.

1. Defendant moved to set aside a judgment against her by default, because (1) she had a good defense, of which plaintiff's attorney had knowledge; (2) payment; (3) plaintiff's attorney misled her attorney as to time of trial; (4) plaintiff's attorney was instructed to dismiss the case because of payment, but prosecuted for his fees, knowing that defendant had an instrument of satisfaction; (5) the note sued on was not exhibited when judgment was taken; (6) there was evidence in support of the motion. Plaintiff's attorney, by affidavit, denied knowledge of the settlement, and stated that he was entitled to a fee, which had not been paid. *Held*, that there was no abuse of discretion in setting aside the judgment, especially as plaintiff in the case consented to it.

2. The judgment was for the client's benefit, and he may consent that it be set aside, and, if he deems proper not to prosecute the suit, the attorney's rights arise, and the latter may prosecute it for his fees; but in doing so he must establish plaintiff's right to recover on the facts existing when the case was first disposed of, independently of the question of fees.

Error from superior court, Fulton county; MARSHALL J. CLARKE, Judge.

Action by George C. Furse against J. A. Furse and Mrs. H. A. Furse. The latter, who alone was served, filed an unsworn plea of general issue and of set-off. The name of J. A. Furse was stricken from the record, and judgment by default was taken against Mrs. Furse. She moved to set aside the judgment because: (1) She had a good defense of which Rodgers, who was plaintiff's attorney, had knowledge. He had possession of her pleas, and hence they were not verified. (2) Payment. (3) Plaintiff's attorney misled defendant's attorney as to time of trial. (4) Rodgers was instructed to dismiss the case because of payment, but prosecuted it to judgment, to compel defendant to pay his fees. (5) Rodgers knew that defendant had in her possession an instrument of satisfaction. (6) Rodgers did not at the time of taking judgment exhibit the note sued on. (7) Error in striking out the name of J. A. Furse. To this motion Rodgers filed a sworn answer, that defendant's counsel knew her pleas were not sworn to; that respondent did not hinder them from seeing the papers; that defendant and her counsel were trying to defeat his lien for fees. The answer denied the statements and charges in the motion, and the right of defendant by settlement to defeat his lien for fees. Defendant introduced evidence in support of the motion, to all of which Rodgers objected; also a paper signed by G. C. Furse, stating that, Rodgers having refused to dismiss the case as instructed, "I agree, consent, and desire that said judgment may be set aside, in order that justice may be done to defendant, and her rights awarded." Respondent, Rodgers, submitted his own affidavit that he did not know of the settlement; that he is entitled to a fee of a certain amount, and has not been paid. The judgment was set aside, and Rodgers brings error.

R. L. Rodgers, for plaintiff in error. *Simmons & Corrigan*, for defendant in error.

SIMMONS, J. Under the facts reported in this case, the trial judge did not abuse his discretion in setting aside the judgment, especially as the plaintiff in the case consented to it. If counsel has any lien for fees in the case, the case can still be tried, and he can secure a judgment therefor. The judgment heretofore taken was for the client's benefit. If the client sees proper not to prosecute the suit, then the attorney's rights arise, and he may prosecute the suit in his client's name for the purpose of recovering his fees in the case. The plaintiff may consent for a judgment in his favor to be set aside by the court, but it must be subject to the right of his attorney for fees, and afterwards the attorney may proceed to establish his right for fees, in doing which he must establish the plaintiff's right to recover, on the state of facts existing at the

Digitized by Google

time the case was first disposed of, independently of the question of fees. Twiggs v. Chambers, 56 Ga. 279; Coleman v. Ryan, 58 Ga. 132. Judgment affirmed.

(83 Ga. 346)

HAMILTON v. RICHMOND & D. R. CO.

(*Supreme Court of Georgia.* April 10, 1889.)

MASTER AND SERVANT—ASSUMPTION OF RISKS.

Where a watchman in a railroad yard uses a platform appropriated to the transfer of freights for the purpose of running along it at night in the dark, he does so at his own risk; it not appearing that the platform was intended by the company for such a purpose, or that he had any reason to think it was so intended.

(*Syllabus by the Court.*)

Error from city court of Atlanta; VAN EPPS, Judge.

J. T. Glenn, for plaintiff in error. *Henry Jackson*, *contra*.

BLECKLEY, C. J. The plaintiff was a night watchman in the yard of the railroad company. This yard included a platform (used for transferring freight) 150 or 200 yards in length, and about 8 feet wide. The duty of the watchman comprehended overlooking the platform as well as the rest of the yard. It also embraced, according to his evidence, attention to the switches, and care in seeing that nothing happened by reason of the switches being wrong, and that no obstruction occurred to trains in passing over or through the yard. At night, in the darkness, he ran along the platform with a view to prevent a collision of trains, and in so doing was thrown and injured by coming in contact with some trucks improperly left upon the platform. The question is whether he had a cause of action. It does not appear that he was expected to run up and down this platform at night, in the dark, or that it was any part of his duty to do so; and we think there was no obligation on the company to keep the platform clear for that purpose. If the platform had been set apart or appropriated to that use, it would have been the duty of the company to keep it in proper condition for such use. But there is no trace in the evidence that the platform was intended for any such purpose. The company was not bound to anticipate that the watchman would use it to run upon in the emergency which arose; and while it was, doubtless, a very meritorious service on his part to attempt to prevent a collision, we think that, unless the company had appropriated the platform as the pass-way for this purpose, it was his duty, rather than the company's duty, to see that it was clear of obstruction at the time he attempted to pass over it. It lay within the area of his walk as watchman, and its condition at the time was much more subject to his observation than to that of the company. Certainly he, being present, could see in the dark better than the corporation which trusted to his eyes. The court granted a nonsuit, and we think there was no error in so doing. Judgment affirmed.

(83 Ga. 337)

ANDERSON v. HOLLAND *et al.*

(*Supreme Court of Georgia.* April 10, 1889.)

TESTAMENTARY POWERS.

A will reciting that the testator owned land in partnership with another, and leaving it discretionary with the executrix to sell his half or buy the other half, or to divide, or to sell the lot altogether, and divide the money, authorized a private sale by the executrix, in connection with the owner of the other half.

(*Syllabus by the Court.*)

Error from superior court, Fulton county; MARSHALL J. CLARKE, Judge.

Hopkins & Glenn, for plaintiff in error. *Hulsey & Bateman*, for defendants in error.

BLECKLEY, C. J. By deed dated June 27, 1865, Mrs. Caroline Lemon and Paul Lemon conveyed the premises in dispute for the consideration of $600. This deed did not disclose that Mrs. Lemon was executrix of her deceased husband, William Lemon. She made another deed to the same parties on November 16, 1865, for the consideration of $300, by which, as executrix, she conveyed one undivided half of the premises, reciting that she did this by virtue of the last will and testament of William Lemon, and that, as executrix, she had theretofore agreed to sell such undivided half. Taking the two instruments together, the proper construction of them is that they were both made to pass the interest of the testator, William Lemon; the first deed, no doubt, by inadvertence, failing to describe her as executrix. The question is whether these deeds legally passed said interest; to answer which it is necessary to construe the sixth item of the will, which reads as follows: "*Item* 6. I and my brother Paul Lemon own a half acre lot in partnership on Marietta street in Atlanta, which is excepted in this will, leaving it to my executor and executrix at their discretion to sell my half and [or] buy his half, to [or] divided [divide] said lot or sell it altogether, and divide the money arising from the sale thereof equally between Paul Lemon and my representatives at the discretion of my executor and executrix." The testator died in December, 1863. The sole objection to the execution of the power is that the sale was made privately and not publicly. Code, § 2567: "If the will merely designates the property to be sold, without specifying the mode of sale, no application for leave to sell is necessary; but, in other respects, the executor or administrator with the will annexed must comply with the requisitions before specified." These requisitions relate to advertising the sale and making a public sale. It seems to us that the will does not fail to specify the mode of sale, but, by necessary implication, authorizes a private sale. It describes the land as owned in partnership, and gives authority to exercise discretion by selling the testator's half, or buying the other half, or by dividing the lot or selling it altogether. The selling was to be done, we think, in the same mode as the buying or the dividing, and certainly these were not contemplated to be

Digitized by Google

done at public outcry, or with any preliminary in the nature of advertisement. We think it quite as clear that a private sale was contemplated under this will, as under the will in Mattox v. Eberhart, 38 Ga. 581. That case, pursued to its consequences, controls this, and the court committed no error in construing the power, or in holding that the deeds of the executrix passed the title. Judgment affirmed.

(83 Ga. 356)

ATLANTA NAT. BANK v. NORTHWESTERN FERTILIZING CO.

(*Supreme Court of Georgia.* April 12, 1889.)

PRINCIPAL AND AGENT—APPOINTMENT.

A letter from the payee and indorser of a promissory note addressed to the maker thereof, written upon the eve of maturity of the note, agreeing to "carry" the maker if he "must have it, and will make the time as short as possible,—say 30 or 40 days,"—is no authority to the maker, express or implied, to draw upon the payee and indorser for money with which to pay off the note, either in favor of the bank to which the note had been sent by another bank for collection, or in favor of the world at large.

(*Syllabus by the Court.*)

Error from superior court, Fulton county; MARSHALL J. CLARKE, Judge.

Abbott & Smith, for plaintiff in error. *Hopkins & Glenn*, for defendant in error.

BLECKLEY, C. J. The case is the same one decided by this court at March term, 1888, (5 S. E. Rep. 793.) At the new trial the plaintiff amended the declaration so as to rest the defendant's liability upon the letter of November 2, 1885, averring that this letter contained implied authority from the defendant to Schaefer to draw upon the defendant for the amount of the note, and that the plaintiff acted and relied upon the same in good faith. The only expression in the letter from which such authority could possibly result, is the following: "Now, about those next two notes. If you must have it, we will carry you if you will make the time as short as possible,—say thirty or forty days,—if this will assist you." One of the two notes referred to in this passage of the letter was to mature two days after the letter was written; and upon the day of maturity Schaefer drew upon the defendant at sight in favor of the plaintiff for the amount of it, and on faith of the letter this draft was cashed by the plaintiff, and the proceeds applied to pay the note, which it seems was then held or controlled by a bank of Chicago, Ill., which bank had sent it to the plaintiff for collection. Schaefer was the maker of said note, and the defendant was the payee and indorser. The letter, as above quoted, contains a promise by the defendant to Schaefer to carry him for a short time,—say 30 or 40 days,—on both of the notes referred to; but we can observe no trace in the letter of any authority delegated to Schaefer to draw upon the defendant in favor of the plaintiff for cash with which to discharge either note. In what manner the carrying was to be accomplished is not specified. To construe the letter as authorizing the drawing of a sight draft upon the defendant, in favor of the plaintiff, would be altogether conjectural. No drawing or draft is mentioned, and we think the safest construction of the letter is that it contains neither express nor implied authority for drawing upon the defendant in favor either of the plaintiff or of the world at large. The rule touching agreements for acceptance upon which an action will lie seems to be that an authority to draw is equivalent to an acceptance, but should be express and special in its character, and describe with sufficient certainty the bill to be drawn. 2 Rand. Com. Paper, § 609. Since the act of 1880, an acceptance of a bill of exchange must be in writing. Code, § 1950. While the question is not wholly free from doubt or difficulty, we think the court below, in sustaining the demurrer to the amended declaration, and dismissing the action, reached the proper result, and committed no error. Indeed the former decision of this court upon the case was a virtual disposition of it on its merits. In honoring Schaefer's draft and advancing the money upon it, the plaintiff had such security as Schaefer's credit afforded, but had no pledge adding the defendant's credit as further security. Judgment affirmed.

(83 Ga. 363)

NEAL *et al.* v. SIMMONS.

(*Supreme Court of Georgia.* April 29, 1889.)

NEW TRIAL.

Where the court is under doubt as to the remedy, and has admitted illegal evidence in behalf of the prevailing party, the first grant of a new trial is well warranted, more especially if the doubt respecting remedy is grave and difficult of solution.

(*Syllabus by the Court.*)

Error from superior court, Gwinnett county; HUTCHINS, Judge.

W. M. Sessions and *T. M. Peeples*, for plaintiff in error. *Sam J. Winn*, for defendants in error.

BLECKLEY, C. J. This was a rule brought against Simmons as an attorney at law. The court at the trial thought the remedy applicable to the facts of the case; but, having admitted some illegal evidence, the judge granted a new trial, being then in doubt as to the remedy. There was no abuse of discretion in this grant of a first new trial. On the contrary, we think the court was well warranted in studying the question of remedy further; for, under the facts, it is a grave question, and difficult of solution. Judgment affirmed.

(83 Ga. 358)

JACKSON v. ROBERTS.

(*Supreme Court of Georgia.* May 6, 1889.)

JUDGMENT—ENTRY.

On a verdict for a gross sum against both defendants in an action at law, a judgment *in solido* against both was properly entered, and the execution issuing on such judgment may be collected out of the property of either; the co-dentors being left to adjust between themselves the question of

Digitized by Google

relative liability as to their respective proportions of the indebtedness.

(*Syllabus by the Court.*)

Error from superior court, Bartow county; FAIN, Judge.

E. D. Graham, for plaintiff in error. *T. W. Akin*, for defendant in error.

BLECKLEY, C. J. Jackson, Roberts, and Collins having been members of a partnership, which was dissolved, Roberts brought an action at common law against the other two, and had a recovery against them jointly for a gross sum. Upon the verdict a judgment was entered up against both defendants in favor of the plaintiff, Roberts. After paying off one-half of this judgment, Jackson considered himself discharged from it, and, the execution being levied upon his property to collect the other half, he filed a bill to enjoin the levy and sale; the theory of the bill being that the joint recovery against himself and Collins meant, when construed by the pleadings, that each was liable for one-half only. When the bill came to a hearing it was dismissed for want of equity, and this is the error assigned. We think it perfectly clear that the court committed no error; for neither in the verdict nor in the judgment was there any intimation that the recovery was for a moiety only against each of the defendants in the common-law action. The suit against them was joint, and so were the verdict and judgment. There can be no doubt that in such a case the liability to pay the whole of the recovery devolves upon the defendants jointly and severally. Each is liable for the whole debt, and, if one pays more than his due proportion, his recourse is upon his co-debtor. Judgment affirmed.

(83 Ga. 359)

TRIPPE v. WINTER.

(*Supreme Court of Georgia.* April 29, 1889.)

TRUSTS—PLEADING—AMENDMENT.

Where the prayer of one of several beneficiaries in a trust-estate, for interlocutory relief, is not appropriate by reason of being too comprehensive, and the relief is denied, this court will not, as a general rule, reverse the judgment; but, the present case being apparently meritorious, as to some relief, leave is given to amend the bill, and to make an application *de novo* to the circuit judge. In the mean time the whole merits of the controversy are left open.

(*Syllabus by the Court.*)

Error from superior court, Fulton county; MARSHALL J. CLARKE, Judge.

Broyles & Johnson, for plaintiff in error. *Arnold & Arnold*, for defendant in error.

BLECKLEY, C. J. The plaintiff is one of several beneficiaries in a trust-estate. Her petition is filed against the trustee, and prays, as interlocutory relief, for an injunction restraining him from selling, disposing of, or in any manner incumbering the trust property; also that a receiver be appointed to take charge of and preserve the property. The other beneficiaries make no complaint, and seem content to allow the trustee to execute his office without interference by the court. The judge denied the specific interlocutory relief prayed for, and certainly was not bound to grant any other, though he might have had a discretion to do so. We think it probable that the case made might, under a proper prayer, entitle the complainant to have an injunction against a sale by the trustee of her interest in the property, unless security be given by him to account ultimately for her share of the proceeds; but we do not adjudicate this or any other question in the case, except that the court did not err in denying the injunction and receiver prayed for. Inasmuch as the trustee has not complied with the law in making returns, etc., we think proper to direct that the complainant have leave to amend her bill so as to reduce the range of the special prayers as she may be advised, and thereupon to make an application *de novo* for appropriate interlocutory relief. In the mean time, the whole merits of the controversy will stand open. Judgment affirmed.

(82 Ga. 740)

TOWNER v. THOMPSON *et al.*

(*Supreme Court of Georgia.* April 29, 1889.)

EVIDENCE—INSTRUCTIONS—ARGUMENTS OF COUNSEL.

1. A writing reciting the purchase of a "mill-seat" is ambiguous, and parol evidence is admissible to show whether land covered by the water of the mill-pond was included or excluded.

2. Where the writings leave boundary uncertain, evidence that one of the coterminous owners, under whom one of the parties claims, said, while he was owner, that a certain creek was the line between the two tracts, is admissible for the adverse party.

3. Generally, if in response to a request to charge upon comments of counsel not warranted by the evidence, the court instruct the jury that they should try the case by the evidence, and not by what counsel said in their speeches, it is sufficient; but, in strict propriety, no court should tolerate counsel in stating any fact in argument as to which there is no evidence, unless it be some fact which can be noticed judicially without proof.

4. The evidence was not such as to constrain a finding for the defendant below, and, while the plaintiff's right to recover was doubtful, the jury resolved the doubt in his favor, and the verdict, being approved by the presiding judge, must stand.

(*Syllabus by the Court.*)

Error from superior court, Glascock county; LUMPKIN, Judge.

H. T Lewis and *Thos. E. Watson*, for plaintiff in error. *Jas. Whitehead*, for defendant in error.

BLECKLEY, C. J. This is the second appearance here of the case of Towner v. Thompson, in which a second motion for a new trial was granted by the court below, and the judgment was affirmed here at March term, 1888. 6 S. E. Rep. 184. At the third trial Thompson, the plaintiff below, recovered, and a motion for a new trial, made by Towner, having been denied, the present writ of error was brought by him.

1. The writing in evidence reciting the

Digitized by Google

purchase of a "mill-seat" was ambiguous, and, that being so, Yarborough's testimony, to the effect that the land in dispute was not embraced in that purchase, although it was covered by water of the mill-pond, was admissible.

2. So, also, was his evidence showing that Robertson, while owner of one of the tracts, admitted that the creek was the line. We take this evidence to mean that the admission was made before Robertson parted with his title, although the date of the same is not fixed.

3. During the concluding argument, counsel for Thompson stated a fact not in evidence, to-wit, that Towner was born in Illinois. This statement was improper, and the request made by opposing counsel to charge directly to that effect should have been granted; but the charge given, to-wit, that the jury should try the case by the evidence, and not by what counsel said in their speeches, was sufficient. No court, however, should tolerate counsel in stating any fact in argument as to which there is no evidence, unless it be some fact which can be noticed judicially without proof. Certainly that Mr. Towner was born in Illinois is not one of this class of facts. There should have been no allusion made to it in argument.

4. Under the evidence as it comes up in the record, the right of the plaintiff below to recover was very doubtful; but the evidence did not constrain a finding for the defendant, and the jury having resolved the doubt, and the verdict being approved by the presiding judge, we do not feel called upon to set it aside. Had the finding been the other way, we would probably have had as strong doubts of its correctness as we have with regard to the finding which actually took place. It is best that the litigation between these parties about a small piece of land be here and now terminated forever. Judgment affirmed.

(83 Ga. 219)

FOWLER v. ATHENS WATER-WORKS CO.

(*Supreme Court of Georgia.* May 1, 1889.)

MUNICIPAL CORPORATIONS—CONTRACTS—PRIVITY.

Against a water company which is under a contract obligation with the municipal government (but no legal duty otherwise) to furnish a supply of water for use by the municipality in extinguishing fires, a citizen and tax-payer, whose property has been consumed by reason of a breach of such contract obligation, has no right of action, there being no privity of contract between the citizen and the water company, and mere breach (by omission only) of a contract entered into with the public not being a tort, direct or indirect, to the private property of an individual.

(*Syllabus by the Court.*)

Error from city court, Clarke county; COBB, Judge.

T. W. Rucker and *S. H. Hardeman*, for plaintiff in error. *Lumpkin & Burnett*, for defendant in error.

BLECKLEY, C. J. Fowler brought action against the Athens City Water-Works Company, making the following allegations in his petition: In August, 1882, the mayor and council of the city of Athens contracted with one Robinson, in which contract Robinson undertook that he would furnish at all times, for a consideration mentioned in the contract, all the water necessary for fire purposes; that he would establish fire-hydrants to the number of 55, and would guaranty at all times a sufficient pressure to throw from any of these hydrants, through a 1-inch nozzle and 50 feet of 2½-inch hose, 5 streams of water to the height of 65 feet; that Robinson, for a valuable consideration, in 1882 transferred this contract to the defendant; that the defendant is paid by a tax levied on the property of the citizens of Athens; that the petitioner, since 1882, has been a resident and tax-payer of Athens, for many years owning a certain house and lot mentioned; that the defendant ran its mains along the street by his house, and established near his house two fire-hydrants; that in July, 1887, some of the outhouses on the lot caught on fire without his fault; the fire extended to the main dwelling, and all were consumed; that the alarm of fire was promptly responded to, and the fire companies were on hand at a time when it could have been easily controlled, but there was so little pressure that the water would not go 10 feet beyond the nozzle, and was of no use in putting out the fire; that, if proper pressure had been put on, the fire could easily have been extinguished and the property saved. Damages were laid at $1,500. At the trial a contract corresponding with that described in the declaration was put in evidence. By it the city agreed to pay to Robinson, his successor or assigns, for 30 years from the completion of the water-works, as a rental for the use of the hydrants and for the supply of water for the purpose mentioned in the agreement, the sum of $3,000 annually. It was proved that the defendant had succeeded to the position of Robinson in the contract, and had received from the city rents accordingly, undertaking to carry out the terms of the contract. The occurrence of the fire, the consumption of the plaintiff's buildings, his loss, and the failure of the company to have a water supply on the occasion equal to that provided for by the contract, or any supply adequate to the exigencies of the fire, also appeared in evidence. The court, on motion of the defendant, ordered a nonsuit. This is the error complained of.

The question of liability was argued briefly but ably on both sides. To the authorities cited by counsel our own research has added nothing of much value. In Robinson v. Chamberlain, 34 N. Y. 389, the duties of the contractor did not rest on contract alone, but were prescribed by statute. The court analogized his position to that of a public officer, in respect both to his duties and his power. Stress was also laid upon his undertaking to repair a public thoroughfare, (the canal,) and that this was a public function formerly devolving on public offi-

Digitized by Google

cers. In Couch v. Steel, 3 El. & Bl. 402, the duty neglected was also one imposed by statute. Such likewise was the duty in Atkinson v. Water-Works Co., L. R. 6 Exch. 404, which case was reversed on appeal, (L. R. 2 Exch. Div. 441,) the appellate court holding that, under a proper construction of the particular statute involved, the action would not lie. The court, composed of Lord CAIRNS, L. C., COCKBURN, C. J., and BRETT, L. J., intimated doubts as to the correctness of the judgment in Couch v. Steel, supra. In Casting Co. v. Railroad Co., 109 Mass. 277, the act complained of was a plain tort of the indirect kind, and no contract relation whatever was involved. It was held in Willy v. Mulledy, 78 N. Y. 310, that the neglect of a duty imposed by statute would give a right of action to any person having a special interest in its performance, and injured by the breach. The present case is not based upon the breach of a statutory duty, but solely upon failure to comply with a contract made with the municipal government of Athens. To that contract the plaintiff was no party, and the action must fail for want of the requisite privity between the parties before the court. A case directly in point is Davis v. Water-Works Co., 54 Iowa, 59, 6 N. W. Rep. 126. See, also, Nickerson v. Hydraulic Co., 46 Conn. 24. There being no ground for recovery, treating the action as one *ex contractu*, is it better founded treating it as one *ex delicto*? We think not. The violation of a contract entered into with the public, the breach being by mere omission or non-feasance, is no tort, direct or indirect, to the private property of an individual, though he be a member of the community and a tax-payer to the government. Unless made so by statute, a city is not liable for failing to protect the inhabitants against the destruction of property by fire. Wright v. Augusta, 78 Ga. 241; 7 Amer. & Eng. Cyclop. Law, 997 et seq. We are unable to see how a contractor with the city to supply water to extinguish fires commits any tort by failure to comply with his undertaking, unless to the contract relation there is superadded a legal command by statute or express law. There was no error in granting the nonsuit. Judgment affirmed.

(83 Ga. 161)

ALLEN *v.* BROWN *et al.*

(*Supreme Court of Georgia.* April 17, 1889.)

ESTOPPEL—TROVER.

1. Where a defendant's property is levied on and properly advertised, and he brings the same to the place of sale voluntarily, and sees it sold without raising any objection, he is estopped from recovering the value of the property from the purchaser, though the officer had no legal authority to sell, and defendant did not consent to the sale.

2. A mule was sold under execution in 1873. Trover was brought against the purchaser, and the case tried in 1888; it not appearing when the suit was begun. Code Ga. § 3028, provides that it shall not be necessary to prove conversion of the property where defendant is in possession when suit is brought. *Held*, that proof that defendant was in possession in 1873 would not show possession in 1888, nor could the jury so infer.

Error to superior court, Douglas county; R. H. CLARKE, Judge.

The official report is substantially as follows: One Allen sued one Whitley in trover for a mule. Whitley died pending action, and his administrators were made parties. Plaintiff introduced two promissory notes dated January 25, 1873, and payable November 1, 1873, each for $80, made by Allen for the purchase money of the mule; also a writing signed by Allen, reciting the sale of the mule, and containing an agreement that Whitley should have a lien on the mule and certain other property, to be enforced if the notes were not paid at maturity; also an affidavit of Whitley on November 25, 1873, claiming the lien. Execution issued on affidavit, and was levied on the mule and other property. The property was sold, and the execution satisfied. Oral testimony tended to show that the property was sold as property of Allen, and was bought by Whitley; that the mule brought $40, and was worth $100. The sale was made after advertisement. Plaintiff bought the mule from Whitley, paying $57, and other property worth $40 or $45. One witness said he heard plaintiff tell the constable that the mule belonged to Whitley, and if Whitley chose to sell his own mule he could do so. Two witnesses said plaintiff came to the sale with the mule, and they did not hear statement. Plaintiff offered his own interrogatories, which were rejected on the ground that Whitley was dead. Nonsuit was granted, and plaintiff excepted.

Code Ga. § 3028, provides that in trover it shall not be necessary to prove conversion where defendant is in possession when suit is brought.

Thomas W. Latham and *R. A. Massey*, for plaintiff in error. *J. S. James*, for defendant in error.

SIMMONS, J. The facts of this case will be found in the official report. Under the facts thus reported, it was not error in the trial judge to grant the nonsuit complained of. Allen, the plaintiff, voluntarily carried the mule to the place of sale, after having been told by the constable that he need not bring it. Before the sale he told the constable that it was Whitley's mule, and that if Whitley chose to sell his own mule he could do so. The mule was sold by the constable, and it does not appear from this record that Allen objected to the sale. He gave no notice at the sale that the mule had been set apart to him as an exemption under the exemption and homestead laws. Some time after the sale (how long after the record does not show) he brought this suit in trover to recover the mule on the ground that the execution under which it was sold was void.

1. We think that where a defendant's property is levied on and properly advertised, as was done in this case, and the defendant

Digitized by Google

voluntarily brings that property to the place of sale, and stands by and sees it sold without giving notice or raising any objection, he is estopped from recovering the property or its value from the purchaser, though the officer, as such, had no legal authority to sell. Reichert v. Voss, 78 Ga. 54, 2 S. E. Rep. 558.

But it is argued by counsel for the plaintiff in error that if the court had not erred in excluding the interrogatories of the plaintiff, the interrogatories would have shown that the plaintiff did not consent to the sale of the mule. While the court may have erred, under the rule laid down in Fletcher v. Collier, 61 Ga. 653, in excluding the whole of these interrogatories when a part thereof was admissible, we have read the interrogatories, and do not think they would have aided him if the legal part had been admitted; for, while the plaintiff says therein that he did not consent to the sale, he does not say that he objected to it. If he did not consent to it at the time, it was his duty then and there to make known his objection, so as to put the purchaser upon notice. He could not stand by and see his property sold under an invalid execution without giving notice thereof, and afterwards say that in his own mind he did not consent; and that is what his evidence amounts to in these interrogatories. It is no doubt true that in his own mind he did not consent to have his property sold. We apprehend that few defendants consent to the seizure and sale of their property by the officers of the law. If, however, they expect to make this non-consent available in future actions, they must make it known at the proper time and place, so as to put purchasers on notice.

2. We think the court was right in granting this nonsuit, for another reason, and that is that the plaintiff did not show by his testimony that the defendant was in possession of the mule at the time the action was brought, as required by section 3028 of the Code. It is true that in the case of Robson v. Rawlings, 79 Ga. 354, 7 S. E. Rep. 559, this court held that, where the property was in the possession of the defendant a few years before the bringing of the action, there would be some degree of presumption that the possession had not changed, and that he still had possession; and the same principle was laid down in Mercier v. Mercier, 43 Ga. 323; but we do not think that these cases control this case, under the facts disclosed by this record. In the case in 79 Ga. the action was brought within two or three years after the defendant had possession of the property, but in this case the record fails to disclose when this action was brought. It shows that the sale occurred in 1873, and that the trial of this case was in 1888; but there is no date in the record indicating when the suit was commenced. The only date we can find tending to throw any light on this is the date to one of the pleas of the defendant, which was sworn to in 1886. So, from the record, we cannot tell how many years elapsed after the sale before suit was brought. This being personal property, we do not think that on the trial in 1888 proof of the possession of the defendant in 1873 would show that the defendant was in the possession thereof in 1888, or that the jury could so infer. For these reasons we affirm the judgment granting this nonsuit.

Judgment affirmed.

(83 Ga. 369)

ROBERTS v. STATE.

(*Supreme Court of Georgia.* May 8, 1889.)

LARCENY—INDICTMENT—INSTRUCTIONS.

1. If bills alleged to be stolen are not sufficiently described in the indictment, the indictment should be demurred to. The witnesses may give such description of them in the testimony as may be consistent with truth, and not inconsistent with what is stated in the indictment.

2. Larceny committed in a house may be simple larceny. If bills be lost in a house, and, when found therein, the owner or his agent be present, but the finder, instead of making his discovery known, conceals it, takes and retains the bills wrongfully, fraudulently, and with intent to steal the same, he may be convicted of simple larceny.

3. A request to charge, partly legal and partly illegal, should be declined.

4. An inaccurate statement in the charge as to the distinction the law makes between direct and circumstantial evidence will not vitiate the verdict, the court having correctly instructed the jury as to the legal definition of both classes of evidence, and afterwards charging that reasonable doubt was to be given in favor of the accused.

5. No hurtful error, if any, was committed by the court, and the evidence warranted the verdict.

(*Syllabus by the Court.*)

Error from superior court, Habersham county; WELLBORNE, Judge.

J. B. Jones and *J. J. Bowden*, for plaintiff in error. *Howard Thomson*, Sol. Gen., for the State.

BLECKLEY, C. J. The indictment was for simple larceny, and the goods stolen, as alleged, consisted of "one hundred dollars in greenback bills, of the value of one hundred dollars." There was no demurrer to the indictment for insufficient description of the bills. Simple larceny is "the wrongful and fraudulent taking and carrying away by any person of the personal goods of another with intent to steal the same." Code, § 4393. Being found guilty, the accused moved for a new trial on various grounds. We will dispose of these grounds by ruling upon all of them which seem material.

1. It was contended that it was erroneous to admit evidence descriptive of the bills stolen, inasmuch as they were not described in the indictment. It may be that the indictment was demurrable by reason of being too general in the matter of description; but this, we think, should have been taken advantage of by demurrer, and not by objection to the evidence. Certainly the witnesses, if they could testify as to bills at all, could describe them. There is no rule that restricts testimony to the limits of the indictment in describing stolen property. Any description, however minute, which is con-

Digitized by Google

sistent with the indictment, may be given in the testimony.

2. The bills were lost from the possession of an agent of the owner, and it is doubtful whether they were lost in a certain railroad depot or elsewhere; some of the evidence tending to show that the loss took place in the depot. The accused may have found them in that building, but, if he did so, it was while the agent of the owner was present, to whom he might have restored them instantly if he had not intended to steal them. They had not been placed in the house by design, if they were there at all, and consequently were not, so to speak, in the protection of the building as a house. Larceny from the house, as defined by the Code, § 4413, "is the breaking or entering any house with the intent to steal, or, after breaking or entering said house, stealing therefrom any money, goods, chattels, wares, merchandise, or any thing or things of value whatever." If the finding was in the house, the stealing was there also; and, though it may have been larceny from the house, we think, under the peculiar circumstances of such a larceny from the house, it was one which included simple larceny. He had already stolen the money before he left the house, and, if he never had left it, the simple larceny would have been complete.

3. A lengthy request to charge was made, embracing numerous propositions, some of which perhaps were legal, but certainly others of them were illegal. This being so, the request was properly refused.

4. After defining to the jury in terms of the Code both direct and circumstantial evidence, the court charged as follows: "The only distinction that the law makes between the two classes of evidence is that where positive and direct evidence is relied upon then the jury must be satisfied beyond a reasonable doubt of the guilt of the party. If circumstantial evidence alone is relied upon for conviction, the rule is then that the evidence must go to the extent of satisfying the jury to the exclusion of every other reasonable hypothesis except that of the guilt of the accused." The court added in a subsequent part of the charge: "If, after you have gone over all the testimony in this case, and weighed and considered it, there remains in your minds a reasonable doubt as to whether the defendant is guilty or not, you ought to give him the benefit of that doubt and acquit him, but the doubt must be a reasonable one." It is plain that the court was not accurate in saying that the only distinction that the law makes between the two classes of evidence is as he states. But we think this inaccuracy did no harm. It was not necessary to charge at all on the distinction, for the court had already properly defined direct and circumstantial evidence, and from the definition the jury could see the distinction which was material for themselves.

We do not quite understand what the court meant by "the only distinction," and by stating it in the terms above recited; nor have we any idea that the jury understood this part of the charge. If they thought the court meant that direct evidence must be strong enough to exclude reasonable doubt, and circumstantial strong enough to exclude reasonable hypothesis, they probably thought hypothesis and doubt both had to be expelled from the mind, in a case of circumstantial evidence, as this was, and they were subsequently told again that, if reasonable doubt remained, the benefit of it was to be given to the accused. The result is that while we cannot approve the only distinction between the two sorts of evidence as marked out in the charge, because, besides other reasons, we do not quite understand it, yet, if error at all, we are satisfied it is not reversible error.

5. If the court committed any other error, it was not such as to be hurtful to the accused. The evidence warranted the verdict, and a new trial was properly refused. Judgment affirmed.

(82 Ga. 643)

HODGE v. STATE.

(*Supreme Court of Georgia.* March 23, 1889.)

WRECKING RAILROAD TRAINS.

1. The act of October 12, 1885, making it penal to wreck railroad trains, etc., applies to all railroads, whether duly chartered as such or not.
2. The evidence warranted the verdict.

(*Syllabus by the Court.*)

Error from superior court, Dodge county; KIBBEE, Judge.

The official report was substantially as follows: Hodge was indicted for wrecking a train. The testimony tended to show that the train and track belonged to a private corporation, and was used for hauling lumber and hands. The wreck was caused by a slab of timber on the track. Several hands were injured. Two piles of such slabs were in the vicinity of the wreck. Two witnesses (one a detective) testified to voluntary confessions by defendant. Defendant had been employed by the company, and had been discharged. He had made threats. He lived near the place of the wreck, and was seen near the place that morning. Defendant offered no testimony, but made a statement denying confession and threats and knowledge of the crime. He was found guilty, and moved for a new trial on the following grounds. (1) and (2) Verdict contrary to law, evidence, etc. (3) Error in charging. It is not necessary that it should be shown that this is the railroad train of a chartered corporation, nor of a strictly railroad company. Motion overruled, and defendant excepted.

L. A. Hall, for plaintiff in error. *Tom Eason*, Sol. Gen., by *J. H. Martin*, for the State.

BLECKLEY, C. J. 1. Hodge having been tried and convicted for wrecking a railroad train, and the court having denied him a new trial, the first question is whether the act of

Digitized by Google

October 12, 1885, applies to a railroad not chartered. We think the act is applicable to any railroad whatsoever, and that the question of whether it has been chartered or not could not properly be raised. This was a railroad *de facto*, whether one *de jure* or not. The language of the act, neither in its title nor its body, suggests any restrictions whatever to railroads of any given class or kind.

2. The next question is whether the evidence in the record warrants the verdict. We agree with the court below in thinking it quite sufficient. For the facts in full, see the official report, and for the statute see Acts 1884–85, p. 131. Judgment affirmed.

(83 Ga. 341)

LOWRY v. PARKER.

(*Supreme Court of Georgia.* May 1, 1889.)

FORECLOSURE OF MORTGAGE—USURY.

Purging, in the judgment of foreclosure, a mortgage of all the usury in the debt which it was given to secure, does not prevent the waiver of homestead and exemption from being void and remaining void. The mortgage lien will be postponed to an exemption right afterwards asserted in the property, but the lien can be enforced after such right expires.

(*Syllabus by the Court.*)

Error from superior court, Lumpkin county; WELLBORNE, Judge.

The official report is substantially as follows: A mortgage *fi. fa.* in favor of Lowry for $1,500 principal, $267.67 interest, and attorney's fees and costs, was levied on property described in the execution. Part of the property was sold by the sheriff, and part was claimed by defendant as a homestead. The agreed facts are as follows: On January 29, 1886, defendant borrowed of McAlister $1,500, and gave his notes for $2,000, due January, 1887, which were secured by mortgage. On December 22, 1886, McAlister transferred notes and mortgage to Lowry as collateral security for a loan of $1,000. On April 23, 1887, they recovered a general judgment against Parker for $1,500, besides interest, attorney's fees, and costs, the jury purging the notes of $500 as usury, and *fi. fa.* was issued at April term, 1888. The mortgage was foreclosed April 16, 1888. A mortgage judgment was rendered for $1,500 principal, besides interest, attorney's fees, and costs; the sum of $500 being purged from the mortgage as usury. *Fi. fa.* issued on the mortgage judgment, and was levied. Notes and mortgage contained this waiver: "Said party of first part [meaning said Parker] hereby renounces for himself and family all rights and benefit of dower, exemptions, schedule, homestead, or bankrupt exemptions as against this mortgage deed." After *fi. fa.* was issued, Parker applied for a homestead for himself and family, which was set apart. The presiding judge held that the homestead property was not subject to levy and sale under the mortgage *fi. fa.* because of usury, and Lowry excepted.

Weir Boyd, for plaintiff in error. *Price & Charters* and *R. H. Baker*, for defendant in error.

BLECKLEY, C. J. The facts appear in the official report. While a mortgage deed infected with usury is not void as a lien upon the property, (Hodge v. Brown, 7 S. E. Rep. 282, March term, 1888,) any waiver of homestead or exemption contained in it is void as against the homestead or exemption right, (Small v. Hicks, 8 S. E. Rep. 628, October term, 1888; Cleghorn v. Greeson, 77 Ga. 343.) True, it may become too late to insist that the debt is contaminated, as by allowing judgment of foreclosure to be taken without setting up the usury, or making it appear, (McLaws v. Moore, ante, 615, this term;) but here the usury was set up and established in the foreclosure proceeding, and recovery was had only for the amount lawfully due, with the usury purged out. This recovery is not inconsistent with the invalidity of the mortgage in so far as it waived homestead, etc., but entirely consistent therewith. Indeed, the invalidity follows as a direct conclusion from the adjudication that the debt and the mortgage security were infected. That a void waiver would become valid by purging out the usury when the judgment of foreclosure was rendered, is a proposition than which none could be more unsound. The mortgage is good as a lien, but there has been no adjudication, and can be none, that its lien will prevail over the homestead or exemption right. With respect to that right, it stands just as it would had no waiver been inserted in the mortgage deed. Until the right expires or has run out there can be no enforcement of the lien, but after that event it can be enforced. Judgment affirmed.

(83 Ga. 187)

SATTERFIELD v. ROWAN.

(*Supreme Court of Georgia.* May 6, 1889.)

WATERS AND WATER-COURSES — POLLUTION OF STREAM.

1. In an action by the owner of land used for agricultural purposes for the pollution of a stream running through it by washing ore, where defendant alleges that the stream is more useful to him and all other riparian owners for washing ore than it is to plaintiff for agricultural purposes, it is proper to charge that defendant, in using the stream to wash ore on his land, is bound to do so in such manner as will not injure its reasonable use by plaintiff; that if no one lives on the stream below the point in use, or has a farm or pasture on it, or if the stream is mainly useful to each riparian owner for washing ore, then the pollution of the stream would not interfere with its enjoyment; Code Ga. § 2227, declaring that no one shall so use or adulterate running water on his land "as to interfere with the enjoyment of it by the next owner."

2. The pollution of the stream being a continued tortious act by defendant, and not mere negligence, plaintiff is not bound to do anything to avoid the consequences of the act.

Error from city court of Catersville; NEEL, Judge.

Milner, Aiken & Harris and *A. S. Johnson*, for plaintiff in error. *A. W. Fite* and *Shelby Attaway*, for defendant in error.

Digitized by Google

SIMMONS, J. Rowan sued Satterfield, alleging that on May 1, 1884, the defendant erected a dam across a branch on the defendant's own land, which lay on the branch just above the land of plaintiff, and on said day began washing ores on said branch, and has continued to do so; that this branch runs through the land of plaintiff; that the washing of the ores rendered its waters unfit for use, the mud and dirt caused thereby making the waters of the branch dirty, filthy, etc., and has so filled the branch with mud and dirt that, in the summer season, the water ceases to run, and during said season a stench arises from the mud which is unhealthy and unpleasant; that this is the only branch of water of any kind running through his land, except a small branch, which only runs a portion of the year; and that the branch in question runs near his dwelling-house, and through his horse lot and fields, and, before the acts of the plaintiff, was used by him for watering his horses and stock, and for other purposes, but that now he is compelled to get water from his well, and the excessive use thereof often exhausts the water and renders it muddy. The defendant pleaded not guilty; also that the use he made of the stream was reasonable, and sanctioned by the usage of the country, of which usage plaintiff is and has always been aware; further, that the stream is of more use and value to the defendant and all adjacent and subjacent riparian owners for the purpose of washing ores than it is to the plaintiff and all subsequent riparian owners for the purpose to which he puts it as alleged in his declaration. The evidence sustained the allegations made in the plaintiff's declaration, and the jury returned a verdict in favor of the plaintiff. A motion for a new trial was made on many grounds, which was overruled by the court, and the defendant excepted.

The only grounds relied on in argument before us by the counsel for the plaintiff in error for a reversal of the judgment of the court below in refusing to grant a new trial, were the first, sixth, and ninth grounds, which are as follows: (1) That the verdict is contrary to law, evidence, etc. (6) That the court erred in charging as follows: "But the defendant, in using the water of said stream on his land for washing ore, is bound to do so in such manner as not to cause it to flow onto and over plaintiff's land so adulterated as to injure or destroy its reasonable use by plaintiff on his land. Water may be adulterated by mixing with it any other substance or matter which renders it impure or unclean in such degree as to either impair or destroy its value." (9) The court erred in charging thus: "As to what is a reasonable manner of use may depend upon the circumstances of the case. What might be reasonable in one case might be wholly unreasonable in another. If the stream used be in an unsettled country, and no one resides on the stream below the point of use, nor has farm or pastures thereon with cattle or live-stock, or if the stream was mainly useful to every single owner on the stream for washing ore in a mining section of country, so that such was the principal and most valuable use to which the stream could be applied by each and every owner on the stream, then it would not interfere with the enjoyment of the stream below, even if the stream were polluted or adulterated in the washing of ore." It was contended by counsel for the plaintiff in error that the verdict was contrary to the evidence, because the evidence showed that the plaintiff could have avoided the damage to himself by the expenditure of $40 in preparing a filterer in which the water might have been filtered, so that the same would flow upon his premises free from the dirt and mud placed in it by the defendant; and he contended that, if the plaintiff below was entitled to recover at all, he could only recover such an amount as he ought to have expended in filtering the water.

1. We do not think that the principle contended for by the plaintiff in error applies in a case like the one under consideration. While it is true that the defendant may reduce the recovery for an injury resulting from his negligence by showing that the plaintiff did not exercise ordinary care to diminish or avoid the damage, yet in this case the act complained of by the plaintiff in the court below was not a mere act of negligence, but was a positive, continuous, tortious act, committed by the defendant in carrying dirt and ore from the mine, and washing it in the stream, and thereby producing continued adulteration of the plaintiff's water. This principle was decided by this court in the case of Manufacturing Co. v. Rucker, 80 Ga. ——, 4 S. E. Rep. 885. In that case the court below refused to charge the following request: "When the consequences of a present or antecedent negligence are impending, whoever can shun them by ordinary care, and fails to do so, ought not, perhaps, to be heard to complain of them, whether they touch his person or his property. If, therefore, by exercise of ordinary care the plaintiff in this case could have avoided the consequences of the defendant's negligence, if there is such negligence, and has failed to exercise such care, he cannot recover." This court sustained the action of the court below in refusing to give in charge the following request, and said: "We do not think that this is a case of negligence. If this company raised their dam, thereby causing water in the creek to run over the plaintiff's land, and thereby injuring and damaging him, that was an invasion of his rights, and was a positive act on the part of the defendant, and not a case of negligence. Nor was it negligence on the part of the plaintiff not to do anything to avoid the consequences of their act. Every man has the right to enjoy his property to the fullest extent; and whenever that right is invaded by another, and injury accrues to him, he is entitled to the damages therefor. The evidence fails to show that

Digitized by Google

the plaintiff did anything that led to or increased this damage. He did nothing, and he had a right to do nothing; and if they invaded his rights they were liable to him for any damages which he sustained by reason of such invasion. We think the court would have been guilty of manifest error to have given this request in charge to the jury."

2. Nor do we think that the court erred in the charges complained of in the sixth and ninth grounds of the motion. Whatever may be the decisions in other states as to the right of one riparian owner to pollute or adulterate the water of the stream before it reaches the lower and adjacent owner, we think that under our Code the upper owner cannot lawfully pollute or adulterate the water of the stream so as to render it unfit for use by a lower owner, without being liable for damages. The Code, § 2227, declares that "running water, while on land, belongs to the owner of it, but he has no power to divert it from the usual channel; nor can he so use or adulterate it as to interfere with the enjoyment of it by the next owner." The same principle is announced in section 3018. The principle announced in these two sections is that, while the water is upon the land, it belongs to the owner of the land; yet he cannot so use or adulterate it as to interfere with the enjoyment thereof by the next owner, and if he does, he is liable in damages for so using or adulterating it. This water belonged to Satterfield while it was on his land, and he had a right to use it. He did not have the right, under this section of the Code, to use it in such manner as to deprive the next owner of the enjoyment of it. The evidence in the record shows that he did so use it as to deprive Rowan, the next owner, of its use and enjoyment. Rowan was entitled to have the water flow upon his land from Satterfield's land in its natural state, free from the mud, dirt, or other adulteration put therein by Satterfield; and if Satterfield adulterated it by using it for washing his ore, and Rowan, the next owner, was injured thereby, he is entitled to damages therefor; and in our opinion is entitled to such damages whether the stream of water was more useful for the purpose of mining than it was for domestic purposes; and this is what we understand the meaning of the court below to be. Judgment affirmed.

(83 Ga. 288)

THORNTON v. AMERICAN WRITING-MACHINE CO.

(*Supreme Court of Georgia.* April 12, 1889.)

JUDGMENT—VACATING.

A non-resident, while engaged as a suitor and witness in court, was garnished, and the second term of court thereafter judgment was entered against him by default, under Code Ga. § 3304, for want of a plea. A year and a half thereafter he moved to set the judgment aside. *Held* that, the court having, under Code, § 21, jurisdiction of "temporary sojourners," and of the subject-matter, the judgment was not void, and, to avail himself of his privilege as suitor and witness, defendant should have moved to set aside the service, or filed a plea in abatement, and his application came too late.

Error from superior court, Fulton county; MARSHALL J. CLARKE, Judge.

J. H. Smith, for plaintiff in error. *Hoke & Burton Smith*, for defendant in error.

SIMMONS, J. The American Writing-Machine Company commenced its action against W. K. Tewksbury & Co. for $1,109.25. On the 19th of January, 1886, affidavit was made and bond given for the issuance of summons of garnishment in said suit, and on the same day a summons of garnishment was issued and served personally by the sheriff upon M. E. Thornton. It was made returnable to the next term of the superior court of said county. No answer was filed to this summons to the first term of the court. At the second term, to-wit, on the 4th of November, 1886, no answer having been filed, judgment was entered against Thornton by default. On the 17th of August, 1888, Thornton filed his petition to the superior court to set aside the judgment, on the following ground, to-wit: That at the time he was served with said summons of garnishment he was a citizen of the state of Kentucky, and not a citizen of Georgia; that he was in the state of Georgia temporarily, as a suitor and witness in his own case, to-wit, the case of Thornton v. Conley, then being tried in the superior court of Fulton county; that during the progress of said trial, and on the day on which he was served with said summons of garnishment, his case was on trial in said court, and he was sworn and testified as a witness therein; that, being a non-resident and a suitor and witness in said court, he was exempted by law from being served with civil process while in attendance upon said court as a suitor or witness; that the plaintiff and its attorneys knew that he was a non-resident and a suitor and witness in said case; and that the summons of garnishment served upon him was therefore illegal and void, and the judgment entered thereon likewise illegal and void; and he prayed the court to set the same aside for these reasons. The trial judge refused to set aside the judgment, and Thornton excepted, and brought the case here. The law seems to be that a suitor or a witness in attendance upon the trial of any case in court is privileged from arrest under any civil process, and is exempted from the service of any writ or summons upon him or them while in attendance upon such court, or in going to or returning therefrom. If a suitor or witness is arrested, or if civil process is served upon him while thus in attendance on the court, the court, upon application made in proper time, will order his discharge from arrest, or will set aside the service of the civil process. The practice in cases of this sort seems to be, where a party is arrested, to move the court for a discharge, or, where served with civil process, to move to set aside the service, or else file a plea in abatement to the suit or summons, and insist in his plea upon his

Digitized by Google

privilege. The service of the civil process is not void, but voidable, under proper action in the proper time by the person served. Atchison v. Morris, 11 Fed. Rep. 582, and cases there cited; Larned v. Griffin, 12 Fed. Rep. 590, and cases cited; Palmer v. Rowan, 21 Neb. 452, 32 N. W. Rep. 210, and cases cited; 1 Tidd, Pr. § 81; notes to Prentis v. Commonwealth, 16 Amer. Dec. 784.

It will be seen, by reference to the facts in this case, that Thornton, the person garnished, did not pursue either of these remedies, but paid no attention to the summons, and waited until nearly 18 months before he moved to set aside the judgment. In our opinion, he should have applied to the court at the time he was served with summons of garnishment to set aside the service, or he should have filed his answer to said summons, setting out and claiming his privilege and exemption from said service. If he had done either, doubtless, the court would have set aside the service in the first instance, or would have sustained his plea in the second. But, as said before, he did neither. He remained silent, filed no answer or plea, and the court entered judgment against him by default. In our opinion, it was then too late to move to set aside the judgment on the ground that his privilege as a suitor and witness had been violated. The judgment was not void. The court which rendered it had jurisdiction both of the person and the subject-matter. The Code, § 21, declares that "the jurisdiction of this state and its laws extends to all persons while within its limits, whether as citizens, denizens, or temporary sojourners." Section 3304 declares, in substance, that, where any person who has been served with summons of garnishment fails to answer at the first or second term, judgment shall be entered up against him as in cases of default. In the case of Matthews v. Puffer, 10 Fed. Rep. 606, BLATCHFORD, J., in treating of this subject, says: "The objection to the service, as made while the defendant was protected by a privilege, was one which the defendant could waive, and one which he might waive by not making it when he ought to make it, or by not making it in a proper way, as well as by not making it at all. It is one of those irregularities which must be promptly availed of." Freeman on Judgments, in discussing judgments against privileged persons, says (section 496:) "If process be served, the defendant must appear and protect his interest. If he is privileged from service as a member of a legislative or other political body, the privilege is a personal one, which must be claimed by motion in the case. Courts cannot, *ex officio*, take notice of the persons thus privileged; and if, in the absence of any claim being interposed, judgment is pronounced against them, it will not be intermeddled with in equity." In the case of Peters v. League, 13 Md. 58, it was held "that service of process upon a privileged person is not void, but a mere irregularity, which may be waived by a trial or confession of judgment. The privilege must be claimed by plea or motion in the particular case, made at the proper time." In the case of Prentis v. Com., 5 Rand. (Va.) 697, it was held that "the privilege of a member of assembly cannot be noticed by the courts *ex officio*. As it may be waived, it must be claimed; and it can only be claimed by plea, or on motion tendered, or made at the proper period." "If a member of assembly allows a judgment to be rendered against him during the existence of his privilege, and does not seek, during the progress of the proceedings, either to abate or suspend them, he will be deemed to have waived his privilege, and he cannot afterwards be allowed the writ of error *coram vobis* to reverse the judgment." See, also, note to the same case, reported in 16 Amer. Dec. 784, where it is said that "every privileged person must at a proper time and in a proper manner claim the benefit of this privilege. The judge is not bound to notice a right of privilege, or grant it without a claim." While Thornton's privilege as a suitor and witness may have exempted him from service of this summons of garnishment, he should in some way have called the attention of the court to the same, either by moving to set aside the service, by plea in abatement, or perhaps by plea to the jurisdiction, as was done in 21 Neb. 452, 32 N. W. Rep. 210, supra. Not having done so, and judgment having gone against him by default, in our opinion it was too late after that to move to set aside the judgment because his privilege had been violated by service of process while in attendance upon the court as a suitor and witness. We have been unable to find any case where a judgment has been set aside on the ground of violation of the privilege of the defendant. All the cases cited by the plaintiff in error were either upon motions to set aside the service or on pleas in abatement or to the jurisdiction. Judgment affirmed.

(83 Ga. 203)

HARDEE v. LOVETT.

(*Supreme Court of Georgia.* May 1, 1889.)

PLEADING—AMENDMENT.

1. A declaration which alleges that defendant is indebted to plaintiff in a certain sum, and interest on a note due at a certain time, which note he refuses to pay, being in the form prescribed by Code Ga. § 3391, except that it omits the date of the note and a copy thereof, sufficiently states a cause of action to authorize an amendment supplying the omissions.

2. Where the declaration shows on its face that the statutory period within which the action could be maintained had expired, an amendment alleging that from the time defendant executed the note until the action was brought defendant was out of the state, does not state a new cause of action.

Error from superior court, Hall county. WELLBORN, Judge.

H. H. Perry, for plaintiff in error. *Howard Thompson*, for defendant in error.

SIMMONS, J. Lovett brought his action against Hardee in the following form: "Georgia. Hall County. To the Superior

Digitized by Google

Court of said County: The petition of Nathaniel Lovett shows that Gardner S. Hardee, of said county, is indebted to your petitioner in the sum of one thousand dollars, besides interest, on a promissory note due in January, 1868, which said note the said Gardner S. Hardee refuses to pay. Wherefore your petitioner prays process may issue requiring the said Gardner S. Hardee to be and appear at the next superior court for said county, to answer your petitioner's complaint. DAN W. ROUNTREE, HOWARD THOMPSON, Plaintiff's Attorneys." Hardee demurred to the declaration, on the ground that no cause of action was set out, and that it showed on its face that the action was barred. Lovett amended his declaration, by adding thereto a copy of the note, and by alleging that Hardee, the defendant, after signing the note, had removed to the state of Florida, and had resided there ever since, up to the time he was sued in this case. The defendant objected to these amendments, on the ground that they added a new cause of action, and that there was nothing in the original declaration to amend by. The objection was overruled, and he excepted. On the trial of the case the jury returned a verdict for the defendant. The plaintiff made a motion for a new trial, which was granted by the court, and the defendant excepted, and brought the case here for review.

1. The first question in this case is whether the court erred in allowing the amendments to the original declaration. We do not think it did. The original declaration is almost in the exact words of the form prescribed by section 3391 of the Code. It only omits a date of the note, and a copy thereof, and is defective only in these two points. We think it set out a cause of action, though a defective one, and was amendable. The Code prescribes a form which may be used in complaint for land, and declares that, when said form is used, an abstract of the title relied on for recovery shall be annexed thereto. In the case of Camp v. Smith, 61 Ga. 449, where a complaint for land was brought under this short form, and no abstract of title was annexed thereto, this court held that the declaration was amendable by annexing the abstract. We see no difference in allowing amendment by annexing an abstract of title and allowing amendment by attaching a copy of the note sued on, as was done in this case. Nor was there any error in allowing the other amendment, alleging the non-residence of the defendant. This was an effort on the part of the plaintiff to avoid the plea of the statute of limitations. It added no new cause of action or new parties. Declarations under these statutory forms may be amended as other declarations at common law. Akin v. Ordinary, 54 Ga. 59.

2. The court granted a new trial. This is the first grant of a new trial in the case, and we are not disposed to interfere with the discretion of the court in granting the same. Judgment affirmed.

(83 Ga. 406)

BROWN v. MEADOR *et al.*

(*Supreme Court of Georgia.* May 1, 1889.)

APPEAL—REVIEW.

A verdict of the jury, on conflicting evidence, approved by the trial judge, will not be set aside, though the appellate court is not fully satisfied of its correctness.

Error from superior court, Hall county; WELLBORN, Judge.

F. M. Johnson and *J. B. Estes*, for plaintiff in error. *Perry & Dean*, for defendants in error.

BLECKLEY, C. J. The action being by brokers against their employer for advances and commissions, and there being some evidence from which the jury could infer that the transactions involved were not dealings in fictitious "futures," but contemplated actual delivery of the produce purchased, the jury having so found in effect, and the trial judge having approved the finding, this court will forbear to set aside the verdict, although not fully satisfied of its correctness. Upon naked questions of fact, where no error by the court in the progress of the trial is complained of, doubt in the appellate court is to be given in favor of verdicts, and not against them. Judgment affirmed.

(83 Ga. 347)

JARRETT v. ATLANTA & WEST POINT R. CO. *et al.*

(*Supreme Court of Georgia.* April 15, 1889.)

ACCIDENT TO PASSENGER ON TRAIN.

1. A declaration in a suit for damages for injuries on defendant railroad alleged that plaintiff, an employé of another road, was riding on defendant's train in going to his work, according to a permitted custom. The train was running, unlawfully, at 25 miles an hour at the crossing where he wished to get off; and, in jumping, plaintiff was injured by defendant's alleged negligence. *Held*, that a general demurrer to the declaration, as stating no cause of action, was properly sustained.

2. An amendment to the declaration, alleging that plaintiff was an experienced train-hand; that he supposed the train would stop; that he was a poor man; and, not knowing how he would get back, if carried further, was excited, and jumped, —was properly refused, as it would not have aided plaintiff, if allowed.

3. Where a general demurrer to the declaration is filed, the judge can pass on its sufficiency and dismiss the suit, though a question of negligence is involved.

Error from city court of Atlanta, VAN EPPS, Judge.

E. W. Martin and *F. A. Quillian*, for plaintiff in error. *Clahoun, King & Spalding*, for defendants in error.

SIMMONS, J. By his original declaration the plaintiff alleged as follows: He was an employé of the Richmond & Danville Railroad Company, whose line terminated in Atlanta. He boarded one of the passenger trains of the Atlanta & West Point Railroad Company at the passenger depot, the starting-point, for the purpose of going to the freight depot of the Central Railroad, at the Mitchell-Street crossing. He did so with the consent of the Atlanta & West Point Com-

Digitized by Google

pany, it being the custom of that and the other railroad companies terminating in Atlanta to permit the employés of each other to ride from the passenger depot on outgoing trains to their freight depots or workshops; and, according to this custom, he was on the train. On arriving at his destination, by reason of the unlawful running of the train at the rate of 25 or more miles per hour, he was, in the act of getting off, thrown violently against the ground, and against a pile of iron which the Central Railroad Company had carelessly placed at the crossing. This was a public crossing, and running of the train at that rate was a direct violation of the city ordinance and the state law. By reason of the above, which was negligence on the part of both defendants, he has been dreadfully and permanently injured; and he sets forth the extent of his damages. He received the injuries by no fault of his own, but by the negligence of the defendants, as above set forth. The defendants demurred generally to the declaration, and moved to dismiss it because there was no cause of action set forth. The motion was sustained. The plaintiff offered to amend by alleging as follows: Before he got on the train he spoke to the fireman, and in the presence of the engineer, told him he was going to the point mentioned, and asked him if the train stopped there, as was the custom; and he was told by these agents that it did and would do so that day. Before he left the train two other men jumped therefrom, and were not hurt. He saw them, and it appeared that he could do so. He was an experienced train-hand, having been at such work all his life,—jumping on and off trains; but the conduct of the agents of the railroad company in misleading him, greatly excited and confused him. He did not know until he reached the crossing that they would not stop; and, being a poor man and without means to get back, and not knowing where he would be carried, it excited him greatly, and he did not have an opportunity for cool and deliberate decision; and this condition was thrown around him by the negligence of the defendants, and was, with the other causes set forth in his declaration, the cause of his injuries. The court refusing to allow this amendment, and the case being dismissed, the plaintff excepted.

1. The court was right in granting a nonsuit in this case. According to the allegations in the declaration, the plaintiff, with a full knowledge that the defendant's train was running at the rate of 25 miles an hour or more, voluntarily, and without any invitation from or knowledge of the defendant's servants, jumped therefrom. Jumping from a rapidly moving train, known to be so moving, where such jumping is not invited or ordered by the agents of the railroad company, or is not done to avoid some apparently threatened peril, is such negligence on the part of the plaintiff as will bar his recovery. Blodgett v. Bartlett, 50 Ga. 353; Watson v. Railroad Co., 7 S. E. Rep. 854, (October term, 1888;) Railroad Co. v. Watts, ante, 129, (October term, 1888.) The amendment offered by the plaintiff to his declaration would not have aided him, if it had been allowed. In it he alleged that he was an experienced train-hand, having been at such work all his life. If that was true, he certainly ought to have known of the great danger in jumping from a train moving at such a high rate of speed, and that it was reckless conduct on the part of any one to jump from such a train at that rate of speed. All the allegations in the original and amended declaration show that he could have avoided this injury by remaining in the cars Wherever a person can avoid an injury to himself by the exercise of ordinary care, he cannot recover.

2. But it is claimed by counsel for the plaintiff in error that, this being a case wherein negligence was alleged, it was the duty of the court to submit the question of negligence to the jury, and that it was unlawful for him to pass upon that question himself. That is true, after the case has been submitted to the jury; but we know of no law that prohibits a trial judge from passing upon this question when it is made in a motion for nonsuit, or on demurrer to the declaration, as was done in this case. When a motion for a nonsuit is made, or a demurrer to the declaration filed, it is the duty of the trial judge to pass upon it. If, however, the case is submitted to the jury without a motion to nonsuit, or a demurrer to the declaration, then the court must leave the question of negligence to the jury, and it is forbidden by law for the court to express any opinion upon the subject when it is solely a question of fact. And this is the distinction between the cases cited by counsel for the plaintiff in error, which holding that negligence is a question for the jury, and those cited by counsel for the defendant in error, which hold that the judge can grant a nonsuit, or sustain a demurrer, upon the facts alleged in the declaration. Judgment affirmed.

(83 Ga. 196)

NEISLER *et al.* *v.* LOUDON *et al.*

(*Supreme Court of Georgia.* May 1, 1889.)

CLERK OF COURT—FEES.

Under Code Ga. § 3695, allowing a clerk of court, "for recording and copying proceedings in chancery, per 100 words 15 cents," and "for issuing writs of subpœna in equity $2.00," the clerk is entitled to 15 cents per 100 words for each copy of the bill made for the defendants in the suit.

Error from superior court, Lumpkin county; WELLBORN, Judge.

Weir Boyd, for plaintiffs in error. *W. S. Basinger*, for defendants in error

SIMMONS, J. It seems from the record in this case that a bill in equity had been filed by Neisler against Loudon, and a decree had therein for the principal, interest, and costs. The clerk, in taxing his costs, among the

Digitized by Google

items had the following: "Filing and docketing suit, $2; making 4 copies of bill and injunction, 4,700 words each, at 15 cents per hundred words, $7 each, $28; issuing writ of subpœna, $2." The whole bill of costs, as itemized by the clerk, amounted to $179.55. Execution was issued against the defendants for this amount of costs, and was levied upon the property of Mrs. Loudon. She filed an affidavit of illegality to said execution, alleging therein that the clerk, in order to make up the sum of $179.50, included therein not only the sum of $2 for issuing the bill and subpœna, but also the further sum of $28 for four copies of the same, one for each defendant, at $7 each; whereas, there having been four defendants, the clerk was entitled only to $3.50 for the same, to-wit, $2 for copying and issuing process, and 50 cents each for the additional copies after the first, and that the execution, therefore, was issued for $26.50 more than the costs lawfully taxable. The illegality was submitted to the trial judge without a jury, and he sustained the illegality, and held that the clerk was only entitled to $2 for issuing the first copy, and 50 cents each for the additional copies. To this decision and ruling the plaintiffs excepted. We think the exception is well taken. This was an equity case, and section 3695 of the Code allows the clerk, "for recording and copying proceedings in chancery, per 100 words, 15 cents;" "for issuing writ of injunction in equity, $3;" "for issuing writ of subpœna in equity, $2." When it becomes necessary, therefore, in equity proceedings, for the clerk to copy the bill, he is, in our opinion, entitled to 15 cents per hundred words for each copy it may be necessary for him to make. The fee-bill prescribed in this section of the Code has charges common both to courts of equity and courts of law, and intends to provide for the whole costs of the clerk in civil cases in both courts. For instance, for "filing and docketing a suit," the clerk is entitled to the same costs in cases at law as in equity. So, likewise, for "issuing a *fi. fa.*;" "for entering the same on the execution docket;" "for issuing subpœnas to witnesses;" "for docketing each motion," etc. These are charges common to both courts. On the common-law side of the court, the fee for copying and issuing process is $2, and for each copy after the first copy, 50 cents. But in equity cases the legislature seemed to think that the clerk was entitled to more compensation than the small amount allowed in common-law cases, and the reason, we suppose, of this difference was the great difference in the labor of copying the proceedings in equity. The common-law declaration is rarely ever over four or five pages, but bills in equity, with the exhibits thereto, frequently contain from 50 to 100 pages; and the legislature doubtless thought that the clerk should be paid more than 50 cents for each copy of such bill, and allowed him 15 cents per 100 words for copying the same. We think, therefore, that the judge erred in sustaining the illegality, and that the clerk's bill for costs was proper, and that the execution ought to be allowed to proceed. Judgment reversed.

(83 Ga. 351)

WESTERN & A. R. CO. v. DENMEAD.

(*Supreme Court of Georgia.* May 3, 1889.)

WEIGHT OF EVIDENCE—DEPOSITIONS.

1. Where the evidence is conflicting, and the trial court approves the verdict, it will not be disturbed on appeal.

2. In Georgia, plaintiff can introduce the testimony of a female witness, taken by interrogatories, though he produces other female witnesses at the trial, but the court, on proper representations, can compel the attendance of the absent witness, under Code Ga. § 206, par. 4, giving it power, in the furtherance of justice, to control all persons connected with a judicial proceeding before it.

Error from superior court, Cobb county; BROWN, Judge.

Code Ga. § 206, par. 4, provides that a court can control, in furtherance of justice, its officers and other persons connected with a judicial proceeding, in every matter appertaining thereto.

Wynn & Faw and *C. D. Phillips*, for plaintiff in error. *Clay & Blair* and *George F. Gober*, for defendant in error.

SIMMONS, J. Denmead sued the railroad company for damages. The jury returned a verdict for the plaintiff, and the defendant made a motion for a new trial, upon the sole ground that the verdict was contrary to law and the evidence. The motion was overruled, and the defendant excepted.

The only ground argued before us was that the verdict was contrary to the evidence. The evidence was conflicting upon the main point in the case, and the jury believed the witnesses for the plaintiff. The court was satisfied with the verdict, and we will not interfere with his judgment in refusing to grant a new trial. Complaint was made in the argument of unfairness in the conduct of the case on the part of the plaintiff, because the plaintiff took the evidence of a female colored witness by interrogatories, and brought other females into court by subpœnas, and had their testimony before the jury. It was argued that the colored female witness whose testimony was taken by interrogatories was of such bad character that, if she had been subjected to cross-examination before the court and jury, the jury would not have believed her. She being a female, the plaintiff, under the law, had the right to take her testimony by interrogatories. If the defendant had desired this witness examined before the court and jury, and could have given the court any special reasons therefor, the judge had the power to compel her presence at the court, and doubtless would have done so upon proper application made to him, and sufficient reasons assigned for the necessity of her attendance. Powell v. Railroad Co., 77 Ga. 192, 198, 3 S. E. Rep.

Digitized by Google

757; Railroad Co. v. Childress, ante, 602, (this term;) Code, § 206, par. 4. Judgment affirmed.

(30 S. C. 564)

HALL *v.* WOODWARD.

(*Supreme Court of South Carolina.* April 11, 1889.)

PLEADING—AMENDMENT—EVIDENCE.

1. In an action against a co-surety for contribution, where the only defense interposed was presumption of payment of the original debt as to defendant, the execution of the note by defendant, and the fact of his suretyship, do not become *res adjudicata*, but may be set up in an amended answer on a second trial of the action.

2. An amendment to the pleadings, offered by defendant on the second trial, introducing the questions as to the execution of the note by defendant, and the fact of co-suretyship, which questions are decided on the trial adversely to plaintiff, will not be held on appeal to be frivolous or evasive, or the allegations on which they rest to be manifestly untrue.

3. Defendant is not estopped from setting up the new defense on the second trial by the fact that he pleaded a different defense in the former trial.

4. Code S. C. § 194, provides that the court may, in furtherance of justice, amend any pleading, etc., by inserting other allegations, etc., "or, when the amendment does not change substantially the claim or defense, by conforming the pleading or proceeding to the facts proved." *Held*, that the limitation as to changing the claim or defense applies only to amendments during or after trial, and does not prohibit that an amendment changing the defense be allowed after reversal of a first trial, and before the second trial.

5. Whether a proposed amendment of pleadings is in furtherance of justice is a question for the trial court, on a review of all the circumstances; and the consideration that the party offering the amendment is put to a disadvantage by the death of witnesses is a proper matter to be considered, but is not conclusive.

6. Under Code S. C., which does not permit a denial of knowledge or information sufficient to form a belief as to the existence of a fact the truth of which can be readily ascertained, such pleading is proper as to the execution of a note which has been lost for about 20 years, and which the pleader has not had an opportunity to examine or had called to his attention for more than 20 years.

7. On the second trial the original answer of defendant, which admitted the execution of the note and the co-suretyship, but which had been struck from the record when the amended answer was filed, was competent, but not conclusive, evidence of the facts therein admitted.

Appeal from common pleas circuit court of Fairfield county; WITHERSPOON, Judge.

Ragsdale & Ragsdale, for appellant. *Lyles & Haynsworth* and *O'Bear & Rion*, for respondent.

McIVER, J. The plaintiff brings this action, as assignee of his father Daniel Hall, Sr., against the defendant Woodward, to recover one-half of the amount paid by him in satisfaction of a judgment which had been recovered against Daniel Hall, Sr., on a note, upon which it is alleged he and Woodward were joint sureties. In his original answer the defendant raised no issue either as to the execution of said note by him, or as to the fact that he and Daniel Hall, Sr., were co-sureties on said note, but rested his defense upon other grounds, one of which was that the note was presumed paid as to him by lapse of time before the judgment was paid by the plaintiff herein. At the first trial the circuit judge, without considering any of the other defenses, sustained the plea of payment presumed from lapse of time, and upon that ground alone rendered judgment dismissing the complaint. From that judgment the plaintiff appealed, and this court reversed the judgment, and remanded the case for a new trial. See the case as reported. 26 S. C. 557, 2 S. E. Rep. 401. As soon as the *remittitur* was sent down, and before the next succeeding term of the court of common pleas, the defendant gave notice that he would move to amend his answer by substituting, in place of the answer originally filed, another answer, a copy of which, together with certain affidavits set out in the case, was served with the notice of the motion. Upon these papers, as well as certain affidavits submitted by plaintiff, likewise set out in the case, the motion was heard and granted by Judge WALLACE. From the order granting this motion the plaintiff gave due notice of appeal, but by an arrangement between the parties the hearing of this appeal was suspended until the final disposition of the case on the merits. In pursuance of this arrangement the case was heard on the merits, by Judge WITHERSPOON, at the next term of the court, upon the pleadings as amended. The amended answer purports to put in issue both the fact of the execution of the note by Woodward and the fact of his co-suretyship with Daniel Hall, Sr., by denying any knowledge or information sufficient to form a belief as to either of these facts. Judge WITHERSPOON, finding as matter of fact that the plaintiff had failed to show by a preponderance of evidence either the execution of the note or that he and Daniel Hall, Sr., were co-sureties thereon, rendered judgment that the complaint be dismissed, with certain provisions as to the costs which need not be stated, as there is no controversy here in reference to that portion of the judgment. From this judgment plaintiff also appeals upon the several grounds set out in the record.

We will first consider the appeal from Judge WALLACE'S order granting leave to substitute the amended answer for the one originally filed. The first exception to this order is that the issues sought to be raised by the amended answer were *res adjudicata* by the former decision in this case. These issues were as to the execution of the note by Woodward, and the fact of his co-suretyship with Daniel Hall, Sr. As it is quite clear that no such issues were presented by the pleadings at the former trial, it is difficult to conceive how they can be regarded as *res adjudicata*. Neither the circuit nor supreme court were called upon to determine anything whatever in regard to these facts, and accordingly, so far from undertaking to do so, both the circuit judge and this court expressly said that the only question to be considered was whether the plea of payment, resting on the presumption arising from lapse of time, could be sustained, and it is quite manifest

Digitized by Google

that that was the only issue considered or determined.

The second exception to the order is that the circuit judge erred in holding that the proposed amendment was in furtherance of justice. Ordinarily, motions to amend are addressed to the discretion of the circuit court, and whether a proposed amendment is in furtherance of justice is a matter to be determined by that court upon a review of all the circumstances. The consideration so earnestly urged, that the plaintiff, by the death of witnesses, was put at a disadvantage, was a very proper matter to be considered by the circuit judge, and no doubt it was allowed by his honor all due weight; but it was not conclusive or controlling.

The third exception is that the motion to amend was improperly granted, because by the proposed amendment the defendant is allowed to change his defense. Section 194 of the Code reads as follows: "The court may, before or after judgment, in furtherance of justice, and on such terms as may be proper, amend any pleading, process, or proceeding, by adding or striking out the name of any party, or by correcting a mistake in the name of a party, or a mistake in any other respect, or by inserting other allegations material to the case, or, when the amendment does not change substantially the claim or defense, by conforming the pleading or proceeding to the facts proved." It is very obvious that the power of amendment conferred by this section is very broad, though not entirely unlimited; and the appellant, by this exception, contends that one of these limitations is that "the claim or defense" shall not be substantially changed by an amendment. It seems to us, however, that this limitation applies only to cases where an amendment is applied for during or after the trial. This is shown by the language used in the latter part of the section, where the limitation is found, "by conforming the pleading or proceeding to the facts proved," showing clearly that it is confined to applications for amendment during or after the trial, for then only could it be ascertained what facts were proved to which the pleading can be made to conform. The reason for the distinction is manifest, for, where a party has come prepared to meet a certain claim or defense, it would be clearly unjust to permit such claim or defense to be changed substantially in the midst of the trial or after it was concluded, though there would be no injustice in permitting an amendment which made no substantial change in the claim or defense, but simply supplied some formal matter, which did not go to the merits of the issue which has been or is being tried. But this would not apply to an amendment made before trial, for there the amendment can operate no surprise, as the other party, if he moves for it, can always obtain time to answer such amendment. See Cleveland v. Cohrs, 13 S. C. 397; Coleman v. Heller, Id. 491. Where, however, the amendment is applied for during or after the trial, in order to conform the pleadings to the facts proved, as in Trumbo v. Finley, 18 S. C. 316, and Dunsford v. Brown, 19 S. C. 567, no opportunity can be afforded the other party to meet the claim or defense as changed by the amendment, and hence there is eminent propriety, in such cases, in prohibiting an amendment which changes substantially the claim or defense. If any authority be needed to sustain this construction of section 194 of the Code, it may be found in the cases cited in the argument of Mr. O'Bear, one of the counsel for respondent. This construction of the Code has been acted upon by this court in several cases. Among others, see Mason v. Johnson, 13 S. C. 21; Cleveland v Cohrs, Id. 397; and Nesbitt v. Cavender, 27 S. C. 1, 2 S. E. Rep. 702,—in which last-named case this court, after ordering a new trial, granted leave to the plaintiff to amend his complaint, so as to raise a new issue. In this case the leave to amend was granted, not only before the trial, but at the preceding term of the court, and could not, therefore, operate as any surprise to the plaintiff.

The fourth exception is based upon the ground that the proposed amended answer "is frivolous, evasive, and insufficient." That it is not frivolous or evasive is shown by the fact that it presents two issues—one as to the execution of the note, and the other as to the fact of co-suretyship—which were essential to the maintenance of the plaintiff's case; and, in view of the fact that both of those issues have been determined adversely to the plaintiff by the circuit court, after a full hearing, we certainly cannot say that the allegations upon which they rest were manifestly untrue. As to the insufficiency of the answer, there is no specific statement in the exceptions as to the ground upon which it is alleged to be insufficient, and under a strict practice we would be justified in disregarding this branch of the exception. But, as we have been able to gather from the argument in what respect the answer is supposed to be insufficient, we will not decline to consider the question. As we understand it, the ground upon which the answer is claimed to be insufficient is that it simply denies any knowledge or information sufficient to form a belief as to whether defendant executed the note, and that such a denial is insufficient to present an issue as to the execution of a written instrument. This may be true as a general proposition, where the instrument is accessible; for the Code, proceeding upon the theory that mere formal proof should be dispensed with and the parties brought to the real issues involved, does not permit a denial of knowledge or information sufficient to form a belief as to the existence of a fact the truth of which can be readily ascertained, as, for example, a record in a public office, or any other writing to which the party can gain access, to be regarded as sufficient to raise an issue. But to apply this rule to such a case as this would

Digitized by Google

be a perversion of its true object and real design. Here the note has been lost for some 19 or 20 years, and the defendant not having any opportunity to examine it, and it not having been brought to his attention for more than 20 years, we do not see how he could truthfully say more than he has done. But we need not say more upon this point, as the question is concluded by the case of Bank v. Strother, 22 S. C. 557.

The fifth exception imputes error to Judge WALLACE in not holding that the defendant was estopped by his conduct from denying either that he had signed the note or that he and Daniel Hall, Sr., were co-sureties. We are unable to find any evidence in the conduct of the defendant which would raise such an estoppel. He certainly never said or did anything calculated to induce the plaintiff to make the payment on the judgment, for, so far from admitting his own liability, he constantly denied it. The fact that he did not place his denial upon the distinct ground that he had never signed the note, or that he and Daniel Hall, Sr., were not co-sureties, cannot affect the question. It seems to us that the whole conduct and conversation of the defendant, instead of encouraging the plaintiff to make the payment, should have had precisely the contrary effect. He certainly never admitted his liability, and never admitted signing the note or the fact of co-suretyship, until he filed his original answer, which, being long after the plaintiff made the payment, could not possibly have induced such payment. The utmost that can be said is that the defendant never denied signing the note or the fact of his co-suretyship, and we do not see that he was under any obligation, either legal or moral, to make such denial until called upon by proper authority. It seems to us, therefore, that none of the exceptions to Judge WALLACE'S order can be sustained.

We come next to the appeal from Judge WITHERSPOON'S decree. The second, third, seventh, and eighth exceptions to this decree have already been disposed of in considering the appeal from Judge WALLACE'S order. The first, fourth, sixth, and tenth exceptions simply impute error in matters of fact. The fifth and ninth exceptions raise questions as to the competency and effect of certain documentary evidence. First, as to the questions of fact. Under the well-settled rule of this court, the appellant must show either that the findings of fact in the court below are without any testimony to support them, or are manifestly against the weight of the testimony; and this, we think, he has failed to do. It was essential to the plaintiff's case to show affirmatively, not merely that defendant executed the note, but that he and Daniel Hall, Sr., were co-sureties. When he introduced in evidence the defendant's original answer admitting these facts, which, we think, was competent evidence, just as any other written or verbal admission made by defendant, he made out a *prima facie* case, which threw the burden of proof upon the defendant to rebut or explain such admissions, and Judge WITHERSPOON very properly gave the plaintiff the benefit of this view. As we have said, this original answer was competent evidence, just as a letter or any other writing signed by the defendant would have been, but it was not conclusive of the facts therein stated. If it had remained as a part of the pleading, then it would have been an admission of record, and conclusive. But when it was "sponged out" as a part of the pleading—to use the expression found in some of the cases—it lost its conclusive character, and stood like any other written or verbal admission which the defendant may have made, open to explanation; and the circuit judge has found as matter of fact that this admission has been explained away; that it was made unadvisedly, and with no intention to admit the fact that the note was signed by the defendant as a co-surety with Daniel Hall, Sr., and, under the rule, we cannot say that the circuit judge has erred in such finding. On the contrary, all the circumstances would seem to indicate that he reached a correct conclusion. Without the admissions found in the original answer, it seems to us that there is absolutely no evidence that defendant and Hall were co-sureties, and very little, if any at all, that defendant ever signed the note. We do not deem it necessary, nor is it usual, to go into a detailed examination of the testimony for the purpose of supporting a finding of fact by the circuit judge, as his decree is sufficient to vindicate itself.

The only remaining inquiry is whether the circuit judge erred in his rulings as to the competency and effect of the documentary evidence referred to in the fifth and ninth exceptions. The defendant was not a party to the record in Mobley v. Hall, and nothing contained in that record was competent evidence against him; and the same may be said of the copy of the note found in Col. Rion's law-office, no matter what the purpose may have been in offering it in evidence. The facts essential to the plaintiff's recovery were that defendant had executed the note, and that he and Daniel Hall, Sr., were co-sureties, and nothing in those papers could legally tend to establish those facts. The judgment of this court is that the judgment of the circuit court be affirmed.

SIMPSON, C. J., and MCGOWAN, J., concur.

(30 S. C. 519)

PORT ROYAL MIN. CO. *v.* HAGOOD *et al.*, Board of Agriculture.

(*Supreme Court of South Carolina.* April 2, 1889.)

LICENSE—MINING PHOSPHATES—CONSTITUTIONAL LAW.

1. Act S. C. 1884, (18 St. 779,) provides "that, in every case in which applications shall be made to the board of agriculture for a license to dig, mine, and remove phospate rock and phosphate deposits, * * * it shall be within the power and authority of the said board to grant or refuse the said license,

Digitized by Google

as the said board may, in its discretion, deem for the best interests of the state, and the proper management of the interests of the state, in such deposits." *Held* that the power of the board was discretionary, and *mandamus* would not lie to compel the board to issue such license.

2. Such act is not unconstitutional, as a delegation of the legislative power to the board of agriculture.

3. Neither is the act unconstitutional as being in violation of Const. U. S. 14th Amend., which provides that "no state shall deny to any person within its jurisdiction the equal protection of the laws."

4. Relator's application for a license was referred by the board to the commissioner of agriculture, "first to procure the payment of [certain royalties owed by relator's agents] in its full amount; and then, and not till then, to grant a license to applicants to mine: provided, further, such regulations are devised and agreed upon, in view of applicants being manufacturers as well as proposed miners, as will secure a just accounting to the state for royalty on rock to be raised." The commissioner was unable to devise regulations to protect the interests of the state, and the license was refused. *Held*, that the board's declaration of willingness to grant the license on certain conditions did not exhaust the discretion allowed them.

5. The special assistant of the department of agriculture had no power to bind the board in the matter of granting licenses by representations.

Appeal from common pleas circuit court of Barnwell county; J. J. NORTON, Judge.

Application by the Port Royal Mining Company for a writ of *mandamus* to compel the respondents, Johnson Hagood and others, constituting the board of agriculture, to issue a license to relator to mine phosphate rock. Application denied, and relator appeals.

Elliott & Howe, for appellant. *Joseph H. Earle*, Atty. Gen., for respondents.

MCGOWAN, J. This was an application to Judge NORTON for a writ of *mandamus* against the respondents, requiring them to issue to the relator a license to mine phosphate rock in certain navigable streams of the state, under the following circumstances: The relator is a corporation, chartered in this state, for "the purpose of mining, dredging, preparing, removing, procuring phosphate rocks and phosphatic deposits, and cleaning, drying, crushing, grinding, and generally dealing in the same in the state of South Carolina," etc., but, having no right to take the phosphate rocks from the beds of navigable streams which belong to the state, they apply to the "board of agriculture" for a license for that purpose. The board refused to grant the license, because they had been informed and believed that the corporators and owners of the property of the said Port Royal Mining Company are now indebted to the state in a large amount for royalty due the state under a license issued to W. T. Seward & Co., their agents; and (2) because the said Port Royal Mining Company are operating at the same time both as miners and manufacturers. The respondents deemed it unwise to grant a license to persons who operated in the double capacity of miners and manufacturers, on account of the difficulty, in such cases, of procuring satisfactory returns of the quantity of rock mined, and the facility with which frauds may be perpetrated against the state. The respondents, however, made return to the rule that they were willing to grant the license upon the conditions stated in the following resolution: "That it be referred to the commissioner of agriculture, under the advice of the attorney general, first to procure the payment of the said royalty [referring to the royalty due as aforesaid by W. T. Seward & Co.] in its full amount, and then, and not till then, to grant a license to the applicants to mine: provided, further, such regulations are devised and agreed upon, in view of the applicants being manufacturers as well as proposed miners, as will secure a just accounting to the state for royalty on rock to be raised," etc. The commissioner of agriculture, to whom the matter was referred under the resolution, was unable to devise such regulations as would protect the interest of the state as directed, and the license was not granted. Thereupon the relator filed this petition to compel the board of agriculture to issue the license demanded. Judge NORTON, after argument, denied the writ, upon the ground that to grant the license was not a plain ministerial duty of the board, but was within the discretion given them by the statute, holding also that the act giving such discretion was not unconstitutional. "The authorities recited relate to acts where only the right to exercise certain privileges upon which a general restraint has been laid was involved; not to the disposition, as in the case before me, of private property. For example,—the right to sell liquors, not the right to require the government to furnish liquor to be sold; the right to set up a laundry, not the right to use government buildings for that purpose," etc. From this order the relator appeals to this court upon numerous exceptions, which are printed in the brief, and need not be restated here.

We think all the points made may be considered under the following propositions: *First*. That it was error to hold that the respondents refused to grant the license in the exercise of a discretion given them by law; *second*, but, if so, that the act of the legislature purporting to confer such discretion was unconstitutional, and conferred no legal authority, (1) because it was an effort to delegate legislative authority to the board of agriculture; (2) and because the act does not specify the standard to which an applicant for a license must conform, but the establishment of such standard, and whether an applicant for such license meets the requirements of such standard, are both left to the arbitrary and unregulated discretion of the board of agriculture. Did the board of agriculture have the discretion to grant or refuse the application for a license, as in their judgment they deemed best for the interests of the state? The writ of *mandamus* is the highest judicial writ known to the law, and it is well settled that it issues only in cases where there is a specific legal right to be enforced, or where there is a positive duty to be per-

Digitized by Google

formed, which can be performed, and where there is no other specific remedy. "When the legal right is doubtful, or when the performance of the duty rests in discretion, or when there is other adequate remedy, a writ of *mandamus* cannot rightfully issue." See Ex parte Mackey, 15 S. C. 330. Soon after the value of phosphatic deposits became known, the legislature made it an indictable offense to dig or mine phosphatic rocks or deposits, without authority, from the beds of the navigable streams and waters of the state; and charged the "board of agriculture" exclusively with the protection of the rights and interests of the state therein. At that time it seems to have been the policy of the state to encourage the granting of licenses "to dig and mine," and, in that view, an act was passed which required the board "to issue to all citizens of the state, and bodies corporate applying for the same, licenses granting a general right to dig and mine phosphate rock" in the navigable streams and waters of the state. See section 67, Gen. St. Under this provision it certainly was a plain ministerial duty of the board of agriculture to issue licenses for a compensation or royalty to all persons who applied for the same. But it appears that in 1884 the state changed its policy in reference to these valuable deposits, and passed an act which provides as follows: "That in every case in which applications shall be made to the board of agriculture for a license to dig, mine, and remove phosphate rock and phosphatic deposits from the beds of the navigable streams or from the marshes of this state, it shall be within the power and authority of the said board to grant or refuse the said license as the said board may, in its discretion, deem best for the interests of the state, and the proper management of the interests of the state, in such deposits," etc. 18 St. 779. It will be observed that there is no other provision in the act, but it seems to have been passed for the express purpose, as stated in the title, of "defining the powers of the board of agriculture" in granting just such licenses as the one in contention in this case. It seems to us that it would be difficult to frame an act giving larger powers of discretion.

We cannot take the view so earnestly pressed, that the board, by declaring a willingness to grant the license upon the performance of certain conditions, thereby exercised the only discretion allowed them, and, the conditions being disregarded, that nothing remained but the plain ministerial duty of issuing the license. It seems to us that the transaction was an entirety, and cannot, as suggested, be divided into two separate and distinct acts. The character of the conditions has nothing to do with the inquiry here. Under the law it was for the board to determine, considering all the circumstances, whether it was most for the interests of the state "to grant or refuse the license." Nor do we think that the special assistant of the department of agriculture had the power to bind the board in the matter of granting licenses by any representations he could make. See City Council v. Hollenback, 3 Strob. 357.

It is insisted, however, that if this be the proper construction of the act of 1884 it is void under the constitution of the state, and affords no justification for the respondents in refusing the license, for the reason that it was a delegation of legislative powers to the board of agriculture. We have just seen that *mandamus* only lies for the enforcement of a plain ministerial duty; but it is not obvious how that can be a plain duty which is only made to appear by declaring an act of the legislature unconstitutional. It is not the province of the board of agriculture to determine the constitutionality of laws defining their own powers; nor will the courts, upon summary proceedings in *mandamus*, determine as to the constitutionality of statutes affecting the rights of third persons. Ex parte Lynch, 16 S. C. 40. It is undoubtedly true that legislative power cannot be delegated; but it is not always easy to say what is and what is not legislative power, in the sense of the principle. The legislature is only in session for a short period of each year, and during the recess cannot attend to what might be called the business affairs of the state. From the necessity of the case, as well as the character of the business itself, that must be performed by agents appointed for that purpose, such as the railroad commission, regents of the lunatic asylum, the state board of canvassers of elections, "sinking fund commission," etc. The numerous authorities cited in the argument show conclusively that, while it is necessary that the law itself should be full and complete as it comes from the proper law-making body, it may be, indeed must be, left to agents in one form or another to perform acts of executive administration which are in no sense legislative. Without incumbering this opinion with the authorities, we think the view is well stated in Locke's Appeal, 72 Pa. St. 491: "Then the true distinction, I conceive, is this: The legislature cannot delegate its power to make a law; but it can make a law to delegate a power to determine some fact or state of things upon which the law makes, or intends to make, its own action depend. To deny this would be to stop the wheels of government. There are many things upon which wise and useful legislation must depend which cannot be known to the law-making power, and must, therefore, be a subject of inquiry and determination outside of the halls of legislation." But it is further claimed that, although the act of 1884 does not on its face make discriminations, yet the absolute discretion which it gives enables the board of agriculture to do so, in violation of the fourteenth amendment of the constitution of the United States, which, among other things, declares that "no state shall deny to any person within its jurisdiction the equal protection of the laws." The relator charges that the board refused to grant to them a license

Digitized by Google

to mine phosphate rocks in navigable streams, for the reason, in part, that the said company was already in the business of manufacturing phosphate rocks, and they deemed it unwise to issue a license to them, "who operate in the double capacity of miners and manufacturers," while they granted such licenses to the Sea Island Chemical Company and the Carolina Mining Company, both being at the same time manufacturers of phosphates. This was denied as a matter of fact, and we observe that in "the statement of facts agreed upon" is the following: "That neither the Sea Island Chemical Company nor the Carolina Mining Company are now engaged in manufacturing fertilizers, nor were they so engaged at the time their licenses were issued, nor were they ever so engaged." But we do not see how the fourteenth amendment of the United States constitution applies to this case. It was decided in State v. Guano Co., 22 S. C. 84, that the state has in the beds of the navigable tidal waters on the sea-coast, "not only title as property, the *jus privatum*, but something more, the *jus publicum*," and, in reference thereto, was charged with "trust duties." Although held for the benefit of the public, we suppose that the state has the exclusive right to control them, and might refuse to grant any licenses to private persons or corporate bodies to mine in them. The relator is not asking to be protected in a right common to all, but to obtain a license to mine in the navigable waters of the state, which is in the nature of a special privilege. The relator company has a charter both to mine and manufacture phosphates, which they may do without any restraint whatever, but, as forcibly stated at the bar, "the right to mine and the right to the mines are essentially different, and so likewise is the right to manufacture and the right to procure from the state the materials to be manufactured." The judgment of this court is that the judgment of the circuit court be affirmed.

SIMPSON, C. J., and MCIVER, J., concur.

(31 S. C. 53)

BURNS v. MILLS.

(*Supreme Court of South Carolina.* April 15, 1889.)

CONTRACTS—REQUISITES.

Plaintiff, by an oral contract, sold to defendant's intestate certain Jersey cattle, agreeing to get them "registered" as part of the consideration. In an action for the price, he proved that he had them registered in a certain Jersey registry. It was also shown that there were two books of registry; that the one in which the cattle were registered was very much inferior; and that the other one was the generally approved and accepted registry of Jersey cattle breeders. Intestate was about to breed stock, but it was not shown to which registry he referred in making the contract. *Held*, that an instruction that the question was not what intestate intended, but, if plaintiff made an offer which intestate accepted, it is what plaintiff intended intestate should understand by his promise, was error; as, the term used being equivocal, it devolved on plaintiff to prove that the minds of the parties met, and to establish the special contract pleaded.

Appeal from common pleas circuit court of Greenville county; MORTON, Judge.

Thomson, Nicholls & Moore, for appellant. *Bomar & Simpson*, for respondent.

MCGOWAN, J. It seems that in May, 1883, the plaintiff sold and delivered to the intestate, L. A. Mills, of Spartanburg, six Jersey heifers, for $525. The plaintiff claimed that the contract (which was verbal) was cash on delivery, but some contention arose as to the blood, and especially as to "the registry" of the animals. In 1885, L. A. Mills died, and O. P. Mills, becoming the administrator of his estate, was sued by the plaintiff upon the contract in February, 1887. The complaint was simply for the purchase money, ($525,) without any mention of interest. The defendant answered that, as informed, his intestate did agree to purchase certain calves from the plaintiff, and that the plaintiff promised to give him a written guaranty, and have the animals registered before they were paid for, which he (the plaintiff) would not or could not do; that upon this discovery his intestate offered to return the cattle, upon being paid his expenses, which offer was refused; and that plaintiff failed to keep his contract, to the damage of the intestate $500. The plaintiff proved that he had the heifers registered in the "American Jersey Herd Registry," kept at Worcester, Mass. S. Harris, the only person, except the parties themselves, who was present when the contract was made, testified "that he was present when the contract was made between plaintiff and intestate. Four of the heifers were about 14 months old, two, about three months old. They were very poor at the time. The understanding was that they were to be registered, or certificate forwarded to that effect. Don't know if book was mentioned in which they were to be registered. It was not to his knowledge. I am a Jersey cattle man to a small extent. Not an expert in registering, etc. The American Jersey Cattle Club Herd Registry is the only registration book in this country for Jersey cattle. The cattle registered in the book spoken of by Mr. Burns [American Jersey Herd Registry] were worth no more than grades of any other cattle," etc. It was satisfactorily proved that the American Jersey Cattle Club Herd Registry was the only recognized registration book in this country for Jersey cattle, and that the heifers sold to the intestate, Mills, were not registered therein. Under the charge of the judge, the jury found for the plaintiff the full amount of the account and interest, ($705.66.) Thereupon the plaintiff moved for leave to amend the complaint, so as to include a count for interest, which was refused. The defendant then moved for a new trial on the minutes, which was also refused, and the defendant appeals, alleging error as follows: "(1) In charging that if there was a contract between plaintiff

Digitized by Google

and intestate, and the contract is proved, they should find for the plaintiff, with interest. (2) In refusing the motion for a new trial. (3) In not at least granting a new trial *nisi*, the plaintiff remitting all of the verdict over $525 demanded in the complaint. (4) In giving five dollars costs against the defendant in refusing a motion for a new trial. (5) In charging the jury that if they concluded that the contract between plaintiff and intestate was that there was to be a registration of the cattle, then the contract, being a verbal one, was for their interpretation. (6) In charging that the law in regard to a verbal contract is, not what Mr. Mills intended by the contract, but if Mr. Burns made an offer to Mr. Mills, and Mr. Mills accepted it, it is what Mr. Burns intended Mr. Mills should understand by his promise that these should be registered cattle. (7) In charging that it was what plaintiff offered to do, and what he intended that intestate should understand that he offered to do, that should govern. (8) In charging that the above definition should only help the jury, if they should conclude that registration had not been sufficiently defined to them by persons sufficiently competent to know. (9) In charging that it might be that the jury sufficiently understood the technical word 'registered,' when applied to Jersey cattle, to give it a definite fixed meaning, and it was for them to say whether that definite fixed meaning was used by Mr. Burns when he guarantied it. (10) In charging the jury that it might be that registration in one of the registration books would be as good as the other. (11) In charging that if the jury should come to the conclusion that Mr. Mills, with full knowledge of the facts, accepted these cattle, whether they were registered or unregistered, would make no difference."

Exceptions 5, 6, 7, 8, and 9 substantially allege error in the charge "that the law in regard to a verbal contract is, not what Mr. Mills intended by the contract, but if Mr. Burns made an offer to Mr. Mills, which he accepted, it is what Burns intended Mills should understand by his promise that these should be registered cattle." We are not quite sure that we apprehend this clearly, as applied to the facts of this case. If there had been nothing ambiguous in the terms used, if there had been a certain fixed meaning universally attached to the term "registered," then the proposition would have been entirely unobjectionable; for a distinct offer made in unequivocal terms, and accepted, is the very definition of an agreement. But, as we understand, such was not the case here. It was undoubtedly a part of the contract that the heifers should be registered, whatever that may be. That is shown, not only by the proof, but by the nature of the contract itself; for it can hardly be supposed that any man would agree to give $525 for six calves in bad condition, two of which were not more than three months old, unless there was something connected with them which gave or was supposed to give them unusual value. The intestate wished to breed Jersey cattle for the market, and it is clear that the promised registration as to him was an essential part of the consideration, as affording record evidence of the pure breed of the stock. It seems, however, that there were two books of registry,—one (A. J. C. C.) which afforded the best evidence of the purity of the stock registered, and generally regarded in this country as the only proper registry of Jersey cattle, and the other (A. J. C. H.) much less valuable in that respect. The contract did not specify which registry was meant; and the confusion has arisen from the fact that the term used ("registered,") admits of more than one sense; and, that being the case, it seems to us that it was error to say that the contract should be interpreted by what was the intention of Burns, the seller, without any regard to the concurring intention of the intestate, the purchaser. It strikes us that, the term used being capable of two meanings, it was not enough to consider alone the intention of Burns. It was incumbent upon the plaintiff to make out the special contract upon which he sued. He proved that he had registered the cattle in the registry, which was not the approved and accepted registry of the country. There was no proof that the intestate meant that registry. "The most essential element of an agreement is the consent of the parties. If two or more parties express their consent to a common purpose, this is an agreement. The terms of a proposal must be sufficiently certain to enable the court to say what the agreement is." 3 Amer. & Eng. Cyclop. Law, 841. An agreement, to be binding, must be understood and assented to by both parties. It is elementary that, in order to constitute a binding contract, there must be a definite promise by the party charged, accepted by the person claiming the benefit of such promise. Chit. Cont. 9. It takes two to make a binding bargain, and, where the terms used are equivocal, both parties must assent in the same sense. The minds of the parties must meet, (Gary v. Watson, 16 S. C. 623;) as was strongly illustrated by the old case put by Dr. Paley in his chapter on "Promises," where a commander offered to receive the surrender of a garrison without bloodshed, and then buried them alive. This makes it unnecessary to consider the other exceptions. The judgment of this court is that the judgment of the circuit court be reversed, and the case remanded for a new trial.

SIMPSON, C. J., and MCIVER, J., concur.

(31 S. C. 87)

HARRIS v. RICHMOND & D. R. CO.

(*Supreme Court of South Carolina.* April 23, 1889.)

PLEADING AND PROOF—VARIANCE.

A complaint alleged that defendant contracted in writing with plaintiff to pay him certain sums

Digitized by Google

according to certain stipulations, the contract containing the express stipulation that neither the contract, nor any obligations or rights under it, should be assigned to any other party. There was no allegation of agency, or that any other person than plaintiff made the contract. The contract offered in evidence was made by defendant with another person, and plaintiff was apparently in no manner a party thereto. *Held*, that under the complaint evidence was not admissible that the person with whom defendant contracted was the agent of plaintiff, who was the principal and the real party to the contract.

Appeal from common pleas circuit court of Fairfield county; HUDSON, Judge.

Osmund W. Buchanan, for appellant. *John C. Haskell*, for respondent.

MCGOWAN, J. Furman Harris, the plaintiff, sued the defendant company for $184.90, balance on account for delivering to the company 500 cords of pine wood, at $1.40 per cord. The complaint, among other things, alleged "that on the ——— day of ———, 1884, the plaintiff and the defendant company entered into an agreement in writing, whereby the said company, in consideration of the delivery to their order, etc., of five hundred cords of pine wood, agreed and contracted to pay for the same at the rate of one dollar and forty ($1.40) per cord; that the plaintiff, in pursuance of the stipulations in said contract, delivered said wood in the manner therein named, whereby the said company became indebted to him in the sum of seven hundred dollars; that at divers times the said company paid to plaintiff different sums amounting to five hundred and fifteen dollars; that the remainder ($184.90) has been long due and demanded, but defendant refuses to pay the same," etc. The defendant company put in a general denial, and upon the trial T. W. Woodward was sworn, who testified that as the friend of Harris, the plaintiff, he did secure a written contract from the company to pay for 500 cords of pine wood, at $1.40 per cord upon delivery; that the contract was for the benefit of Harris, but he did not disclose the fact that he was acting for another; and the contract was drawn up in his name, and signed by himself and G. B. Talcott, superintendent of the company. The defendant objected to the testimony, and required the production of the written contract. It was produced, and was found to be a carefully drawn contract: "Memorandum of an agreement between T. W. Woodward, of Fairfield county, of the first part, and the company of the second part," etc.; and, after making other stipulations as to the character and delivery of the wood, provided as follows: "And in consideration thereof the said party of the second part agrees to pay the said party of the first part for fulfilling this contract, etc.; and, in the event the said party of the first part shall neglect to fulfill the stipulations of this agreement to be performed on his part, then the ten per cent. reserved as aforesaid, etc.; * * * and it is hereby expressly agreed by the parties hereto that this contract, or any obligation or right thereunder, shall not be transferred or assigned by the party of the first part to any other party without the consent of the party of the second part indorsed thereupon," etc. Upon the close of the plaintiff's testimony the attorney for the defendant made a motion for a nonsuit, upon the ground that the plaintiff had not shown that he ever had any contract with the defendant company. The judge refused the motion for nonsuit, but offered to grant an order giving leave to amend the complaint, so as to insert an allegation "that the contract sued upon, though made in the name of T. W. Woodward, was, nevertheless, for the benefit of the plaintiff, who was the principal,—stating that the amendment was allowed to conform the pleadings to the proof. But the plaintiff's attorney, for the reason that the amendment would postpone the trial of the case, declined to move for the order allowing the amendment; whereupon the judge granted the nonsuit, upon the ground that there was a total failure of proof as to the allegation of written contract between the parties. From this order the plaintiff appeals upon the following grounds: "(1) That his honor erred in holding that there was a total failure of proof of the cause alleged in the complaint, when there had been introduced in evidence a written contract signed upon the part of the defendant and by T. W. Woodward, and in his name, who, after being duly sworn, testified that he was but the agent of the plaintiff, and authorized to make said contract, and contracted with defendant for the said plaintiff in pursuance of said agency, and when the undisputed evidence showed that the plaintiff was the real party in interest, and entitled to the relief demanded in the complaint. (2) That his honor erred in not holding that the proof was sufficient and ample to go to the jury, and was in furtherance of the cause set out in the complaint, and consistent therewith, and supported the allegation of the complaint, and therein was no error of law."

We do not clearly see how one, through an undisclosed agency, can make himself a contractor with another, without the knowledge or consent of the latter. It strikes us that one capable of contracting has the right to know with whom he is entering into the reciprocal relations of a contractor. There is, however, no doubt that Woodward could enforce all the rights conferred upon him by the contract which the company made with him; and there is certainly respectable authority for the doctrine contended for by the plaintiff, that where the agent is the only known and ostensible party, or where the agent has made a contract, not under seal, in his own name, for an undiscovered principal, either the agent or the principal may sue on it, or be sued on it; the defendant in the latter case being entitled to be placed in the same situation at the time of the disclosure of the real principal as if the agent had been the

Digitized by Google

contracting party. See Story, Ag. §§ 393 and 410; 2 Smith, Lead. Cas. (6th Ed.) 355; Sims v. Bond, 5 Barn. & Adol. 389; Dupont v. Ferry Co., 9 Rich. Law, 258.

But, for the purposes of the case, assuming this to be correct, the question as to the pleadings still remains. If the dormant principal with whom the defendant did not contract, may sue upon the contract, assuredly he can only do so upon proper allegations made in accordance with the facts. We incline to think that the judge was right, in the first instance, when he proffered to grant leave to amend the complaint, by inserting the allegation that the contract sued on, though made in the name of T. W. Woodward, was, nevertheless, for the benefit of the present plaintiff, who was the principal. But the offer to amend being refused, and the complaint remaining unchanged, we cannot say that the judge erred in granting the nonsuit or dismissing the complaint. One of the first principles of pleading is that the facts must be stated as they are, and not according to their legal effect. The allegations must be of naked actual facts, while the rules of law applicable thereto, and the legal rights and duties arising therefrom, must be left entirely to the court. It is also, as a rule of evidence, elementary, that the *allegata* and *probata* must correspond. "The requirement, therefore, that the cause of action or the affirmative defense must be stated as it actually is, and that the proofs must establish it as stated, is involved in the very theory of pleading." Pom. Rem. §§ 554, 564.

Now, the allegation in the complaint was that the defendant company contracted with the plaintiff, thereby agreeing to pay him according to the various stipulations stated, while the written agreement offered in evidence was that the contract was made with a different person, (T. W. Woodward,) not as the agent of the plaintiff, or of any other person, but in his own individual name, to whom the money on the contract was to be paid, and the payments made were actually paid; and containing the express stipulation that neither the contract, nor any obligation or rights under it, should be transferred or assigned to any other party "without the assent of the company indorsed thereon." It is said that there was no effort to assign, and that there was in fact no necessity for such assignment, as the evidence abundantly showed; that it was originally and continued to be the contract of the plaintiff, the principal. The question is not whether the evidence (received under objection) was or was not sufficient, but whether, under the complaint, without amendment, it was admissible at all. Without now going into the question whether such parol testimony, directly contradicting the express terms of the written agreement, was admissible, we think it is enough to say that in the complaint there was no allegation whatever to support and authorize the introduction of such testimony. The judgment of this court is that the judgment of the circuit court be affirmed.

SIMPSON, C. J., and MCIVER, J., concur in the result.

(21 S. C. 81)

STATE *ex rel.* GRUBER *v.* COUNTY COMMISSIONERS.

(*Supreme Court of South Carolina.* April 22, 1889.)

COUNTY BOARD—CLAIMS AGAINST COUNTY—MANDAMUS.

1. County commissioners go out of office when their successors are commissioned, and have no right to correct their own acts done while in office, though their successors have not taken possession of the office and records.

2. An account for services as clerk of the board of county commissioners was not itemized, and was not presented to the board in office when rendered, nor was it presented to or filed with the commissioners during the fiscal year the services were rendered, or the year next thereafter, as required by Gen. St. S. C. § 625, but was presented two years afterwards, and marked "approved." Two years after approval a writ of *mandamus* to pay it was prayed for. *Held*, that the delay was against the policy of the state, and unreasonable, and the writ should be denied.

3. Another account for similar services was presented in the year after they were rendered, and was marked "approved," but the board afterwards illegally attempted to reduce it, and paid the reduced amount. Another sum was afterwards paid to the claimant, but for what did not appear. *Held*, that the questions whether claimant assented to the reduction and payment so as to become bound, and whether the other payment was made on the claim, were questions of fact which the court had not the means by the examination of witnesses to determine with sufficient certainty to authorize a writ of *mandamus*, but that, as the claimant had no remedy except by *mandamus*, the writ should be denied without prejudice.

W. B. Gruber, for relator. *C. C. Tracy*, for respondents.

MCGOWAN, J. This was a petition in the original jurisdiction of this court, filed January 7, 1889, for a writ of *mandamus*, requiring J. H. Knight, J C. Strickland, and R. T. King, the county commissioners of Colleton county, to draw their order on the county treasurer of the county, in payment of two accounts claimed to be due the relator, W. B. Gruber, for services alleged to have been rendered by him as clerk of the board of county commissioners in the years 1884 and 1885; one for "balance due as clerk board county commissioners fiscal year 1884, 125 days, at $1 per day, $125.00;" and the other for "balance due on fiscal year 1885," $217, (less paid $92;) leaving $125; aggregating $250, which petitioner claimed to be now due and owing. The commissioners returned that they went into office in December, 1886, and found on the records of the office the two accounts of the relator. They were indorsed as follows: "Approved Nov. 16, 1886," signed by W. P. Appleby, I. S. Buchanan, and M. W. Simmons, the then commissioners; but just below on the accounts were the further indorsements as follows, viz., on the account for 1884, these words, "Reopened and re-

Digitized by Google

jected," and on the account for 1885, "Reopened and approved for $92," both dated December 9, 1886, and signed by two of the commissioners, Appleby and Buchanan; and the records further show that upon the same day (December 9th) the commissioners (Appleby board) turned over the records of the office to their successors, who organized by electing W. A Marshall "chairman," and the relator, W. B. Gruber, as clerk, who it seems had also been "clerk" of the outgoing Appleby board, and all the indorsements on his claims are in his own handwriting, as well those which purported to "reopen" and reduce them as those which originally "approved." It also appeared that the sum of $92, to which the two commissioners (Appleby and Buchanan) reduced his claims, was paid by the Appleby board, through checks issued in favor of the relator, and signed by himself as clerk, viz., one for $69.56, on November 16, 1886, the day on which the accounts were indorsed "approved," and another for the exact balance of the $92, viz., $22.44, issued by the two commissioners Appleby and Buchanan, on December 8, 1886, which was paid to another person on the claim of the relator. It also appeared that on December 23, 1886, the Marshall board issued another check in the name of the relator for $74, which was also paid to another person, but does not seem to have been credited. Under these circumstances the respondents say that in view of the contradictory indorsements, and having no *data* upon which to act themselves, they could not conscientiously order the balance of the accounts, ($250;) that they could not see that it was their "plain ministerial duty" to do so, and declined to so order, unless required to do so by competent authority. The relator replied by showing that, although the Appleby board continued to do business up to the 9th of December, when their successors took charge of the office, the Marshall board, their successors, were duly commissioned as the county commissioners of Colleton county on December 2, 1886; and insisted that after that time the Appleby board were out of office, and even if all of those who had been county commissioners had joined in the action of December 9th, by which they undertook to reconsider and reduce his claims, such action would have been null and void, leaving their former "approval" unaffected, which he insists shall be enforced as a judgment of that tribunal.

According to all the authorities, the writ of *mandamus* only lies where there is a specific legal right or a positive ministerial duty to be performed, and there is no other appropriate remedy. When the legal right is doubtful, or the performance of it rests in discretion, the writ of *mandamus* cannot rightfully issue. Has the relator a specific legal right, clear and beyond doubt, to require the present board of county commissioners of Colleton county to give a check for the payment of the aggregate balance of his accounts ($250) as a plain, ministerial duty resting upon them? We can understand how the present board could not consider it "a plain," ministerial duty to order paid accounts several years old, which had come down to them from a former board, bearing the mark of their "approval," and the evidence, also, that shortly after they had "reopened and rejected" one of the accounts, and "reopened and reduced" the other to $92, which had been paid in full. After examination here, however, we have no difficulty as to the second indorsements on the accounts, made by a majority of the outgoing Appleby board on December 9, 1886. That action was after the incoming Marshall board had been commissioned, (December 2,) and, as a matter of strict law, the Appleby board were out of office, and had no right to correct their own acts, done while in office. State v. Bryce, 11 S. C. 344. But, considering the second indorsements made by the two commissioners as being without authority of law, it seems to us that it is at least doubtful whether the right is so plain and clear as to authorize the writ of *mandamus* to issue, requiring the accounts to be paid. The accounts differ in some material circumstances, so as to make it proper that they should be considered separately.

First, as to the account for $125. This account was not itemized further than to state that it was for "balance due as clerk of the board of county commissioners, fiscal year 1884," $125. It does not appear to have been presented to the board then in office, (1884,) and to whom the services were rendered, but to their successors in office, the Appleby board, in the last hours of their administration, (November 16, 1886;) that is to say, it was not "presented to and filed with the county commissioners" during the fiscal year in which the services were rendered, nor the next thereafter. When presented it was indorsed by the Appleby board "approved," but within a short time thereafter (December 9th) two of the same commissioners made on it a second indorsement, "reopened and rejected." It does not appear to have been presented to the succeeding Marshall board, and this petition to enforce payment of it was not filed until January 7, 1889, after the Marshall board had been succeeded by the present board. Now, assuming that the character of the claim was such that the action of the Appleby board in approving it was *quasi* judicial, and that a succeeding board had no right to review and revive the action of its predecessors in approving the claim; and assuming further, that a majority of the Appleby board could not, after their successors had been sworn in, review and correct the former action of their own board,—we do not think that it necessarily follows that the relator may at any future time, or under any and all circumstances, have the writ of *mandamus* to enforce payment of his claim. "The statute of limitations does not apply in terms to a proceeding

Digitized by Google

in *mandamus*, but when there is unreasonable delay the court, in the exercise of its discretion, may refuse to issue the writ." State v. Kirby, 17 S. C. 566; State v. Appleby, 25 S. C. 103. As was said in the case of Appleby, supra: "It is manifestly the policy of the law, in reference to the administration of county affairs, to keep separate and distinct the accounts of each fiscal year, chargeable as they are upon the levy for that year; and to that end great promptness is necessary in the presentation and settlement of county claims." Indeed, a recent act of the legislature, (1882,) now section 625 of the General Statutes, declares that "no claim against any county of this state shall be valid and payable unless the same be presented to and filed with the county commissioners of such county during the fiscal year in which they are contracted, or the next thereafter, and all claims not presented and filed as herein required, shall be forever barred." This act was ratified on February 3, 1882, immediately after the decision of the case of Richland Co. v. Miller, 16 S. C. 236, and we have no doubt, from its very peremptory terms, that it was intended to cut up, root and branch, all county claims not conforming to its provisions. The official term of county commissioners is short. There is an election every two years, and new men, unfamiliar with the business, are introduced into the administration of county affairs, and this affords an additional reason why county claims should be presented and considered promptly. In this case the account was not filed with the county commissioners during the fiscal year in which it was contracted, or the next thereafter. The application for *mandamus* was not filed until January, 1889,—more than four years after the services were rendered,—more than two years after its presentation to the Appleby board, which placed upon it the two indorsements first "approved," and then "rejected." Without considering the last indorsement as legally made or binding, we are unable to discover any sufficient reason, or, indeed, any reason, for this delay, which, under the circumstances, we regard as against the declared policy of the state, and "unreasonable." The *mandamus* is refused, therefore, as to the account for services of clerk of the board in the year 1884.

Second. Then as to the account ($217) for the fiscal year 1885. The circumstances of this account are somewhat different from that just considered. This was for "balance of account for services as clerk in the year 1885." It was, without being itemized, presented to the Appleby board in the year after the services were rendered, November 16, 1886, and indorsed "approved;" but soon after (December 9th) the second indorsement was made on it by two of the commissioners, purporting to reduce the claim to $92, which was paid. Now, disregarding the second indorsement, as made without legal authority, and assuming that the $92 were only received as a payment in part of the whole claim, a balance of $125 would still remain. But the question being whether the matter is so plain as to justify the writ of *mandamus*, it is suggested that possibly the balance may not be still due and owing by the county, but by arrangement was settled in full at the time the two commissioners thought they had reduced the claim; that the balance of the amount to which they had reduced it, $92, having been paid by their check in favor of the relator, with his knowledge and consent, amounted to a waiver of the want of authority on the part of the commissioners, and was such assent on his part as to bind him, as in the case of VanHook v. Whitlock, 26 Wend. 54. Besides, it was admitted that soon after this transaction the Marshall board, on December 23, 1886, paid to the relator the sum of $74. If that was paid upon the claim under consideration, it was certainly a recognition that the balance of the account still unpaid, was a subsisting legal claim against the county, notwithstanding the cloud which had been cast upon it by the second indorsement and the receipt of the amount to which it had been apparently reduced. But, in that case, it seems to us that the amount ($74) should be credited as part payment. These, however, are for the most part questions of fact, and we make no ruling upon them. This court, not having the machinery for the examination of witnesses, cannot determine them with the certainty and clearness necessary to authorize *mandamus* for the payment of the account, or any part of it. But as the relator has no other remedy except by *mandamus*, and as possibly injustice may be done, the writ to compel payment of the account for services as clerk of the board in 1885 is refused without prejudice. We make no ruling upon the questions for the lack of sufficient information, which may be presented as an original question on the circuit, where all the facts may be satisfactorily ascertained. The petition is refused, but without prejudice as to the account for services in the fiscal year of 1885.

SIMPSON, C. J., and MCIVER, J., concur.

(85 Va. 962)

NIAGARA FIRE INS. CO. *v.* ELLIOTT *et al.*

(*Supreme Court of Appeals of Virginia.* June 1, 1889.)

INSURANCE.

Defendant insured plaintiffs "on carriages, buggies, hacks, and harnesses, their own or sold, until removed, contained in" a certain building "occupied as a livery and sales stable." *Held*, that the words "contained in" were used to designate the usual place of deposit of the property when not in use, or while being prepared for use; and that the policy covered the property while at a repair-shop, several hundred yards from the stable, for the purpose of being repaired.

Action by Elliott & Doss against the Niagara Fire Insurance Company. Defendant brings error.

R. G. H. Kean, for plaintiff in error. *Kirkpatrick & Blackford* and *Wm. L. Lile*, for defendants in error.

Digitized by Google

HINTON, J. This is an action upon a policy of insurance to recover of the defendant company their *pro rata* share of the loss upon three vehicles which were destroyed by fire, in the city of Lynchburg, on the 27th day of February, 1887; the residue being claimed of the Fire Association of Philadelphia, a company in which the plaintiffs also held a policy. At the time of the fire these vehicles were not in the livery and sales stable where they were kept, except when in use, but were several hundred yards off, at a carriage repair-shop, whither they had been sent for repairs. The language of the policy is that the said company, in consideration of the premium, "does insure Elliott & Doss to the amount of fifteen hundred dollars, on carriages, buggies, hacks, and harness, their own or sold, until removed, contained in the framed metal building and framed addition thereto, No. 916 Lynch street, Lynchburg, Va., occupied as a livery and sales stable." Under this state of facts, the general, and indeed the only, question presented for decision is whether the property destroyed was covered by the policy at the time of the burning. It is not denied that this property came within the protection of the policy as often as it was returned to the stable, but it is argued that it was the purpose of the company to indemnify the insured for any loss by fire in that building, and not elsewhere. Now, is this so? No rule is better settled than that contracts of this character must receive a fair and reasonable interpretation. To use the language of NELSON, C. J., in Turley v. Insurance Co., 25 Wend. 374, "its intent and substance, as derived from the language used, should be regarded." But, says he: "There is no more reason for claiming a strict literal compliance with its terms than in ordinary contracts. Full legal effect should always be given to it, for the purpose of guarding the company against fraud or imposition. Beyond this, we would be sacrificing substance to form,—following words rather than ideas."

Now, bearing in mind the observations of Lord MANSFIELD in Pelly v. Royal Exchange Assurance, 1 Burrows, 341, that the insurer, in estimating the price at which he is willing to indemnify the insured, must have under his consideration the nature of the business, and the usual course and manner of conducting it; and everything done in the usual course must have been foreseen and in contemplation at the time he engaged, and that he takes the risk upon the supposition that what is usual or necessary will be done. Should the words "contained in," upon which the plaintiff in error rests its contention, be construed to restrict the liability of the company to the use of the property at the place specified, or should those words, when used with respect to property of the kind destroyed, be construed as merely designating the accustomed place of deposit of the property when not in use or being used for some purpose incidental to its use? Where merchandise kept in stock, or carriages kept in a carriage-maker's establishment for sale, are insured, there is nothing in the nature of the property to indicate that it will be removed before it is sold, and hence the insurer may be supposed to have underwritten the policy upon the idea that the property would be entitled to whatever protection the character of the building and its situation might afford, and that it should be exempt from the risks incident to temporary removals, or to the use of the property at other than the specified place of location. But where the property is of such a kind that it must be kept in constant use, and therefore of necessity be often in need of repairs, no room for such an inference can exist; and in such a case we are constrained by every principle applicable to the construction of contracts of this kind to hold that the words "contained in" were used to designate the usual place of deposit for the property when not in use, or while being prepared for use. As was said by ADAMS, J., in McCluer v. Insurance Co., infra, the words "contained in" are in cases of this kind synonymous with the word "kept," and yet it would hardly be maintained that a plaintiff who had signed an application, in which he had said that he kept his carriage in his barn, would be deprived of the benefits of the policy merely because at the moment he obtained the policy it was standing at the door of the insurer's office, and was there consumed by fire. To the same effect is the great current of authority. McCluer v. Insurance Co., 43 Iowa, 349; Peterson v. Insurance Co., 24 Iowa, 494; Noyes v. Insurance Co., 64 Wis. 415, 25 N. W. Rep. 419; Longueville v. Assurance Co., 51 Iowa, 553, 2 N. W. Rep. 394; Railroad Co. v Insurance Co., 7 Gray, 64; Holbrook v. Insurance Co., 25 Minn. 229; Mills v. Insurance Co., 37 Iowa, 400; Lyons v. Insurance Co., 14 R. I. 109; and 1 Wood, Ins. 115 et seq. There is no error in the judgment complained of, and it must be affirmed.

(103 N. C. 237)

MOFFIT v. CITY OF ASHEVILLE.

(*Supreme Court of North Carolina.* May 9, 1889.)

JAILS—INJURIES TO PRISONERS—LIABILITY OF MUNICIPAL CORPORATIONS.

Const. N. C. art. 11, § 6, requires "that the structure and superintendence of penal institutions of the state, the county jails, and city police prisons secure the health and comfort of the prisoners." Code, § 3464, provides that sheriffs or jail-keepers shall cleanse prisoners' rooms daily, and furnish prisoners with fuel, and with wholesome food and water. Section 3465 provides for furnishing suitable bedclothes to jailers for the use and comfort of prisoners. *Held* that, where a city authorized by law to build a city prison has built a reasonably comfortable one, and furnished to the officers in charge thereof the supplies required by law, it is not liable to a prisoner for neglect of the jailer or attendants to keep fires or furnish him with necessary bedclothing, whereby the prisoner is injured, where the city has no notice of such neglect, and is not negligent in overseeing the prison.

Appeal from superior court, Buncombe county; BOYKIN, Judge.

Digitized by Google

Action by D. C. Moffit against the city of Asheville, for injuries received by plaintiff by being confined in the prison of defendant city, on a bitterly cold night, in a room in which a number of the window-panes were broken out, without fire or other means of heating, and without a bed or bedclothes. The defendant asked the court to charge the jury as follows:

"(1) That before the plaintiff can recover in this action he must allege and prove that he sustained an injury whereof the proximate cause was the negligence of the city defendant, or its authorities; and it has not been alleged, and there is no evidence that such negligence existed or was such proximate cause.

"(2) If the jury shall find that the plaintiff contributed in any manner to his own injury, if any injury he sustained, either by drunkenness and walking in open air on a very cold night without his coat, or by declining to obey the advice of his physician and go to bed, or in any other manner which the testimony may show, then he is not entitled to recover.

"(3) The defendant was bound to use only ordinary care under the circumstances, and there is no evidence showing or tending to show any want of ordinary care on its part. If, therefore, the jury should find that the plaintiff was injured by the window-panes being out in the prison, they must, in order to render the defendant liable, show that this fact was known to the city authorities, or that the windows had been out for such a length of time as they would ordinarily have known it; and of these things there is no evidence. If the jury shall find that there was no coal or other fuel wherewith to build a fire sufficient, or that the fire built was insufficient to warm the room, or that the machinery provided for warming the room was insufficient for that purpose, they must further find, in order to render the defendant liable, that these things were known to the city authorities a sufficiently long time beforehand to enable them to remedy the same; and of this there is no evidence. If the defendant supplied in the cell where it is alleged the plaintiff was confined blankets in sufficient numbers to provide for plaintiff under circumstances which might reasonably have been anticipated, the plaintiff would not be entitled to recover.

"(4) The plaintiff must satisfy the jury by a preponderance of evidence at least that the injury he sustained, if any, was the proximate result of the negligence of the defendant, and if the jury shall be of opinion that such injury was brought about even in part by the negligent acts of the plaintiff, whether in going about without his coat in cold weather or otherwise, the plaintiff would not be entitled to recover, but in order to such recovery the jury must be satisfied by a preponderance of the evidence that the exposure of the plaintiff in the prison, and without his fault, was the sole cause of his injury, not in any way aided by anything else wherein the plaintiff failed to exercise ordinary care. The plaintiff must be without fault in that regard, and take such care of himself as a man of ordinary prudence would, in order to entitle him to recover. The city can be liable to plaintiff in no event except for its own negligence. It cannot be liable for the tortious negligence of its police officers.

"(5) If the plaintiff sustained an injury by reason of the failure of the defendant to anticipate and provide against an extraordinary cold night, he cannot recover therefor. Before the plaintiff can recover for an injury he must show by a preponderance of evidence that the injury was the ordinary or probable consequence of the act complained of.

"(6) If the plaintiff might have avoided the consequence of the act of defendant, if such act existed, by the exercise of ordinary care, he cannot recover.

"(7) If a wrong and resulting damage are not known by common experience to be naturally and usually in sequence, and the damage does not, according to the ordinary course of events, follow from the wrong, then the wrong and the damage are not sufficiently conjoined or concatenated as cause and effect to support an action. It is not only requisite that the damage actually or inferentially should be suffered, but this damage must be the legitimate consequence of the thing amiss. If an injury has resulted in consequence of a certain wrongful act or omission, but only through or by means of some intervening cause, from which last cause the injury followed as a direct and immediate consequence, the law will refer the damage to the last or proximate cause, and refuse to trace it to that which was more remote."

The court refused these prayers for instructions, except as they are embraced in the charge given hereinafter, and the defendant excepted. The court charged the jury as follows: "The plaintiff must prove by the preponderance of the evidence that the injury that he sustained was the immediate and proximate result of the negligence of the defendant. It must appear from the testimony that the imprisonment of the plaintiff by the defendant, and the carelessness or neglect of defendant or its agents in providing sufficient bedclothing, or properly heating the prison, or failing to supply the windows with panes, resulted in the injury which plaintiff alleges he has sustained. If there appears to be any cause independent of the conduct of defendant, and intervening between the acts and omissions complained of and the injury to which the same may be referred and traced, the plaintiff cannot recover. If the injury is the natural and usual result of the act or omission of defendant, and the plaintiff be without fault himself, there may be a recovery. In determining the cause of plaintiff's injury, the jury may consider whether the plaintiff exercised prudence and ordinary care, such as would suggest themselves to prudent and cautious

Digitized by Google

men in the preservation of their health and bodies. If the injury may be attributed to the negligence of plaintiff upon the occasion referred to in imbibing intoxicating liquor excessively, and in exposing himself to the inclemency of the weather without suitable or necessary clothing, or if the said injury resulted from his inattention to his person after the imprisonment, the plaintiff cannot recover, except as hereinafter explained. The plaintiff, however, can recover, though he was in fault himself to some extent, if the injury complained of could not have been avoided by the exercise of ordinary care on his part. When the negligence of the defendant is the proximate cause of the injury, and the negligence of the plaintiff is remote, consisting of some act or omission on his part not occurring at the time the injury is such, the plaintiff may recover. It is the duty of the defendant to provide for the comfort of its prisoners in a reasonable manner. It was its duty to furnish everything essential and necessary to accomplish this. These necessities must, of course, conform to the exigencies of the time and season. There must be proper ventilation, sufficient bedclothing, suitable heating apparatus, operated as occasion may demand. The cell must be protected in such a manner as to prevent the inblowing of cold winds of winter. The prisoner must be treated in a humane manner. If the defendant has neglected its duty in respect of any of these requirements, and injury has been sustained by the plaintiff by reason thereof, he is entitled to be compensated therefor. The defendant would not be required to provide against unforeseen, unusual, and extraordinary exigencies such as might not be reasonably anticipated. If, therefore, the injury of the plaintiff may be attributed to circumstances attending his imprisonment which could not have been reasonably anticipated and provided for by the defendant, the plaintiff could not recover damage. It was the duty of the plaintiff to conduct himself prudently, and, if he did not do so, and failed to exercise ordinary care and prudence, the defendant is entitled to a verdict. If the injury sustained by the plaintiff resulted from the carelessness of the defendant or its officers, and its failure to provide sufficient and suitable means to insure his comfort and safety, then the defendant is responsible, and damages may be awarded to the plaintiff as a compensation. Although the illness of the plaintiff may not have resulted from the imprisonment as alleged, still the plaintiff would be entitled to compensation for any sufferings and pains he may have endured during the time of his incarceration by reason of the negligence of the defendant." To this charge as given defendant excepted. The jury found in answer to the first issue, "Yes;" in answer to the second issue, "No;" and in answer to the third issue, "One thousand four hundred and fifty-eight dollars and fifty cents." Judgment for plaintiff. Defendant appealed.

F. A. Sandley and *Theo. F. Davidson*, for appellant. *J. M. Gudger, Jr.*, and *Gudger & Carter*, for respondents.

AVERY, J. The liability of cities and towns for the negligence of their officers or agents depends upon the nature of the power that the corporation is exercising when the damage complained of is sustained. A town acts in the dual capacities of an *imperium in imperio*, exercising governmental duties, and of a private corporation enjoying powers and privileges conferred for its own benefit. When such municipal corporations are acting (within the purview of their authority) in their ministerial or corporate character in the management of property for their own profit, or in the exercise of powers assumed voluntarily for their own advantage, they are impliedly liable for damage caused by the negligence of officers or agents subject to their control, although they may be engaged in some work that will inure to the general benefit of the citizens of the municipality. Shear. & R. Neg. §§ 125, 126; 2 Dill. Mun. Corp. §§ 966, 968; 2 Thomp. Neg. 734; Meares v. Wilmington, 9 Ired. 73; Wright v. City of Wilmington, 92 N. C. 156; Whart. Neg. § 190; 10 Meyers, Fed. Dec. § 2327. The grading of streets, the cleansing of sewers, and keeping in safe condition wharves, from which the corporation derives a profit, are corporate duties. Whit. Smith Neg. 122; Barnes v. District of Columbia, 91 U. S. 540-557; Weightman v. Washington, 1 Black, 39; Whart. Neg. § 262. On the other hand, when a city or town is exercising the judicial, discretionary, or legislative authority conferred by its charter, or is discharging a duty imposed solely for the benefit of the public, it incurs no liability for the negligence of its officers, though acting under color of office, unless some statute (expressly or by necessary implication) subjects the corporation to pecuniary responsibility for such negligence. Hill v. Charlotte, 72 N. C. 55; State v. Hall, 97 N. C. 474;[1] 2 Dill. Mun. Corp. §§ 965, 975; Dargan v. Mayor, 31 Ala. 469; City of Richmond v. Long, 17 Grat. 375; Stewart v. New Orleans, 9 La. Ann. 461; Whart. Neg. §§ 191, 260; Hill v. City of Boston, 122 Mass. 344; Shear. & R. Neg. § 129. As illustrations of the principle last stated, it has been held that a city is not answerable in damages for an assault with excessive force, committed by a police officer in the attempt to enforce a city ordinance, or for the negligent or unnecessary killing by a peace officer of a city of one whom he is attempting rightfully to arrest. Many cases illustrating by example the principle that municipal corporations are exempt from liability when acting as agents of the state, and exercising governmental power, will be found collected in Danaher v. City of Brooklyn, 4 N. Y. Supp. 312. The plaintiff was arrested for an assault, committed in presence of the

[1] 1 S. E. Rep. 683.

Digitized by Google

peace officer of the city who arrested him, and the officer was unquestionably exercising a right; in fact, discharging a duty to the public. Code, §§ 3808, 3810, 3811, 3818; Priv. Laws 1883, c. 111, § 59. The city of Asheville was not, therefore, answerable in damages to the plaintiff for any violence or negligence on the part of its officials towards him up to the moment when he was committed to the city prison.

When we follow the plaintiff across the portal of the prison, we are confronted with the new question whether there is any provision of law creating a liability (expressly or by implication) on the part of the city for injury to the health of, or for the bodily suffering of, the plaintiff, caused by the neglect of the city or its agents in the construction of the prison, or the subsequent superintendence of it. Section 6, art. 11, of the constitution, and section 3464 of the Code, are as follows: Const. § 6, art. 11. "It shall be required by competent legislation that the structure and superintendence of penal institutions of the state, the county jails and city police prisons, secure theh ealth and comfort of the prisoners," etc. Code, § 3464: "The sheriff or keeper of any jail shall every day cleanse the room of the prison in which any prisoner shall be confined, and cause all filth to be removed therefrom; and shall also furnish the prisoner a plenty of good and wholesome water, three times in every day; and shall find each prisoner fuel, one pound of wholesome bread, one pound of good roasted or boiled flesh, and every necessary attendance." Section 3465 of the Code imposes upon the county commissioners the duty of purchasing "a number of good, warm blankets, or other suitable bedclothes, which shall be securely preserved by the jailer, and furnished to the prisoners for their use and comfort, as the season or circumstances may require." It is not necessary to decide whether the substitution in the Code of the term "keeper of any jail," instead of "keeper of any public prison," (in section 9, c. 89, Battle's Revisal, quoted in Lewis v. City of Raleigh, 77 N. C. 229,) limits the responsibility of towns, or whether "jail," as the generic term, includes every kind of prison, or whether section 3465 of the Code applied to police prisons at all. The aldermen of Asheville were vested with authority to erect a city prison by section 47, c. 111, Priv. Laws 1883, if they did not have the power by implication under the general law in reference to towns; and when they built the police guard-house in the exercise of their power the city became as fully amenable for its proper structure and superintendence, as the general assembly was required by the constitution to make it answerable by competent legislation. The defendant, in the discharge of its judicial duties, could not have incurred any liability in any view of the case, but for the express provisions of the constitution and laws. 2 Dill. Mun. Corp. § 975, (773;) Hill v. Charlotte, supra. By a well-known rule, therefore, the law imposing this responsibility on such municipal corporations for the proper structure and superintendence of their prisons must be construed strictly. We hold that the defendant is liable in damages only for a failure either to so construct its prison, or so provide it with fuel, bedclothing, heating apparatus, attendance, and other things necessary, as to secure to the prisoners committed to it a reasonable degree of comfort, and protect them from such actual bodily suffering as would injure their health. If the aldermen of the city built a reasonably comfortable police prison, and afterwards furnished to those who had immediate charge of it everything that was essential to prevent bodily suffering on the part of prisoners from excessive cold, or heat, or hunger, and to protect their health, the city would not be liable, even if the suffering or sickness of the plaintiff was caused by neglect of the jailer, the policemen, or the attendants, to keep the fires burning all night, or to give the plaintiff the necessary bedclothing furnished to them. Shear. & R. Neg. § 139, and note 2.

The word "superintendence" means oversight or inspection, and was intended, as used in the constitution, to impose upon the governing officials of a municipal corporation the duty of exercising ordinary care in procuring articles essential for the health and comfort of prisoners, and of overlooking their subordinates in immediate control of the prisons, (so far at least as to replenish the supply of such necessary articles when notified that they are needed,) and of employing such agents, and raising and appropriating such amounts of money, as may be necessary to keep the prison in such condition as to secure the comfort and health of the inmates. Threadgill v. Commissioners, 99 N. C. 352.[1] The rule in reference to the liability of counties for torts is always the same as that which applies to cities and towns when exercising governmental duties. Counties are never answerable in damages for torts unless made so by the provisions of some statute, either expressly or by necessary implication. Bowditch v. Boston, 4 Cliff. 323; 2 Dill. Mun. Corp. §§ 963, 965. In Threadgill v. Commissioners, supra, Chief Justice SMITH, for this court, after laying down the rule that a county is required to provide money to repair public buildings other than prisons by the provisions of the Code, § 707, subs. 5–7, says: "The doctrine is that, while these corporate agencies must provide the means and employ the men to perform such duties, they are not personally and by their own labor to perform such menial service, and the default to make them liable must be in neglecting to exercise their authority in the use of labor and money for that purpose, and so it must be charged to make a cause of action against them." It is true that this language was used in reference to the liability imposed by the Code upon the board of

[1] 6 S. E. Rep. 189.

Digitized by Google

commissioners, as representing the county, for a failure to have the public privies cleaned, and allowing them to become a nuisance. But the reasoning and the principle apply to the general duty of building and overlooking prisons, imposed by the constitution upon counties and towns in the very same language; and the statutes (Code, §§ 3464, 3465) are, if there is any difference, more stringent as to the duty of county commissioners and county jailers in providing and caring for prisoners in the county jails than they are towards town authorities and keepers of police prisons. However the general question of the liabilities of counties by virtue of this legislation may hereafter be settled, we may safely say that neither counties nor towns can be required as a general rule to answer in damages for injuries to prisoners caused by the neglect of their respective jailers, policemen, or guards who may have immediate charge and custody of them, and of which the governing officials of the corporation had no notice. We think that where window glass in the window of a police prison has been broken, and the bedclothing furnished for its inmates has been destroyed, but the governing officers of the town are not shown to have had actual notice of the breaking or destruction, or to have been negligent in omitting to provide for such oversight of the prison as would naturally be expected to give them timely information of its condition, there is not such a failure in discharging the duties of construction or superintendence as to subject the corporation to liability. We do not wish, however, to be understood as intimating that a city or town would not be liable, if it should retain incompetent or careless jailers or servants after notice of their character, for damages caused by their negligence, though the question is not directly presented in this case.

It naturally follows from giving our sanction to the principles already stated that we should hold that the judge below erred in refusing to give the third instruction asked, and in telling the jury, in lieu of the charge asked: *First.* "It must appear from the testimony that the imprisonment of the plaintiff by the defendant and the carelessness or neglect of the defendant or its agents in providing sufficient bedclothing or properly heating the prison, or failing to supply the windows with panes, resulted in the injury which plaintiff alleges he has sustained." *Second.* "If the injury sustained by the plaintiff resulted from the carelessness of the defendant or its officers, and its failure to provide sufficient and suitable means to insure his comfort and safety, then the defendant is responsible, and damages may be awarded to the plaintiff as compensation," etc. Acting under the instruction given, it may be that the jury believed from the evidence that the sickness and suffering of the plaintiff were caused by the failure of the keeper of the prison to make a fire in a stove—though he had an abundance of fuel—provided by the proper authorities of the city. The case of Lewis v. City of Raleigh, supra, was one in which the plaintiff was arrested for a violation of a city ordinance, which is made, by section 3820 of the Code, a criminal offense, and therefore it is very similar to this. But it is distinguishable in that the plaintiff, Lewis, was confined in a narrow cell—8x14—located in a cellar under the market-house, with no window and no ventilation except a grate in the door that opened on an under-ground passage with a window at one end, lighted through a grate on the sidewalk. Reviewing the admitted facts, Justice READE, for the court, said: "It was an impossibility that such a place could 'secure health and comfort,' in the language of the constitution, or that it could be 'clean,' in the language of the statute."

On the trial below there was a great deal of testimony tending to show that the prison of the defendant was well constructed for health and comfort, and was provided with bedclothing, fuel, stoves, and everything necessary to secure a reasonable degree of comfort and protect health. Counsel on the argument cited Bunch v. Edenton, 90 N. C. 431, in support of the contention that the evidence established the accountability of the defendant. The plaintiff there brought his action to recover damages for an injury caused by his falling into an excavation near the sidewalk in the town of Edenton. Justice MERRIMON, in delivering the opinion of the court, adverted to the distinction we have drawn between the corporate and governmental powers of a town, and cited Lewis v. City of Raleigh, supra, and Hill v. Charlotte, supra, as illustrations of the two classes of cases. The law required that the commissioners "shall provide for keeping in proper repair the streets and bridges in the town." Code, § 3803. The court, construing the law, said: "And proper repair implies also that all bridges, dangerous pits, embankments, dangerous walls, and the like perilous places and things, very near and adjoining the streets, shall be guarded against by proper railings and barriers."

It is not necessary that we should pass upon the exception to the evidence of Dr. Reagan, who testified as an expert, yet we would suggest a careful examination of the rule laid down in State v. Bowman, 78 N. C. 509, in framing questions for the witness in any future trial.

For the error pointed out in the charge to the jury the defendant is entitled to a new trial.

(103 N. C. 383)

STATE v. HOUSTON.

(*Supreme Court of North Carolina.* May 18, 1889.)

PERJURY—INDICTMENT.

The oath prescribed by Code N. C. § 2681, for an applicant for registry as a voter, by which he swears that he is a "duly-qualified elector," is confined to the qualifications for suffrage set out in Const. N. C. art. 6, § 1, and an indictment for per-

Digitized by Google

jury of one who takes the oath, on the ground that he has previously lost his right to vote by reason of being convicted of larceny, should be quashed.

Appeal from superior court, Buncombe county; J. H. MERRIMON, Judge.

Indictment of Houston, for perjury in swearing before a registrar, when making application to be registered as a voter, preparatory to the exercise of the electoral franchise, that he was "a duly-qualified voter," when in fact he was not so duly qualified and entitled to be registered; he having been theretofore convicted of larceny by the verdict of a jury upon which judgment had been suspended. A motion to quash the indictment was allowed on the ground of its insufficiency in form to warrant a conviction and sentence, and the state appeals.

T. F. Davidson, Atty. Gen., for the State.

DAVIS, J. The oath administered is contained in section 2681 of the Code, and is in these words: "I, ———, do solemnly swear that I will support the constitution of the United States and the constitution of the state of North Carolina; that I have been a resident of the state of North Carolina for twelve months, and of the county of ——— for ninety days; that I am a duly-qualified elector, and that I have not registered for this election in any other precinct, and that I am an actual and *bona fide* resident of ——— township; so help me God."

The inquiry that presents itself is as to the meaning and force of the words "a duly-qualified voter," contained in said oath, in the taking of which the perjury is alleged to have been committed; and whether, in their connection, they embrace more than the original conditions, on which depended the right to be admitted to the registry as a competent voter. There is an omission in the form of the oath of some of the essential requisites prescribed in the constitution, such as naturalization of one alien-born, which the term may supply; and thus the oath is confined, as suggested, to those indispensable qualifications set out in the constitution, art. 6, § 1, and does not extend to the loss of the franchise consequent upon the commission of and conviction for crime. This construction is supported by the form of the oath directed to be taken, under section 2684, where a registered voter is challenged. It is made the duty of the judges to explain to the person offering to vote the required qualifications, and to ascertain by examination if he possesses them, and then to administer the oath therein set out, in which, among other specific prerequisites, are the words, "that you are not disqualified from voting by the constitution and laws of this state." In the former, the voter swears to his possessing the qualifications of an elector; in the latter, that he has not lost the right by any provision in the constitution and under the law which takes it from him. The last oath points distinctly, as the first does not, to the disqualification which may arise under the constitution. We are therefore of the opinion that the oath administered to the defendant did not embrace the alleged grounds of disqualification, and that for this reason there was no error in the ruling of his honor in quashing the indictment.

SMITH, C. J. Concurring in the opinion of the court that no false oath has been taken in this case upon the allegations contained in the indictment, I think, and in this my convictions are strong, the ruling may be sustained on the ground, as I understand the record, upon which it was predicated in the court below, and this is that a judgment upon conviction is essential to the deprivation of the electoral franchise. The section of the constitution in question, after enumerating the required qualifications for a voter, proceeds to say: "But no person who, upon conviction or confession in open court, shall be adjudged guilty of felony or any other crime infamous by the laws of this state, and hereafter committed, shall be deemed an elector, unless such person shall be restored to the rights of citizenship in a manner prescribed by law." Now, upon a fair and reasonable interpretation of this highly penal clause, which, besides the punishment inflicted for the crime, affixes the personal disability, can it be extended to a mere verdict establishing guilt, or do these consequences follow the rendition of the judgment, and result from it? The able and efficient attorney general contends that the conviction alone and of itself is sufficient, without further action in the cause, to annex to the person of the elector the specified disqualifications, and withdraws from him, at once, the right, as a voter, to participate in any election thereafter held for the choice of public officers, or for any other purpose affecting the interests of the public. In support of this view are cited and relied on the cases of Com. v. Lockwood, 109 Mass. 325, and State v. Alexander, 76 N. C. 231.

The cases have one feature in common, and refer to the exercise of executive clemency towards the convicted criminal, *in misericordia*. The case from Massachusetts puts a meaning upon the word "conviction" that confines it to the action of the jury alone. Yet when the results are to reach beyond the punishment proper prescribed for the offense, and work a change in the political *status* of the offender,—a deprivation of personal rights,—the opinion pauses, and the eminent judge (GRAY) who delivers it uses this qualifying language: "When, indeed, the word 'conviction' is used to describe the effect of the guilt of the accused, as judicially proved in one case when pleaded or given in evidence in another, it is sometimes used in a more comprehensive sense, including the judgment of the court upon the verdict or confession of guilt; as, for instance, in speaking of the plea of *autrefois convict*, or of the effect of guilt judiciously ascer-

Digitized by Google

tained as a disqualification of the convict." He proceeds to give this meaning to the word, when in the constitution it is provided that no person convicted of bribery or corruption in obtaining an election or appointment "shall hold a seat in the legislature, or any office of trust or importance in the state government."

I see no just reason for distinguishing in principle the consequences flowing from the criminal act, in the conditions under which, and the proof by which, they are to be extended to the disability to give evidence and the disability to vote. In my opinion, the same rule must govern in each. The doctrine is that the party, in case of incompetency to testify, (in the language of Mr. Greenleaf,) "must have been legally adjudged guilty of the crime," (the very words used in the constitution;) "and this is not done in rendering the verdict, for it is the judgment, and that only, which is received as the legal and conclusive evidence of the party's guilt for the purpose of rendering him incompetent to testify." 1 Greenl. Ev. §§ 374 and 375. In the words of Lord MANSFIELD, spoken in Lee v. Gansel, Cowp. 3: "A conviction upon a charge of perjury is not sufficient, unless followed by a judgment. I know of no case where a conviction alone has been an objection; because, upon a motion in arrest of judgment, it may be quashed." The cases are numerous to the same effect, as well as the concurring authors in works upon the law of evidence. Rex v. Crosby, 2 Salk. 689; 2 Inst. 419; Walker v. Kearney, 2 Strange, 1148; 1 Starkie, Ev. 95. Under the statute of New York, which forfeits the dower of the widow who has been convicted of adultery in a divorce proceeding, it is held that there must be a judgment to render the bar effectual. Schiffer v. Pruden, 64 N. Y. 47; Pitts v. Pitts, 52 N. Y. 593. In Gallagher v. State, 10 Tex. App. 469, (decided in 1881,) the indictment was for illegal voting, prosecuted against one who had been found guilty of burglary, and sentenced in the verdict to confinement in the penitentiary; and an exception was taken, on a motion to quash, to the want of an averment that judgment had been entered. The court refused the motion, saying that "the word 'convicted,' used by the pleader, has a definite signification in law. It means that a judgment of final condemnation has been pronounced against the accused." In State v. Jones, 82 N. C. 685, ASHE, J., speaking for the court, and discussing the question whether the constitutional political incapacity should, in a case where this results, be made a part of the judgment of the court, says: "This should not be the judgment. The courts have no such power. They can only render such judgments as the law annexes to the crimes, and empowers them to pronounce. For the crime of larceny the law has prescribed the punishment which the courts by their judgments may impose to be imprisonment in lieu of corporal punishment. This is the only judgment they can pronounce; the only punishment they can impose. In rendering their judgments, they cannot look to consequences. They have nothing to do with the disqualifications and penalties which, under the constitution, may result from them." This language conveys a very distinct intimation that the disabilities are consequent upon, though no part of, the judgment itself. In State v. Alexander the chief justice (PEARSON) dissented, in an opinion which has been sustained by the supreme court of Illinois in Faunce v. People, 51 Ill. 311, in construing a section of the Criminal Code of that state which declares that "each and any person convicted" of any of the crimes previously mentioned, and of which larceny is one, shall be deemed infamous in a sense that he has been convicted by the jury, but not until the judgment is rendered is he convicted by the law. The court says: "An examination of the adjudged cases in the various states of the Union, where substantially the same laws are in force, will show that it is not the commission of the crime, nor the verdict of guilty, nor the punishment, nor the infamous nature of the punishment, but the final judgment of the court, that renders the culprit incompetent."

But, without going outside the limits of the state, I find an adjudication in State v. Valentine, 7 Ired. 225, directly in point. In this case an accomplice in the murder, with which the prisoner was charged, had been convicted, but not sentenced, and was examined as a witness against him, after objection, (or rather his deposition taken intermediately between verdict and judgment was used in evidence,) and he was found guilty. NASH, J., afterwards chief justice, in disposing of the exception to the receiving the deposition in evidence, thus speaks: "His guilt, to work that effect, must be legally ascertained by a conviction, and that followed by a judgment. * * * This can only be done by the record, and that must show both a conviction and judgment; otherwise it is incomplete,—not a full record of the case. The judgment may have been arrested, and the conviction thereby rendered a nullity, as if it never had an existence."

To authorize the loss of personal privileges as a witness or voter, there must be administered the appropriate punishment due to crime imputed and ascertained by a jury finding, or confessed, and the cause must come to an end by final judgment disposing of it. Such must be understood to be the meaning of the term "conviction," upon which is dependent the incurring of such disabilities. Until this is done, and the cause fully disposed of, there has been no condemnation of the law, nor follow those further penal consequences to the personal *status* of the criminal, and this from that benignant rule adopted in the construction of penal statutes of doubtful import, which interprets them favorably towards the accused. The lan-

Digitized by Google

guage of the constitution itself enforces the rule of construction in the present case, since, not stopping at the words, "conviction or confession in open court," it proceeds and requires the person to be also "adjudged guilty," and this plainly implies the concurring action of the judge to give it full legal effect. In the indictment it is alleged that the judgment consequent upon the verdict has been suspended; that is, put off, to be hereafter pronounced, if deemed proper. When, if ever, moved hereafter, it is exposed to an order of arrest founded upon any substantial defect in the indictment itself, and if arrested the force of the verdict is destroyed, and in legal contemplation there has been no conviction of crime, and can be no punishment inflicted to which the disability can attach. Moreover, while the prosecution remains in an unfinished state, no appeal is admissible to correct any errors in law that may have been committed on the trial, and which would render it invalid.

There is another anomalous feature developed, if the rendition of the verdict suffices to pronounce this personal infirmity in the elector. The judge deems the conduct of the accused such, or for some other consideration, as not to require the present vindication of the violated law, and forbears to proceed; and yet the severe and heavier punishment of disfranchisement cannot be arrested, while the verdict remains, neither by the court, nor through intervening executive clemency. If sufficient grounds were found for staying the hands of justice, as must be inferred, from forbearing to render judgment, must it have been intended that the heavier blow should fall upon the offender in the loss of citizenship, recoverable only in an action to be provided by legislation? In either aspect of the case, I concur in the ruling of the court that the indictment be quashed.

(102 N. C. 347)

BROWN *et ux* *v.* MITCHELL.

(*Supreme Court of North Carolina.* May 17, 1889.)

FRAUDULENT CONVEYANCES—HUSBAND AND WIFE—INSTRUCTIONS—AMENDMENTS—NEW TRIAL.

1. In an action against a sheriff for wrongfully seizing plaintiff's property under execution against her husband, defendant alleged that a conveyance of the property to plaintiff by her husband was fraudulent. *Held*, that an instruction, immediately after calling attention to the testimony of plaintiff and her husband, that if the jury were satisfied that plaintiff "accepted the bill of sale, and gave her husband authority to hold the property as her agent, they living together, and he using the property as hers, and for the benefit of the family, according to her direction, this would be a constructive delivery," left the *onus* on plaintiff to prove delivery, and was correct as to what constituted constructive delivery.

2. Where both plaintiff and her husband testify that the latter owed her sufficient to amount to an adequate price for the property, which testimony is not controverted, it is proper to instruct the jury that, "if they (plaintiff and her husband) have satisfied you by a preponderance of the evidence that there was an actual debt owing by the husband to the wife, he had a right to pay or secure the debt," as such instruction properly leaves the *onus* on plaintiff to prove a consideration; and it is immaterial whether the husband gave plaintiff any written evidence of the debt.

3. After the debt is established, it is proper to instruct the jury that, though the husband intended to defraud his creditors, the validity of the transfer would not be destroyed, unless the wife participated in that intent.

4. Plaintiff may show the advice of her attorney as evidence of her good faith.

5. It is not necessary to leave to the jury the question whether the bill of sale was intended as a chattel mortgage merely because plaintiff did not show that she gave her husband a written receipt for the debt, where there is no evidence that the bill of sale was intended as a security.

6. An exception to the court's refusal to submit to the jury certain issues requested, and to its substitution of others, cannot be sustained where the judgment can be predicated on the facts found by the jury, and it does not appear that the law applicable to any material testimony was not fairly presented to and passed on by the jury.

7. Under Code N. C. § 272, giving the superior courts power to allow pleadings to be amended both before and after judgment, providing that the cause of action or defense shall not be substantially changed, an amendment, after verdict, of a complaint against a sheriff and the sureties on his bond, so as to strike out the names of the sureties, where the defense and issues would have been the same, is within the discretion of the trial court.

8. A new trial will not be granted for newly-discovered evidence which will tend merely to contradict a witness examined on the trial.

SMITH, C. J., dissenting.

Appeal from superior court, Hertford county; MACRAE, Judge.

Action by Brown and wife against Mitchell, sheriff, and the sureties on his official bond, for conversion of property alleged to belong to the *feme* plaintiff, and taken by the sheriff under an execution against the husband. After a verdict for plaintiffs, they were allowed to amend their complaint by striking out the names of all defendants except Mitchell. Judgment for plaintiffs, and defendant appeals.

Winborne & Bro., for appellant. *Batchelor & Devereux* and *W. D. Pruden*, for respondents.

AVERY, J. When a party to an action moves in the superior court, before the end of the trial term, for a new trial on account of testimony discovered after the rendition of verdict, the motion is addressed to the sound discretion of the presiding judge; and, if he rests his refusal to grant it solely upon his discretionary power, his decision is not reviewable in the appellate court. Carson v. Dellinger, 90 N. C. 226. So where a party moves for a new trial in the supreme court on the ground that he has discovered, since the expiration of the trial term below, new and material evidence, that he could have the benefit of on a future trial, the higher court exercises a purely discretionary power in passing upon the motion. We therefore deem it proper to give notice that this court will, as a rule, in future, grant or refuse such motions without discussing the facts embodied in the petitions or affidavits of the

Digitized by Google

moving party, as we cannot see that any good will be accomplished by contributing another to the volumes that have been written upon the exercise of legal discretion in deciding questions raised by applications for new trials. In this case, however, we find that the new testimony which the defendant proposes to offer is intended only to contradict the *feme* plaintiff as to her alleged declarations to the witness. The testimony in chief is not separated in the statement from that elicited by cross-examination; but it may be, and indeed it seems probable, that her testimony on that point was given in response to a question from defendant. We can readily see how, if the motion were granted and acted upon as a precedent, a majority of defendants, in cases like this, might lay the foundation for a new trial by asking one charged with being a party to a secret fraudulent conveyance to whom the witness communicated the fact that it was executed, and then proposing by some of the persons named in reply, to contradict on a future trial. The proposed new testimony as to the collection of fees for the services of the horse would be offered confessedly to contradict statements made by the husband on cross-examination. The general rule is that, when the new testimony will tend merely to contradict a witness examined on the trial, a new trial will not be granted the party wishing the benefit of it. Hil. New Trials, c. 15, § 19; 1 Grah. & W. New Trials, 498.

The defendant excepted to the refusal of the court below to submit the more numerous and specific issues tendered on his part, and the substitution of those passed upon by the jury instead of them. The judgment can be predicated upon the facts found by the jury as set forth in the record. It does not appear that the defendant was denied the opportunity to have the law applicable to any material portion of the testimony fairly presented and passed upon by the jury, through the medium of some one of the issues submitted. Emry v. Railroad Co., ante, 139. The exception cannot, therefore, be sustained.

The defendant insists that there was error in the refusal to give the instructions asked, numbered 6, 7, and 15, involving the question whether upon the evidence the court should have told the jury that there was a presumption not only that the wife had not paid *bona fide* for the property assigned to her by her husband, but that a transaction of the kind between husband and wife cast upon the plaintiff the burden of rebutting the presumption that it was fraudulent. The doctrine of the burden of proof, in its application to causes involving an issue of fraud, has led to their division into three classes, (Hardy v. Simpson, 13 Ired. 132:) *First.* When fraud appears so expressly and plainly upon the face of the deed as to be incapable of explanation by evidence *dehors*, (as when it is manifest from reading a conveyance that it was made and was intended to secure the ease and comfort of a debtor embarrassed with debt at the time of its execution,) there is conclusive presumption of fraud, and the court, without the intervention of a jury, declares the deed fraudulent. *Second.* When the law raises a presumption of fraud because of the relation of the parties to a transaction or the circumstances attending it; and if rebutting evidence is offered the issue must be left to the jury, but, in the absence of such testimony, the court acts upon the presumption, as when a person stands in certain fiduciary relations to others, such as arise out of reposing trust in his skill and integrity, the law raises a presumption in any transaction between the parties that the party in the superior position has used it to the injury of the person in the inferior position. Bigelow, Frauds, 190; Lea v. Pearce, 68 N. C. 76; McLeod v. Bullard, 84 N. C. 515; Kerr, Fraud & M. 385, 386. Among the other cases classified under this head are those in which a conveyance seems—nothing more appearing—to have been made for the ease and comfort of the debtor, but in which it is evident that some explanation might be given, and a different purpose and intent might be shown. Hardy v. Simpson, 13 Ired. 132. *Third.* As a general rule, where there is only evidence of such circumstances as naturally excite suspicion as to the *bona fides* of a transaction, the issue involving the question as to its fraudulent character should be left to the jury, with instructions that such circumstances are badges of fraud, and should be scrutinized closely in passing upon the issue. Among these badges, as enumerated by the courts, are failure to register a conveyance required by law to be registered within a reasonable time after its execution; the embarrassment of a grantor and his failure to reserve sufficient property to satisfy his indebtedness; inadequacy of price; unusual credit given by one in failing circumstances; secrecy in the execution of a conveyance; the fact that one involved in debt makes a conveyance to a near relation. Bump, Fraud. Conv. c. 4; Id. 158. The last proposition embodies the usual, but not the universal, rule, however. When a voluntary conveyance is attacked for fraud by the creditors of a donor, the burden is always upon the donee to establish the truth of circumstances that will repel the presumption of fraudulent intent, as by showing that the grantor retained other property sufficient to discharge all of his pecuniary obligations. Id. 286. The possession of the wife is also *prima facie* the possession of the husband, and consequently raises a presumption of ownership in him; and where the wife purchases property during coverture, whether from the husband or another, the burden is upon her to show distinctly that she paid the purchase money out of her own separate estate, not with the funds furnished by her husband. Id. 318. But this court has held that certain combinations of the several badges of fraud already mentioned will raise

Digitized by Google

a presumption of fraudulent intent, and make it incumbent on the party benefited by the alleged fraud to show the *bona fides* of the transaction. Counsel for the defendant cited especially the cases of Reiger v. Davis, 67 N. C. 189; Tredwell v. Graham, 88 N. C. 208; and McCanless v. Flinchum, 89 N. C. 373,—in support of his position, and we propose at a later stage of this discussion to distinguish each of said cases from that at bar.

In applying some of the principles announced, we find that his honor instructed the jury as to the delivery: "Now, if the testimony satisfies you that Mrs. Brown accepted the bill of sale, and gave her husband authority to hold the property as her agent, they living together, and he using the property as hers, and for the benefit of the family, according to her direction, this would be a constructive delivery." This instruction was given just after calling attention to the testimony of the plaintiff and her husband, and plainly left the recovery of the plaintiff to depend upon the question whether their evidence should show to the satisfaction of the jury that there was a constructive delivery. The *onus* was thus plainly thrown upon plaintiff to prove the delivery. The instruction was correct, too, as to what constituted a constructive delivery. Benj. Sales, § 1018, and notes 1043, 1044; Jenkins v. Jarrett, 70 N. C. 255; Bartlett v. Blake, 37 Me. 124. The judge also left to the jury the question whether the testimony of the husband and wife combined (there being no other evidence as to the point) had satisfied them that there was a *bona fide* debt due from the former to the latter, and made the right of recovery dependent upon the weight given to their testimony as to the existence of the debt. On this point he charged as follows: "Was there an indebtedness by the husband to the wife? You have heard the testimony of both husband and wife on this point. If they have satisfied you by a preponderance of evidence that there was an actual debt owing by the husband to the wife, he had a right to pay or secure the debt," etc. He did not tell the jury that the law presumed that the deed was executed in good faith and for a fair consideration, but imposed the burden upon the plaintiff of showing a delivery, and also of establishing the consideration. The judge was not bound to adopt the language of the defendant's counsel. He went far enough when he required the jury, as a condition precedent to finding for the plaintiff, to be satisfied of the truth of the facts mentioned by him, when those facts, if true, would rebut the presumption, arising out of the relation of husband and wife, that he was in possession in his own right, and that she had not paid for the property with her own funds. Indeed, it has been held by eminent authority incorrect to use the phrase "burden of proof" in such connection as suggested in the prayer for instructions. The burden of proof, it is said, never shifts, but is always on the party having the affirmative of the issue. The weight of evidence does sometimes shift in the progress of a trial. 1 Greenl. Ev. § 74, and note; 2 Amer. & Eng. Cyclop. Law, 655. This case cannot be made to depend on any construction given to the language used in Reiger v. Davis, 67 N. C. 185, nor upon the more decided terms used in Tredwell v. Graham, 88 N. C. 208. It differs from both in the facts that a stranger, who was present and wrote the bill of sale, was examined on the trial as well as the husband and wife, and there was an opportunity given to the jury to weigh the testimony of all as to the good faith of the transaction in question. It differs from both of those cases, and also from McCanless v. Flinchum, 89 N. C. 373, in another respect. The husband and wife both testified that he had owed her a certain sum of money, and had paid a portion, leaving still due a balance sufficient to pay, and that was used to pay, an adequate price for property described in the bill of sale. While the testimony as to the existence of the debt does not seem to have been controverted by any other testimony, still the *onus* was put upon the plaintiff by a preponderance of testimony. In Hodges v. Lassiter, 96 N. C. 351, 2 S. E. Rep. 923, Chief Justice SMITH, for the court, says: "But assuming proof not controverted to have been given of the indebtedness, the burden then rests upon the plaintiffs, who allege, to prove the fraud." If it were not true, as it is, that our case is distinguishable from Reiger v. Davis, we will find by referring to the language used by Justice BOYDEN (not to the syllabus) that the court intended to state the rule of evidence laid down by Best, in his work on the Principles of Evidence, p. 277: "Where effective proofs are in the power of a party who refuses or neglects to produce them, that naturally raises a presumption that those proofs, if produced, would make against him." When the proofs are produced, the presumption is gone. The court said in Reiger v. Davis, supra: "It is a rule of law to be laid down by the court that when a debtor, much embarrassed, conveys property of much value to a near relative, and the transaction is secret, and no one is present to witness the trade but these near relatives, it is to be regarded as fraudulent; but when these relatives are made witnesses in the cause, and depose to the fairness and *bona fides* of the transaction, and that there was in fact no purpose of secrecy, it then becomes a question for the jury to determine the intent which influenced the parties, and to find it fraudulent or otherwise, as the evidence might satisfy them." The relatives and the stranger were introduced, and an attorney named, with whom plaintiff had consulted. The court evidently meant that the question whether the fraud was shown by the defendant to the satisfaction of the jury would in our case be left to the jury. Having pointed out the distinction between our case and that of Tredwell v. Graham,

Digitized by Google

supra, it therefore is not necessary to question the proposition that the burden of proof shifted in that case.

Abbott, in his work on Trial Evidence, pp. 171, 172, says: "It is held that, if the wife shows title to separate property or capital not derived from him, the fact that she employs him * * * upon it, and supports him, does not raise a presumption of fraud. * * * But his conduct in the business may be given in evidence on the question of fraud." The conduct of the husband in managing her horses and other property was given in evidence. It is not material whether the husband gave her any written evidence of an indebtedness, and how he invested or reinvested the money, if he owed her an honest debt, and agreed to pay it. George v High, 85 N C. 99; Dula v. Young, 70 N. C. 450. We conclude, therefore, that the learned judge who tried the case correctly interpreted the law when, after declaring the *onus* upon the plaintiff to establish the debt and prove the delivery of the property, he left the jury to determine what weight they would attach to the circumstances in the evidence that amounted to badges of fraud, and, mentioning each circumstance, specifically cautioned the jury, because of the character of the evidence, to scrutinize the matter closely, and, if they found that the husband executed the bill of sale with intent to hinder, delay, or defraud his creditors, and that the wife participated in that intent, they would return a verdict for defendant on the first issue. Bump, Fraud. Conv. c. 4; Johnson v. McGrew, 11 Iowa, 151. After establishing the debt, it was proper to tell the jury that, though the husband intended to defraud his creditors, the validity of the transfer to the wife would not be destroyed, unless she participated in the intent. Battle v. Mayo, ante, 384. It was competent for plaintiff to show the advice of her attorney as evidence of her good faith. Bump, Fraud. Conv. 553. There was no testimony tending to show that the bill of sale was intended as a security. On the contrary, the witnesses testified that it was a sale. We cannot see how the principle stated in Dukes v. Jones, 6 Jones, (N. C.) 14, applies to the facts of this case. The judge was not bound to leave the question whether the bill of sale was intended as a chattel mortgage to the jury merely because the plaintiff did not show affirmatively that she gave her husband a written receipt for the debt.

The defendant objected to the order of the judge allowing the pleadings to be amended to conform to the proof, after verdict. Superior courts possess an inherent power to amend pleadings, and under the provisions of the Code have power to allow amendments both before and after judgment. The only limitation on the power is that no vested right shall be disturbed and that the cause of action or defense shall not be substantially changed. Knott v. Taylor, 96 N. C. 553, 2 S. E. Rep. 680; Gilchrist v. Kitchen, 86 N. C. 20; March v. Verble, 79 N. C. 19. If the action in this case had been originally begun and prosecuted against the sheriff individually, and not against him and his sureties to his official bond, it is obvious that the defense would have been the same made in this case, and the same issues would have arisen. The nature of the action has not been so changed as to surprise the defendant by making it necessary to establish any fact not already material under the issues submitted to the jury. The judge could, in his discretion, refuse the motion to amend or grant it with or without terms. Code, §§ 272, 273; Carpenter v. Huffsteller, 87 N. C. 273; Reynolds v Smathers, Id. 24. We conclude, therefore, that the defendant has shown no error that entitles him to a new trial. The judgment must be affirmed. No error.

SMITH, C. J., (*dissenting.*) The facts developed in the trial, that the alleged consideration of the conveyance was an indebtedness arising out of the sale of the wife's land 10 years before, and the application of the moneys received therefor to the husband's use; that he was on the eve of hopeless insolvency; that the deed was kept without disclosing the transfer of the property; that it was proved at a late hour of the night, under unusual circumstances; that specific values were not put upon each article; the continued possession and use of the personal property, with no indication of a change of title, sustaining the credit of the husband in making contracts upon the faith of it; the assent of the wife thereto, whereby he had the beneficial enjoyment as before; these, in my opinion raise a presumption of fraud between parties, husband and wife, thus dealing with each other, which the appellant was entitled to have given as an instruction to the jury, requiring proof in rebuttal. If the agreement for the continued use of the property after as before the making of the deed had been part of the arrangement for the transfer, it would have rendered the deed *ipso facto* void, as securing an interest to the vendor. Rea v. Alexander, 5 Ired. 644. The assent to such possession and use may authorize the inference of its being a prior condition, express or implied, which would avoid the deed, and certainly strengthens the presumption of the presence of this vitiating element in the transaction. In Askew v. Reynolds, 1 Dev. & B. 367, the following language is used by GASTON, J., (quoted with approbation by RUFFIN, C. J., in Foster v. Woodfin, 11 Ired. 339,) in reference to a conveyance unattended with a change of possession: "But such a repugnance between the transfer and the possession yet raises the presumption of a secret trust for the benefit of the grantor, which, while it admits, also requires, an explanation, and which, unexplained, or not satisfactorily explained, establishes the fraud." Here there is more,—the consent, to the use for his own benefit.

Digitized by Google

of the vendee, his wife. The refusal to so charge is an error, in my opinion, entitling the appellant to a *venire de novo*.

(103 N. C. 221)

BROWN *et al.* *v.* BROWN.

(*Supreme Court of North Carolina.* May 6, 1889.)

PUBLIC LANDS.

Act N. C. 1783 (1 Potter, Revisal, c. 185) forbade the entry and grant of land within the boundaries of the lands set apart to the Cherokee Indians. The treaty of July 2, 1791, extinguished the title of the Indians to such land. Act 1784 (1 Potter, Revisal, c. 202) required surveyors in the eastern part of the state to survey for any person his entries previously or subsequently made, and provided that, when two or more should have entered or might afterwards enter lands jointly, etc., the entries might be surveyed as one. Act 1794 (1 Potter, Revisal, c. 422) provided that all the lands of the state "eastward of the line of the ceded territory" (which was the territory afterwards forming the state of Tennessee, and immediately eastward of part of which line lay the land acquired from the Indians) should be deemed as coming within the meaning and purview of the act of 1784. *Held*, that by the latter act the Indian lands were subjected to entry and survey as other lands mentioned in the act of 1784, especially as a county embracing such lands had been previously erected, and had an entry office like other counties, and as the act of 1809, (2 Potter, Revisal, c. 774,) which exempted from entry lands to the westward thereof, and other statutes, implied that the Indian lands might be entered; and as it was the understanding of the people and authorities, after 1794, that those lands were subject to entry and grant.

On petition for rehearing. 8 S. E. Rep. 111.

T. F. Davidson, *R. D. Gilmer*, *M. E. Carter*, and *W. W. Jones*, for petitioners.

MERRIMON, J. This is an application to rehear the case of Brown v. Brown, 8 S. E. Rep. 111, (decided at the last term.) From the opinion of the court delivered in that case it will plainly appear that its decision was founded upon the ground that the treaty of Holston, ratified the 11th of November, 1791, referred to very fully, had not the effect to repeal or modify the statute (Acts 1783, 1 Potter, Revisal, c. 185) settling and prescribing the boundary of lands of the Cherokee Indians, and absolutely forbidding the entry and grant of any land within that boundary. The counsel for the appellants on the argument of the appeal insisted strongly that the treaty had such effect, and cited Strother v. Cathey, 1 Murph. 162, and other cases in support of their contention. It was not contended or suggested that there was any statute or statutory provision that repealed or modified the statute cited above. None was called to our attention, nor did our protracted and industrious researches in the course of reaching a conclusion enable us to find one. In the absence of such repealing or amendatory statute, unquestionably the decision of the court was correct, and this is now freely conceded by the learned counsel of the appellants.

But it is alleged in the petition to rehear, and earnestly contended by counsel, that the treaty mentioned certainly extinguished the title or claim of the Cherokee Indians to the land embraced by it in favor of this state as far to the west as the Meigs and Freeman line, and that the state owned it as part of its vacant lands, at once upon the ratification of the treaty; that the statute enacted subsequently to that treaty, creating the county of Buncombe, which embraced all the land of the Cherokee Indians in this state, had the implied effect to render such vacant lands subject to entry and grant; and as the entry of David Allison, embracing part of such vacant land, was made on the 4th day of May, 1795, in the county of Buncombe, and the grant thereupon issued to him on the 29th of November, 1796, it must be valid and operative. The statute creating the county of Buncombe did not mention or refer to it. It certainly did not in terms, (the statute first above cited forbidding the entry and grant of lands within the boundary of lands of the Cherokee Indians,) nor is any reference made in it to such lands. That county was simply created on a footing with other counties of the state as to the entry of lands, except that it embraced all the lands of the Cherokee Indians in this state, as perhaps the counties of Rutherford and Burke did to some extent before that county was created. It is very questionable whether such strained interpretation of this statute could be allowed—encouraged—by strong attending circumstances favoring it, but the discovery of a statute presently to be mentioned has relieved us from deciding that it could or could not be.

There are several collections of the older statutes of this state. All of these are more or less imperfect. Some of them give but a summary of the statutes, while others give such parts of them as were deemed important. The citations in all these collections are more or less complicated and confused. It is not, therefore, surprising that it is sometimes difficult to find an old statute that long since ceased to be current, and yet continued to be important and effectual in some connections and for some purposes. Being strongly impressed with the belief that there was some enactment shortly after the state acquired the lands, the Indian title to which was extinguished by the treaty of Holston, we have, in addition to the industrious research of counsel for the like purpose, scrutinized all the statutes passed after the year 1791, and have found one consisting of four lines, that extended the provisions of another prior statute, and thus by clear implication intentionally subjected these lands to entry and grant. It is singular that so large and important an acquisition of lands by the state was not made the subject of express legislation. They seem to have been neglected by the legislature for a long while, but to have been watched by a few persons who obtained grants for much the greater part of them; a single grant, in some instances, embracing hundreds of thousands of acres. The grant in question embraced 250,240 acres. Why these lands were not regarded with more seriousness by the legislature is left largely to conjecture. It may be it was supposed they were on a footing

Digitized by Google

with other lands of the state, subject to entry and grant, but this could not be so in the face of express statutory provision forbidding the entry of them, while such provision remained without repeal or modification by statutory provision.

The statute (Acts 1784, 1 Potter, Revisal, c. 202) required that surveyors in the "eastern part of the state" should survey for any person or persons whosoever, his or their entries of land already made, or that hereafter may be made, in or adjoining any of the great swamps, (be the number of entries more or less,) in one entire survey," etc.; and "that when two or more persons shall have entered, or may hereafter enter, lands jointly," etc., the surveyor may survey two or more entries as one, etc. The provisions of this statute were afterwards extended by the statute, (Acts 1794, 1 Potter, Revisal, c. 422; Hayw. Man. p. 188,) which provided as follows: "Be it enacted," etc., that "all the lands in this state lying eastward of the line of the ceded territory shall be deemed and considered as coming within the meaning and purview of the said act."

By "all the lands in this state, lying to the eastward," etc., is meant all the lands of this state not specially devoted to some particular purpose, and the implication intended was that they should be subject to entry and survey, just as were the lands mentioned in the statute amended. Such lands—"all the lands in this state lying," etc.—were to "be deemed and considered as coming within the meaning and purview of said act;" that is, they were all deemed alike subject to entry. Otherwise a part of the land would be excepted from the act, and this the express and sweeping words employed would not allow; and it seems that particularly there was a purpose to embrace the lands so acquired from the Cherokee Indians. Hence the words, "lying to the eastward of the line of the ceded territory." That was the line which separated this state from the territory ceded by it to the United States, (Acts 1789, 1 Potter, Revisal, c. 299,) which now forms the state of Tennessee, and the land acquired from the Indians by the treaty of Holston lay immediately to the eastward of a part of that line. If the purpose of the brief statute just recited had been to omit this land, the proper language would have been, "all the lands in this state subject to entry," and the words "lying to the eastward of the line of the ceded territory" would have been omitted. These words were used advisedly, it seems, and intended to have force, and serve the purpose we attribute to them in connection with the other words employed.

This interpretation is strengthened by the fact that the county of Buncombe had been erected before that statute was enacted (Acts 1791, c. 52) embracing the Indian lands, and it had an entry office like other counties of the state. The state owned these lands, having acquired them through the United States by the treaty of Holston, and they had not been devoted to any particular purpose. They were vacant, and might be disposed of as the legislature might direct. Moreover the statute (Acts 1809, 2 Potter, Revisal, c. 774) seems to imply that the land so acquired had theretofore been subject to entry and grant, as it expressly provided "that the land lying west of the line run by Meigs and Freeman within the bounds of this state (and we add immediately west of the land so acquired by this state) shall not be subject to be entered under the entry laws of this state," etc.; and other subsequent statutes seem to have had the like implication, making no mention of the lands now referred to.

It was certainly understood among the people and the authorities of the state after 1794 that the lands thus acquired from the Indians were subject to entry and grant. So far as we are informed and can learn, from the most diligent search and scrutiny made by counsel and the court, there is no statute other than that we have referred to that allowed such entry and grant. It has not such clearness and directness as it might not unreasonably be expected to have, but we think the interpretation we have given it is reasonable and the proper one. We may add that it is fortunate that it has been discovered, as it rendered the land subject to entry, and makes valid and sustains the grant in question, under which, no doubt, many excellent people derived title to their lands. We are glad to correct an error attributable to the singular character of the statute pertinent, and the unavoidable embarrassment encountered in finding it among a vast number of very old uncurrent statutes.

The prayer of the petitioners must therefore be granted. The case must be reheard, and the judgment of this court entered therein at the September term of 1888 must be set aside, and judgment entered declaring that there is error, and directing a new trial to be had. Prayer of the petitioners granted.

(102 N. C. 290)

WILSON *et al.* v. PEARSON.

(*Supreme Court of North Carolina.* May 18, 1889.)

PLEADING—AMENDMENT—LIMITATIONS—MERGER—ABATEMENT—APPEAL.

1. Plaintiffs sued to have the real estate of M., their deceased debtor, sold to pay his debt, alleging that there were no personal assets out of which to pay it. They made B., the administrator *d. b. n.* of M., M.'s heirs, and the administrator of W., who was administrator of M., defendants. They also joined as a defendant, P., the executor of the only solvent surety on W.'s administration bond, but prayed no relief as to him. The complaint was amended by alleging that in an action brought by plaintiffs' assignor against W a judgment had been rendered for the same debt. It was also averred that the heirs of M. claimed that W had received assets of the estate for which he had not accounted, but as to the truth thereof plaintiffs were ignorant. The amended complaint prayed an account to ascertain the amount of assets with which W.'s estate should be charged, and for a judgment against the representatives of both W.

Digitized by Google

and P. on the bond. *Held*, that the amendment introduced no new cause of action.

2. If a defendant makes no objection to an order of reference, on the ground that a plea in bar is undisposed of, he thereby waives the error, and cannot take advantage of it on appeal.

3. Though the administrator of a deceased debtor should bring suit to sell the realty to pay debts, upon his refusal to do so creditors may maintain the action.

4. The objection as to the right of plaintiffs to bring such an action can be taken advantage of only by demurrer, as the alleged want of authority appears on the face of the proceedings.

5. Such an action being brought on the administration bond executed in 1859, for a misapplication of assets received in that year, it is governed, not by the statute of limitations subsequently passed, but by the statute of presumption of payments existing before August 24, 1868, as, under Code N. C. § 136, cases in which the right of action accrued before that day are unaffected by the statute of limitations, and the fact that judgment against W., the administrator, was afterwards rendered for the debt, would not so change the nature of the claim by merger as to bring it within the last-named statute.

6. An action on said demand having been brought against W, the administrator, within ten years after the cause of action accrued, and there having been no period as long as one year when it or actions for the same demand subsequently brought were not pending, the presumption of payment arising from lapse of time is rebutted.

7 After a judgment absolute against W as administrator was rendered for the debt in question, from which an appeal was taken, and a final judgment was rendered in the action in the supreme court, the superior court no longer had jurisdiction to amend its judgment by making it a judgment *quando*, although the judgment was originally intended to be so entered.

8. The decision of the supreme court in a subsequent action between the same parties, in which it did not appear that an appeal was pending when the amendment was made, to the effect that the amendment was proper, would not be conclusive on that question, if the parties, after the case was remanded, did not cause judgment to be entered in conformity with the opinion rendered, but agreed to a nonsuit.

9. If, after a demurrer to a complaint is filed, the complaint is amended by consent, an answer is filed, and a trial had, the demurrer is waived.

10. Where, pending an action, a nonsuit is entered *nunc pro tunc* in another action between the same parties as of a term before the second action was begun, it relates back to the term as of which it was entered, and the defense of "another action pending" cannot be interposed to the second action.

11. There is no inconsistency between a finding of the fact that B., administrator *d. b. n.* of M., should have assets in his hands, and the legal conclusion that plaintiffs are entitled to have their debt paid by the sureties on W.'s bond.

12. Under Code N. C. § 965, authorizing amendments by the supreme court, either of form or substance, in furtherance of justice, a complaint by creditors of a decedent upon the administrator's bond payable to the state may be so amended as to substitute the state as plaintiff.

Civil action, tried before BOYKIN, J., at August term, 1887, of the superior court of Burke county, and heard upon the report of the referee (to whom the cause had been referred) and exceptions thereto. There was judgment confirming the report, and the defendant Richmond Pearson, executor, etc., appealed.

The action was commenced by summons issued on the 8th day of February, 1883, against John Gray Bynum, administrator *d. b. n.* of Charles McDowell, deceased, C. M. McCloud, administrator of N. W. Woodfin, deceased, Richmond Pearson, executor of R. M. Pearson, deceased, Samuel McDowell, and others. The complaint alleges in substance: (1) That Charles McDowell died in 1859, leaving a last will, which was duly proved; (2) that N W Woodfin was duly appointed administrator *cum tes. an.* of said Charles McDowell, and executed his bond as such, with John W. Woodfin, W. F. McKesson, and R. M. Pearson as sureties; (3) that said N. W. Woodfin died insolvent, and C. M. McCloud is his administrator, and that John W Woodfin and W. F. McKesson are dead, and their estates insolvent; (4) that R. M. Pearson died leaving a large estate, and the defendant Richmond Pearson is his executor; (5) that on the 25th of November, 1855, W. F. McKesson, Charles McDowell, and James McKesson (the last two as sureties) executed their bond, signed and sealed, to W. M. Walton, promising to pay to him or to his order the sum of $2,200; (6) that James McKesson is dead, and his estate is insolvent; (7) that no part of said bond has ever been paid; (8) that the plaintiffs are the assignees and owners of said bond and the debt created thereby; (9) that N. W Woodfin died in 1876, and John G. Bynum has been appointed and duly qualified as administrator *de bonis non*, etc., of the estate of Charles McDowell; (10) that the outstanding debts against the estate of Charles McDowell, deceased, are between $8,000 and $9,000; (11) that Charles McDowell, deceased, left a large personal estate, consisting mostly of slaves, and the plaintiffs are informed and believe that all the personal estate of the deceased has been exhausted in the payment of debts, and by the emancipation of the slaves and other destructive results of the war; (12) that there are no personal assets known to plaintiffs out of which they can obtain payment of their debt, and none have come to the hands of John G. Bynum, administrator, etc., as they are informed; (13) that Mary T. Pearson (and others named) are the heirs and devisees of Charles McDowell, deceased; (14) that Charles McDowell died seised of the lands mentioned in the complaint; (15) that said lands are in the possession of Samuel McDowell (and others named;) (16) that John G. Bynum, administrator, etc., of Charles McDowell, has not instituted any legal proceeding to recover any assets, if any there be, from N. W Woodfin, the former administrator, etc., nor has he instituted any legal proceeding to subject the real estate of said Charles McDowell, deceased, to the payment of the debts of the deceased; (17) that plaintiffs demanded of said Bynum, administrator, etc., before bringing this action, that he should file a petition for sale of real estate, etc., and that he declined to do so. Judgment is demanded for sale of real estate, and for such other and further relief, etc.

To this complaint the defendant Richmond Pearson, executor, demurred, assigning as

Digitized by Google

cause therefor: "(1) That no relief is prayed against him in the complaint; (2) that the complaint admits that there had been no *devastavit* of the principal of his testator, N. W. Woodfin, administrator, etc., of Charles McDowell, and consequently there is no breach of the administration bond of said Woodfin." It nowhere appears from the record that this demurrer was ever passed upon judicially, but at the same term of the court the following order was made: "In this case, the defendant having filed a demurrer, and the pleadings being under oath, and the defendant Pearson being absent, it is ordered that within 30 days the defendant Pearson be allowed to withdraw his demurrer and file an answer, and he is required to serve the plaintiffs with a copy of answer in case he should file the same." At September term, 1883, by consent of counsel for all parties (including the defendant Pearson) in writing filed, allegation 5 of the complaint was amended by adding: "That W. M. Walton brought suit on said bond 15th of March, 1866, and at fall term, 1869, obtained judgment thereon, as appears of record in the superior court of Burke county." Allegation 8 was amended so as to read: "That W M. Walton, by a written assignment, conveyed all his interest in said bond and judgment thereon to S. M'D. Tate, and that said interest belongs to the plaintiffs jointly." Allegation 11 was amended by adding: "Nevertheless the plaintiffs are informed that the devisees of Charles McDowell, deceased, defendants in this action, deny that the assets of the estate of Charles McDowell have been exhausted or legally applied, and allege that N. W. Woodfin, former administrator, was guilty of a *devastavit* of said assets, and plaintiffs are not able to swear positively how the matter stands." And the prayer for relief was amended by adding: "That an account be taken of the estate of Charles McDowell, deceased, to ascertain whether the assets have been exhausted or have been legally applied, and how much, if any, assets are still in, or ought to be in, N W Woodfin's hands; and, if it appears that he was guilty of a *devastavit*, that plaintiffs have judgment against his administrator and the surety on his bond, to-wit, Richmond Pearson, executor of R. M. Pearson, deceased, and for such further relief in the collection of plaintiffs' debt or claim as may be consistent with the facts found in this case."

To this amended complaint the defendants answer: (1) That the judgment mentioned as having been entered and recorded in 1869 is barred by the statute of limitations; (2) that the judgment aforesaid is dormant, and leave to bring an action thereon was not obtained prior to the bringing of this action. And for further answer they adopt the answer of their co-defendant, J. G. Bynum, administrator. This answer is signed by counsel for defendants, including George N. Folk, counsel for the defendant Pearson. Upon the trial of the cause at September term, 1883, by agreement in writing, allegations 1, 2, 3, 4, 5, 6, 8, 9, 13, 14, 15, 16, and 17 were admitted, and it was also admitted that N. W. Woodfin, as administrator of Charles McDowell, within less than two years after his qualification, divided among the legatees the greater part of the personal property, and took no refunding bonds, and upon being heard "upon the pleadings, the records made part of the facts, and the admissions of the parties," judgment was rendered for the defendants and the plaintiffs appealed. In the supreme court (92 N. C. 717) the judgment of the superior court was reversed. At spring term, 1886, upon motion of plaintiffs, the case was referred, under the Code, to George F Bason "to take and state an account of the estate of Charles McDowell, deceased; to ascertain and report whether the assets have been exhausted or legally applied, and how much, if any assets, are still in, or ought to be in, the hands of N. W. Woodfin, administrator of said estate, or in the hands of his personal representative, which ought to be applied to the claim of the plaintiffs, and report," etc. This order of reference was resisted by J. G. Bynum, administrator, etc., Cora McDowell, Manly McDowell, and Thomas Walton and wife, and was made without prejudice as to them. At the same term it was ordered that J. G. Bynum, administrator, etc., and the McDowell heirs, have leave to amend their answers, and that the "plaintiffs have leave to amend their complaint heretofore filed herein, as they may be advised, said amendment to be filed either at the time or before the referee appointed herein to state an account, and upon any amendments to plaintiffs' complaint, the defendants shall have leave to amend their answers in reply to such amendments made by plaintiffs." And thereupon the heirs of Charles McDowell, defendants, filed an amended answer, with a copy of the judgment of the supreme court rendered at January term, 1870, upon appeal from the superior court of Burke county in the case of "W. M. Walton, plaintiff, against W. F. McKesson, N. W. Woodfin, administrator of Charles McDowell, and W. F. McKesson, administrator of James McKesson," and insist that it was a "final judgment absolute" against the defendants in the judgment mentioned in allegation 5 of the amended complaint, and fixed N. W. Woodfin, administrator, etc., with assets sufficient to discharge the same, and that said judgment is a bar to the recovery of the plaintiffs against them. They further say that the administration bond of said Woodfin was then, and still is, perfectly solvent, etc.

The plaintiffs filed (August 6, 1886) an amended complaint, admitting the copy of the record of the judgment of the supreme court of North Carolina in the case of Walton v. McKesson et al. to be true, and alleging "now that N. W. Woodfin, administrator, etc., of Charles McDowell had in his hands assets sufficient to pay the plaintiffs'

Digitized by Google

debt, and that he unlawfully distributed them and wasted them, and that the sureties on his bond, and their representatives, are liable for plaintiffs' debt." Plaintiffs thereupon demanded judgment against the defendant Pearson for the said debt, and for such other or different relief as they may be entitled to against all the defendants.

Thereupon the defendant Pearson, executor, etc., filed a separate answer to the "complaint and amended complaints of the plaintiffs," admitting paragraphs 1, 2, 3, 4, 5, 6, and 9 of the complaint. That allegation 7 is not true as therein alleged, but, in substance, that the bond set out in paragraph 5 was reduced to judgment at fall term, 1869, of the superior court of Burke county, in the action of Walton v. McKesson et al., and by said judgment merged and extinguished, and that it was a judgment *quando*, and not absolute, as to N. W. Woodfin, administrator, etc., of Charles McDowell, and an admission of record that he had not, and ought not to have had, assets of the estate of said Charles McDowell at the date of said judgment, and that the plaintiffs (assignees, etc.) are estopped from averring that there was a *devastavit*, etc., prior to said judgment. That he has no knowledge, etc., as to paragraphs 8, 10, 11, 12, 13, 14, 15, 16, and 17; and to the amended complaint of the plaintiffs he answers, in substance, that the judgment mentioned in paragraph 1 of the amended complaint was rendered by the supreme court at January term, 1870, in an action begun in 1866 in the superior court of Burke county, in which there was a judgment at fall term, 1869, absolute against W. F. McKesson, individually, and *quando* against N. W. Woodfin, administrator, etc., and that from said judgment W. F. McKesson alone appealed, and that there was no appeal by Woodfin, administrator, etc. That said judgment on appeal was affirmed at January term, 1870, of the supreme court; and that, while it is true that said judgment of the supreme court appears to have been entered against W. F. McKesson and N. W. Woodfin, administrator, etc., of Charles McDowell, yet, as said McKesson had alone appealed, the court had no jurisdiction as to Woodfin, administrator, etc., and no authority to render such judgment as against him, or that it can have the effect to fix said Woodfin, administrator, etc., with assets. The second allegation of the amended complaint is denied, and it is insisted that, even if the plaintiffs were the owners of said judgment, they are estopped from averring that Woodfin had, or ought to have had, assets. For a further defense it is insisted that the plaintiffs have no right to maintain this action, "but that the administrator *de bonis non c. t. a.* is the real party in interest, * * * and alone has the right to maintain actions for breaches of said Woodfin's said administration bond." For a further defense it is insisted that the judgment at January term, 1870, is dormant, has never been revived, etc., and the ten-years, the six-years, and the three-years statutes are relied on, each as a bar to this action. For a further defense it is insisted that on the 19th of January, 1874, an action was commenced by W. M. Walton in the superior court of Burke county upon the administration bond of N. W. Woodfin, and the surety thereon, for the "same cause of action, and between substantially the same parties" as this, and that said suit was pending till spring term, 1883, in the superior court of Catawba, (to which it had been removed,) when the plaintiffs caused a "nonsuit" (as it is styled in the pleadings) to be entered "taken as of fall term, 1882," and that this action was begun on the 8th day of February, 1883, pending said action. For a further defense it is insisted that more than a year elapsed after the entry of said nonsuit before the filing of the amended complaint, seeking to charge the defendant as executor, etc., or asking any relief against him, and that the defendant never gave his consent to the filing of the amended complaint, and that the court had no power to grant leave to file an amendment that would deprive defendant of the benefit of any statute in respect to the matters alleged in said amendment. For a further defense the defendant adopts and sets out as part of his answer a portion of the answer of J. G. Bynum, administrator, etc., in this action, and also the answer of his testator, R. M. Pearson, to the complaint of W. M. Walton v. N. W. Woodfin, administrator, etc., et al., but in the view taken of this case it is not material to report them here.

The report of the referee, Bason, was filed at March term, 1887, which was substantially, and so far as material to the questions before us, as follows:

(1) That on the 25th of November, 1855, W. F. McKesson executed to W. M. Walton the note under seal for $2,200, (set out in full,) with Charles McDowell and James McKesson as sureties.

(2) That plaintiffs are the owners of said bond and judgment thereafter taken thereon.

(3) That W. F. and James McKesson are both dead, and their estates insolvent.

(4) That Charles McDowell died in 1859, leaving a will, and on the 24th of November, 1859, (the executor having failed to qualify,) N. W. Woodfin was appointed administrator *c. t. a.*, and gave bond as such, with John W. Woodfin, W. F. McKesson, and R. M. Pearson as sureties.

(5) That N. W. and J. W. Woodfin are dead, and their estates are insolvent.

(6) That J. G. Bynum is the administrator *d. b. n.* of Charles McDowell, but has no assets, etc.

(7) That R. M. Pearson died leaving a large estate, and the defendant Richmond Pearson is his executor.

(8) That Charles McDowell left, besides valuable real estate, "personal property of the value of $31,727, a large portion of which consisted of negro slaves, all of which went into the hands of Woodfin, his administrator.

Digitized by Google

and all of this sum, except some $1,500, paid out on debts of his testator, was either wasted by said administrator or distributed to the legatees named in the will, without taking refunding bonds therefor, leaving the debt of plaintiffs still due and outstanding." It is further found that a part of the property so distributed (more than enough to pay plaintiffs' debt) "was lost by the results of the war."

(9) That J. G. Bynum, administrator *d. b. n.*, etc., was, before the institution of this action, "requested by the plaintiffs to bring suit to collect the assets of his testator's estate to pay their debts, but refused to do so without indemnity against costs, as set out," etc.

(10) That suit was brought by W. M. Walton in the superior court of Burke county on the 15th of March, 1866, against W. F. McKesson, administrator of James McKesson, and N. W. Woodfin, administrator, etc., of Charles McDowell, on the bond referred to in section 1, and at fall term, 1869, there was a trial of said cause, and an absolute judgment thereon, etc., from which judgment all the defendants appealed to the supreme court. The verdict of the jury, judgment of the court, and appeal by the defendants, as set out on the minute docket of Burke superior court, are set forth in Walton v. McKesson, 101 N. C. 430, 7 S. E. Rep. 566.

(11) That at January term, 1870, of the supreme court said appeal was heard, and a judgment absolute in said court was rendered for the plaintiff against all the defendants, etc.

(12) That at spring term, 1870, of Burke superior court, an entry of judgment purporting to be according to the certificate of the supreme court was made of record in said cause, but in fact said entry of judgment was not in accordance with said certificate, which only directed an entry of judgment for costs of Burke superior court, while the judgment actually entered was for plaintiff's debt as well as for costs.

(13) That at spring term, 1878, of Burke superior court the records of said fall term, 1869, of said court were, by order of Judge CLOUD, amended as set out, (making the judgment absolute against W. F. McKesson individually, and *quando* as against him as administrator of James McKesson, and *quando* against N. W. Woodfin, administrator, etc., of Charles McDowell,) and on the 11th of March, 1879, an assignment of all his right, title, and interest in the said judgment was made by W. M. Walton to the plaintiff Tate.

(14) That on the 5th of November, 1869, W. M. Walton and one Michaux filed a creditor's bill in the superior court of Burke county, against N. W. Woodfin, administrator, etc., of Charles McDowell, and others, for the collection, among others, of the Walton debt, and on the 21st of March, 1870, an order was made in said cause restraining the creditors of said McDowell from collecting their debts otherwise than as ordered in said cause. R. M. Pearson was made a party defendant on the 19th of December, 1873, and at fall term, 1874, (August 24th,) the cause was dismissed.

(15) That on the 19th of June, 1874, W. M. Walton brought suit on the administration bond of N. W. Woodfin, against the said Woodfin and R. M. Pearson and W. F. McKesson, his sureties, to recover the debt mentioned in section 1. Pending said action Woodfin died, and J. G. Bynum, administrator *d. b. n.* of Charles McDowell, was made a party, and, R. M. Pearson having also died, Richmond Pearson, his executor, came in at March term, and made himself a party defendant. At March term, 1879, the cause was removed to Catawba superior court, and the present plaintiffs were made parties. At spring term, 1879, there was a trial and judgment, from which both parties appealed to the supreme court. See case in 82 N. C. 464, 83 N. C. 309, and 85 N. C. 34. At fall term, 1881, of Catawba superior court the opinion of the supreme court was filed, and the case continued without an entry of judgment according to the certificate of the supreme court. At spring term, 1882, "by consent of all parties," signed by their counsel, it was agreed that the plaintiffs have leave to take a nonsuit, and "enter the same in vacation between this and fall term, if they desire." At fall term, 1882, the case was continued, and on the 6th day of February, 1883, two days prior to the bringing of this action, a "nonsuit" was entered of record in vacation by the plaintiffs, and afterwards, at spring term, 1883, (last Monday in February,) an entry of "nonsuit" was made as of fall term, 1882, and the costs for which the plaintiffs were liable were paid.

(16) That on the 14th of August, 1875, W. M. Walton brought suit against R. M. Pearson, to follow assets of the estate of Charles McDowell in his hands, (value of certain slaves.) At spring term, 1876, J. G. Bynum, administrator, etc., of Charles McDowell, and others were made parties defendant. At spring term, 1878, the death of R. M. Pearson was suggested, and Richmond Pearson, his executor, made himself a party defendant, and at spring term, 1879, the present plaintiffs were made parties plaintiff. The cause was continued from term to term till spring term, 1882, when the same order as to nonsuit, etc., was entered, as in Walton v. Woodfin, (in preceding section,) and on the 6th of February, 1883, in vacation, and at spring term, 1883, similar entries of nonsuit were made as in that cause. No objection appears to have been taken, and there was no appeal therefrom.

(17) That the plaintiffs' debt (principal and interest) amounts to $6,329.40, is still due and unpaid, and, so far as the evidence shows, is the only outstanding debt against the estate of Charles McDowell.

(18) That the assets that came into the hands of N. W. Woodfin, administrator, etc.,

Digitized by Google

and wasted or distributed, amount (with interest added) to $79,400, all of which ought now to be in the hands of the present representative of Charles McDowell.

Exceptions to the referee's report were filed as follows: (1) The evidence offered by the plaintiffs and the McDowell heirs, defendants, tending to show a distribution of the slaves of the estate of Charles McDowell, by Woodfin, administrator, etc., among the legatees under the will without taking refunding bonds, was competent to show a *devastavit*, etc., and the objection thereto by the defendant Pearson was overruled. (2) The evidence offered and objected to, tending to show a sale of said slaves by Mrs. Pearson or Judge Pearson, after such distribution, was competent to show that they were not lost by the results of the war. (3) (The third conclusion of law relates to the amendment of the record by Judge CLOUD at spring term, 1878, of Burke superior court, and, the exception thereto having been sustained by his honor below, it and the exception thereto need not be stated here.) (4) As a final judgment absolute was rendered in the supreme court, at January term, 1870, (case 64 N. C. 154,) there was properly no judgment of record in the superior court of Burke to be amended into a *quando* judgment. (5) Said judgment, having been absolute, fixed the administrator with assets. (6) The plaintiffs' cause of action, having accrued prior to the Code, is not affected by the statute of limitations, and, the statute of presumption having been rebutted, the plaintiffs have a right to recover, new suit having been brought within one year after nonsuit, etc. (7) The plaintiffs having requested the administrator *de bonis non* to bring action, etc., and he having refused to do so unless indemnified, the plaintiffs had a right to bring action against him and the other defendants under section 185 of the Code; and, if not, it appeared upon the face of the complaint, and should have been taken advantage of by demurrer, and he finds that the plaintiffs are entitled to recover.

The defendant Pearson, executor, filed numerous exceptions, 36 in number, covering many pages of the written record, besides numerous others taken before the referee, but the first, second, third, and fourth were abandoned in this court, and only so much of the substance of the others is stated, as, in the view of the case taken by the court, is material. The fifth exception, the first relied on, is to the power of the referee, under the order of reference, to consider or take into the account any assets that came or ought to have come into the hands of N. W. Woodfin, administrator, etc., prior to the judgment at fall term, 1869, of Burke superior court, or before the judgment of said court at spring term, 1870, or to consider any matters except the assets which came or ought to have come into his hands since the fall term, 1869, of said court. The sixth, tenth, eleventh, thirteenth, fourteenth, fifteenth, sixteenth, seventeenth, eighteenth, nineteenth, twentieth, twenty-first, twenty-fourth, twenty-fifth, part of twenty-sixth, twenty-seventh, twenty-eighth, part of twenty-ninth, thirtieth, and thirty-first, which are set out at great length and argumentatively, are based upon the assumption that the judgment of fall term, 1869, was a judgment *quando* as to Woodfin, administrator, etc., of McDowell; that the plaintiffs acquired by the assignment to them nothing but the judgment *quando;* that the testimony objected to in the several exceptions upon which the referee acted was irrelevant and incompetent because the judgment *quando* was an admission that there was up to the time of said judgment no *devastavit*, and that the personal assets had been legally exhausted; that the several findings of fact and conclusions mentioned in said exceptions were not within the province of the referee, were immaterial and irrelevant, supported by no competent evidence; that the plaintiffs are estopped by their allegations in seeking to subject the real estate to the payment of their debt, from alleging a *devastavit*, etc., and, if they were not, that an action for the *devastavit* could only be brought by the administrator *de bonis non* of Charles McDowell; and further that the nonsuits taken in February, 1883, (both that attempted to be taken in vacation and that entered in term-time, as of fall term, 1882,) were irregular, illegal, and void. The seventh exception is that the referee treated the action as one against the defendant on the administration bond of N. W. Woodfin, administrator, etc., and took into consideration the alleged amendment of August 6, 1886, which changed the nature of the action, introduced a new cause of action, and that neither the court nor the referee had authority to make or allow such amendment, and that at the time of said amendment there was no action against this defendant, and further that if there was any such judgment in the supreme court as that referred to in said alleged amendment there was no evidence that the plaintiffs owned it. The eighth exception is that the order of reference was improvidently made and premature, in that the defenses in bar of the action were undisposed of, and said order of reference was erroneous and irregular. The ninth exception is that the first finding of fact by the referee is against the weight of evidence, contrary to the allegations of the complaint, without evidence to support it, and the finding is "immaterial and without the province of the referee, and there is no competent evidence of bond not paid." The twelfth exception is to the ninth finding of fact as immaterial, outside the province of the referee, "contrary to the weight of evidence, and without evidence to support it." The twenty-second and twenty-third exceptions are to the seventeenth and eighteenth findings of fact as without the province of the referee upon a matter adjudicated to the contrary, (as to the eighteenth

Digitized by Google

finding,) and which the plaintiffs are estopped to controvert, etc. The thirty-second exception is that the referee should have found "that the complaint does not state facts sufficient to constitute a cause of action against this defendant." The thirty-third exception is to the admission of the testimony of G. N. Folk as irrelevant and inconsistent, and to the admission in evidence referred to in the testimony taken by the referee as the admission of facts filed in the case. The thirty-fourth exception is to that part of the testimony filed by the referee "which purports to be and is a copy of the testimony taken, and not the original." "Exception 35. The referee finds in the eighteenth finding of fact that assets found to have been wasted by Woodfin, administrator, ought now to be in the hands of the representative of Charles McDowell, and yet further finds in the sixth finding of law that this defendant is liable for so much thereof as will pay the amount claimed by these plaintiffs to these plaintiffs, and that these plaintiffs can maintain this action in their own names to recover the same against this defendant. Such findings of law upon such findings of fact cannot be, and are not correct." The thirty-sixth exception is substantially and at much length a recapitulation of the other exceptions, and is fully and in detail covered by them, and need not be repeated here. So much of exceptions 26 and 29 as are not covered by the summary were sustained, and need not be referred to. The other exceptions were overruled. The court held that the cause of action was not barred by the statute of limitations, nor was there payment under the statute of presumptions, and that the evidence of Tate and Walton—exception to which (29) was sustained—on this point was immaterial. The court further held that the plaintiffs were not entitled to judgment against the McDowell heirs, and gave judgment, as to them, for costs against the plaintiffs. There was judgment against Richmond Pearson, executor, for $50,000, (the penalty of the bond of Woodfin, administrator, etc., to which R. M. Pearson was surety;) to be discharged on the payment, etc. From this judgment the defendant Richmond Pearson, executor, etc., appealed.

F. A. Sondley and *Armistead Jones*, for appellant. *D. Schenck* and *Batchelor & Devereux*, for respondents.

DAVIS, J., (*after stating the facts as above.*) The purpose of this action is to recover a debt originally due by note under seal executed by W. F. McKesson, with Charles McDowell and James McKesson as sureties. Actions to recover this debt have been pending in some form against parties sought to be held liable for its payment since March, 1866. After various amendments and many irregularities and inconsistencies in the pleadings, which perhaps would have been fatal to the action if objection had been taken and insisted upon in apt time, but which were either waived or cured by amendments, it has now assumed the simple character of an action against the representative of the only solvent surety on the administration bond of N. W. Woodfin, administrator of Charles McDowell, for a *devastavit* and misapplication of assets. In one form or another its subject-matter has been frequently before this court, as will be seen by reference to 64 N. C. 154, 82 N. C. 464, 83 N. C. 309, 85 N. C. 34, 92 N. C. 717, and 101 N. C. 428, 7 S. E. Rep. 566. When it was here at February term, 1885, (92 N. C. 717,) ASHE, J., characterized the record, "interspersed with its numerous amendments," as "obscure, inconsistent, and voluminous," and, after the new trial granted at that term, and to meet defects then suggested, it was again amended, (both the complaint and the answers,) and to the order allowing the amendments there was at the time no objection—certainly no exception—noted, and no appeal taken, or right of appeal reserved, and whether the amendments ought or ought not to have been allowed are not now questions for our consideration. It is said by counsel: "The plaintiff had complained. Pearson had answered by demurrer. No reply thereto had been or ought to have been filed for three years. This was the end to the pleading between them." This might have been so, but for the facts that at the first term after the demurrer was filed (September term, 1883) by consent the complaint was amended, and an answer filed; there was a trial, a judgment, and an appeal to the supreme court. That the demurrer (if not passed upon) was thus waived, seems too plain to need the support of authority.

It is insisted by counsel for the defendant that "the reference in this action was compulsory and irregular because it preceded a determination of the matters pleaded in bar, to-wit, the statute of limitations, that the action was brought in the wrong name, the pendency of another action between the same parties and for the same purpose at the commencement of this action, and the existence of a judgment *quando;*" and for this he cites numerous authorities. The authorities cited clearly show, and it cannot be questioned, that the defendant had a right to have any plea in bar passed upon before the reference was ordered, but if he wished to avail himself of that right it was his duty to have insisted upon it before the reference was ordered. This is well settled. Grant v. Hughes, 96 N. C. 190, 2 S. E. Rep. 339, and the cases there cited. The order of reference was resisted by J. G. Bynum, administrator, etc., and the McDowell heirs, and was "without prejudice as to them," but there was no objection by the defendant Pearson, and as to him it "was equivalent to assent and a waiver." Grant v. Hughes, supra. But it is insisted that, when the order of reference was made, the defendant Pearson could not object because there "was no case stated" as against him, as that was settled by the judgment *quando*. One of the objections now

Digitized by Google

urged against the reference is, that the question whether there was a judgment *quando* was, among others, not passed upon before the reference was ordered. But the defendant was a party to the action, made no objection to the order, and the very purpose and the only purpose of the reference was to ascertain whether the assets in the hands of Woodfin, administrator, etc., (to whose bond the defendant's testator was surety,) had "been exhausted or legally applied," and if he assented to the order of reference, or made no objection and took no appeal, as he had a right to do, he cannot now be heard to object. The same may be said in regard to the amended complaint of August 6, 1886. If the defendant had any objection to the order allowing the amendments, it should have been then taken.

But it is insisted that the "referee treated this action as one against this defendant brought on Woodfin's administration bond," and the court had no right to "permit an amendment which changes the nature of the action, makes a misjoinder of causes of action inconsistent in themselves and inconsistent with the action originally begun, and with the admissions of the complaint." The defendant's testator, R. M. Pearson, was made a party defendant in the creditor's action instituted by Michaux and others, and also in the action brought in June, 1874, by W. M. Walton on the administration bond of N. W. Woodfin, in both of which the recovery of the debt now sued on was attempted, and when this action was brought the present defendant (his executor) was made a party defendant. If liable at all, it could only be on the administration bond, and, so far as the defendant is concerned, no action could be brought except on the administration bond. However defective the original complaint may have been in failing properly to allege a cause of action against the defendant, and in failing to demand specifically judgment against him, the purpose of the action has been apparent. The defendant was made a party with the heirs at law for some purpose, and allegations in the complaint show what the purpose was. It is alleged that Charles McDowell died; that Woodfin was appointed his administrator; that the defendant's testator was surety on his administration bond; that McDowell in his life-time was one of the sureties to the debt for the recovery of which this action is brought; that all the persons or their estates liable for said debt, except McDowell's estate, are insolvent, and that no part of the debt has been paid; and by an amendment by consent of all parties for the purpose of ascertaining whether the assets in the hands of Woodfin, administrator, etc., have been legally applied or exhausted, an account is asked for, to the end that, if it shall appear that there was a *devastavit*, the plaintiffs may have judgment against the defendant Pearson, executor, etc. The defects in the complaint were not such as, in the absence of objection, to defeat the action altogether, and when amended by consent or without objection, as they were, they are cured.

The original administration on the estate of Charles McDowell was granted prior to the 1st day of July, 1869, and except so far as relates to the courts having jurisdiction "is to be dealt with, administered, and settled according to the law as it existed just prior" to that date. Code, §§ 1433, 1476. According to the law as it then existed, a creditor in a court of equity could by a proper bill obtain an account of the personal and real estate of his deceased debtor, and have a decree for the payment of his debt out of the proper fund. Martin v. Harding, 3 Ired. Eq. 603; Finger v. Finger, 64 N. C. 183. Of course, in such an action it would be necessary to have the real as well as the personal representative before the court, and the one or the other would be charged with the payment of the debt as, upon the statement of the account, it might appear that the one or the other was liable. This action may be treated as a bill to ascertain, by an account, whether the real or personal representatives of Charles McDowell are liable for plaintiffs' debt, and this seems to have been the view taken in this court when the judgment was reversed at February term, 1885, (92 N. C. 717, and cases there cited.) There was but one cause of action in the original complaint or as amended, and that was the liability of the estate of Charles McDowell for the plaintiffs' debt; and, if liable, whether that liability should rest upon the personal or real representatives, required the equitable aid of the court to determine. After the amended answer of the heirs of Charles McDowell, in which it appeared that there had been an absolute judgment final, fixing liability upon the personal representative, the plaintiffs very properly abandoned all claim as against them, and sought judgment against the defendant only. The amended complaint was a reply, and not an amendment, so far as it related to the amended answer of the McDowell heirs, admitting the truth and effect of their amended answer, but so far as it related to the defendant Pearson, executor, etc., it was an amendment, alleging directly that Woodfin, administrator, etc., had distributed and wasted assets applicable to the payment of their debt, and that the sureties on his administration bond were liable, etc. No new cause of action was alleged, but, so far as the heirs of Charles McDowell were concerned, it was conceded, when the record of the judgment in the supreme court was filed, that they were not liable, and that no judicial decree was necessary as to them, and the action was thereafter prosecuted against the defendant Pearson, executor, alone.

It is not the least singular fact connected with this action, the record in which, one of our predecessors said, "constituted a moderate-sized volume," and which, we may add, has, with its age, greatly increased its pro-

Digitized by Google

portions, as well as its "irregularities, obscurities, and inconsistencies," that the judgment of the supreme court at January term, 1870, should have been so strangely overlooked by counsel on all sides. We do not know how to account for it, unless it be to prove by the exception the truth of the utterance of the wise man that "in the multitude of counsellors there is safety," for in looking through the record it will be seen that there have been more than a score of counsellors engaged, at one time or another. It may be, however, as they were not all engaged at the same time, the confusion resulted from a failure on the part of succeeding counsel to properly apprehend the plan of attack or defense arranged by their predecessors. The first exception relied on was the fifth, and it may be considered with those numbered 6, 10, 11, etc. These exceptions rest mainly upon the assumption that the judgment rendered at fall term, 1869, of Burke superior court, as amended by order of Judge CLOUD at spring term, 1878, was a judgment *quando*, and conclusive as to all questions relating to assets and *devastavit* prior to that time, and that all the evidence objected to was irrelevant. Much of the very elaborate and learned brief of Mr. Sondley, which does great credit to his ability as well as to his industry, relates to the effect of the judgment *quando* and the power of Judge CLOUD to make the amendment. Whatever may have been the power of the judge in regard to the record of the superior court, (and he unquestionably had the power to amend the record properly in that court,) he certainly had no power to make any amendment that would affect the records of this court, and (though it seems not to have been known) the final judgment was in this court. The appeal having been taken, there was no judgment in Burke superior court which the judge could amend, and we regard all questions relating to this branch of the case as settled by the decision of this court directly upon the question, (Walton v. McKesson, 101 N. C. 428, 7 S. E. Rep. 566,) and we content ourselves with a reference to it.

It is insisted, however, that it is settled in Walton v. Pearson, 85 N. C. 34, that Judge CLOUD had the right to make the amendment in the superior court of Burke, so as to declare it a judgment *quando*, and that this is conclusive. However this might have been as a question of *res adjudicata*, if judgment had been entered in that case in conformity with the opinion of the supreme court it was not done, and a judgment of "nonsuit" was taken by consent or without objection, and a new action brought; and it now appears that there had been an appeal from the judgment sought to be amended by Judge CLOUD, and a judgment absolute and final in this court, which facts did not appear when this case was before the court at October term, 1881. Id.

But it is insisted that the plaintiffs are estopped by their allegations, in seeking to subject the real estate to the payment of their debt, from alleging a *devastavit*, etc. As we have seen, this is an action equitable in its nature, and the plaintiffs had a right to have an account in order to ascertain whether the real or personal representatives of Charles McDowell were chargeable with the payment of their debt, and, if there was any inconsistency in the allegations, it was cured by the amendments, and the very purpose of the account was to determine whether there was or was not a *devastavit*. But it is said that an action for such a purpose could only be brought in the name of the administrator *de bonis non* of Charles McDowell. It is undoubtedly true, as the authorities cited by the defendant abundantly show, that, nothing else appearing, the action should have been in the name of the administrator *de bonis non*. This is well settled in this state, though a different rule prevails elsewhere. See Merrill v. Merrill, 92 N. C. 657, and the cases there cited. Also, Tulburt v. Hollar, ante, 430, (at this term.) But it is in this case found as a fact that the administrator *de bonis non* was, "before the institution of this suit, requested by plaintiff to bring suit to collect the assets of his testator's estate to pay their debts, but refused to do so without indemnity against costs." He was a necessary party, either as plaintiff or defendant, and, whether under section 185 of the Code or under the old equity practice, he could be made a party defendant. Smith v. Sheppar's Heirs, 2 Hayw. (N. C.) 163, (349;) Hardy v. Miles, 91 N. C. 131; Lunn v. Shermer, 93 N. C. 164, and cases cited. Besides, the alleged defect appearing upon the face of the complaint, if relied on, it should have been by demurrer. Lunn v. Shermer, supra; Davidson v. Elms, 67 N. C. 228. Under the old equity practice all parties whose rights or interests were involved were required to be brought in, and now creditors may bring special proceedings against the personal representatives, (Code, § 1448,) and if it shall appear at any time that the personal assets are insufficient, the heirs or devisees may be made parties, (Code, § 1474.)

It is insisted that when this action was commenced—February 8, 1883—another action was pending between substantially the same parties, and for the "same cause of action as this," and that the "nonsuit" taken in that action, in vacation, February 6, 1883, and also the "nonsuit" taken thereafter at the February term, 1883, were void. At spring term, 1882, it was agreed in writing "by consent of all parties" "that the plaintiffs have leave to take a nonsuit, and enter the same in vacation, between this and fall term, if they desire." This was not done, but, without objection, there was a nonsuit entered at spring term, 1883, *nunc pro tunc*, as of fall term, 1882. Whether this was to carry out the written agreement of the parties made at spring term, 1882, or not, it was in

Digitized by Google

effect as much a part of the proceedings of fall term, 1882, as if then made, and the defendant cannot impeach it now, collaterally.

The seventh exception was properly overruled. It is based, it seems, upon the misapprehension that the action was brought on a judgment, whether *quando* or not, and that the amendment of August 6, 1886, introduced a new cause of action, whereas the only cause of action against the defendant, from the issuing of the summons, was on the administration bond, and this sufficiently appeared, though indefinitely stated, in the first complaint. Besides, there was no objection to the order allowing the amendment. The plaintiffs' action, so far as the defendant is concerned, is for a breach of the administration bond in distributing and wasting the assets without paying plaintiffs' debt. The judgment was evidence, not the cause, of the action. Being a judgment absolute, it fixed Woodfin, administrator, etc., with assets.

The eighth exception relates to the order of reference, and has already been disposed of.

The ninth exception relates to the first finding by the referee. The finding is fully sustained by admissions in the record. The fact found is alleged in the complaint. It was within the scope of the order of reference, and there was no evidence that the bond was paid, and the exception was properly overruled. The assignment carried with it whatever interest Walton had.

The twelfth exception relates to the ninth finding of fact. The finding was material in that it was proper that the action should have been brought in the name of the administrator *de bonis non*, unless he declined or failed to do so after request, when he might be made a party defendant. It was within the scope of the reference. It was supported by evidence, the defendant Bynum having testified that he never intended to bring any suit on Woodfin's bond, unless indemnified. But, as already said, the objection relates to a party to the action, and, this appearing on the face of the pleadings, should have been taken by demurrer, so, in any event, the fact found could not be objectionable.

The twenty-second and twenty-third exceptions are to the seventeenth and eighteenth findings of fact. Both findings were clearly within "the province of the referee," and as to the eighteenth there has been no "adjudication to the contrary," as the judgment was absolute and not *quando*.

The thirty-second exception is to a failure of the referee to find a conclusion of law which was not within his province, and the exception was properly overruled.

The thirty-third exception relates to the admission of the testimony of Folk. His testimony covers eight pages. No exceptions were taken at the time, either to the competency of the witness or the admissibility of his evidence, and this broad exception cannot be considered. It is proper, however, to state that the defendant, being a party to the action, is charged with a knowledge of what transpired and was made of record in its progress, and he is bound by the pleadings and admissions of fact filed in the cause. Folk was his counsel of record, and he was charged with a knowledge of that fact, as well as of the pleadings and admissions filed.

We are unable to see the force of the thirty-fourth exception. It does not specify the testimony objected to, and there is nothing to direct our attention.

The thirty-fifth exception is that the eighteenth finding of fact and the sixth conclusion of law are inconsistent. The fact that assets wasted by Woodfin, administrator of Charles McDowell, ought to be in the hands of the defendant J. G. Bynum, administrator *de bonis non* of Charles McDowell, is not inconsistent with the legal conclusion that the plaintiffs are entitled to have their debt paid by those liable for the wasted assets which were applicable to the discharge of the debt, and, as they are not in the hands of the present personal representative, the plaintiffs can (he having failed to collect them) maintain an action against him and the sureties on his predecessor's bond to subject them to the payment of his debt.

It is insisted that the note on which action was brought in 1866 was the original cause of action, and that it was merged in the judgment rendered at fall term, 1869, of Burke superior court, and is barred by the statute of limitations. This is a misapprehension. As to the defendant Pearson, this action is on the administration bond of Woodfin, to which his testator was surety. When the case of Walton v. Pearson was before this court in 1881, (85 N. C. 34,) it was said: "The defendant insists that, having obtained a judgment against all the makers of his note, it became merged in the judgment as being a security of higher dignity, and could not therefore constitute a good cause of action in any suit subsequently instituted, and hence he argues that the plaintiff can only complain of the non-payment of the judgment as a breach of the administrator's bond, and, as that was obtained in 1869, the case falls under section 34 of the Code, (section 155,) which limits actions against the sureties of executors, administrators, and guardians on the official bond of their principal to three years after the breach thereof complained of. We cannot yield our assent to the position assumed by the defendant, or the conclusion he deduces therefrom. Every administrator owes the duty of faithfully administering the assets that come to his hands, and any default in that duty constitutes a breach of his official bond, which then and there gives to the creditors and others interested in a proper administration a sufficient cause of action against him and his sureties; and this breach of his bond can be cured only by a full satisfaction or by a release. Very sure it is, we think, that it cannot be cured

Digitized by Google

or in any wise affected by any change short of actual payment, which may occur in the mere form or character of a claim against the estate. The dereliction of duty for which the administrator and his sureties are chargeable, and the one assigned, is the misapplication of the assets of the estate in December, 1859, by making distribution thereof amongst the legatees without refunding bonds from them; and the moment this occurred each creditor had a right of action on the bond,—the plaintiffs amongst others,—which right continued to subsist notwithstanding his claim against the estate might subsequently assume the shape of a judgment." It was then adjudged that for purposes of action for breach of the administration bond the doctrine of merger has no effect. This action is on an administration bond executed in 1859, and for a breach prior to August 24, 1868, and the statute of presumptions, and not the statute of limitations, applies. Code, § 136.

The question of the statutory bar is settled by the case in 85 N. C. 34, and this action was brought within less than one year after the nonsuit was taken in that case. But the statute only raises a presumption of payment, which may be and was rebutted. The original action to recover this debt from the McDowell estate was within 10 years, (deducting the time during which the statute was suspended,) and it has been persistently pressed ever since, for immediately after the last "nonsuit" a new action was commenced; and, if such a thing as continual claim could rebut a presumption, it would avail in this case. The continued pendency of actions, less than a year intervening after nonsuit, defeats the plea of the statute.

The defendant moves in this court to dismiss the action because, the bond being payable to the state, the action should have been in the name of the state, and insists that this defense was taken before BOYKIN, J., in the trial below; and in answer to this motion the plaintiffs move to amend so as to sue in the name of the state to the use of the present plaintiffs, and insist that the objection is taken here for the first time. The objection does not go to the merits of the case, and, without passing upon the conflicting affidavits, we think the case a proper one under section 965 of the Code,[1] for the exercise of the power of amendment, and the motion of plaintiffs is allowed. Grant v. Hughes, 94 N. C. 231. But for this amendment the plaintiffs must pay the entire costs of the action. Under the peculiar circumstances that have marked the progress of the cause we think it is proper that they should be required to do so. We think, upon an examination of the record, that there is no error in the ruling of his honor below, and the judgment is affirmed.

[1]Said section provides that the supreme court may allow amendments of form or substance in furtherance of justice at any time before final judgment upon just terms.

CHAMBERS *et al.* v. HARPER.

(*Supreme Court of Georgia.* April 15, 1889.)

SALE—WARRANTY—ATTORNEYS' FEES.

1. Where the jury found that plaintiff purchased a horse from defendants, who warranted him to be sound; that he returned it to them, and took another horse in exchange, to be kept if it suited; that it proved worthless, and was returned; and that defendants took the horses and the money paid for the first horse,—they were justified in finding that plaintiff was entitled to recover the money paid for the first horse.

2. In such case plaintiff is entitled to recover his counsel fees under Code Ga. § 2942, providing that they may be recovered, where defendant has acted in bad faith.

Error from superior court, Fulton county; MARSHALL J. CLARKE, Judge.

Harper sued Chambers & Co. in a justice's court on an account for $65, money paid them for a horse warranted to be sound, and for $30, his expenses. The horse was unsound, and was returned to C. & Co., who refused to refund. Plaintiff obtained judgment for $65, and defendant appealed to superior court. On trial there, plaintiff testified he bought the horse of Chambers, who warranted him to be sound, and agreed, if the horse should be returned in two weeks because unsound, he would refund money. On next day he ascertained the horse was "stove up," lame, and broken down, and returned him and asked for his money. Chambers told him to try another. He did so, led it a short distance, hitched it to a hack, and, before he had gone 100 yards, it stumbled, fell, and broke the shaft. It could not go out of a walk. Was not as good as the first horse. He returned it also, and demanded his money. Payment was refused. That on first trial Chambers swore that the latter horse died in a week or so after it was returned, and that he had sold the first horse. That the veterinary surgeon testified that he examined both horses, and that both were lame. Plaintiff had expended $30 for lawyer's fees in this case. Nazarenus, one of defendants, testified that both horses were good hack horses, and sound, except swollen legs; were in good condition for $65 horses; that plaintiff took the second horse in exchange. Three other witnesses testified, for defendants, that Chambers refused to give a warranty; that the first horse was worth $65; its present owner paid $80 for it. The jury found for plaintiff $104.10. Defendant moved for a new trial on following grounds: That the verdict was contrary to law and evidence. That the verdict was contrary to charge of court. (The court charged thus: "The plaintiff says that, at the date mentioned by him, defendant sold him a horse for $65 cash; that in making the sale defendant warranted that the horse was altogether sound, but that in fact the horse, so far from being such, proved to be incurably lame and worthless; that he was damaged by such breach of warranty, and to the extent of the purchase price, with interest thereon to the present time.") That such charge was error, because an incorrect statement of plaintiff's allega-

Digitized by Google

tions, or, if correct, it is unsupported by evidence. That the damages were excessive. The motion was overruled, and defendant excepted.

J. C. Jenkins, for plaintiff in error. *W. J. & J. R. Albert, contra.*

SIMMONS, J. 1. The facts of this case will be found in the official report. Under these facts, the court did not err in refusing to grant a new trial upon any of the grounds set out in the motion. The charge of the judge is a full and fair exposition of the law governing the case. Under the charge, the jury found that there was an express warranty in the sale of the first horse, and that the plaintiff did not take the second horse in exchange for the first, except on condition that the second horse suited him. They also found by their verdict that the first horse was worthless. The first horse was returned to the defendants by the plaintiff, and they kept him. The second horse was also returned to them, and he was kept by them. The defendants, therefore, had both horses and the plaintiff's money. They were not entitled to keep the horse and the money too. The plaintiff was entitled at least to recover the money he paid for the horse.

2. The only difficulty we have had in affirming this judgment has been the question upon the allowance of counsel fees to the plaintiff by the jury. Code, § 2942 declares: "The expenses of litigation are not generally allowed as a part of the damages; but if the defendant has acted in bad faith, or has been stubbornly litigious, or has caused the plaintiff unnecessary trouble and expense, the jury may allow them." We have carefully read over this evidence as sent up in the brief thereof, and we think that the testimony shows that the defendants acted in bad faith towards the plaintiff. They kept both horses, and refused to return the purchase money. Under these circumstances we think the jury were justified, under this section of the Code, in allowing the plaintiff his counsel fees in the case. Judgment affirmed.

(82 Ga. 732)

TUMLIN v. PARROTT.

(*Supreme Court of Georgia.* May 6, 1889.)

TRESPASS—PLEADING—AMENDMENT.

1. The declaration in an action brought under section 1445 of the Code for triple damages, by reason of killing cattle in an inclosure not protected by a lawful fence, is not amendable by adding a count praying exemplary damages independently of that section, nor is a charge to the jury correct that recognizes their power to find on such amendment, nor is a verdict literally correct which refers to the amendment as its basis; yet the verdict being for much less than it should have been under the original declaration, and the proof applicable thereto, will not be set aside for these errors and irregularities.

2. The record of the defendant's acquittal on an indictment for killing the cattle, as constituting the offense of malicious mischief, though the plaintiff was the prosecutor, is not admissible in the civil action.

3. A charge of the court on irrelevant and immaterial matter will not vitiate a verdict which is correct on the merits of the real controversy.

4. An agreement to dispense with a partition fence is not the equivalent of a legal fence, so as to justify the killing of stock escaping by negligence of one of the parties, and depredating on the premises and crops of the other. To kill stock unnecessarily, without responsibility for so doing, an actual lawful fence must have been broken, not merely a contract or agreement to dispense with a fence, or to treat the dividing line as though it were a fence.

(*Syllabus by the Court.*)

Error from city court of Catersville; NEEL, Judge.

J. B. Conyers and *Thos. J. Lyon*, for plaintiff in error. *Milner, Akin & Harris* and *A. S. Johnson*, for defendant in error.

BLECKLEY, C. J. These parties owned adjoining farms, but had between them no dividing fence. The way was open for cattle to pass from the premises of one to those of the other. There was an agreement between the parties that a partition fence should be dispensed with, and that each should keep his cattle off the land of the other. Parrott was engaged in the dairy business, and kept a herd of animals, which he grazed upon his side of the dividing line, and they sometimes trespassed upon Tumlin, and had frequently injured his crop. Tumlin as frequently remonstrated, and repeatedly gave notice that they must be kept off. Finally, on one occasion, while the animals were grazing, under the care and watch of Parrott's servants, in consequence of the negligence of the servants they escaped, and again trespassed upon Tumlin's land and crops. He discovered them, and with a Winchester rifle shot and killed several of them. Thereupon Parrott brought against him an action for damages, founding it expressly upon section 1445 of the Code, which section is as follows: "If any trespass or damage shall be committed in any inclosure, not being protected as aforesaid, by the breaking in of any animal, the owner of such animal shall not be liable to answer for the trespass, and if the owner of the inclosure shall kill or injure such in any manner, he is liable in three times the damage." The protection here referred to is that of a lawful fence, as defined or described in the three preceding sections. These sections make no provision for an agreed or conventional fence, but contemplate an actual one. At the trial the declaration was amended by adding a count which claimed exemplary damages, independently of section 1445 of the Code. The defendant objected to the allowance of this amendment, on the ground that it introduced a new cause of action; but the objection was overruled. The evidence made out the plaintiff's case substantially as above detailed, and showed that the animals killed were of the value of $190 to $200. The jury found a verdict for $116.66, basing it expressly on the count added by amendment, the court having charged them that upon that count they could find for the plaintiff the actual damages sustained by him, if

Digitized by Google

they believed the evidence authorized a recovery to that extent, and did not entitle the plaintiff to the triple damages for which the suit was originally instituted. The defendant made a motion for a new trial, which was denied.

1. We think the amendment to the declaration was improperly allowed, not because it introduced a new cause of action, but because it claimed exemplary damages other than the triple damages originally declared for, and to which the recovery in the action, if any, had to be limited. The amendment, however, did no harm; for, while the jury based their verdict upon it, the recovery was much less than the plaintiff was entitled to on his original declaration. The error of the jury in founding their verdict upon the bad instead of the good part of the declaration did the defendant no harm. As to the amount of the verdict, that was certainly not matter of complaint by the defendant, though the plaintiff might well have complained of it. A case ought not to be remanded for a new trial merely that the verdict might be made to rest on the sound, instead of the unsound, part of the declaration. The truth is, the so-called second count is a mere extension and amplification of the first, in everything except the claim of exemplary damages. The error of the court in allowing the amendment, and of the jury in basing their verdict upon it, makes the justice a little ragged; but it is none the less justice, as against the defendant. It is certainly not artistic, but it has the better quality of being substantial.

2. The defendant having been indicted, tried, and acquitted of the shooting, as an offense against the state, the offense charged being malicious mischief, and the plaintiff, being the prosecutor, offered the record of his acquittal in evidence. The court rejected it. This was correct. Cottingham v. Weeks, 54 Ga. 275. That the plaintiff was the prosecutor and failed to convict the defendant of the tort as a crime would not tend to prove that the tort was not committed.

3. A part of the charge of the court was touching the subject of recoupment or set-off by the defendant of the damages which he had sustained by reason of the depredations of the animals upon his lands and crops. This matter was wholly irrelevant, as no set-off or recoupment was pleaded; but, though irrelevant, we think it did the defendant no harm.

4. The great contention on the part of the defendant, Tumlin, both in the court below and here, was that the agreement between the parties to dispense with a dividing fence, etc., was equivalent to having an actual lawful fence upon the dividing line. The authority relied upon for this position was the case of Winters v. Jacobs, 29 Iowa, 115. This doctrine may be sound in some cases, but we think it does not apply so as to justify the destruction of live-stock that may escape by the negligence of one of the parties to the contract or his servants, and stray upon the land of the other. Code, § 1446, declares that "when fences are made pursuant to law, and any animal breaks in, the owner of the inclosure shall not kill or injure him for the first breaking, and not until after notice is given to the owner or agent, if possible, but said last-mentioned owner shall be liable for double the damage done by his stock." This is our only killing section, and it contemplates actual fences, and not contracts to dispense with them. According to the evidence, the shooting done in this case was wholly unnecessary. The cattle could have been expelled from the defendant's field without injuring them, as had been frequently done before. We recognize the fact that repeated encroachments of the sort which the defendant had endured were exceedingly provoking, besides being otherwise injurious, and that upon the score of passion there was much to palliate his aggressive conduct. Nevertheless, we think he was legally liable for the amount recovered against him, and indeed for much more. The court committed no error in refusing the motion for a new trial. Judgment affirmed.

(83 Ga. 153)

TATE v. GRIFFITH *et al.*

(*Supreme Court of Georgia.* May 8, 1889.)

APPEAL—RECORD—BRIEF OF EVIDENCE.

1. While nothing is a brief of the oral evidence but an abstract or abridged statement of the oral testimony, without any admixture of extraneous matter, yet whatever the presiding judge has regularly approved as such brief, and ordered to be filed, and is filed accordingly, is to be treated as the brief when the motion for a new trial is heard, unless some motion, then or previously, be made to vacate and set aside the approval and order for filing, or to have the so-called brief condensed and corrected. A motion to dismiss the motion for a new trial is not the appropriate remedy, so long as the approval and order for filing stand unrevoked.

2. A brief of evidence being amendable, amendments might be made, even after a writ of error based on a refusal to dismiss the motion for a new trial has been adjudicated by this court; certainly so if this court thought proper to direct the allowance of amendment.

3. Upon the question of granting a new trial, this case falls within the rule touching the first grant of a new trial in the discretion of the court below.

(*Syllabus by the Court.*)

Error from superior court, Pickens county; BROWN, Judge.

C. D. Phillips, Clay & Blair, Geo. R. Brown, W. T. Day, W. H. Simmons, and *E. H. Myers,* for plaintiff in error. *Geo. R. Gober, S. A. Darnell, J. W. Henley, Wynn & Faw,* and *Harrison & Peeples,* for defendants in error.

BLECKLEY, C. J. A bill in equity filed by Tate against Griffith and Tate was tried, and a verdict rendered for the complainant. The defendants moved for a new trial on the general grounds that the verdict was contrary to law, evidence, etc. A so-called "brief" of evidence was approved by the presiding judge, ordered to be filed, and filed in the month of July. In September following the

Digitized by Google

motion came up for hearing, and the respondents therein moved in writing to dismiss the same, "for the reason that no brief of evidence has been filed in terms of the statute, the only brief of evidence filed being the notes filed as taken by the reporter on the trial of the case, such brief not being a brief as required by law." The court overruled the motion to dismiss, proceeded to hear and adjudicate the motion for a new trial, and ordered that a new trial be granted. Thereupon Tate excepted, assigning error in refusing to dismiss the motion and in granting a new trial.

1. We have some doubt whether the judgment refusing to dismiss the motion for a new trial should not be reversed. Still we hold the contrary, and our reasons for so holding will appear presently. In so far as the brief consisted of a mere copy of the stenographic notes after being written out in ordinary character by the reporter, it is in no proper legal sense a brief of the oral evidence; for only an abstract or abridgment of the oral testimony can rightly be considered a brief of it. In the oral examination of witnesses during almost any trial, many trivial and immaterial questions are asked and answered, and during a lengthy trial this worthless lumber accumulates to an enormous mass. In briefing the evidence all such stuff should be omitted. The substance only of the material testimony should be set out in succinct narrative form. Questions put to witnesses should be reproduced in the brief only when necessary either to clearness or brevity, and then they should be as much abbreviated as practicable. Of course, the testimony, pure and simple, should be admitted into the document without admixture with extraneous matter, such as remarks by court or counsel. It is not the province of the brief to report the trial, but to present a synopsis of the evidence. But though the voluminous writing which acquired the name of a brief of evidence in this case was not a brief at all, but a report of the trial, starting out with the names of the numerous counsel and of the twelve jurors, the presiding judge treated it as such, approved it, ordered it filed, and it was filed. His approval and order were regular though erroneous, and being in the nature of a judgment, had to stand, for his court at least, until set aside. When the motion for a new trial came up for hearing, it was in order to move to set them aside for error apparent on the face of the document, but no such motion was made. Had it been made it should have been granted, with leave, on proper terms, to amend the so-called "brief," by reducing it to a real and correct brief. That there was enough in the paper to amend by there can be no doubt, as its chief defect was that it set forth not less than it should, but much more. Though it was not a brief itself, it carried a good one in its belly. If a brief of the evidence can be amended at any time while the motion for a new trial is pending, and it certainly can, (Vanover v. Turner, 41 Ga. 577; Ford v. Holmes, 61 Ga. 419; Howard v. Munford, 80 Ga. 166, 4 S. E. Rep. 907,) the whole evidence, after it has been approved and filed as a brief, can be amended by purging it of extraneous matter, and condensing the evidence down to a proper summary or synopsis. Any terms just and reasonable could be imposed as a condition of the privilege, just as in other cases of amendment provided for by the Code. While holding that a motion to dismiss the motion for a new trial was not the remedy to reach a defective brief, or so-called brief, the approval of the judge and the order to file being regular, and that the proper motion was to vacate these, we also think that, without vacating them, a motion might have been made to correct and condense the brief, for error apparent on the face thereof. Thus either party might have caused the brief, or what the court treated as a brief, to be purged, reduced, and corrected.

2. Even if we reversed the judgment refusing to dismiss the motion, that would not cut off the right of the losing party here to amend, after this writ of error is disposed of. It would leave the motion still pending in the court below, and, by analogy to Walker v. Cook, 17 Ga. 126, the amendment could still be made. Certainly, by analogy to Methvin v. Bexly, 18 Ga. 551, it would be competent for this court to direct that the privilege of amendment be allowed.

3. We have looked into the evidence as brought here by this writ of error sufficiently to see that, in so far as the question of granting a new trial is concerned, the case falls within the rule that the discretion of the court below in granting a first new trial upon the facts, where no controlling principle of law is involved, will not be interfered with. It was discretionary with the judge to order a new trial or to refuse it. Judgment affirmed.

(82 Ga. 790)

LEDBETTER *et al.* *v.* DEAN.

(*Supreme Court of Georgia.* May 13, 1889.)

ACTION AGAINST PARTNERS—RECOVERY AGAINST ONE.

In an action against two jointly, as partners, a recovery may be had against one alone, on proof that the debt sued for was his individual debt. Following Maynard v. Ponder, 75 Ga. 664.

Error from superior court, Floyd county; MEYERHARDT, Judge.

C. Rowell, for plaintiffs in error. *Dean, Ewing & Smith*, (*Harrison & Peeples*, of counsel,) for defendant in error.

SIMMONS, J. Dean sued Ledbetter & Harris, as partners, on an account for certain work done by Dean. Under the evidence and the charge of the court the jury returned a verdict against Ledbetter only, for the amount sued for. The defendant made a motion for a new trial, which was overruled by the court. The court's charge to the jury contained the following instructions:

Digitized by Google

"First, see whether Ledbetter made the contract for himself, or for the firm of Ledbetter & Harris. If he made it for himself, individually, in order to save a debt, or for any other reason, then, if under the rules I shall give you there is any liability, Ledbetter alone will be liable."

The only ground insisted on before us for reversal of the judgment of the court below in refusing to grant a new trial is the following: "The charge above quoted was error, because there was no evidence upon which to base it, and because the action was against Ledbetter & Harris jointly, as partners, and therefore the jury were misled into bringing in a verdict against Ledbetter individually." It was argued before us by counsel for the plaintiff in error that, where a partnership is sued as such, a verdict against one of the partners only is illegal, and should be set aside. We think the point made in this case is settled in the case of Maynard v. Ponder, 75 Ga. 664, and that we are bound by that decision. In that case it was held, "where a suit was brought against a firm, and, in addition to the general issue, the defendants filed a plea that they were not liable on the account sued on, for the reason that they never at any time bought said bill of goods from the plaintiff, nor did they authorize any one else to purchase the same, or authorize the plaintiff to sell the goods to any one, a verdict for the plaintiff against one of the defendants, if warranted by the evidence, would be sustained, and would not furnish any ground for a motion in arrest of judgment. If the proof showed that only one of the defendants was liable, the declaration could have been amended, on objection, and, evidence of his liability having been admitted without objection, a verdict against him will be sustained. There was no material error in charging that the jury might find against both defendants, or against one of them only, if they found for the plaintiff, according to the truth as it appeared from the evidence." Judgment affirmed.

(82 Ga. 786)

BAGLEY v. STATE.

(*Supreme Court of Georgia.* May 15, 1889.)

INTOXICATING LIQUORS—ILLEGAL SALE.

If a dealer in spirituous liquors, whose place of business is beyond the limits of a prohibition county, receives an order for whisky to be delivered in such county, and does deliver it there, whether by himself or agent, and receives pay for it, the sale is consummated in that county, there being no intermediate delivery to or through a common carrier.

(*Syllabus by the Court.*)

Error from superior court, Newton county; BOYNTON, Judge.

Middlebrooks & Simms, for plaintiff in error. *E. Womack*, Sol. Gen., for defendant in error.

BLECKLEY, C. J. A prohibition law against the sale of spirituous liquors prevails in Newton county. Bagley was indicted, tried, and convicted for a violation of that law. The evidence showed that he, being in Covington, received from one Anderson a sealed letter addressed to himself at Rutledge, which is in Morgan county. The letter contained an order for a quart of corn whisky, to be delivered in Covington; but Anderson did not communicate all the contents of the letter to Bagley, who was going towards the post-office. Anderson requested him to please mail it for him, telling him that it was an order for some whisky. The whisky came, and was left at one Jarboe's, and Anderson received it at Jarboe's store in Covington, Newton county. Afterwards he paid Bagley for it, telling him he wanted to pay him for that "corn" he got from Mr. Vining, who it seems transacted Bagley's business at Rutledge. At the time of paying the money Anderson requested Bagley to credit or cancel the account against him at Rutledge. The question is whether the sale was consummated in Morgan county or in Newton county. We think most clearly it was in Newton county. The order addressed to Bagley was delivered to him there. The whisky was received there, and, as we infer from the evidence, was there paid for. As far as appears, there was no contract for delivery elsewhere. Nothing was said in or out of the order about delivery to a carrier at Rutledge, or, if so, there was no account of it in the evidence. It is true, Bagley did not read the order, but only received it to mail to himself to his place of business. He was, however, told that it was an order for whisky. He may not have complied with it in person, but he was instrumental, by mailing it, in having his clerk or agent comply with it, and there is no reason to suppose that he did not know what he was doing, or that he was unwilling for his clerk to deliver the whisky. The case is altogether unlike that of Dunn v. State, 8 S. E. Rep. 806, (last term,) in which delivery was contemplated to a common carrier at Atlanta, a place at which there was no prohibition upon the sale of spirituous liquors. Here delivery was to be made and was made in Newton county, and by what means or mode of conveyance the package reached Jarboe's is not explained. For aught that is known Bagley or his clerk may have left it at Jarboe's store, and that store may have been their regular depot for such purposes. We see no error in any of the grounds of the motion for a new trial, and, in our opinion, the court did not err in overruling the motion. Judgment affirmed.

(83 Ga. 399)

RODAHAN v. TERRY.

(*Supreme Court of Georgia.* May 15, 1889.)

APPEAL—REVIEW—EVIDENCE.

When the record on appeal contains oral evidence which is not approved by the trial judge, though that part of the evidence brief containing documentary evidence is so approved, the oral evidence cannot be considered; and when it is admitted that such oral evidence was taken on the trial, and the grounds of a motion for new trial are

Digitized by Google

that the verdict was contrary to the evidence, and that certain instructions were not authorized by the evidence, the judgment will be affirmed.

Error from superior court, Carroll county; HARRIS, Judge.

G. W. Bryan and *G. W. Austin*, for plaintiff in error. *W. J. & J. R. Albert* and *Reese & Adamson*, for defendant in error.

SIMMONS, J. When this case was called for hearing, counsel for the defendant in error moved to dismiss it, because there was no approval by the trial judge of the brief of evidence sent up in the case. We refused the motion, it appearing at that time that there was an approval by the judge below of a part of the brief of evidence, to-wit, that part containing the documentary evidence. We did not feel that we were authorized to dismiss the case when there was a brief of the documentary evidence approved by the judge, as the judge may have concluded that that part of the brief was all that was material and necessary to a clear understanding of the errors complained of. After the argument of the case was concluded, and upon an investigation of the record, we found some 60 pages of oral evidence attached to that part of the brief which had been approved by the judge, but this oral evidence was not approved, nor was it marked filed in the clerk's office, as required by law. The orders of the judge below continuing the hearing of the motion for a new trial from time to time show that this brief of documentary evidence was not all the evidence before the jury and the court on the trial of the case. It was also admitted by counsel for the plaintiff in error in the argument here that this oral evidence attached to the approved brief of documentary evidence was had upon the trial below. The grounds of the motion for a new trial contain the usual one, that the verdict is contrary to the evidence. A large part of the other grounds complains of certain charges of the court, because there was no evidence to authorize them. The record showing that there was oral testimony taken on the trial, and it being admitted here by counsel for the plaintiff in error that this part of the brief attached to the approved brief, but not approved, contains the oral testimony taken on the trial, we cannot determine the question made in this case without considering this oral evidence, and we cannot consider it, because it has never been approved by the trial judge. It follows, therefore, that the judgment of the court below must be affirmed. Judgment affirmed.

(82 Ga. 783)

HUTCHERSON *et al.*, Commissioners, *v.* ROBINSON.

(*Supreme Court of Georgia.* May 15, 1889.)

SHERIFFS—POWERS.

The sheriff of a county has no power to contract a county debt, or engage the credit of the county for a conveyance, such as a hack, team, and driver, for use by him in executing a warrant issued by the ordinary against a lunatic or insane person. The authority to incur and pay necessary expenses under a commission of lunacy is lodged with the ordinary.

(*Syllabus by the Court.*)

Error from superior court, Carroll county; HARRIS, Judge.

Reid & Grow, for plaintiffs in error. *Gordon & Brown*, for defendant in error.

BLECKLEY, C. J. The sheriff of Carroll county, having a warrant to execute against a lady charged with lunacy, hired of Robinson a hack, team, and driver, telling him to debit the county with the expense. This was done without authority from the ordinary, or from the county commissioners. The bill was $4, and, the commissioners refusing to pay the same, Robinson brought his action against them in their official capacity, and recovered, first by judgment of the magistrate, and again by the verdict of a jury, in the magistrate's court. The case was carried by *certiorari* to the superior court, the error alleged being that, under the facts, there was no liability either upon the county or the commissioners. The *certiorari* was overruled.

We think the sheriff had no legal power or authority to make a contract of hiring, and engage the credit of the county for payment. He was a mere ministerial officer, and was not clothed by the law with any discretion to create county debts. Under the constitution of 1877 it is no easy matter to involve a county in debt, though the amount be small. Even before that constitution was adopted, this court, in Dougherty Co. v. Kemp, 55 Ga. 252, held that the sheriff, while engaged in his legal duties, is not the agent or servant of the county, but of the law; and it was there ruled that, even under the order of the judge of the superior court, he had no power to make the county the bailee of a horse, and that the county was not responsible for the loss of a horse bailed to an officer for the purpose of serving process. It is true that the Code, §§ 1864, 1864*a*, declares that the expense of confining a lunatic shall be paid out of the county funds, if the estate of the lunatic be insufficient for the purpose, and that in such event the ordinary shall draw his warrant upon the treasury of the county for such sum or sums as shall be actually necessary or requisite to defray the expenses of trying a commission of lunacy, and of carrying or conveying the insane person to the lunatic asylum; but this does not contemplate that the sheriff or other ministerial officer shall be the judge of what expenses, if any, shall be incurred. On the contrary, that question is expressly confided to the ordinary. In the present case, the ordinary gave no warrant or permission for hiring the conveyance, nor has he ever ratified, confirmed, or approved the act. The expenses contemplated are such as appertain to his court or his official proceedings, and he is to be the judge of whether they are actually necessary or not. No officers can incur ex

Digitized by Google

penses at the charge of the public, without some express permission of law so to do; and persons dealing with officers must take notice of the extent of their powers, and must abide the consequences of allowing them to transcend their powers in business transactions. The court erred in not sustaining the *certiorari*. There can be no recovery in the case; and, as the question involved is one of law solely, the superior court is directed to make a final disposition of it, in conformity to the statute applicable to writs of *certiorari* of this class. Judgment reversed.

(82 Ga. 743)

EPPENS *et al.* v. FORBES *et al.*

(*Supreme Court of Georgia.* May 15, 1889.)

NEGOTIABLE INSTRUMENTS—PROTEST—NOTICE.

Plaintiffs agreed to give their debtor further time to pay the debt, if he would give them a note with defendants' signature thereon. The debtor executed the note, payable to plaintiffs' order, and defendants signed their name on the back of the note, and returned it to the debtor to be delivered to plaintiffs. *Held*, that defendants were liable as sureties, and not as indorsers, and were not entitled to notice of protest.

Error from superior court, Troup county; HARRIS, Judge.

Calhoun, King & Spalding, for plaintiffs in error. *G. A. Howell, B. H. Bigham, T. H. Whitaker*, and *Hall & Hammond*, for defendants in error.

SIMMONS, J. Langston & Woodson filed a creditors' bill against J. C. Forbes & Co., alleging, in brief, that Forbes & Co. were insolvent traders indebted to said Langston & Woodson; that the indebtedness was due, and demand for payment had been made after the same became due, and payment had been refused. The bill was amended by making various other charges, and at different times a number of new parties complainant were made. Among others Eppens, Smith & Weimann filed their intervention, alleging that they were creditors of Forbes & Co. in the sum of $1,513.34, with interest, on a promissory note, the terms of which will be hereafter set out, praying for judgment on the same, and that they might participate in any and all distribution of assets that might take place in the case, and for general relief. This intervention, and the right of the intervenors thereunder, coming on to be heard, they were submitted to the presiding judge upon the pleadings and the following agreed statement of facts: R. H. Buckley, Jr., was indebted $1,513.34 to Eppens, Smith & Weimann, which debt was past due. They were pressing Buckley for payment, and agreed with him that if he would make them the following note with J. C. Forbes & Co's. signature thereon they would take same, and extend the time one year. Thereupon this note was made out, and sent by Buckley to J. C. Forbes & Co., a firm composed of T. J. Harwell and J. C. Forbes, who, both parties knowing and agreeing thereto, put their firm name on the back of the note as it now appears, Forbes signing said firm name, and returning same to Buckley to be delivered to Eppens, Smith & Weimann, and it was afterwards so delivered. This was done by Forbes & Co. as an accommodation to Buckley, and without consideration moving to them. At maturity said note was not paid, and said payees did not have it noted and protested for non-payment at maturity, whereupon Forbes & Co. claimed to be discharged from responsibility thereon. Eppens, Smith & Weimann are the holders of the note, which was introduced in evidence before said judge, and is as follows, to-wit: "$1,513.34-100. Atlanta, Ga., March 3, 1887. Twelve months after date I promise to pay, to the order of Eppens, Smith & Weimann, fifteen hundred and thirteen & 34-100 dollars, at Atlanta National Bank, with interest at six per cent. from date. Value received. R. H. BUCKLEY, Jr. No. 1. Due 3, 6, 1888." "J. C. Forbes & Co.," written on back. No further evidence was introduced, and the court rendered judgment against Eppens, Smith & Weimann, and in favor of Forbes & Co., holding that they were discharged from liability because the note had not been noted and protested for non-payment when due. The judge also proceeded to render a decree in the main case, after verdict by the jury, wherein he adjudged in favor of other parties complainant in the bill against Forbes & Co., and that they do participate in the distribution of the funds in the hands of the receiver, and failed to render judgment in favor of Eppens, Smith & Weimann, or permit them to take any part of the assets in the hands of the receiver. Eppens, Smith & Weimann except, and say that the court erred in adjudging that Forbes & Co. were not liable to them, and in not adjudging in their favor in the decree rendered in said case, and in not allowing them to share in the distribution of the assets in the hands of the receiver.

Under the facts disclosed by this record, we think the court erred in holding that Forbes & Co. are not liable on this note because they were indorsers, and because the note had not been protested, and notice of dishonor given to them. It will be observed that the note is payable to Eppens, Smith & Weimann, or order. Under the common law Forbes & Co. would only have been liable on this note as second indorsers after it had been indorsed by the payees. Under our Code, § 3808, blank indorsements of negotiable paper may always be explained between the parties themselves, or those taking with notice of dishonor, or of the actual facts of such indorsement. Under this section the above-recited facts were introduced by the parties, and under those facts we think that Forbes & Co. were not indorsers on this note, but securities. Buckley was indebted to Eppens, Smith & Weimann, and was unable to pay. They agreed to give him time if he would make the note and procure Forbes & Co.'s signature thereon. The note was made

Digitized by Google

out, and sent by Buckley to Forbes & Co., and both parties, knowing and agreeing thereto, put their firm name on the back of the note. This, in our opinion, shows that Forbes & Co. knew the terms on which the note was given; that is, that Buckley was to have further time for the payment of his indebtedness. If they did know of the indebtedness of Buckley, and the terms upon which time was to be extended to him, and they signed this note with that knowledge, they became securities of Buckley, and not indorsers. It would have been foolish in Eppens, Smith & Weimann to take Forbes & Co. as indorsers for themselves. Their object was to secure the payment of the debt which Buckley owed them, and not to have Forbes & Co. become their indorsers. Under the agreed state of facts in this record the object of Forbes & Co. was to procure an extension of time for Buckley, and, at the maturity of the note, if Buckley did not pay it, they would. It certainly could not have been their understanding, from the facts disclosed in this record, that they would only be liable on the note in case Eppens, Smith & Weimann had indorsed it and failed to pay it. We think, therefore, that they were merely securities for Buckley on the note, and were not entitled to notice of protest, etc. For a full and able discussion of this subject, see Camp v. Simmons, 62 Ga. 73, and cases cited; Neal v. Wilson, 79 Ga. 736, 5 S. E. Rep. 54. The reasoning in these cases upon this point is adopted, and made a part of this opinion. Judgment reversed.

(83 Ga. 77)

BOWDEN *v.* HATCHER.

(*Supreme Court of Georgia.* May 15, 1889.)

JUDGMENT—VALIDITY.

Though no court is actually held at the appearance term of a case duly served, the defendant can file his plea at the time appointed by law for the court to convene, and he may file it as late as the following term; and, if judgment be rendered at the latter term, no plea having been filed or answer made, the judgment is not void, and cannot be attacked by affidavit of illegality. The defend ant has had his day in court, and, at most, the judgment is only irregular.

(*Syllabus by the Court.*)

Error from superior court, Meriwether county; HARRIS, Judge.

J. M. Terrell, for plaintiff in error. *B. F. McLaughlin*, for defendant in error.

BLECKLEY, C. J. This was an affidavit of illegality founded on the fact that judgment was rendered at the first term of the court actually held after the suit was brought. The appearance term of the case was February term, 1887, but for some reason that term of the court was not held, and no court actually sat in the county until August term of the same year. That was treated as the trial or judgment term of the case, and judgment was rendered accordingly. No exception was taken, but, after execution was issued and levied, an affidavit of illegality was filed, making the question above indicated. The illegality was overruled, and the *fi. fa.* ordered to proceed. The party had his day in court. He was warned to appear and plead, and might have filed his plea to the action at the appearance term, although the court was not held. True, Code, § 3452, says: "Where the defendant has been served with petition and process, as provided by this Code, he shall appear at the court to which such process is made returnable, and, on or before the last day of said court, shall make his defense in writing," etc. But we think it would be a full compliance with this statute to file the plea or pleas in the clerk's office, and that the court need not be actually in session to render a plea so filed available. Moreover, a plea filed as late as the August term would have been available. Even had the case been treated as in default at that term, the default could have been opened. As far as appears, no plea was filed at any time; and, even if it was error to render judgment at the August term, it was mere error, and we think the party should have taken advantage of it by bill of exceptions, or in some other mode. What we rule is that the judgment was not void, so as to make an affidavit of illegality available in resisting the execution founded upon it. If there was a material defense, it should have been presented before the judgment was rendered, and the exercise of any diligence would have prevented the loss of such defense. The party has had his day in court, and there was no error in overruling his affidavit of illegality. Code, § 3671. No complaint is made that there was any defect in the service of the declaration and process, either in point of time or otherwise. Judgment affirmed.

(83 Ga. 79)

FLEMISTER *v.* FLEMISTER.

(*Supreme Court of Georgia.* May 17, 1889.)

WILLS—CONSTRUCTION—TAX-SALE.

1. The question of prescription does not arise where as much as seven years' possession is not shown; and, where proceedings to assign dower affect the element of prescription only, their regularity is not in question in such case.

2. The residuary devisee has both title and the right of possession, according to the face of the will, although assent of the executor (the executor having declined to qualify) be not affirmatively shown, the will having been probated more than 20 years, and although the devise of the residuum was after the payment of debts, etc., the existence of debts or charges upon the estate not being proved; the presumption after such a lapse of time being against their existence.

3. Certificate of sale by the deputy collector of internal revenue, for internal revenue taxes, does not pass title to the land, and is not evidence that title has passed, but only that the holder has a right to acquire title by deed, or to receive the money necessary to effect redemption.

4. The defendant in ejectment cannot defeat the action or delay recovery until he is reimbursed for an alleged payment to redeem the land from tax-sale under the United States revenue laws, where it does not appear that he in fact redeemed, and where, if he did, the money advanced, if not belonging to the tenant in dower, belonged jointly to himself and another, such other not being a

Digitized by Google

party before the court, and being interested in the question of reimbursement.

(*Syllabus by the Court.*)

Error from superior court, Newton county; BOYNTON, Judge.

L. L. Middlebrooks and *Capers Dickson*, for plaintiff in error. *J. M. Pace* and *E. F. Edwards*, for defendant in error.

BLECKLEY, C. J. Taking the results of all the evidence, both that admitted and that rejected, Flemister, the testator, died in 1866, and his will was probated and admitted to record, but the nominated executors declined to qualify. His residuary legatees and devisees were his widow and child, in equal shares, with a provision that, if the former died leaving no other child, her share was then to belong to the latter. The same persons were his only heirs at law In the residuum was a tract of land containing several hundred acres, in which the widow claimed dower, which was assigned to her. Afterwards the whole tract was sold, under the revenue laws of the United States, for internal revenue taxes assessed against the testator; the deputy collector giving the purchaser a certificate of the sale, as provided for by the statute. Within the year allowed by law for redemption, the widow executed a power of attorney to the plaintiff in error to redeem the dower, and he went to Augusta under the power, but whether he redeemed or not was not proved, though he testified as a witness. According to the rejected evidence, he and one Lee took jointly from previous assignees an assignment of the deputy collector's certificate of sale, paying jointly therefor. Afterwards, in the same year, (1868,) the widow certified in writing that she transferred to him (the plaintiff in error) all her right and title to the whole tract; and in 1877 she conveyed to him by deed, for a consideration paid in 1869, her dower, the deed reciting that the dower had been duly laid off by the superior court of Newton county, and referring to the records of that court. In 1887 the widow died, leaving no child but the defendant in error, her co-legatee and devisee under the will of the husband and father. After her death the suit was brought by him against the plaintiff in error, to recover the land embraced in the dower, the dower estate therein having terminated. The action involved none of the original tract, except the part assigned to the widow as dower.

1. The only evidence touching possession of the premises sued for was that the defendant below was in possession when suit was brought. This puts prescription out of the case, and renders immaterial all the evidence as to the regularity of assigning dower to the widow.

2. The questions left are three: The first is whether, according to the terms of the will, and without respect to the sale for taxes, the son was invested with title and the right of possession when his suit was brought. The first objection is that no assent of the executor was shown. The answer to this is twofold: There was no executor, and, if there had been, his assent might have been presumed from the length of time which had expired, to-wit, more than 20 years after the probate of the will. The second objection is that by the terms of the will the residuum was not bequeathed and devised to vest in title and possession immediately, but after the payment of the testator's debts, etc. The shortest reply to this is that no debts or other charges on the residuum were shown to be outstanding, and the lapse of time was sufficient to raise the presumption that none existed.

3. The next question is whether the officer's certificate of the tax-sale passed title to the purchaser, or was evidence that the devisee was without title. We think the certificate neither passed title nor was evidence that title had ceased to be where it was before. The statutes of the United States on the subject apply to this question, and are decisive of it. See Rev. St. §§ 3198, 3199. They contemplate that title is to pass, not by certificate, but by deed, and that the certificate is to be evidence of the right to a deed, or to the redemption money, but not of any direct right to the land, or possession thereof. Such a certificate is a step in acquiring land, but another step is necessary to arrive at ownership.

4. The last question is whether, under the pleadings and evidence, the plaintiff below, as a condition precedent to recovery, was chargeable with any sum as redemption money paid by the defendant below to redeem the land from the results of the tax-sale. Two answers to this question are at hand. One is that there is no evidence that the land was redeemed, but only that a power of attorney was given to redeem the dower, and that a trip to Augusta was made under the power. The second is that, if it was redeemed, Lee was joint owner of the money, and he is not a party to this claim for equitable relief. But the first is decisive. The whole tenor of the rejected evidence is that the power given by the widow to redeem was not intended to be executed, but that the plaintiff in error intended to ignore the power,—whether in good or bad faith to the donor we need not say,—and to purchase the certificate of sale jointly with Lee. Lee is as much an owner of the certificate as he is, and if one is entitled to a deed from the government officer the other is equally entitled; and if one can be considered as having redeemed the other has a joint interest with him in the money advanced for that purpose. A still further observation to be made is that, if one or both of them redeemed under the power given by the widow, the presumption ought to be that she furnished the money with which the redemption was effected, or, if they advanced the money, that they advanced it for her and at her request; and they are her creditors for the same, and not

Digitized by Google

the creditors of one whom they did not represent, and from whom they had no authority to redeem. There is no direct evidence in the record, and none was offered, to show whose money was used in the so-called redemption. The court did not err in refusing to grant a new trial. Judgment affirmed.

(31 S. C. 1)

HENRY v. HENRY.

(*Supreme Court of South Carolina.* April 15, 1889.)

JUDGMENT LIEN—CONSTITUTIONAL LAW.

1. Gen. St. S. C. § 1831, provides that no mortgage, judgment, etc., shall constitute a lien on land after 20 years from the creation of the same, unless the holder shall record or file a note of some payment or acknowledgment, in which case the 20 years shall date from the payment or acknowledgment: "provided, that nothing contained herein shall be construed to affect the duration of the liens of judgments as prescribed by section 310 of the Code of Procedure." The act of 1879 (17 St. 167) is the same as this provision, except that in the last proviso, in the place of "section 310 of the Code," etc., it reads "an act * * * approved March 8, 1875," which act is the same as section 310 of the Code, *mutatis mutandis*. That section prescribes 10 years as the duration of the liens of judgments recovered after November 25, 1878. *Held*, that the effect of the proviso in section 1831 of the statutes and in the act of 1879 was to exempt all judgments recovered after the adoption of the Code from the operation of the section or act, and the body of the act must apply to judgments recovered before the adoption of the Code, which were the only judgments which had a lien running for 20 years.

2. Since, under the law which the above act was designed to amend, the debts secured by such liens were presumed paid after 20 years, and such presumptions could be rebutted by proof of some payment, or of some such positive acknowledgment as would imply a promise to pay, the object of the act was not to limit the duration of the liens, but simply to declare what should be sufficient evidence of payment or new promise; and hence, as the alteration was in the rules of evidence, and did not affect a pre-existing right, the act is not unconstitutional, as impairing the obligation of contracts, or divesting vested rights, especially where seven years elapsed between the passing of the act and the expiration of the twenty years' limitation, thus giving reasonable time to conform to the new law.

SIMPSON, C. J., dissenting.

Appeal from common pleas circuit court of Richland county; KERSHAW, Judge.

Andrew Crawford, for appellant. *John T. Rhett*, for respondent.

MCIVER, J. The sole inquiry raised by this appeal is as to the proper construction of the act of 1879, (17 St. 167,) entitled "An act to declare the law in relation to liens on real estate," incorporated in the General Statutes as section 1831. That section reads as follows: "No mortgage, or deed having the effect of a mortgage, no judgment, decree, or other lien on real estate, shall constitute a lien upon any real estate after the lapse of twenty years from the date of the creation of the same: provided, that, if the holder of any such lien or liens as aforesaid shall, at any time during the continuance of such lien, cause to be recorded upon the record of such mortgage, deed having the effect of a mortgage, or shall file with the record of such judgment, decree, or other lien, a note of some payment on account, or some written acknowledgment of the debt secured thereby, with the date of such payment or acknowledgment, such mortgage, deed having the effect of a mortgage, judgment, decree, or other lien shall be, and continue to be, a lien for twenty years from the date of the record of any such payment on account or acknowledgment: provided, further, that nothing herein contained shall be construed to affect the duration of the liens of judgments as prescribed by section 310 of the Code of Procedure." This provision, thus inserted in the General Statutes of 1882, is, in substance and effect, identical with that found in the act of 1879; for, although the phraseology of the second proviso was altered, yet such alteration did not affect the substantial meaning. In the act of 1879 the language of that proviso is: "That nothing herein contained shall be construed to affect the duration of the liens of judgments as prescribed by the fourteenth section of an act entitled 'An act to alter and amend the Code of Procedure, being title 5, pt. 3, of the General Statutes,' approved March 8, 1875," which act was a mere repetition *in totidem verbis* of the act of 1873, (15 St. 495,) and was passed under the unfounded apprehension, as it proved, (Arnold v. McKellar, 9 S. C. 335,) that the act of 1873 had failed to become a law. Now, as section 14 of the act of 1875 was, so far as the duration of the lien of a judgment is concerned, substantially the same as section 310 of the Code as it read in 1882, the only difference being in certain changes in the phraseology rendered necessary by the difference in the dates of the two enactments, it seems to me that there is no substantial difference between the second proviso as found in the act of 1879, and as it is expressed in section 1831 of the General Statutes of 1882. The obvious effect, therefore, of this proviso, whether read as it is found in the act of 1879, or in section 1831 of the General Statutes, was to exempt all judgments recovered after the adoption of the Code from the operation of the legislation found in the preceding part of the act or section; for it expressly declares "that nothing herein contained shall be construed to affect the duration of the liens" of such judgments. It cannot be construed either to extend or limit the duration of the lien of such judgments, for to do either would be to affect the duration of the lien, and that is expressly forbidden.

As I understand, it is conceded that the act of 1879 could not affect the duration of the lien of judgments recovered between the adoption of the Code and the passage of the act of 1879, but it is suggested that it may affect the lien of judgments recovered after the passage of the act of 1879, by extending the lien of such judgments from 10 years, as prescribed by the Code as it then stood, to 20 years. But, besides the fact that this would

Digitized by Google

be a strained construction of the act of 1879, the manifest purpose of which was to declare the limit, and not to extend the duration of the lien of judgments, which, possibly, might be permissible with a view to avoid giving the act a retroactive effect, it seems to me that it would be impossible to give the act such a construction without violating the express prohibition contained in the proviso. The Code had expressly prescribed 10 years as the duration of the lien of all judgments recovered after the 25th of November, 1878, and, when it was declared by the proviso under consideration that the act should not be construed to affect the duration of the liens of judgments as prescribed by the Code, I do not see how the court, in the face of this express declaration of the legislative will, can put such a construction upon the act as would necessarily affect the duration of the lien of a judgment recovered after the date specified, by extending its duration from 10 years, as prescribed by the Code, to 20 years, as might possibly be inferred from the terms of the act; and it seems to me that the proviso was inserted for the very purpose of avoiding any such inference. If, therefore, the act of 1879 cannot be applied to judgments recovered after the adoption of the Code, the intention must necessarily have been to refer to those recovered prior to the adoption of the Code, for there are none others to which it could apply; and the terms of the act itself show that such was the intention of the legislature, for they were manifestly dealing with such judgments as had a lien for as long a period as 20 years, and *ante*-Code judgments were the only judgments which ever had a lien for that length of time; and they must necessarily have been the class of judgments to which the legislature referred; and the only class, as all others are expressly exempted from the operation of the act. It is true that this view gives the act a retroactive effect, and it is equally true that the well-settled rule is that a statute must never be given a retrospective operation, unless such a construction is required by the express terms of the statute or by necessary implication. Now, while the act under consideration contains no express words declaring that it shall have a retroactive effect, yet it seems to me that the intention that the act should have such an effect is necessarily implied; for, as we have seen, it could not otherwise have any effect at all, for, if it cannot apply to any judgment recovered after the adoption of the Code, then necessarily it must apply to judgments recovered before that time.

If, then, the intention of the legislature was that the act should be retrospective, it will only be necessary to inquire whether it is within the power of the legislature to pass such an act. There is nothing in the constitution of the United States or of this state which forbids the general assembly from passing a retrospective act, provided such act does not impair the obligation of a contract, or divest vested rights resting on contract, or vested rights of property. McLure v. Melton, 24 S. C. 570, and the cases there cited. The simple fact, therefore, that the act is retrospective does not render the act unconstitutional. Hence before the act can be declared unconstitutional, which all the authorities declare can only be done in a clear case, it must appear that the necessary effect of the act is to impair the obligation of a contract, or divest some vested right resting on contract, or some vested right of property. If, therefore, any construction can be placed upon the act which will not affect any of those results, it seems to me that it is the duty of the court to adopt such construction. To determine this question it is necessary to inquire into the scope, purport, and object of the act, and for this purpose we must ascertain what was the old law which this act was designed to amend. Conceding that under that law there was no limit to the duration of the lien of a judgment or mortgage, yet it was well settled that, after the lapse of 20 years, the debts secured by such liens were presumed paid, and thus the liens were extinguished, but still such presumption could be rebutted by proof of some payment on account, or some such positive acknowledgment, as would imply a promise to pay. This being the state of the law, it seems to me that the object of the act was not to limit the duration of such liens, but simply to declare (and it is noticeable that such was the word used in the title) what should be the evidence of such payment or new promise as would be sufficient to rebut the presumption of payment. Under the old law, neither a judgment nor a mortgage, after the lapse of 20 years, constituted a lien, because of the presumption of payment, which, though susceptible of being rebutted by evidence, the nature and kind of such evidence was not distinctly defined, and the object and effect of the act was to declare what should be, after the passage of the act, the kind of evidence necessary to rebut the presumption of payment. The act, in substance, declares that no judgment or mortgage shall constitute a lien after the lapse of 20 years, unless some note of payment on account, or some written acknowledgment of the debt, is recorded on the record of the mortgage, or filed with the record of the judgment; the only alteration being in the rules of evidence, not in anywise affecting the previously existing right. It seems to me that this is the proper construction of the act; and, at all events, it is capable of such a construction, and, if so, then, with the view to avoid a conflict with the constitution, it is the duty of the court to adopt such construction. All the authorities agree that the right to have one's controversies determined by the rules of evidence existing at the time the contract is entered into is not a vested right, and therefore may be changed by retroactive legislation, without any violation of the constitution. Cooley, Const. Lim. 288, 367, 368, with the cases

Digitized by Google

there cited. See, also, End. Interp. St. § 284, especially the notes on pages 383, 384, where many cases sustaining the proposition stated are cited. It there appears that, after the passage of Lord Tenterden's act, requiring that the promise relied upon to bar the statute of limitations must be in writing, it was held that such legislation was applicable to pre-existing contracts. This is, in principle, identical with the present case. It is true that some of the cases hold, and perhaps rightly, that such legislation cannot be applied to a pre-existing contract, unless a reasonable time has been afforded the party to be affected thereby, to conform to the requirements of the new law, but, even conceding such a qualification of the rule, there is nothing to prevent its application here, for the appellant certainly had a reasonable time to conform to the new law, for the act was passed in 1879, upwards of seven years before the expiration of the 20 years from the date of the entry of his judgment in February, 1867.

Under this view of the case, the important and interesting question (as to which a good deal might be said) whether an act limiting the duration of the lien of a judgment can be applied to pre-existing judgments without a violation of the constitution does not arise; nor is it necessary to consider the effect of the act of 1885, (19 St. 229,) amending section 310 of the Code. The judgment of this court is that the judgment of the circuit court be affirmed.

MCGOWAN, J., concurs.

SIMPSON, C. J., (*dissenting.*) Samuel G. Henry, the defendant, on the 27th February, 1867, confessed a judgment to John P. Henry, and execution was issued thereon immediately thereafter. Nothing more was done, however, until October 17, 1887, 20 years and 7 months after the confession was entered as above, when proceedings were instituted to renew said execution, upon which an order was obtained renewing the same by consent of defendant, who accompanied the summons served upon him with an affidavit stating that said debt was founded upon a *bona fide* and valuable consideration; that he had frequently acknowledged it during the past 20 years as a *bona fide* debt, with lien on his real estate, and as remaining wholly due and unpaid. Shortly thereafter, to-wit, on the day of ———, the real estate of the defendant was sold under this execution, and another issued on the Watkins judgment in the office of the sheriff at that time, to Mr. Crawford, the attorney of the plaintiff, who claimed to have his bid credited on the aforesaid judgment. This the sheriff declined to allow, inasmuch as still another judgment, known as the "Hornsby Judgment," of prior date to the Watkins judgment, was found in the office, which claimed the proceeds of the sale, on the ground that the renewal of the execution of plaintiff in October, 1887, more than 20 years after the entry of the judgment, was illegal, the judgment having been barred by the lapse of time; that said Hornsby judgment should have the proceeds of the sale over the Watkins judgment, because it was prior in date thereto, which, being patent, the parties representing the Watkins judgment had abandoned all claim to said proceeds. Upon the sheriff being ruled, and the matter coming up before his honor, Judge J. B. KERSHAW, an order was granted, discharging the rule, with $10 costs; his honor holding that the act of December 24, 1879, now section 1831, where it is declared "that no mortgage, or deed having the effect of a mortgage, no judgment, decree, or other lien on real estate, shall constitute a lien upon any real estate after the lapse of twenty years from the date of the creation of the same," applied to the case, and controlled it. The appeal alleges error to his honor: (1) That he erred in holding that section 1831, Gen. St., applied to the case, thereby giving said act a retroactive effect. (2) If it was intended to have a retroactive effect, "then it was null and void, for the reason that, in so far as it affected the question at bar, there was a divesting of vested rights."

The questions before us are, did the act (section 1831, supra,) have a retroactive effect? And, if so, would its operation be to divest vested rights, if held valid?

Under the old law, before the recent war between the states, there was no limit of time as to the lien of judgments. When once obtained and attached by a proper entry of the judgment, the lien continued until the judgment was paid, either actually or by a conclusive presumption arising from the lapse of time, which usually took place by the running of 20 years, or, at least, a period of 20 years, with nothing done in the mean time, gave such an artificial force to a presumption of payment that it was held conclusive, unless overthrown by extraordinary circumstances, such as would check the statute of limitations, and prevent it from being a bar to the recovery of a debt subject to said statute. Now, in this case, the question whether the presumption of payment had assumed this artificial character, and whether, if so, the facts relied on were sufficient to overthrow it, did not arise, and it was not passed upon by his honor. But the case was decided upon the ground that section 1831, Gen. St., had repealed the old law, and expressly, *in totidem verbis*, provided that no judgment, whether under the old law or the present, should have lien for more than 20 years from the date of the creation of the same. So that the question, as we have stated, is, was it the intention of this act to retroact? Now, while it is true that the general assembly may pass retroactive laws, when they do not impair the obligation of contracts nor divest vested rights, yet the intention to be retroactive must appear clearly and distinctly. In fact, the rule seems to

Digitized by Google

be, as derived from the weight of the decisions and utterances from judicial writers, as is said by Mr. Endlich, "that, even in the absence of constitutional obstacles, a construction giving to a statute a prospective operation is always to be preferred, unless a purpose to give it a retrospective force is expressed by clear and positive command, or to be inferred by necessary, unequivocal, and unavoidable implication from the words of the statute taken by themselves, and in connection with the subject-matter, and the occasion of the enactment, admitting of no reasonable doubt, but precluding all question as to such intention." End. Interp. St. § 271.

Examining section 1831 under the light of this rule, we certainly find no express words giving it any retrospective effect, nor can this be inferred by a "necessary, unequivocal, and unavoidable implication" from any words used therein. But it is asked, if the section does not refer to these older judgments, what does it refer to? It must be remembered that this section is taken from the act of 1879. At that time the act of 1873, in reference to the lien of judgments, had been passed, and was then of force. This act had provided that judgments should have lien only for 10 years, with the right of renewal within 3 years after the 10, with like lien as the original for 10 years, and so on, we suppose, *ad infinitum*. But this act of 1873 was expressly limited to judgments obtained since 1870. It left old judgments obtained before that time untouched and under the old law. Now, where is the difficulty in applying section 1831 to judgments obtained after the passage of the act of 1879, wherein this section was first enacted, thus making it entirely prospective, and thus leaving judgments as to their liens obtained under the old law, and those obtained under the act of 1873, intact, and to be governed by the law as it stood when said judgments were obtained? Such a construction would be just to all parties, and would harmonize with the idea of prospective application which belongs to statutes generally, and necessarily so, unless the implication is unavoidably otherwise. May not the intention have been to prevent renewals from extending liens beyond 20 years, as to future cases, which might be done under the provisions of the act of 1873. And, besides, we think there is foundation for the position taken by appellant, that to give this section a retroactive operation would be divesting vested rights. Previous to the passage of this act, the judgment in question had an unlimited lien as to time upon the property of the debtor. This right had been secured to the creditor by the law under which he had acted, and had rested. Why was it not a vested right? What more was required of him to make it such a right than he had done? The law had said to him, "Obtain your judgment, and you shall have a lien until the judgment is paid." It is true that may not have been a contract the obligation of which was forbidden by the constitution of the United States as to impairing the obligation of contracts, but it seems to us that it approaches very closely a vested right, which is unassailable, equally with obligations of contracts. The case of Moore v. Holland, 16 S. C. 15, does not conflict with this view. There a decree had been obtained after the 1st of March, 1870, which denied to final judgments and decrees a lien on property, but the cause of action upon which the decree was founded existed before the act of 1st of March, 1870, when judgments, if obtained in such cause, had lien. And the owner of the decree contended that to deprive him of the right of lien in said decree, under the act of 1st of March, 1870, would be impairing the obligation of the contract. This court, however, said, "No. The lien which you might have acquired, if you had reduced your claim to judgment before the act of 1870, was no part of the contract, but was a remedy attaching to the judgment after it was obtained, and, it being taken away before judgment, there was no impairing any obligation or legal tie that bound the debtor to the performance of his contract;" in substance, that this legal tie or obligation had not attached, nor was there any promise that it should attach. It was a mere inchoate right, which the plaintiff had, and which, if he had reduced his claim to judgment before the act of 1870, would have become fixed. But, this not having been done, the general assembly having the power to alter the law as to future judgments, and having done so by the act of 1870, it should govern. The case at bar differs from Moore v. Holland, supra, in the material fact that, while the law allowing liens had been repealed before the judgment was obtained in Moore v. Holland, and another act passed denying all lien, in the case at bar the judgment was obtained while the law allowing unlimited lien was of force, and the act of 1879, destroying this lien, was passed long after it had attached, and had become a fixed fact. The acts of 1873 and of 1885 have no bearing upon the questions involved, and therefore this opinion need not be prolonged by a discussion of said acts. For these reasons I cannot concur in the opinion of the majority.

(31 S. C. 36)

RODDEY *et al.* v. ERWIN.

(*Supreme Court of South Carolina.* April 15, 1889.)

ATTACHMENT—AFFIDAVITS.

1. Code S. C. § 290, authorizes attachment when it shall appear by affidavit that a cause of action exists, specifying the amount of the claim and the grounds, and that defendant is not a resident of the state, or has removed, or is about to remove, any of his property with intent to defraud creditors, or has assigned or secreted, or is about to assign or secrete, any property with like intent, whether defendant be a resident of the state or not. *Held*, that an allegation that defendant has disposed of the greater part of his property, and is about to dispose of the remainder, with intent to defraud his creditors, and has left the state with like intent, is sufficient under the law.

Digitized by Google

2. Where an attachment is set aside after sale thereunder, the proceeds of the sale may be attached for the same debt while in the sheriff's hands.

3. The affidavits of one of the plaintiffs stated that affiant was informed and believed that defendant had disposed of part of his property, and was about to dispose of the residue, to defraud creditors, and gave circumstantially and in detail the sources of such beliefs; that, on being informed that defendant was disposing of his property with the intention of going to another state, affiant asked defendant about it, and received "evasive answers," defendant stating that he "did not know what he was going to do," etc.; that there was an agreement to meet defendant's brother-in-law, and settle the claim of plaintiff; that the brother-in-law failed to keep the engagement; and that affiant was informed and believed that he left for another state before the time set for the meeting; that defendant, after being arrested, broke his arrest, and was recaptured; that he had disposed of 147 acres of land which he had owned, etc. An affidavit by a third person stated that defendant told affiant that he had sold his property, and intended to leave the state with his brother-in-law. Another affidavit stated that defendant told affiant, also a third person, on a train that he was on his way to another state, and asked affiant to tell certain of his creditors, not mentioning plaintiff, to send their accounts to him, and he would pay them. *Held*, that the affidavits showed sufficient grounds for attachment.

Appeal from common pleas circuit court of York county; WITHERSPOON, Judge.

The affidavits filed for the attachment were as follows;

No. 1. "James F. Reid, one of the plaintiffs above named, being duly sworn, says: (1) That William L. Erwin, the above-named defendant, is justly and truly indebted to said plaintiffs, under their firm name of W. L. Roddey & Co., in the full sum of nine hundred and six dollars and forty-four cents, balance on account for goods and merchandise sold and delivered, and cash advanced by said plaintiffs to said defendant, between August 29, 1885, and October 20, 1887; also by a certain sealed note dated February 18, 1886, in the sum of ten dollars, with interest thereon at ten per cent. per annum, payable annually from date until paid; also by one certain sealed note dated May 26, 1886, in the sum of thirty dollars, with interest at ten per cent. per annum, payable annually from date until paid; also one certain sealed note dated June 31, 1887, in the sum of seventy-one dollars and twenty cents, with interest at ten per cent. per annum, payable annually from October 31, 1887, until paid; and which said four several causes of action in favor of said plaintiffs against the said defendant will more fully appear by the sworn complaint in this action hereto annexed, all the statements contained in which are true to the knowledge of the deponent. (2) That, as deponent is informed and believes, the said William L. Erwin is disposing of all his property, and converting the same into money, with the intention of leaving this state, and that he is so disposing of his property with the intention to defraud his creditors, and especially the said plaintiffs, and that the sources of deponent's information are as follows, to-wit: On November 3, 1887, deponent was informed by Dr. T. A. Crawford, at Rock Hill, that the said W. L. Erwin was disposing of all his property with the intention of leaving this state and going to Florida. That on November 4, 1887, deponent went out to the said W. L. Erwin's place of residence, and saw him, and, upon being questioned by deponent, gave evasive answers as to his intention of leaving the state, and admitted that he had disposed of all his stock. He also alleged that he was unable to pay anything on plaintiffs' debts against him, and that everything he had had been attached by J. T. Sloan, (who is a brother-in-law of the said W. L. Erwin, and a resident of Florida,) and that he, the said W. L. Erwin, had nothing with which to pay. That deponent then in a few hours called upon the said J. T. Sloan, who admitted to deponent that he had obtained an attachment on the property of W. L. Erwin from W. S. Adams, trial justice, for two hundred and forty dollars; and also alleged that he had paid over to the said W. L. Erwin, in cash, within the last three weeks, over five hundred and seventy-five dollars, and that the said W. L. Erwin had also sold cotton within said time in which his (Erwin's) interest amounted to about six hundred dollars. That on November 4, 1887, deponent was told by James A. Erwin that he had purchased from the said W. L. Erwin his plantation in York county, and had settled for same in full a few days ago by assuming the payment of two mortgage debts covering said plantation, and by paying the balance by check on bank. That immediately after obtaining this information deponent returned to find the said W. L. Erwin, but was wholly unable to find him, and deponent verily believes that the said W. L. Erwin has disposed of the greater part of his property, and is about to dispose of the remainder, with the intent to defraud his creditors. (3) That the said plaintiffs have commenced an action in this court, by issuing the summons hereto annexed against the said defendant upon the said causes of action.

"J. F. REID."

No. 2. "Before me personally came James F. Reid, who, being duly sworn, deposes and says: (1) That he is a member of the firm of W. L. Roddey & Co., of Rock Hill, S. C. (2) That J. T. Sloan, a brother-in-law of William L. Erwin, on or about November 11, 1887, made an engagement with him to meet him, or the attorney of W. L. Roddey & Co., in Yorkville, S. C., on November 14, 1887, for the purpose of settling a claim the firm of W. L. Roddey & Co. had against the estate of W. G. Erwin. (3) That on November 14, 1887, he went to Yorkville to meet the said J. T. Sloan, but that he, the said J. T. Sloan, did not put in an appearance; and deponent further says that he has been reliably informed, and believes it to be true, that the said J. T. Sloan left this state for the state of Florida on the Sunday previous, November 13, 1887, by private conveyance.

"J. F. REID."

Digitized by Google

No. 3. "Personally appeared James F. Reid, one of the plaintiffs above named, and in addition to his affidavit in above case, made and filed in the office of the clerk of the court of common pleas on November 5, 1887, further makes oath that when on November 4, 1887, deponent questioned the defendant, William L. Erwin, as to his intention of leaving this state and going to Florida, he gave an evasive answer, by replying that he did not know what he was going to do. That on the next day, (November 5th,) when arrested by W. J. Neely, the deputy of R. H. Glenn, sheriff, in above case, he broke his arrest, and was recaptured in Columbia, South Carolina, which fully appears by the return of the said Neely, sworn to November 28, 1887, and now on file in the office of the clerk of the court. That the said William L. Erwin has since left the state, and deponent alleges that the object of the said Erwin in disposing of all his property, and converting it into money, and then leaving the state, was to defraud the plaintiffs above named. That the said Erwin had previously sold and conveyed all his interest in real estate, under his father's will, to his sister, Emily E. Sloan, the wife of J. T. Sloan, of Florida, as appears from deed recorded in the office of the register of mesne conveyances for York county in Book E, 6, p. 416, said real estate being located in said county. Said deed was executed in January, 1887, and on the same day the said Emily E. Sloan conveyed to the said W. L. Erwin one hundred and forty-seven acres of land in York county, which the said Erwin has since disposed of.

"J. F. REID."

No. 4. "Personally appeared T. A. Crawford, who makes oath, and says that on October 31, 1887, J. T. Sloan told him that W. L. Erwin had sold his property, and intended going with him, J. T. Sloan, to Florida; further, that he, the said J. T. Sloan, had an attachment on the crops of W. L. Erwin, then in the field. The said T. A. Crawford further deposes and says that on November 1, 1887, W. L. Erwin told him that he, W. L. Erwin, had sold all his property, and intended going to Florida with J. T. Sloan.

"T. A. CRAWFORD."

No. 5. "Personally appeared T. A. Robertson, who makes oath and says that on Thursday, December 8, 1887, while on the Charlotte, Columbia and Augusta Railroad Company's south-bound train, he met W. L. Erwin, who told him that he, W. L. Erwin, was on his way to Florida, and asked that the deponent, T. A. Robertson, say to Messrs. Holler & Anderson, and R. T. Fewell & Co., of Rock Hill, to send their accounts to W. L. Erwin, Pinellas, Florida, and he would pay them. T. A. ROBERTSON."

Wilson & Wilson, for appellants. *W. B. McCars* and *Hart & Hart*, for respondent.

MCGOWAN, J. On November 5, 1887, the plaintiffs sued the defendant on several claims, amounting in the aggregate to something over $1,000, and at the same time the clerk of the court for York county, at the instance of the plaintiffs, and upon the affidavit of J. F. Reid, a member of the firm, issued an attachment against the defendant, alleging that he was disposing of his property and converting it into money with intent to leave the state and defraud his creditors. Certain perishable property of the defendant was attached and sold, under the order of the court, by the sheriff, who was directed to hold the proceeds subject to the further order of the court. On December 14, 1887, this attachment was set aside upon defendant's motion, on the ground of the insufficiency of the affidavit on which it issued. On December 16, 1887, a second warrant of attachment in the same case was issued by the clerk upon additional affidavits of J. F. Reid, T. A. Crawford, and T. A. Robertson. Under this second warrant the aforesaid funds in the hands of the sheriff, ($272.52,) arising from the sale under the first warrant, were attached, and on December 24, 1887, the defendant moved before Judge WITHERSPOON to set aside this attachment also, on the grounds that it was irregularly and improvidently issued: (1) That the affidavits failed to set forth a cause of action; (2) that they failed to set forth facts within the personal knowledge of the affiants; (3) that they failed to state fully the sources of their information, or the facts upon which affiants based their belief, etc., that the facts stated were untrue, and that the property attached ($272.52) in the hands of the sheriff, under the order of the court, was not subject to attachment, etc,—the judge holding that, "as hearsay evidence would be inadmissible to establish a *prima facie* case of fraud at law, such evidence should not be considered in determining the sufficiency of affidavits upon which an attachment had issued; and, disregarding the affidavits so far as the source of information given was the statement of others, held that the affidavits were not sufficient to authorize the clerk to grant the attachment, and set it aside upon the ground that it had been irregularly issued. From this order the plaintiffs appeal to this court upon the following grounds: "(1) Because, when the attachment was issued, the defendant had left the state, having gone to Florida to reside. (2) That the affidavits upon which the attachment issued were sufficient to show that the defendant had disposed of all his property, and left the state, with the intent to defeat the appellants' debt, and were sufficient to establish a *prima facie* case at law. (3) That said affidavits were a sufficient compliance with the provisions of the attachment law. (4) That the facts proved showed collusion between the defendant and his brother-in-law, J. T. Sloan, to defeat the claim of appellants. (5) Because his honor erred in holding that the 'voluntary admissions' of the defendant negatived any fraudulent intent towards the appellants. (6) Because the motion to vacate the attachment should

Digitized by Google

have been decided in the light of all the evidence before the court. (7) Because his honor erred in holding that hearsay cannot support an attachment, even when the would-be incompetent sources of information are stated. (8) Because his honor erred in holding that, as hearsay evidence to establish a *prima facie* case at law, such evidence should not be considered in determining the sufficiency of an affidavit upon which an attachment has been issued."

Section 290 of the Code declares that "a warrant of attachment may be issued whenever it shall appear by affidavit that a cause of action exists against such defendant, specifying the amount of the claim and the grounds thereof, and that the defendant is either a foreign corporation or not a resident of this state, * * * or that such corporation or person has removed, or is about to remove, any of his or its property from this state with intent to defraud his or its creditors, or has assigned, disposed of, or secreted, or is about to assign, dispose of, or secrete, any of his or its property, with the like intent, whether such defendant be a resident of this state or not," etc.

There can be no question that the allegation here was ample, under the law, "that the defendant has disposed of the greater part of his property, and is about to dispose of the remainder thereof, with intent to defraud his creditors, and has left the state with like intent." Indeed, we do not clearly see why it would not have been sufficient to confine the allegation to the last paragraph of absence from the state, in conformity with what, under the old practice, was called a foreign, as distinguished from a domestic, attachment. We agree with the circuit judge that the affidavits stated a cause of action, specifying, as required, the amount of the claim, and the grounds thereof. This was done fully and most circumstantially in the first affidavit of J. F. Reid, (November 5, 1887,) before the first attachment was issued. Afterwards, when the second writ was issued, on December 16th, he made another affidavit, adopting and adding to the first one, saying: "And in addition to his affidavit in the above case made and filed in the office of the clerk of the court on November 5, 1887, further makes oath," etc. There is not the slightest doubt of the identity of the affidavit, and that it was before the clerk of the court when he issued the second warrant, who inserted in the warrant itself a very full description of the cause of action. We also agree with the circuit judge that there is nothing in the objection that the funds in the sheriff's hands were not subject to attachment. After the first attachment was set aside, the money raised by the sale in that case ($272.52) belonged to the defendant, and might have been turned over to him, but the sheriff properly held it for the further order of the court. The principle of *custodia legis* applies only where the officer is bound to pay the execution plaintiff, and not to cases in which he has in his possession, after satisfying the execution, a surplus. Such surplus is the property of the execution defendant, and being held by the sheriff in a private, and not in an official, capacity, it may be attached in his hands. See Drake, Attachm. (6th Ed.) § 251, and cases cited; and 1 Amer. & Eng. Cyclop. Law, 916, and notes.

The only remaining question is whether the allegation, in the language of the law, "was made to appear by the affidavit," or the warrant was irregularly issued. Certainly there can be no valid attachment without a sufficient affidavit, and, whether sufficient in the first instance, new facts or new grounds to sustain it cannot be brought before the judge in behalf of the plaintiff. We can hardly suppose it necessary to say anything as to the allegation that defendant disposed of his property with a view to leave the state. That has been shown by the event itself. The defendant has disposed of his property, and he has left the state. Facts cannot err. Then the only matter of inquiry left is whether it was shown *prima facie* that it was done with the intent to defraud his creditors, and especially the plaintiffs. Fraudulent intent is not a physical entity, which can be seen and felt, but a condition of the mind beyond the reach of the senses, usually kept secret, not very likely to be confessed, and therefore can only be proved by unguarded expressions, conduct, and circumstances generally. As was said in Myers v. Whiteheart, 24 S. C. 196: "The allegation that a person has done a certain act with a fraudulent intent must necessarily be based upon information or belief, and therefore, in such a case, the rule is well settled that the sources of information, or the facts upon which such belief are founded, must be stated." This is undoubtedly a wise rule; but when, in obedience to it, a party gives as the source of his information the statement of another, giving his name, place, etc., we very much doubt whether, in a proceeding like this, such statement should be brushed away as "incompetent," because as "hearsay" it would not be admissible in a regular trial at law. We can hardly think that such was the intention of the rule requiring the sources of information to be given; but that all the circumstances, especially upon a question of fraudulent intent, where there may have been concert and combination, should be considered, giving to each the weight, great or small, to which it is entitled. Burch v. Brantley, 20 S. C. 506. It was certainly in conformity to the rule as to the sources of information to include these statements in the affidavits. But inasmuch as the circuit judge took another view, and expunged from the affidavits all statements of information received from others, and especially from J. A. Erwin, the brother, and J. T. Sloan, the brother-in-law, of the defendant, let us see how, in that view, the matter as to the fraudulent intent stands.

Digitized by Google

On December 16, 1887, when the second attachment was issued, five affidavits on the part of the plaintiffs were before the clerk as his authority for issuing the writ. Admonished probably by the first failure, the affidavits seem to have been drawn with care and particularity. No. 1, J. F. Reid's first affidavit, (November 5th,) was before the defendant went to Florida; states that he is informed and verily believes that the defendant had disposed of the greater part of his property, and is about to dispose of the remainder, with the intent to defraud his creditors, and gave circumstantially and in detail the sources for such beliefs; that, upon being informed by Dr. T. A. Crawford that defendant was disposing of his property with the intention of leaving the state and going to Florida, he went to see defendant, and, upon being questioned about going to Florida, he gave "evasive answers," saying he "did not know what he was going to do;" that J. T. Sloan (his brother-in-law and a resident of Florida) had attached everything he owned, etc., (omitting what Sloan and J. A. Erwin told him.) No. 2, Reid's second affidavit, (December 12th,) states that about November 11th there was an agreement to meet J. T. Sloan at Yorkville, November 14th, for the purpose of settling the claim of plaintiffs; that Sloan failed to keep his engagement, and he (the deponent) has been reliably informed and believes it to be true that Sloan left the state for Florida on the Sunday previous (November 13th) by private conveyance, etc. No. 3, Reid's third affidavit, (December 16,) states that on the day after his previous interview with defendant, (November 5th,) when he was arrested, defendant broke his arrest, and was recaptured in Columbia, S. C.; that the defendant has since left the state, and deponent alleges that his object in disposing of his property and turning it into money, and then leaving the state, was to defraud the plaintiffs; that he previously sold his interest under his father's will to his sister, Mrs. Sloan, wife of J. T. Sloan, of Florida, as appears from deeds recorded. This deed was executed in January, 1887, and on the same day Mrs. Sloan conveyed to him 147 acres of land in York county, which he has since disposed of, etc. No. 4, Dr. T. A. Crawford's affidavit, (omitting what Sloan told him,) states that on November 1, 1887, the defendant told him that he had sold all his property, and intended going to Florida with J. T. Sloan, etc. No. 5, T. A. Robertson's affidavit, states that on Thursday, (December 8th,) while on the Charlotte & Columbia south-bound train, he met the defendant, who told him that he was on his way to Florida, and asked that the deponent would say to Heller & Anderson and R. T. Fewell & Co. of Rock Hill to send their accounts to "W. L. Erwin, Pinellas, Florida," and he would pay them.

It seems to us it appears from the affidavits, all considered together, that when Mr. Reid first spoke to the defendant about the plaintiff's claim, on November 4, 1887, he had already disposed of most of his property, and was preparing to go to Florida, but that he concealed such purpose from the plaintiffs by giving "evasive answers;" that the appointment with J. T. Sloan for a meeting at Yorkville on November 14th, to settle the plaintiffs' debt, was made also for the purpose of misleading the plaintiffs, and giving time to get off to Florida, as shown by the fact that he did actually leave in a private conveyance on Sunday, November 13th, the very day before the meeting was to have taken place in Yorkville; that the defendant left hurriedly, and on his way to Florida, (December 8th,) Thursday, met Mr. T. A. Robertson on the C. C. & A. Railroad, and, after informing him that he was on his way to Florida, requested him (Robertson) to inform certain of his creditors at Rock Hill (making no mention however of the plaintiffs) to send their accounts to W. L. Erwin, Pinellas, Florida, and he would pay them, or something of that character. From simply reading the affidavits, with attention to the dates, we cannot doubt that the defendant misled the plaintiffs as to the disposal of his property and his intention to leave the state; that the clerk was authorized to issue the attachment; and that it was error to set it aside as irregularly issued. The judgment of this court is that the judgment of the circuit court be reversed, and that the case be remanded for such orders as may be necessary to carry out the conclusions herein announced.

SIMPSON, C. J., and MCIVER, J., concur.

(21 S. C. 49)

LIPSCOMB v. TANNER.

(*Supreme Court of South Carolina.* April 15, 1889.)

DAMAGES—TRANSITORY ACTIONS.

1. Under a complaint for damages for unlawfully detaining the personal property of a bailor, evidence that the property was injured by a storm during the detention is inadmissible, unless that fact is specially alleged, as such an injury is not the necessary result of the detention.

2. Such an action is transitory, and may be brought in another state than that in which the detention occurred.

Appeal from common pleas circuit court of Spartanburg county; WALLACE, Judge.

Action by Albertine E. Lipscomb against H. C. Tanner, to recover damages for the unlawful detention of the plaintiff's property. Verdict and judgment for plaintiff, and defendant appeals.

Duncan & Sanders, for appellant. *J. A. Corry* and *Thomson, Nicholls & Moore*, for respondent.

MCGOWAN, J. It seems that the plaintiff (wife of W. S. Lipscomb) kept an hotel at Saluda, N. C., but that in October, 1884, she removed to Gaffney City, S. C., leaving her furniture in the house she had occupied, consisting of beds, bedding, linen, silver-ware, earthen-ware, etc. The property was left in

Digitized by Google

charge of the defendant, Tanner. About January, 1885, the plaintiff sent for the property, but the defendant, upon some matter of alleged counter-claim, refused to deliver it. This detention continued for 18 days. The husband of the plaintiff (W. S. Lipscomb) indicted the defendant in North Carolina for the detention, but this proceeding was withdrawn upon some compromise. The property was delivered upon each party paying half the costs. Afterwards the plaintiff, finding the defendant in Spartanburg, S. C., sued him there, claiming damages for the enforced detention of the property. The complaint stated "that the defendant unlawfully detained from plaintiff certain hotel furniture, (describing it,) the property of the plaintiff, of the value of $1,500, and that by reason of such unlawful detention the plaintiff was damaged $500," etc. The defendant put in a general denial, and for further defense answered, that before this action was commenced the plaintiff began his action in North Carolina, upon the same alleged facts, and upon the same supposed cause of action, which was fully settled and determined before this action was begun, and that plaintiff ought not now to be allowed to proceed any further with this suit. Upon the trial a witness for the plaintiff was asked to state "whether or not there was a snow-storm during the time the defendant withheld the property from the plaintiff, and the beds, bedding, etc., were all wet and damaged by the leaking upon them to the extent of $100." To this question the defendant objected, but the objection was overruled, his honor, the judge, holding: "There is no special damage alleged, and I do not understand that the witness proposes to prove special damages; that there was an actual injury inflicted on the property by the acts of the defendant; but the plaintiff alleges here that she was injured by such unlawful detention, to her damage so many dollars. Now, if there was a deterioration anywhere in the property sued for, in consequence of such detention, by means of which the plaintiff has been damaged, I am sure she can prove it, but that is all I will allow. Anything that resulted from the storm resulted from the detention." The defendant excepted. The witness then proceeded: "There came a sort of a cyclone or snow-storm, and the mattresses froze plum through," etc. Upon the charge of the judge, the jury found for plaintiff $135, and the defendant appeals upon the following grounds, alleging error: "(1) In allowing evidence to the effect that the property of the plaintiff has been damaged by leakage. (2) In charging 'that plaintiff alleges that the property had been damaged by leakage in the building in which it had been stored, and that this injury had taken place after the demand was made by her, about Christmas or the 1st of January, and had taken place between then and the time the property was delivered to her. Now, upon that state of facts or allegations, she brings her complaint, and demands that, by reason of such unlawful detention of the property, plaintiff was injured.' (3) In charging: 'If the property was injured in that house, and because it was in that house, and because it was kept there and detained from the owner by the defendant, then that injury resulted from the unlawful detention of the property.' (4) In refusing to charge: 'If the plaintiff and defendant settled their difference in North Carolina, in reference to the detention of the property, then the verdict must be for the defendant.' (5) Because the court of common pleas for Spartanburg county had no jurisdiction to hear and determine the case."

The last exception does not give the reason, nor is it stated in the argument, why the Spartanburg court had no jurisdiction to hear the case. If the intention was to make the point that a tort as to personal property, committed in another state against a citizen of this state, is not within the jurisdiction of the courts of this state, we think it was not well taken. The alleged wrong was personal, and, there being no state law upon the subject, the action was not local; and when the defendant came into this state, and was regularly served with process here, we know no reason why the courts in this state have not jurisdiction to hear and determine the case.

As to the fourth exception, the brief itself shows that the judge was asked to charge: "If the jury find that, in consideration of the defendant's surrendering the property the plaintiff agreed to discontinue all further proceedings against the defendant for the withholding of his property, then the verdict must be for the defendant;" and he said: "I charge you that. You are to settle the facts. I am just giving you the legal rules." All the other exceptions complain of error in the charge that, "if the property was injured in that house, and because it was in that house, and kept there by the defendant from the owner, then the injury resulted from the unlawful "detention of the property;" that is to say, that evidence was admissible tending to show that a "cyclone or snow-storm," during the detention, caused leakage which injured the property. It is admitted that special damage cannot be proved or recovered, unless it is expressly alleged. It is clear that no special damage was alleged here, and therefore the precise point is whether the injury to the property by the snow-storm was special damage, under the allegation of "detention" merely. It is not always easy to determine whether damage is or is not special. The cases upon the subject are full of nice distinctions. We have seen no clearer definition or description of it than the following: "The general allegation of damages will suffice to let in proof, and to warrant recovery of all such damages as naturally and necessarily result from the unlawful act complained of; the law implies such damages. But where damages do not necessari-

Digitized by Google

ly result from the act complained of, and consequently are not implied by law, the plaintiff must state the particular damage sustained in order to introduce testimony in regard to it. The rule is to avoid surprise," etc. See 5 Amer. & Eng. Cyclop. Law, 49, and very full notes. Now, apply this rule here. It was not an action of trespass for the recovery of the property itself, in which case the law would imply that the damage was the value of the property, unless it happened to be a case for vindictive damages. But the property had been delivered up, and the action was not for its recovery, nor damage to it, but for the injury resulting to the plaintiff from its "detention;" that is to say, from the inconvenience and loss, and possibly the annoyance of being deprived of the use of it for a period. It is said, however, that if the property had been delivered to the owner, it would not have been in the house, and could not have been injured by the storm, and therefore the "detention" was the cause of all the damage, and the defendant, like all other persons, must be held responsible for all the natural consequences of his own wrongful act. It seems to us that the question was, not whether the evidence would be admissible in support of an allegation of special damage, but whether it was upon this complaint admissible. Under the rule above stated, was damage from the "snow-storm or cyclone" necessarily involved in the allegation of "detention" merely, so that the evidence was no surprise to the defendant? We do not think so, for while the snow-storm was natural, it was not certain. It might snow or it might not. It could not be known certainly, so as to authorize the conclusion that its consequences were necessarily included as part of the damages from the "detention of the property." See Rowand v. Bellinger, 3 Strob. 373, where it was held that "whenever the damages sustained have not necessarily accrued from the act complained of, and therefore are not implied by law, then the rule of pleading is familiar enough that, in order to avoid surprise on defendant, the particular or special damage sustained and meant to be relied on at the trial must, in general, be stated, or else evidence of that will be excluded." The judgment of this court is that the judgment of the circuit court be reversed, and the case remanded for a new trial.

SIMPSON, C. J., and MCIVER, J., concur.

(31 S. C. 601)

COLEMAN v. KEELS.

(*Supreme Court of South Carolina.* April 30, 1889.)

APPEAL—REHEARING.

1. The omission of counsel to bring to the court's attention the fact that defendant's appeal had been abandoned or dismissed by the clerk furnishes no ground for rehearing, especially when the statement made by defendant's counsel in the argument, that the parties had agreed that both appeals might be considered together, was suffered to remain uncorrected.

2. When both parties appeal it is not necessary to docket the case twice.

Petition by plaintiff for rehearing. For former opinion, see ante, 270.

M. C. Galluchat, for petitioner. *A. Levi, contra.*

PER CURIAM. The petition for a rehearing in this case is based upon the ground that this court, in rendering its decision filed 11th March, 1889, considered an appeal by the defendant from the order of 7th June, 1888, when such appeal had in fact been waived, and the same had been dismissed by the clerk under rules 1 and 2 of this court, before the hearing in this court, and the petitioner assumes that the court was induced to do this by the statement made by counsel for defendant in the course of his argument, that the parties had agreed that the two appeals—the one taken by plaintiff from the order of 19th June, 1888, and the one taken by defendant from the order of 7th June, 1888—should be heard together, when no agreement in writing to that effect was produced. This assumption is without foundation in fact. The papers, as prepared for argument, and now on file in the clerk's office, show that there were two appeals in the case,—one by the plaintiff, and the other by the defendant,—and there was nothing whatever on these papers to show that the defendant's appeal had been waived or dismissed by the clerk, and that fact has for the first time been brought to the attention of the court by the petition for a rehearing. On the contrary, these papers show that both appeals were still pending at the time of the hearing, for they consist of the "case" as prepared by plaintiff, with his notice of appeal and exceptions, to which is attached the "case" as prepared by defendant, with his notice of appeal and exceptions. It was upon these papers alone, together with the argument of counsel, that this court acted in considering the case, and not upon the mere verbal statement of defendant's counsel that the parties had agreed that both appeals should be heard together. Indeed, such verbal statement, which plaintiff's counsel suffered to remain uncorrected, though offered the opportunity to do so when the court reconvened at its evening session, amounted to nothing more than what the papers submitted to the court by the plaintiff's counsel, at the opening of the case, showed upon their face,—that is, that both parties had appealed,—the plaintiff from the order of 19th June, 1888, and the defendant from the order of 7th June, 1888,—and both of these appeals were argued. The court could not, therefore, do otherwise than consider and determine both appeals. If counsel through oversight, or from any other cause, omitted to bring to the attention of the court the fact that defendant's appeal had been abandoned or dismissed by the clerk, that certainly furnishes no ground for a rehearing, especially when it appears from

Digitized by Google

the petition itself that the statement made by counsel in the argument, that the parties had agreed that both appeals might be considered together, confirmed as it was by the fact that at the opening of the case the court was furnished with the "case," notice of appeal and exceptions of each appellant, attached together, was suffered to remain uncorrected. Under these circumstances, it seems to us that the court was bound to consider and determine both appeals. It is said, however, in the petition that the defendant's appeal was never docketed; but when both parties appeal in the same case it is neither necessary nor customary to docket the case twice. The petition is dismissed.

(31 S. C. 69)

LAMAR v. WRIGHT.

(*Supreme Court of South Carolina.* April 19, 1889.)

STATUTE OF FRAUDS—AGREEMENTS CONCERNING LAND.

An oral agreement, made between the judgment debtor and a third person, that the latter will bid in the debtor's land about to be sold under the judgment, advance the money therefor, and hold the title for the benefit of the debtor's wife, is void under the statute of frauds.

SIMPSON, C. J., dissenting.

Appeal from common pleas circuit court of Richland county; KERSHAW, Judge.

R. W. Shand, for appellant. *F. W. McMaster*, for respondent.

MCGOWAN, J. On sales-day, February 3, 1887, the master of Richland county, John T. Seibles, Esq., under a decree of foreclosure in the case of Building & Loan Association v. R. G. Lamar, sold at public auction a small tract of land near the eastern line of the city of Columbia, containing 80 acres, more or less, as the property of the defendant, Lamar. The terms of sale were, one-third cash, and the remainder on one and two years' credit. George K. Wright was the highest and last bidder, at the price of $2,100. The sale was not complied with and closed up until March 17, 1887, (about six weeks,) when Wright paid the whole purchase money in cash, and took titles in his own name. The sale was confirmed and the proceeds were applied as follows, viz.: Costs, $189.68; to two mortgages, $1,854.45; and the remainder upon the homestead of R. G. Lamar, which had been previously assigned in money to him, $55.87. Soon after the master's deed was executed to Wright, R. G. Lamar sold to him the cotton-seed and a pile of manure on the place for $40, and with his family left the place. Wright took possession, made a crop, and did some repairing of buildings and fences, probably to the value of $1,000. On February 15, 1888, a year after the sale, Mrs. Carrie M. Lamar, (wife of R. G. Lamar,) caused a tender to be made of the purchase money paid, and commenced this action against the defendant, Wright, alleging, substantially, that her husband, R. G. Lamar, before the master's sale, made a verbal arrangement with the defendant that he (Wright) would bid in the land for the plaintiff, and secure himself by a first mortgage upon the same; and that, in accordance with said arrangement, he did bid for her, thereby having the land knocked off to him at less than its market value, but, in violation of said arrangement with her husband, had it set down in his own name, and now fraudulently refuses to make titles to her as he had agreed to do,—and praying that a trust should be declared against said Wright in her favor, that an account be taken as to the amount of purchase money paid by him, and that the land should be sold, and all, after refunding to the defendant the purchase money, may be paid to the plaintiff as her property, under the arrangement made for her benefit by her husband as aforesaid.

The defendant, Wright, answered, in substance, that he is a broker and real-estate agent of Columbia; that he never had any communication, written or verbal, with the plaintiff concerning the land in question; that before the sale R. G. Lamar, husband of the plaintiff, approached him, and requested defendant to place a mortgage on the land, and he (Wright) answered that he could procure $1,500 on the security of the first mortgage upon the land. To this R. G. Lamar assented, and agreed to raise all that would be necessary to pay the bid over $1,500. It was fully understood that the master was to be paid in cash, so that titles would be made to enable Lamar to make the mortgage to secure the $1,500, and that defendant was not to advance a dollar on the purchase; that he (Wright) bid off the property in his own name for $2,100, but with the full intention of transferring the bid to Lamar, whenever he paid the money he was to raise; that he certainly said or did nothing to prevent free and full competition in the bidding; that after the sale he had frequent interviews with Lamar, in all of which he (Wright) expressed his willingness to do all that he had promised, and urged Lamar to do what he had promised, and let the matter be closed up, and in order to help Lamar he discovered that he could procure $1,800 on the security of the land. Lamar did make efforts to raise the additional $300 necessary,—tendered him a note for that amount, signed by B. B. McCreery, which he (Wright) declined to take, declining then and always to advance any money himself in the business. Believes that Lamar then made an effort to raise the whole $2,100 from the Carolina Bank, and failed. The master was pressing to have the bid closed up, and, believing that Lamar could not comply with the terms of the arrangement, they went together to the office of Mr. Shand, who prepared, and they signed, the following written agreement: "Memorandum of agreement between George K Wright and Robert G. Lamar, made March 4, 1887, at 10 A. M. Whereas, George K. Wright bid off at foreclosure sale my tract of land of eighty acres, near eastern line of city

Digitized by Google

of Columbia, on sales-day, in February last, at twenty-one hundred dollars, but has not yet complied: Now, the said George K. Wright agrees to transfer his said bid to Mrs. Caroline M. Lamar, if the sum of twenty-one hundred dollars be paid to him in cash by three o'clock this afternoon; and the said Robert G. Lamar agrees, if said payment be not paid by 3 o'clock as aforesaid, that he will at once surrender possession to said George K. Wright, and that any holding of said land thereafter by said Robert G. Lamar will be as agent of said George K. Wright. Given under our hands and seals. R. G. LAMAR. [L. S.] GEO. K. WRIGHT. [L. S.] Witnesses: ROBT. W. SHAND. M. H. MOORE." This was the first and only written agreement upon the subject-matter of this land, and the first time, as far as defendant remembers, that plaintiff's name was mentioned. "That the defendant [as Wright states] still delayed, wishing to give said Lamar, or his wife for him, every opportunity to make this purchase, but finally, on March 17, 1887, defendant was compelled to assume the bid, and he complied by paying the entire amount in cash, all parties agreeing. He complied in his own name, with his own money, for his own benefit, and took deed to himself. Lamar surrendered the possession, sold to defendant a pile of manure thereon, and received pay therefor. Received from the master a portion of the proceeds of sale, and permitted the report of sales and disbursements to be confirmed without objection. Defendant never heard of any claim after that by R. G. Lamar or the plaintiff to any interest in the land, until it was published in the newspapers that defendant had sold the land at a profit, etc.; whereupon this action was brought by Mrs. Lamar.

The case was referred to the master, John T. Seibles, Esq., to take and report the testimony, which was done. Much of the evidence was parol, as to the alleged verbal agreement of Wright to bid off the land for Mrs. Lamar, the plaintiff. To this testimony the defendant objected that it was not admissible under the statute of frauds; but the master, holding that he had no right to decide the question, took down all of the testimony subject to objection, to be determined by the court above. It was voluminous, and of course cannot be reproduced here, but it is all printed in the record. It may, however, contribute somewhat to clearness to give a very condensed outline of it. In brief, it appeared that Wright, under some arrangement, expected to place a first mortgage upon the land to secure some advance to be made for a friend, and, with a view to such transaction, he was to bid for the property when it was offered for sale, which he did, and it was knocked off to him at $2,100. That the terms of sale were not complied with, but remained unclosed, until March 17, 1887, when Wright assumed the bid, and complied with the terms of sale; paying his own money and taking titles in his own name. Up to that time, as Wright claimed, the bid was left open to allow R. G. Lamar time to comply with the agreement, but they differed essentially as to what were the terms of the verbal arrangement; Lamar claiming that Wright agreed to bid off the land for Mrs. Lamar, and to advance the whole purchase money, and secure himself by a first mortgage on the property, while Wright most positively affirms, both in his answer and in his testimony, that he never agreed to advance a dollar of his own money, but that, being a land agent, he agreed to advance for a customer as much as $1,500 on the land, and that Lamar was to raise the remainder out of his money, homestead or otherwise; that after the sale Wright enlarged the amount to be procured by him to $1,800; that R. G. Lamar made efforts to raise the $300, and offered a note for the amount, signed by B. B. McCreery, which was declined. Wright informed Lamar that the parties were "cursing him" for not closing the purchase, and Lamar said: "If I cannot arrange the $300 in three or four days' time I will surrender the place." Finally they went together to the office of Mr. Shand, and the written agreement of March 4, 1887, was executed. Soon after R. G. Lamar sold the manure on the place to the defendant, and surrendered the possession.

The cause came on to be heard by Judge KERSHAW, who held that all the testimony was admissible; and, upon his view of it, granted the relief prayed for, saying, among other things, that "the answer shows that there was some agreement between the defendant and Lamar, for the purpose of securing to him the benefit of the sale, and this should open the door to the admission of evidence to show the whole truth in regard thereto, and for whose benefit it was intended. In consequence of that agreement having been mentioned, an understanding prevailed among the interested bidders at the sale, to some extent, that the defendant was bidding for the family, in consequence of which some were induced to refrain from bidding who would otherwise have offered more for the land than it was bought for by defendant. Under these circumstances, the parol evidence will be admitted, and the purchaser be charged with a trust upon the land, according to the principles declared in Kinard v. Hiers, 3 Rich. Eq. 423; Schmidt v. Gatewood, 2 Rich. Eq. 178; and McDonald v. May, 1 Rich. Eq. 95. * * * This case, therefore, does not fall within the statute. The parol evidence is admissible to show the previous agreement, as one of the means whereby an unjust and inequitable advantage in the sale was secured to defendant, and the property will therefore be charged with a trust in favor of the plaintiff," etc.

From this decree the defendant appeals to this court upon 14 grounds, (1 and 2 of which, challenging the correctness of certain findings of fact, are very long, and will be omitted,) charging error as follows: "(3) That his

Digitized by Google

honor erred in holding that defendant's purchase was charged with a trust in plaintiff's favor. (4) That he erred in receiving parol testimony to establish a trust in land, under the facts of this case, and in holding that this case was outside the statute of frauds. (5) That he erred in holding that, because defendant admitted an agreement with Mr. Lamar, parol evidence was admissible to prove a different agreement with another person, (Mrs. Lamar,) or that Lamar was acting only as agent for his wife. (6) Having found that R. G. Lamar was acting for his wife, his honor erred in not finding that such agency continued throughout the negotiations, and in not holding plaintiff to acts done and agreements made by R. G. Lamar with defendant. (7) That he erred in permitting plaintiff to reap the advantage, if any, derived from statements made at the sale by R. G. Lamar, (who the plaintiff claims was her agent, and through whom she claims,) intended by said R. G. Lamar to discourage bidding. (8) That his honor erred in holding that plaintiff was not bound by the written agreement. (9) That he erred in construing the written agreement to affect only the possession of the land, and, in arriving at such conclusion, he has further erred in charging defendant with an agreement which finds no support whatever in the testimony. (10) That his honor overlooked the testimony of R. G. Lamar himself, and did the defendant great injustice by the following finding: 'It [the agreement] seems to have been resorted to by defendant as a means whereby to get possession of the land, for he was satisfied that Lamar could not raise the money in the few hours to which he was limited. It was, under the circumstances, an unreasonable abuse of the advantage of his position and the supposed necessities of Lamar to exact such an agreement, but it succeeded.' (11) That his honor does defendant great injustice, and disregarded the concurrent testimony of all parties, in holding that 'the terms of the sale were one-third cash, and the balance on one and two years. Under the circumstances, the land being worth much more than defendant's bid, it was inequitable in him to demand of plaintiff the payment of the purchase money. It was an abuse of his position, and a breach of his duty to plaintiff, who was entitled to a reasonable time, with reference to the conditions of the sale, to comply with her contract with defendant.' (12) That he erred in holding that the plaintiff had an interest in the land, and in permitting her to redeem it, or, on her failure to do so, in directing a sale. (13) That he erred in failing to decree, upon the sale ordered by him being had, defendant should have judgment against plaintiff for the deficiency, if any," etc.

There is no doubt that Wright has a chain of paper title,—legal title. Section 2019 of the General Statutes ("Frauds") declares "that no action shall be brought upon any contract or sale of lands, or any interest in or concerning them, * * * unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, signed by the parties to be charged therewith," etc. This action is brought to set up an interest in lands, without any such agreement in writing, and, by the great conflict in the parol testimony, would seem to afford another proof of the wisdom of the law. There are, however, well-established exceptions. One is where a party pays the money of another, and takes title in his own name. That raises what is called a "resulting trust" in favor of the party whose money is so used, and the facts may be proved by parol. Wright paid for this land with his own money, and there can be no resulting trust here. Ex parte Trenholm, 19 S. C. 126; Nesbitt v. Cavender, 27 S. C. 1, 2 S. E. Rep. 702. There is still another exception, when the legal title is acquired under such circumstances as to avoid the sale or to impress upon it a constructive trust *ex maleficio*. In order, however, to make out such a case, it is necessary to show actual fraud, such as misrepresentations, concealments, etc., and we may add, where a purchaser at a public sale enables himself to obtain the legal title at less than the value of the property, by declaring, truly or falsely, that he is bidding for others, and not for himself, as in the cases of McDonald v. May, 1 Rich. Eq. 98, and Kinard v. Hiers, 3 Rich. Eq. 424, cited in the circuit decree. In such case parol testimony is admissible, for the reason that, in contemplation of law, there has been no legal sale, and there is really no title. The property still remains as if there had been no sale, and the trust is declared in favor of him who was the owner before the fraudulent sale. As Chancellor JOHNSTON, with his usual clear discrimination, said in McDonald v. May, supra: "The establishment of an agreement is not the essential feature of this case. Let it be admitted that there never was an agreement of any description between the parties. The bill not only charges that there was an agreement, but that May was enabled to make his purchases by his statements that he was acting for McDonald. * * * The statute of frauds, it appears to me, has no application here. This branch of the case does not proceed upon the contract, does not look to an execution of the contract, but founds the remedy upon a fraud," etc.

If the action had been brought by R. G. Lamar to set aside the sale, for his benefit, parol testimony would have been admissible as to any matter touching the *bona fides* of the sale. As such, however, is not the character of the action, we will not, of course, undertake to decide anything as to the force of the testimony in that aspect. But we think we ought to say that we do not see the evidence justifying the conclusion that the defendant Wright obtained title to the land, for less than its market value, by representing himself as bidding for Mr. or Mrs. Lamar. We

Digitized by Google

have read the testimony carefully, in order to ascertain whether, at the sale or before it, he declared directly or indirectly that he would bid, or was bidding, for any other person than himself; and we have failed to find any such proof. Wright denies it positively, and, as it seems to us, he really had no motive to attempt to chill the biddings; for, as the arrangement stood at that time, he was not to get the land itself, but simply a mortgage upon it to secure a certain amount to be loaned. He did say, after the sale in general terms, that he had bought for R. G. Lamar, which, however, was not inconsistent with his understanding of the arrangment, which it seems he expected to carry out, and for that purpose kept the bid open for more than a month. Besides, mere opinions as to the market value of land are more or less uncertain, and apt to be somewhat speculative. From the homestead proceedings, and the other evidence on the point, we are inclined to think that the market value of the land, at the time of the sale, was somewhere about $2,500; for within a year after, when improvements had been placed upon it to the extent of $1,000, it was bargained at private sale to the trustees of the university for $3,500, and the trade only broken up by notice of this proceeding. If the sale was affected by anything which fell from Mr. Lamar, as to the defendant Wright bidding for Mrs. Lamar, of course they could not complain of that. Baggott v. Sawyer, 25 S. C. 405.

It will be observed, however, that the action is not brought by R. G. Lamar to set aside the sale as fraudulent and void; but by his wife, Mrs. Carrie M. Lamar, as a separate and distinct person, not to set aside the sale, but, assuming, its validity, to give to her the advantages supposed to arise out of it. If the sale were set aside, it would not inure to her advantage. Fraud in the sale is no part of her case. We do not clearly see how the sale can be void for one purpose and good for another. It is elementary that no right can arise out of, or be engrafted upon, that which is void for fraud. We cannot think there is anything in the allegation that it was a distinct fraud upon the plaintiff to require the cash, when the sale, as to two-thirds, was upon a credit; for a first mortgage could not be given until title was executed, and that could not be expected until the money was paid. All agree that such was the express contract of the parties. But, be that as it may, it is quite clear that Mrs. Lamar was a stranger,—a new party. Before the sale she had no interest in the land, and cannot now possibly have any, except through the alleged agreement of Wright that he would buy it for her. That agreement was not in writing, within the statute of frauds, and parol evidence to prove it was inadmissible. Schmidt v. Gatewood, 2 Rich. Eq. 177; Johnston v. La Motte, 6 Rich. Eq. 351; Harrison v. Bailey, 14 S. C. 334; Howell v. Howell, Harp. Eq. 158; Burden v. Sheridan, 14 Amer. Rep. 505; Purcell v. Miner, 4 Wall. 517; 1 Perry, Trusts, § 134.

The doctrine is so well put in Schmidt v. Gatewood, supra, that we do not think it can be necessary to do more than state it: "It is alleged that this purchase was made at a sacrifice, under an agreement on the part of the plaintiff that the family should have the benefit of it. The evidence rests in parol. It is argued that the family, trusting to the agreement, permitted the plaintiff to purchase at a sacrifice; that to allow him to retain the property, under such circumstances, would encourage fraud; and that, upon this distinct ground, independently of the statute of frauds, a trust should be decreed. Undoubtedly there are cases (such as McDonald v. May, 1 Rich. Eq. 91) where a party, who enables himself to purchase at an under-rate by representing that he is buying for another, is liable to have his purchase set aside for fraud. There are cases where competition is fraudulently reduced or destroyed. In such cases it matters not whether there was an agreement or not. Indeed, in the latter case, where, of course, the representation is wholly false, that circumstance serves only to enhance the fraud complained of. Such cases as these steer entirely clear of the statute of frauds. The evidence of the purchaser's representations is received, not for the purpose of substantiating the supposed agreement, but for the purpose of showing the means by which he effected his fraudulent design, and when received it is employed, not for the purpose of enforcing the contract, but for that of setting it aside. But no such circumstances have been developed in this case. The fraud insisted on consists merely in the non-fulfillment of the alleged agreement, and depends, of course, entirely upon the question whether there was in fact an agreement to be performed, and that preliminary fact the statute will not allow to be established by parol," etc. We can add nothing.

But there is another view which, as it seems to us, must lead to the same result. Wright says that he never met the plaintiff, Mrs. Lamar, nor exchanged a word with her during the negotiations about the sale and loan; that Mr. Lamar always spoke in the first person as to what he would or would not do, and he (Wright) thought he was acting for himself,—certainly until March 4, 1887, when he desired the name of his wife inserted in the agreement then signed. But Mr. Lamar says that in the negotiations he was always acting for his wife, and we see that she did endeavor to assist him in raising the $300 required to make the purchase money $2,100. Now, taking that view, we think we are bound to consider that he was still acting for her when he signed the agreement that, if the money was not paid by a certain hour, he would surrender the possession, and did so. We find it impossible to concur in the construction and effect given to that paper, that it did not bind Mrs. Lamar; that Mr. Lamar only agreed to surrender his possession as

Digitized by Google

distinct from that of his wife; and that such surrender could in no wise affect plaintiff's rights, for they were in no way dependent upon her possession. We think it is not unusual for the husband, accustomed to outdoor business, to act in such matters as the agent of his wife, considered as a separate person. But we cannot doubt that, such agency in a particular business being once established, it should, as in an ordinary case of principal and agent, continue until the particular business is ended or the agency revoked. As it seems to us, the husband, acting for his wife, could not, as to a particular act, disclaim the agency, and assume the personal responsibility, and that the said agreement was binding upon the plaintiff. That paper was the first written agreement upon the subject, and unfortunately the parties were not able to comply with it. The judgment of this court is that the judgment of the circuit court be reversed, and the complaint dismissed.

MCIVER, J., concurs.

SIMPSON, C. J., (*dissenting.*) The facts of this case, as found by the circuit judge, are as follows: The real estate in question was sold at a foreclosure sale as the property of R. G. Lamar, the husband of the plaintiff, Carrie M. Lamar. It was bid in by the defendant, George K. Wright, not for himself, but for the plaintiff, under an agreement made same days before the sale with the said R. G. Lamar as agent of his wife; the purchase money to be advanced by Wright, who was to secure himself by a mortgage on the premises. That the property was knocked down to Wright at $2,100, a reduced price, on account of the fact that it was understood by some persons at the sale, who would otherwise have made the property bring a larger price, that Wright was buying for Mrs. Lamar. That after the sale, as above, Wright informed Lamar that he could advance but $1,800 of the purchase money, and that the remainder, $300, would have to be raised by Lamar. This sum Lamar not being able to raise in cash, tendered a note for the $300, with 10 per cent. interest added, indorsed by B. B. McCreery. This was declined by Wright, who then required R. G. Lamar to sign a written agreement with him, "reciting the bidding off of the land, and that the same had not been complied with, whereby the defendant agreed to transfer his bid to the plaintiff if the sum of $2,100, be paid in cash by 3 o'clock that afternoon, and the said R. G. Lamar agreed, if said payment was not made by 3 o'clock as aforesaid, he would at once surrender possession to said defendant." This was done without consulting Mrs. Lamar, the plaintiff. R. G. Lamar failed to raise the $2,100 by 3 o'clock of the day mentioned, and a few days thereafter the defendant, Wright, paid the whole amount of the purchase money, $2,100, and took absolute titles to himself; and, upon application to R. G. Lamar to that end, he received possession of the land, to-wit, in March, 1887. In February, 1888, the plaintiff made a tender of $2,232, the purchase money and the interest at the rate of 10 per cent., declaring herself ready to pay to the defendant other expenses of titles, etc., and demanded titles, which being refused, the action below was commenced, etc.

Now, the *first* question which arises is, are these facts above to be regarded as the facts of the case, to which, and upon which, the law must be applied, and the rights of the parties adjudicated? This depends upon the application of the following rule, which has been uniformly acted upon by this court, and which is the rule in all courts where the law is properly administered, to wit: That the findings of fact by a circuit judge must be taken and regarded as the facts of the case, unless said findings are either entirely without evidence in their support, or the great weight of the testimony is against them. Now, applying this rule, what do we find? There can be no dispute as to the finding that the defendant, Wright, did not bid off the land in the first instance for himself. This is testified to by R. G. Lamar, admitted in the answer of the defendant, and fully appears from the fact that Wright did not take titles to himself until some time after the bidding, when several efforts had been exhausted to make arrangements for the titles to be executed to Mrs. Lamar.

Second. There was testimony that Wright was not only not bidding for himself, but that he was bidding for Mrs. Lamar. R. G. Lamar testifies positively that some days before the sale he called upon Wright, and asked him if he could not make some arrangement to buy in the place for Mrs. Lamar. That Wright asked what property Mrs. Lamar had, and he stated that she had lands in Kershaw county, from which she could reimburse him, and after several interviews the arrangement stated above was made. True, Wright denies this, and this produces a conflict, but we cannot say that there is no evidence to support these findings, nor that the great weight thereof is against them. There was some testimony, also, that the land would have brought more than it did, but for the fact that certain parties who had intended to buy heard in some way that it was to be bid in for Mrs. Lamar. John Crowly said that he was present at the sale, and was there with the view of buying it, and was prepared to give $2,500, but, hearing that it was to be bought for Mrs. Lamar, did not make a bid. See, also, testimony of Mr. Lorick, to the same effect. There is certainly testimony also to the facts that after the sale Wright declined to carry out the understanding at first agreed upon, and suggested one or two others, as found by the circuit judge, more and more stringent, none of which Lamar could comply with; and, finally, that he paid up the whole purchase money, and had the titles executed to himself, and took possession. It is said, however, that all of this

Digitized by Google

testimony was verbal, and therefore incompetent in this case, it being a case where an interest in land is attempted to be set up upon contract, which it is contended should have been in writing under the statute of frauds, and could only be proved by the writing. It is true that the statute of frauds requires all contracts for the sale of land, or of any interest therein, to be in writing, or else they are void; and in a contest turning upon a contract for the sale of land, or of any interest therein, the writing must be produced, verbal testimony being utterly incompetent. But does this contest, between the plaintiff, Mrs. Lamar, and the defendant, Wright, depend upon, or involve in the least, a contract for the sale of land, or of any interest therein, by Wright to Mrs. Lamar? We do not think so. According to the facts found by the circuit judge, Wright was not to become a purchaser for himself, nor even a purchaser at all. He was to bid at the sale, it is true, not for himself, however, but for Mrs. Lamar. It does not seem that it was ever intended that titles were to be executed to him, but they were to be executed to Mrs. Lamar, who was to make payment of the purchase money,—amount of funds to be advanced by Wright,—which she was to secure to him by a mortgage of the premises, which could only be done by her getting the titles. Wright said to Lamar, in the first interview, that he thought the arrangement could be made by putting a mortgage on the place; so that the action below did not involve the enforcement of a contract for the sale of land, or of any interest therein, and therefore it steers clear of the statute of frauds. Instead of being an action to enforce a contract for the sale of land, it was an action by a principal against an agent, where the agent has taken titles to himself, in a purchase where he obtained an advantage by the fact that he was understood to be buying for his principal. Such being the character of this case, it differs from those cases relied upon by the respondent, where the facts brought them under the statute of frauds, and excluded verbal testimony to enforce the agreement of sale, though the testimony, under certain circumstances, even in such cases, might be allowed to set aside the sale as fraudulent. Under the facts as found by the circuit judge, I think he was right in charging Wright with a trust, according to the principles declared in the cases cited, to-wit: Kinard v. Hiers, 3 Rich. Eq. 423, and McDonald v. May, 1 Rich. Eq. 95. I cannot concur in the idea that the written agreement entered into by Wright and R. G. Lamar, by which Lamar agreed to give up the premises unless he raised the entire purchase money, $2,100, by 3 o'clock, was binding upon the plaintiff. R. G. Lamar testifies that this paper was executed without the knowledge of Mrs. Lamar, and it does not seem to me that it was within the scope of his original agency, which was to get Wright to bid in the land for her. More than this, it was a very stringent agreement, and made under circumstances of pressure, which does not appeal to the court for support. I think the judgment below should be affirmed, and therefore I am unable to concur in the opinion of the majority.

(30 S. C. 617)

MILLS v. CARRIER.

(*Supreme Court of South Carolina.* April 2, 1889.)

ACCOUNTING—EVIDENCE.

In an accounting, evidence that certain items were, in an effort to arbitrate, admitted to be substantially correct is sufficient to sustain an allowance of them by a referee.

Petition for rehearing. For former opinion and statement, see ante, 350.

Thomson, Nicholls & Moore, for appellant. *Bomar & Simpson*, for appellee.

SIMPSON, C. J. The petition for a rehearing of this case is based upon the statement that this court allowed two items proved in Exhibit B in favor of defendant, to-wit, a draft of Brem, Brown & Co. for $6, and two drafts of Melster, aggregating $64.53, when there was no testimony supporting them. The referee allowed these items, we suppose, upon the testimony of Mr. G. W. Nicholls, attorney, who stated that, when the matter was attempted to be arbitrated, there was no contest over these items; on the contrary, that these, with others, were substantially admitted as correct. This was sufficient. As to the other ground, to-wit, that the judgment of the court in favor of Carrier, the defendant, should have been subject to a future settlement of the copartnership affairs, there is nothing in the appeal or exceptions which would have authorized such a decree. It is therefore ordered that this petition be dismissed.

(31 S. C. 600)

STODDARD v. ROLAND.

(*Supreme Court of South Carolina.* April 17, 1889.)

REINSTATEMENT OF APPEAL.

An appeal dismissed under rules one and two of the supreme court for failure to file return will be reinstated, where it appears that an "agreed statement," signed by the parties, was filed by consent with the clerk as a return, and given to the printer, who failed to print the same in time, and the appeal was taken in good faith.

Motion to reinstate appeal.

Ball & Watts and *C. J. Hunt*, for appellant. *Johnson & Richey*, for respondent.

SIMPSON, C. J. This is a motion to reinstate the appeal in this case, which was dismissed by the clerk of the court, under rules one and two, because of failure to file the return, as required by said rules whereby appellant was deemed to have waived his appeal, and, on motion by respondent's attorneys, an order was entered dismissing the appeal. The appellant bases his motion to restore the appeal on the following grounds: That the notice and grounds of appeal in

Digitized by Google

the case were served upon the respondent on the 4th of October, 1888; that on the 28th of October, following, the appellant made a case, and served the same within the proper time on the respondent's attorneys, who claimed a day or two to examine the case; that appellant's attorney called on the respondent's attorneys several times for the purpose of having a statement of the case agreed to for the return for the supreme court; that respondent's attorneys consented to the proposition to file an "agreed statement" as the return for the supreme court, and subsequently signed the same; that this paper was filed in the office of the clerk of the court of common pleas, and was given to the printer on the same day; that the printer failed to print the same in time for the next term of the supreme court, and the respondent's attorneys declined to consent to the docketing of the appeal; that the appeal was taken in good faith; and that due diligence as far as possible was used in the prosecution of the appeal. On hearing the motion, and the statements and arguments of counsel on both sides, the court granted the motion, under the circumstances, and ordered that the appeal be reinstated.

(31 S. C. 600)

HARLE *v.* MORGAN *et al.*

(*Supreme Court of South Carolina.* April 17, 1889.)

Motion to reinstate appeal.

For opinion on dismissal, see ante, 659.

Calvert & Wilson, for appellants. *Thomson, Nicholls & Moore*, for respondent.

PER CURIAM. This is a motion for an order relieving defendants (appellants) from the order heretofore granted by the supreme court dismissing the appeal herein because of the failure of appellants to perfect the same as required by law, on the ground that their failure to do so was due to the mistake, inadvertence, and excusable neglect of their attorneys, etc. The motion was based upon affidavits, and arguments were made *pro* and *con*. The supreme court decides as follows: This action is based upon section 329 of the Code, which authorizes the supreme court to permit such acts to be done necessary to perfect an appeal which have been omitted through mistake or inadvertence. There is no evidence in the case sufficient to satisfy the court that the omission to serve exceptions within the prescribed time resulted from either mistake or inadvertence. Motion dismissed.

(31 S. C. 600)

TALBIRD *v.* WHIPPER. LYNCH *et al.* *v.* WILDER *et al.* GREAVES *v.* GRAHAM.

(*Supreme Court of South Carolina.* April 26, 1889.)

APPEAL—FILING RETURN.

No unavoidable causes, nor mistake or inadvertence, being shown, under act S. C. Dec. 24, 1880, § 2, for appellants' omission to file the return on appeal, or an agreed statement in writing in lieu thereof, as allowed by act March 5, 1875, within the time required by rule 1, the appeal must be dismissed, no matter how important the case.

Motion to reinstate appeals from common pleas circuit court of Beaufort county.

S. J. Lee and *A. G. Magrath*, for appellants. *W. J. Verdier*, for respondents.

PER CURIAM. The clerk dismissed the appeal in these cases under rule 1, on the application of the respondents' attorney, April 15, 1889. The appellants' attorneys moved to reinstate the appeals, but the respondents' attorney objected, because eight days' notice had not been given of such motion. The appellants' attorneys, on account of the gravity of the case, and under the circumstances, obtained a rule to show cause why the appeal should not be reinstated, which was served upon the attorney for respondent. Upon the return of this rule the supreme court heard argument *pro* and *con* on the motion to reverse the ruling of the clerk of the court, and to reinstate the appeal on the docket. The supreme court decides as follows: On account of the circumstances surrounding the cases it would be a pleasure to the court to grant relief on this application, but it cannot be done without ignoring the rules of the court. The return is the foundation of every appeal. It is necessary to be filed to give jurisdiction to the court, besides other essential reasons therefor. Rule 1 designates the time within which the return must be filed. Rule 2 defines what shall constitute the return. Under the act of March 5, 1875, entitled "An act to facilitate and save expenses in appeals," (15 St. 862,) the parties may agree upon a statement of the case, which may be filed in the place of the return specified above. Undoubtedly this act contemplated that such agreement should be in writing. This is in lieu of the return under rule 1. In this case neither requirement has been complied with. There has never been any agreement between the parties, and from their correspondence it is clear that no such agreement was ever contemplated. Neither a return under rule 1 nor under the statute of 1875 having been filed, the rule declares the appeal abandoned. Rule 1 provides that, upon it being made to appear to the satisfaction of this court that such default on the part of the appellant has arisen from unavoidable causes, he may on motion, upon at least eight days' notice, apply to this court for an order reinstating the appeal. Section 2, of the act of December 24, 1880, provides that when any party shall omit, through mistake or inadvertence, to do any act or acts necessary to perfect an appeal or stay proceedings, the supreme court may, in their discretion, permit such act or acts to be done at any time to perfect the appeal, on such terms as may be just, etc. Neither unavoidable causes for the default of the appellants, nor mistake or inadvertence, has been shown. The court is always anxious to relieve parties whenever they can show proper

Digitized by Google

cause; but, none having been shown in this case, the court is obliged to adhere to its rules, however unpleasant. Motion refused.

(31 S. C. 602)

BALLEW, Sheriff, *et al.* v. ANDERSON.

(*Supreme Court of South Carolina.* May 20, 1889.)

APPEAL—FILING RETURN.

The fact that appellant relied upon a local practice in his county of agreeing upon a "case," and filing a printed copy thereof with the clerk of the supreme court within a reasonable time, will not excuse his failure to file a return or an agreed statement in writing, as allowed by act S. C. March 5, 1875, within the time required by rule 1.

Motion to reinstate appeal from common pleas circuit court of Laurens county.

Ball & Watts, for appellant. *Geo. Westmoreland*, for respondents.

PER CURIAM. This is a motion to reinstate an appeal dismissed by the clerk of the court, under rules 1 and 2, for failure to file the return required. The appellant makes affidavit that under the practice in appeals from his county it has been generally the rule to agree upon a "case," print the same, and file the printed copy with the clerk of the supreme court as the return prescribed by rule 1; and that he, at the time of filing the brief in this case, believed he was complying with rule 1 as to appeals. He furthermore states that, from conversations with respondents' attorneys, he was under the impression that service of a case and printing of brief in a reasonable time would be sufficient. The supreme court decides that, not having filed the return, nor an "agreed statement" of the case, as allowed by act of March 5, 1875, (15 St. 862,) within the time required by rule 1, he must be deemed to have waived his appeal, and the clerk was not in error in entering the order dismissing the appeal. Motion refused.

(31 S. C. 602)

PICKENS v. QUILLIAN *et al.*

(*Supreme Court of South Carolina.* May 27, 1889.)

APPEAL—JURISDICTION—RECEIVERS.

Until the return on appeal has been filed, the supreme court has no jurisdiction to grant leave to apply to the circuit court for appointment of a receiver to take charge of the subject-matter of the action.

Appeal from common pleas circuit court of Pickens county; NORTON, Judge.

Child & Carey, for appellants. *Green, Wells, Orr, & Boggs*, for respondent.

PER CURIAM. This is a motion, upon affidavits, for leave to apply to a circuit judge for the appointment of a receiver to take charge of certain mortgaged premises described in the pleadings. An action was commenced in the court of common pleas for the foreclosure of said mortgage, which was given to plaintiff to indemnify him against the payment of certain notes given to one Lenhardt by the defendant Quillian, on which the plaintiff, Pickens, is surety; and the circuit judge filed his decree allowing the plaintiff to amend his complaint by making the said Lenhardt a party defendant thereto, etc. From this decree the defendant Quillian gave notice of appeal, on the 29th April, 1889, but has not filed the return in the supreme court. The supreme court adjudges that, no return having been filed in this court, the jurisdiction of the supreme court has not attached.

(31 S. C. 602)

VAUGHN v. MORGAN *et al.*

(*Supreme Court of South Carolina.* May 31, 1889.)

APPEAL—DISMISSAL.

Where it does not appear that appellant's omission to file points and authorities in this court as required by rule 8 occurred through mistake, inadvertence, or other excusable cause, the appeal must be dismissed, under rule 11.

Appeal from common pleas circuit court of Spartanburg county.

Motion to dismiss appeal.

Nicholls, Calvert, Carlisle, & Hydrick, for appellant. *Duncan & Sanders*, for respondents.

PER CURIAM. This is a motion to dismiss the appeal, on the ground that rule 8, in reference to furnishing points and authorities, had not been complied with. It is conceded that there has been a failure on the part of the appellant to file the points and authorities in accordance with the requirements of rule 8. The appellant urges that, if there has been any omission on his part, the same has been caused by his mistaken ideas of the rules; that this appeal is taken in good faith, and deponent believes there is merit in his appeal; that there has not been any waiver or abandonment or intention to waive or abandon the appeal; that, if the court should hold that there has been any failure to follow the letter of the rules of court, he asks that the court will allow him to do whatever is necessary to perfect his appeal. The supreme court decides that, it not appearing that this omission to file the points and authorities has occurred from mistake, inadvertence, or other excusable cause, rule 11, relied on by respondent, requires the dismissal of the appeal. Motion granted.

(82 Ga. 776)

BAKER v. STATE.

(*Supreme Court of Georgia.* May 15, 1889.)

CONTEMPT—WHAT CONSTITUTES.

A court is not dissolved by a mere recess or necessary adjournment from one day to the next, and misbehavior affecting public justice, in the court-room, and in the immediate presence of the judge, while he is attending there to resume business when the hour of recess expires, is misbehavior in presence of the court, and may be punished summarily as a contempt of court; especially if the misbehavior is by a suitor who has called attention to a pending case, and is discussing it in the presence of some of the jurors who may have to try it.

(*Syllabus by the Court.*)

Digitized by Google

Error from city court of Cartersville; NEEL, Judge.

The official report is as follows: "The rule against Baker was as follows: It appearing to the court that the cause of Graham & Graham v. Thos. H. Baker, pending in said court, (the city court of Cartersville,) was subject to be called on the morning of the 14th of September, 1888, for trial, and that just before the meeting of the court, and in the court-room, said Baker was discussing, in the presence of the court and jurors, before whom the cause would be tried, if tried, the said cause and the plaintiffs thereto, greatly to the prejudice of plaintiffs and their cause, and that said Baker was instructed by the court that this was highly improper, and refused to pay attention to the court, and still insisted upon talking as aforesaid, and that the court then informed said Baker that the court had power to hold him for contempt, and said Baker, though thus again admonished, still insisted and would not desist from said discussion, it is ordered that he show cause why he should not be held in contempt. The court ordered, as a statement of what occurred at the time of the alleged contempt, the following statement to be made a part of the rule: Baker, about six or seven minutes before the time appointed for the court to begin business for the day, in the presence and hearing of several of the jurors, asked the court if the case of Graham & Graham v. Baker would be tried that day. The court told him there was a case on trial, and that the court had given Graham leave to go home to a sick child the evening before, but expected him to be in court that morning, and if his family were well enough the court would try his case next after the one then on trial. Baker, in a tone of complaint, then said Graham didn't want to try, and didn't intend to try, that case this court. The court then said to him that the jurors who might have to try the case were sitting around, and that it was not proper to refer to the matter as he had done; and further stated that if he could show that Graham's family did not require his attention the court would force the case to trial. Baker replied that he could make no counter-showing against a man who looked like he was half asleep or half dead all the time. The court then told him that Graham had obtained leave of absence for the evening before, not on his own account, but for sickness in his family. Baker then said Graham did not want to try, because he knew Baker would get judgment against him on a set-off; that he got judgment against him (Baker) in a case tried some days before, and wanted to put this one off until he could collect said judgment out of him (Baker.) During the delivery of this last speech the court again requested Baker to desist from such talk before the jury, stating to him that it was improper; but, notwithstanding the court's protest, he continued until he had finished the statement as above given, and then said: 'This jury will have to be governed by the evidence in the case, as sworn from the witness stand, and not by what I say here. I have got as much right to talk as you have. Court is not in session, and you have no more power than I have.' The court then arose, and said to him in a peremptory manner that he must stop that sort of talk, or the court would be called to order, and Baker called on to show cause why he should not be attached for contempt. Baker then started out of the court-house, saying something as he left, which the court did not understand. All the above occurred about from five to seven minutes before the exact time court was to begin business, to which time the court had taken a recess on suspending business the evening before. Graham was representing his own case, and neither he nor his son, who was his partner, was present. Baker demurred to the rule on the ground that there were no such allegations of fact therein as to require him to answer, or as to make against him a case of contempt, or a case to justify this proceeding against him. As to the amendment to the rule above set forth he says that the charges and facts therein alleged are true. But in explanation of them he says that he knew he would be wholly unable to make any counter-showing to Graham & Graham's motion for a continuance, mentioned in said rule, because he knew the facts upon which said motion was predicated were susceptible of easy proof, and he knew that Graham & Graham would continue the case because E. D. Graham, the senior member of the firm, had said in his presence that he intended to continue it, and for this reason respondent knew that the jurors mentioned would not be charged with the trial of the case. He disclaims having any object or purpose to prejudice the case of plaintiffs, or of being in either actual or constructive contempt of the judge or the court,—if, under the circumstances, the judge could be considered a court. He says he came to the court-house to learn if the leave of absence granted to Graham the evening before on account of sickness in his family had been extended, and the case continued, as it afterwards was. Baker was adjudged guilty, and sentenced to pay a fine of $25, or be imprisoned two days. To this judgment he excepted."

Baker & Heyward, for plaintiff in error. *T. W. Harris*, Sol. Gen., and *T. W. Akin*, for defendant in error.

BLECKLEY, C. J. The official report of the facts is prefixed to this opinion. The constitution of the state provides that the power of the courts to punish for contempts shall be limited by legislative acts. This provision has been in every constitution which the state has adopted since that of 1861, and was in that also. The statute on the subject (Code, § 4711) is similar to the act of congress passed in 1831. It declares that "the power of the several courts of law

Digitized by Google

and equity in this state to issue attachments and inflict summary punishments for contempts of court shall not extend to any cases except the misbehavior of any person or persons in the presence of the said courts, or so near thereto as to obstruct the administration of justice, the misbehavior of any of the officers of said courts in their official transactions, and the disobedience or resistance by any officer of said courts, party, juror, witness, or other person or persons, to any lawful writ, process, order, rule, decree, or command of the said courts." The conduct imputed to Dr. Baker as a contempt of the city court of Cartersville took place in the court-room, during the time appropriated to the regular sitting of the court, at September term, 1888, but in the recess of the court for necessary rest and refreshment; business having been suspended the previous afternoon or evening, and the time appointed by the judge for resuming business in the morning not having arrived by six or seven minutes. The matter of the time will, perhaps, be put in the truest light by saying that, the previous day's work having been concluded, the court adjourned over to a stated hour next morning, and the misbehavior occurred from five to seven minutes before the recess expired. The judge had arrived, and was in attendance for the purpose of resuming and proceeding with judicial business, part of which was to conclude an unfinished trial. Some of the jurors who had been impaneled for the week were also present. Dr. Baker, himself a suitor in the court, was there to inquire about or look after his case. The place was the temple of justice, the time was term-time, and the business in contemplation by the judge, jurors, and party was court business. Dr. Baker then and there entered upon the subject of his case, and insisted on discussing it, on making remarks about it to the judge, and in the presence and hearing of the jurors. What right did he have to do this if the court was not in session? And what right did he have to do it in an improper manner if it was in session? It was urged in argument before us that he was merely complaining to the judge, and in so doing was in the exercise of a legal right. But what law confers on a suitor the right to converse about his case with the judge out of court? Are the state's judges to be questioned by suitors about their cases, and listen to complaints, elsewhere than in court? We think not. The office of judge would be intolerable to the holder, and degrading to the state, were the incumbent subjected by law to personal and private approach, questioning, and harassment at the will of anxious and discontented suitors. The only place for intercourse with a judge touching business pending in court is the place where the court sits, and the only time for it is during the sitting. And we think that whenever a judge of the city court is in the court-room during term, and a suitor there calls upon him to deal in any manner with, or answer questions concerning, a pending case, the court is in session respecting that case, to the extent at least of keeping the suitor in order in discussing it or making remarks about it, and that any misbehavior of the party then and there occurring takes place in the presence of the court, within the spirit and meaning of the statute above recited. Moreover, it is matter of necessity that the court shall be deemed in session throughout the term for the purpose of keeping order and maintaining decorum in the halls of justice. The orderly assembling of the court for the transaction of business after each temporary recess would otherwise be impracticable. If the judge had to scramble with a mob of suitors or others to reach the bench every morning, and then could punish none of them for the indignity which they had offered the law and the public authority, because he had not succeeded in formally opening the court for the day's business before he was insulted, he would soon become powerless to administer justice. Of what avail would be the power of protecting the court against contempt after the judge actually seated himself on the bench, if while attending in the court-room for the purpose of so seating himself he could not command order and enforce it by summary punishment? To the end that there may be a court held at all it is necessary that the judge shall have the sanctity of the law's majesty about him while he waits officially in the temple of justice, both before and after each daily session. The court is not dissolved by a mere recess; and misbehavior affecting public justice, in the court-house, and in the immediate presence of the judge, especially by a suitor, is misbehavior in presence of the court, and may be punished summarily as a contempt of court. In State v. Garland, 25 La. Ann. 532, an attorney who read abusive language towards a member of the court, and committed an assault upon his person during a recess, and in the court-room, under the pretext of resenting what he had said or done when on the bench, was adjudged guilty of a contempt of court, and punished accordingly. The report in that case states that the court had not adjourned, and in the present case it is not expressly declared in the record that the court had adjourned the previous evening or afternoon, but we take it for granted that it had done so, as that is the usual course of business. We think, however, that necessary adjournments from day to day are but recesses in the sittings, and that when the judge returns to the court-room to resume business the court at once has "a presence," and that disorder then and there committed affecting the public justice or business of the court is misbehavior in presence of the court. This precise question is not distinctly determined in the authorities which we have examined, and we have looked into very many referred to by Rapalje on Contempts; 3 Amer. & Eng. Cyclop. Law, 777; 15 Cent. Law J. 42; 12 Amer. Dec. 178, notes to Clark v. People. The city court of

Digitized by Google

Cartersville, by its organic law, (Acts 1884–85, p. 487,) has the same power to punish contempts as the superior courts of the state. The punishment inflicted was very moderate, being a fine of $25, with the alternative of imprisonment two days in the event of nonpayment. That the misbehavior merited this measure of punishment there can be no doubt. The complaining suitor, when warned that he was out of order, persisted in discussing his case, and closed by defying the judge, saying to him: "I have got as much right to talk as you have. Court is not in session, and you have no more power than I have." He needed to be taught his true position as a suitor at the bar of public justice, and, as he would not listen to admonition and remonstrance, the court instructed him in the proper manner. Judgment affirmed.

(82 Ga. 770)

RUSSELL v. NAPIER.

(*Supreme Court of Georgia.* May 13, 1889.)

WAYS—EVIDENCE—INSTRUCTIONS.

1. A finding that complainant is not entitled to a way by prescription is warranted, when the weight of evidence is that the way has not been kept in repair by complainant; that the original road-bed has not been used for the length of time prescribed by statute, and that trees have been allowed to fall across the road, and lie there, another way around them being used.
2. Where complainant claims a way by necessity over certain land, evidence that he has bought other land, and made a way thereon to the public road, which there is some evidence is better than the way in controversy, is admissible, and warrants a finding that the way claimed is not a way of necessity.
3. Where the whole theory of a bill is that complainant, by express contract, purchased a right of way of defendant, which the latter denies, failure to instruct as to whether complainant is entitled to the way as appurtenant to land purchased by him of defendant is not error.

Error from superior court, Catoosa county; FAIN, Judge.

W. H. Payne and *McCutchen & Shumate*, for plaintiff in error. *R. J. McCamy*, for defendant in error.

SIMMONS, J. Russell filed his bill against Napier, on January 12, 1887, alleging that in December, 1878, he purchased from defendant a certain tract of land, together with the right to the free and uninterrupted use of a private road leading from the tract into a public road. For the land and for the use of this way he paid defendant $400 at the time of the purchase, but defendant made him no deed then to the land, but it was agreed at the time that defendant should make a deed to the land and right to the use of the way as soon as defendant obtained a deed. The land which complainant purchased did not lie on any public road, and the right to the private way was included in its sale, and was a part of the consideration of the payment made by complainant, there being no other way leading from the land to the public road except the one purchased. Defendant had purchased the land which he sold complainant and an adjoining lot, No. 268, at a sale made by the administrator of T. T. Napier, prior to the sale by defendant to complainant. Lot 268, through which the private way in question runs, adjoins the land purchased by complainant, and lies between it and the public road, and the private way mentioned had been located where complainant claims the right to use it for a long time prior to the purchase mentioned, and has been used as a way from the land bought by complainant to the public road by T. T. Napier and those owning the land through which it passes. The land purchased by complainant, and also lot 268, had been owned for a long time before his death by T. T. Napier, and defendant still owns lot 268. The private way in question was pointed out to complainant by defendant as the way which complainant was to have the right to use, in the event he purchased the land, at the time he did so purchase, and complainant refused to buy the land until the right to the use of the way was included in the sale, and complainant would not have purchased without such right. After complainant had bought the land and the right to use the way he went into possession of the land, and commenced to use the way so purchased, to-wit, about the 28th of December, 1878. He has remained in possession of the land, and is still in possession of it, and he used the way continuously, uninterruptedly, etc., up to March 22, 1886, when defendant, without authority of law and contrary to the contract, closed it up by building a fence across it on lot 268, and it is still closed by said fence. This act of defendant has forced complainant to travel to and from the public road over another way, which is much further and rougher than the way which has been closed by defendant. Defendant lived on the adjoining lot all the time that complainant was in possession of the land bought by him, and at no time made objection to the use by complainant of the way first above mentioned, but always recognized that complainant had the right to use it. Defendant made no deed to complainant until November 29, 1880, when he had a deed prepared and signed, in which he conveyed the land only. Complainant refused to accept this deed, because it did not include the right to the use of the way, and defendant then admitted that it had been agreed that this right should be included, and said it had been omitted by oversight, and that he did not have time to have another deed drawn, but insisted that complainant should take the deed already prepared, and in a short time he would execute to complainant a conveyance of the right to use the way. Believing that he would do this, complainant accepted the deed. He has demanded of defendant such a conveyance, and defendant refuses to comply with his contract, and has closed the way up. The way in question is necessary for the proper enjoyment of the land purchased, and for deprivation of it complainant cannot be compensated in damages, etc.

Digitized by Google

The bill prays that defendant be compelled to execute to complainant a conveyance to the use of the way, and that free use of the same be decreed to be in complainant, for general relief, etc. The defendant answered the bill, and denied every material allegation therein. He positively denied that there was any contract made between him and the complainant for the purchase of the right of way over his land, which adjoined the land purchased by the complainant. The only thing agreed on between them about his right of way was that he agreed to allow the complainant to use the right of way until he (the defendant) desired to clear up the land. In that event the road was to be closed. On the trial of the case the jury returned a verdict for the defendant. The complainant made a motion for a new trial on the several grounds stated therein, which motion was overruled, and he excepted.

1. It will be observed, by reading the synopsis of the complainant's bill, that the way in controversy in this case was claimed by the complainant upon three grounds: (1) By contract of purchase; (2) by prescription; and (3) as a way of necessity. It is insisted by the plaintiff in error that the verdict was contrary to the evidence. We have read the evidence sent up in the record, upon the question of the purchase of the right of way, and while it is conflicting the jury seem to have believed the defendant and his witnesses in preference to the complainant and his witnesses. The court below was satisfied with the verdict, and we will not disturb it.

2. The same may be said as to the second ground, to-wit, that he was entitled to the way by prescription. Evidence was introduced by both parties upon this point. It was conflicting as to the length of time the road had been used, and as to whether it had been kept in repair by the complainant as required by law. The weight of testimony seems to be that it was not kept in repair by the complainant, and that the original roadbed was not used for the length of time prescribed by the statute; that trees were allowed to fall across the road, and, instead of cutting them off, another way around the trees was used; and we think there was sufficient evidence on this point to authorize the finding of the jury.

3. The complainant also claimed the way as one of necessity. Upon this point the evidence showed that the complainant had purchased other land from Mrs. Wooten, and made a road over this land to the public road, which according to some of the evidence was a better way than the one in controversy. The plaintiff in error objected to this evidence, and assigns error therein in the third and fourth grounds of the motion. We do not think it was error to admit this testimony. If the complainant had purchased other land, and made a way over it to the public road, then the original road (the one in controversy) would no longer be a way of necessity. The new road would destroy the old one as a way of necessity A person is not allowed to claim a road over another's land as a road or way of necessity, when he has or can have a road over his own land. Washburn, in his work on Easements and Servitudes, (page 235, 3d Ed.,) says: "And so limited is the right of way of necessity in respect to its duration, that, though it remains appurtenant to the land in favor of which it is raised so long as the owner thereof has no other mode of access, yet the moment the owner of such a way acquires, by purchase of other land or otherwise, a way of access from a highway over his own land to the land to which the way belongs, the way of necessity is at an end; or, in other words, a way of necessity ceases as soon as the necessity ceases. The necessity limits the duration of the grant, and this applies as well to a subsequent owner of the estate to which such way attaches as to the first grantee in whose favor it was originally raised. It is not enough that it continues to be a way of convenience, if it ceases to be indispensable as a means of access to the land." There was therefore no error in allowing the defendant to prove that the complainant had made another road over this land equally as good as the one in controversy, and upon this evidence the jury was authorized to find that the road in controversy was not a way of necessity. This disposes of the complaint in the sixth ground, as to the prescriptive right of the complainant, and of the complaint in the seventh ground, of the charge of the court as to the new road and way of necessity.

4. Complaint is made in the fifth ground that the court failed to charge as to whether the complainant was entitled to the way claimed by him as appurtenant to the land he purchased from the defendant, and as to whether the way passed under the deed to the complainant. We have carefully read the allegations in the bill of the complaint, and we do not find that this question was made therein. That part of the bill which counsel for the plaintiff in error claimed makes this point does not do so, in our opinion. It is simply a reiteration of an express contract of purchase of this right of way; and the court was right, therefore, in not charging upon that point in the case, even if he had been requested to do so in a legal manner. The whole theory of the complainant's bill was that by express contract he purchased the right of way over the defendant's land. As said before, this was denied by the defendant, and the greatest portion of the evidence adduced on the trial was upon this point. The jury found that there was no such contract, and also found that it was not the intention of the parties that the right of way over the defendant's land should pass under the deed. Having found this fact, it would have been useless for the court to have submitted this point to the jury. Judgment affirmed.

Digitized by Google

(85 Va. 966)

ATWOOD *et al.* v. SHENANDOAH VAL. R. CO. *et al.*

(*Supreme Court of Appeals of Virginia.* April 11, 1889.)

RAILROAD COMPANIES—BONDS—EQUITY—PRACTICE—DEPOSITIONS.

1. The S. V. Railroad Company had power under its charter to borrow money, issue certificates, and mortgage its property as security therefor. It executed a mortgage to a trustee, conveying all its line of road then and thereafter to be constructed, to be a continuing security without preferences for such bonds, not exceeding $15,000 per mile of road, as should be issued. Bonds were issued and sold to the extent allowed by the mortgage. The company decided afterwards to extend the line, but determined that the expense would exceed $15,000 per mile. Accordingly the stockholders authorized a general mortgage to be made, covering the whole line of road, to secure bonds to an amount not exceeding $25,000 per mile. It was determined to retire the first mortgage bonds, if possible, and cancel the mortgage. The directors were also authorized to continue the issue of bonds under the first mortgage, but the trustee was required to set apart out of the general mortgage bonds an amount equal to the outstanding first mortgage bonds, unless the latter should already have been acquired by exchange, in which event the first mortgage was to be canceled. After the execution of the general mortgage, $1,560,000 of first mortgage bonds were issued, and deposited with the trustee, that being the amount authorized by the mortgage at $15,000 per each mile of the proposed extension, to be delivered as the extension should be completed. A prospectus was issued, showing that of the general mortgage bonds enough would be retained to retire outstanding bonds, leaving a specified amount, which would be entitled to share in the security of the first mortgage to the extent of $1,560,000 of bonds deposited with the trustee as collateral to the general mortgage. The bonds were negotiated by means of this prospectus, one of the inducements to purchasers being the security afforded by the deposit of the $1,560,000 of bonds. *Held*, that the issue of said last-mentioned bonds was authorized, and did not violate the rights of the holders of the other first mortgage bonds, and that the general mortgage bondholders were entitled to share in the security of the first mortgage to the extent of $1,560,000.

2. Though the S. V. Co. was first incorporated by the state of Virginia, and its charter afterwards confirmed and similar powers given it in the states of Maryland and West Virginia by legislation of the latter states, it was still a separate corporation in each state, and statutes of the latter two states, limiting the indebtedness of a corporation to the amount of its capital stock, would not render void the bonds in question though issued in excess thereof, if valid in Virginia.

3. Even if the issue of the $1,560,000 of first mortgage bonds could be considered as causing an indebtedness exceeding the limit of $25,000 per mile, the first mortgage bondholders could not be prejudiced thereby, and the holders of the later bonds could waive the restriction, which was for their sole benefit.

4. Though the $1,560,000 of bonds were never certified by the trustee as the mortgage provided, they would not be void for that reason, as they need not have been certified for the purpose of affording security for the general mortgage bondholders, and, if necessary, equity could compel the trustee to perform his duty, or could disregard the omission under the rule that "equity will consider that done which in good conscience ought to be done."

5. C. & Co., the financial agents of the S. V. Co., when the general mortgage bonds were placed on the market negotiated them for the company, on commission. The price of the bonds was fixed by the S. V. Co., and they were sold by C. & Co., who used entire good faith. A syndicate with which the members of the firm of C. & Co. were connected purchased a large portion of the bonds. The proceeds were paid to the S. V. Co., and used in the construction of its road. *Held*, that the fiduciary relationship between C. & Co. and the corporation did not invalidate the purchase made by the syndicate.

6. A supplemental bill seeking no discovery, alleging no new matter, and making no issue save as to the validity of a debt included in a master's report, which could be disposed of by exception, is improper, and should be rejected.

7. Under Code Va. 1873, c. 172, § 36, providing that a deposition in a suit in equity may be read if returned before the hearing, though after an interlocutory decree, if it refers to a matter not adjudged by such interlocutory decree, as well as under the general rules of chancery practice, a master may, in his discretion, take the depositions of witnesses, though he has once closed the taking of testimony, and made up the draft of his report, the case being a complicated one, in which it is impossible to know definitely what testimony is necessary until that fact is developed by the examination of other witnesses.

HINTON, J., dissenting.

Appeal from circuit court of city of Roanoke; HENRY E. BLAIR, Judge.

The Shenandoah Valley Railroad Company was incorporated under the laws of the state of Virginia, and given general powers to construct a railroad through the state, etc. Subsequently like privileges were conferred by the states of West Virginia and Maryland by different acts of the legislature of each state. Different mortgages were executed by the corporation to secure various bonds, the Fidelity Insurance, Trust & Safe-Deposit company being trustee in all of them, and default being made in the payment of the bonds the trustee filed this bill for a foreclosure. A receiver was appointed and the cause was referred to a master, who reported. The court held that the bondholders under a general mortgage were entitled to share in the security of the first mortgage to the extent of $1,560,000, the amount of first mortgage bonds deposited with the trustee as collateral security for the payment of the general mortgage bonds, (the amount so deposited is sometimes erroneously referred to in the record as $1,545,000, owing to a miscalculation in the number of miles of road built with the proceeds of the general mortgage bonds, as explained in the opinion,) and on the 24th day of December, 1887, decreed a foreclosure, etc. Various bondholders became parties by petition pending the suit, and the first mortgage bondholders appeal. Another decree was rendered in April, 1888, from which other parties appealed, but the questions arising thereon are treated in a separate opinion. Insurance Co. v. Railroad Co., post, 759.

Joseph Leedom, Chas. L. Lamberton, and *William W. & B. T. Crump*, for appellants. *Wm. J. Robertson* and *John C. Bullitt*, for the trustee, appellee. *Camm Patteson* and *Williams & Boulware*, for the general mortgage bondholders, appellees.

RICHARDSON, J. This is a case of far more than ordinary importance, and in the investigation of the complicated questions involved this court has been favored with

Digitized by Google

elaborate arguments, written and oral, of eminent counsel, at home and from abroad, in which the claims of the respective contestants have all been discussed with consummate skill and ability. In this opinion we have no concern with the questions decided by the court below in its decree of April, 1888, as those questions will be treated and decided in separate opinions. We are therefore restricted in this opinion to the consideration of the questions decided in the decree of the court below of December 24, 1887, by which the 1,560 first mortgage bonds here in controversy were declared to be valid outstanding obligations of the Shenandoah Valley Railroad Company, issued under and in pursuance of the terms of said company's first mortgage of April 1, 1880, and properly delivered to and now held by the Fidelity Insurance, Trust & Safe-Deposit Company as trustee in said company's general mortgage of April 5, 1881, as collateral security for the bonds issued under and in pursuance of the terms of said general mortgage, and now so held by the appellees, the general mortgage bondholders. But before proceeding to consider this question, we must first dispose of two preliminary questions of practice.

1. It is objected that the circuit court erred in refusing to permit the appellants, the first mortgage bondholders, to file their supplemental bill, which bill was for the first time tendered and leave asked to file it at the term in which the decree complained of was rendered, and just as the argument in the cause was about to commence. From the facts and circumstances disclosed by the record we are clearly of opinion that the objection is without merit. The order of account made in the cause on the 11th of May, 1885, was for the express purpose, as shown on its face, of clearly ascertaining the rights of the respective classes of the creditors of the Shenandoah Valley Railroad Company "to satisfaction out of its property and effects, and the amount due or to become due to said classes respectively." Hence the master was directed to take, among others, an account "of the amounts due or hereafter to become due under the respective trust-deeds or mortgages which have been made by said" Shenandoah Valley Railroad Company, "and which have not been released or satisfied, showing the relative rights and priorities and the property included in or conveyed by said deeds respectively." The taking of testimony under this order was commenced on the 26th of February, 1886, and was continued from time to time until the 12th of March, 1887, the counsel for appellants (first mortgage bondholders) being present and participating on each occasion in the examination of witnesses, and introducing witnesses on behalf of their clients. And, as already stated, in the progress of taking this testimony, counsel for the first mortgage bondholders, the appellants, applied to the trustee company, the sole plaintiff in the suit, to be formally recognized of record as counsel by it as trustee, and to be permitted to appear in the trustee's name in order to protect the interests of their clients, the first mortgage bondholders. The request was very properly refused, and for the obvious reasons—*First*, that it involved the surrender, in part, at least, of the plain right and duty of the trustee company, a common trustee in both the first and general mortgages, to conduct the suit for the protection of the interests of all parties secured by both mortgages; and, *second*, because to grant the request would be, in effect, to displace its own counsel, which it had no occasion for doing; at the same time, however, expressing the opinion that doubtless the court would recognize the counsel of individual bondholders should they appear and so desire.

Afterwards, at the December term, 1886, the appellants, (first mortgage bondholders,) upon presenting their petitions to be admitted as parties plaintiff, were allowed to file them, and the original plaintiff, the Fidelity Insurance, Trust & Safe-Deposit Company, was given until the 15th of January, 1887, to answer the same; and at the same term leave was given Lewis C. Clark, a general mortgage bondholder, to file his petition asking to be admitted as a party defendant, and leave was given the Fidelity Insurance, Trust & Safe-Deposit Company and the said petitioning first mortgage bondholders to answer it. This action on the part of Lewis C. Clark, it is clear, was induced by the action of said first mortgage bondholders, for in his petition, which was presented on his own behalf and on behalf of the other general mortgage bondholders, he says that he had not previously applied to be made a technical party to the suit, because he, in common with the other bondholders of his class, and also the first mortgage bondholders, had been represented by counsel, with the assent of the plaintiff, the Fidelity Insurance, Trust & Safe-Deposit Company, in the proceedings in the suit; but that, inasmuch as sundry first mortgage bondholders had filed their petitions to be made parties plaintiff, to protect their interests, which were in conflict with the interests of the general mortgage bondholders, it was manifestly proper that, if they should be admitted as parties plaintiff, he, on his own behalf, and on behalf of the other general mortgage bondholders, should be admitted as defendants, and in his petition, stating that the 1,560 bonds were then uncertified by the trustee, asked that it should be required to certify them and deliver them to the general mortgage bondholders. In their answers to this petition of Lewis C. Clark, a general mortgage bondholder, the first mortgage bondholders show that the ground, and the only ground, on which they based their application to be admitted as parties plaintiff was their claim that the deposit of the 1,560 first mortgage bonds with the Fidelity Insurance, Trust & Safe-Deposit Company, trustee, as security for the general mortgage

Digitized by Google

bondholders, was unauthorized and illegal, and that the trustee company had, in its bill, taken a position in reference to said bonds adverse to the interest of the first mortgage bondholders; and they ask that the application of Lewis C. Clark that the trustee of the first mortgage be required to sign, certify, and deliver these 1,560 bonds to the general mortgage bondholders be stricken out as irrelevant and impertinent, and then add "that the question as to the validity of these bonds is one of the main issues in the cause raised under the pleadings and testimony taken and passed upon by the master commissioner in his findings, who holds the said bonds to be invalid; all of which, at and before the filing of said petition, was well known to the solicitor of the petitioner." When this answer was filed all the testimony in the cause was in, and the master (before part of that testimony was taken) had made up and submitted to counsel, as already stated, the rough draft of his report, in which these 1,560 bonds were held to be invalid; but the petitions filed as aforesaid to be admitted as parties plaintiff or defendant had not then been acted on, and were not acted on until the 26th day of July, 1887, when the petitioners were all admitted as parties plaintiff or defendant. Thus it is seen that the first mortgage bondholders, relying on the report of the master, made up before all the evidence now in the record was taken, were disposed, not only to spurn as irrelevant and impertinent the petitioning request of Lewis C. Clark, a general mortgage bondholder, that the trustee be required to certify and deliver the 1,560 bonds to the general mortgage bondholders, but they directly affirm that the validity of these bonds is a main question at issue in the cause, and has been passed on by the master adversely to the general mortgage bondholders. It is a doctrine too familiar to need the citation of authorities that a party may always except to a commissioner's report upon the ground that a debt or claim which is invalid has been reported as valid, or that a valid claim has been reported as invalid. Indeed, it was upon the last-named ground that the general mortgage bondholders in this case excepted to the report of the master, and, a question being thus properly raised under the pleadings and evidence in the cause, the circuit court at the hearing entertained and passed upon the question so presented, and rightfully presented, for its consideration and decision. And we are bound to conclude that this was the view taken by the learned counsel for the first mortgage bondholders, or else, we apprehend, they would at the July term, 1887, when they were first admitted as parties plaintiff of record, have asked to change their position from that of plaintiffs to defendants, and to be permitted to file a cross-bill. Nor did they, when so admitted as plaintiffs, even move to suppress any of the evidence in the cause, and it all was then in. The reason is obvious. They were then resting and relying upon the already made up report of the master in their favor, and chose to be quiet as to the after-taken testimony then in the cause.

It is useless to enter into a discussion as to what is or what is not properly supplemental matter, or when and under what circumstances it is proper to allow a supplemental bill to be filed; for, be this as it may, and admitting, for the sake of the argument, that the appellants might have proceeded as well by a supplemental as by a cross bill, it is quite clear that, as the supplemental bill sought no discovery, alleged no new matter, and tendered no issue not already made, the court was right in refusing leave to file it, as delay only would have been the result. Upon principle and authority it is clear that the issue was as fully made up in respect to the validity of the 1,560 bonds, and as open to a full consideration and fair decision, as it could have been by a supplemental bill or by a cross-bill, and that there was really no necessity for either. See Moorman v. Smoot, 28 Grat. 87; French v. Townes, 10 Grat. 513; Faulkner v. Davis, 18 Grat. 652; and numerous other cases that might be cited. In Story's Equity Pleadings the rule applicable to this case is briefly stated as follows: "If new evidence has been discovered since the commission was closed, as to the facts stated in the original bill, the proper course would be, not to file a supplemental bill, but to apply to the court for permission to examine the new witnesses." Story, Eq. Pl. § 844, note 1, citing Knight v. Knight, 4 Madd. 1. Here the supplemental bill is grounded solely upon the non-certification of the 1,560 bonds, a fact discovered in the course of taking evidence in the cause, and a discovery which seems to have been a surprise to all parties, but it was known to the appellants when they were admitted as parties plaintiff in July, 1887, and is set up in their petition to be made such parties. They did not then ask to suppress any evidence, and doubtless because they relied upon the then made up report of the master to outweigh the subsequently taken testimony. But the master, as he was in duty bound, returned all the evidence, and made a supplemental report, in which he did not content himself with simply referring to the after-taken testimony, but he reported the facts thereby proved, and they were of a most potential nature. Then, just on the eve of the hearing of the cause, the appellants tender their supplemental bill, and, it being rejected, and properly rejected, they direct their attention to the after-taken evidence, and this is the subject next to be considered.

2. The second assignment of error is as to the propriety of the ruling of the court below in refusing to suppress the depositions of certain witnesses. The objection to the depositions of all the witnesses examined after the master had made up and submitted the rough draft of his report, as aforesaid, is that they were taken after the taking of testimony in the cause had been closed by the

Digitized by Google

master, and after he had made up his report and had submitted it to counsel. The objection to the depositions of part of the same witnesses is that their depositions had previously been taken, completed, and signed by them, and that their depositions were afterwards again taken without first obtaining the leave of the court to re-examine them, and that, therefore, they, as well as the others, should be suppressed. We are clearly of opinion that, under the peculiar circumstances of this case, the objection is not well taken. The evidence alone in this case makes a printed volume of 772 pages, two-thirds of which is made up of extract copies from the books and papers of the Shenandoah Valley Railroad Company. The witnesses whose depositions are sought to be suppressed are Clarence H. Clark, W. G. McDowell, and G. R. W. Armes, who were, or had been, officials of this railroad company, and were supposed to be familiar with the conduct of its affairs, and John B. Gest, vice-president of the Fidelity Insurance, Trust & Safe-Deposit Company. During the taking of the depositions in this cause before the master, three of these witnesses, to-wit, McDowell, Armes, and Gest, were several times examined, they signing their depositions each time, and being re-examined from time to time by the master as the facts were developed and their further testimony was needed. This doubtless resulted from the fact that it was impossible to tell at any one time what and how much of the railroad company's actings and doings, as evidenced by its books and papers, or as personally known to these witnesses, might be needed in evidence. It is therefore apparent that justice and the necessities of the situation fully warranted the course thus far pursued by the master. The rule is that a commissioner properly has much latitude of discretion in granting continuances of proceedings before him, and the court whose order he is executing will not overrule his action in that respect unless it be plainly erroneous. Still less will an appellate court reverse a decree for that cause. Fant v. Miller, 17 Grat. 187.

Under the circumstances above stated we think the action of the master in taking and retaking the depositions of these witnesses was fairly within the spirit of the rule above stated, and was not only authorized but demanded by the necessities and very right of the case. Upon what principle, then, can it be contended that, though the master had adjourned the taking of the depositions *sine die*, and had even made up his report, but had not returned it, as was the case, he could not, for reasons satisfactory to him, and dictated by a sense of duty, and in aid of the justice of the case, proceed to take further testimony? We know of no sufficient reason why he might not do so, his conduct being subject always to the controlling supervision of the court whose order he was executing. And such would seem to have been the view taken by the master himself; for the record shows that while the adjournment of the taking of evidence in the cause occurred on the 17th of February, 1887, yet before the adjournment a commission was regularly issued, after due notice to all parties, to Thomas J. Hunt, commissioner, for the taking of depositions on behalf of the general mortgage bondholders on the 15th of February, 1887, four days prior to said adjournment. Moreover, the counsel for the first mortgage bondholders claim that the taking of testimony before the master closed at a day earlier than the 19th of February, 1887, though the adjournment of the master is of that date. The record shows that the master had given notice for the taking of depositions before him on the 12th of January, 1887, when, no witnesses appearing, the taking of depositions was continued until the 19th of February, 1887, the date of the master's adjournment *sine die*. At the appointment of January 12, 1887, the counsel of the first mortgage bondholders appeared before the master and entered a protest in writing against the further taking of depositions, claiming that the taking of testimony had been duly and regularly closed on or about the preceding 16th day of December, 1886; and, among other things, said counsel propounded to the master, in writing, the following question: "Has or has not the testimony in the foreclosure proceedings before the master in this case been closed, and, if so, when?" Answer: "The master replies that he considered that the testimony under the order of general reference of 11th of May, 1885, was closed on the 3d day of November, 1886; that since that time he has notified counsel in the cause that he would take and receive any testimony that they should see fit to offer, and return the same to the court, together with any exceptions that might be made thereto. [Signed] ROBERT E. SCOTT, Master." Yet the master's adjournment is dated subsequently, to-wit, on the 19th of February, 1880, four days before which time depositions had actually been taken before Commissioner Hunt in the city of Philadelphia, under the commission sued out for the purpose as aforesaid, and the record shows that the master, Robert E. Scott, was present. In thus proceeding the commissioner violated no rule of law, practice, common sense, or propriety. Under such circumstances it would indeed require an iron rule to induce a court of conscience to suppress these depositions. It must be conceded that as the law then stood the general rule was that, without the leave of the court, a deposition once taken could not be retaken without the leave of court, but much latitude was always allowed in permitting a second examination. In Fant v. Miller, supra, Judge MONCURE said that when such leave had been granted by the circuit court, even though the court of appeals "differed from the circuit court in regard to the propriety of granting such leave, it would not afford just ground for reversing the decree, at least unless it was palpably improper

Digitized by Google

to grant such leave; as the circuit court ought to possess much latitude of discretion in the decision of such questions." There could be little excuse for holding in this case that the circuit court, had the leave been asked, should not have granted it. Nor is there, as has been shown, anything which rendered it necessary first to obtain from the court a special order authorizing the re-examination of these witnesses. The depositions were taken by the master under the order of the court, and in the due execution of that order, as to the commissioner seemed best, under all the circumstances. In thus proceeding to execute the order the master commissioner was but the hand of the court, and was, in the nature of things, allowed much latitude of discretion; and, while his action was subject to the control of and liable to be rejected or corrected by the court, and would have been corrected had the discretion allowed been abused, yet that was a matter resting in the sound discretion of the court, and to be exercised in the same manner that the court could correct its own direct acts and proceedings. The court below saw nothing to warrant it in disturbing the action of the master in this respect, and this court sees nothing to authorize it to interfere with what certainly seems to have been a proper exercise of discretion by that court. But more has already been said on this subject than was actually necessary, as the question is settled by statute; nor would the subject have been so fully considered but for an evident misapprehension as to the authority vested in the master independently of the statute. By our statute (Code 1873, c. 172, § 36) it is provided that "in a suit in equity a deposition may be read, if returned before the hearing of the cause, or though after an interlocutory decree, if it be as to a matter not thereby adjudged, and be returned before a final decree." Doubtless this provision was intended by the legislature to preclude the idea that the action of a commissioner in making up and even returning his report could have the effect of preventing the parties, or either of them, from taking further testimony. It may often happen that important evidence is discovered after the return of the commissioner's report, or, from sickness or other cause, a party may not be able to take his testimony, or a party may desire to offer more cumulative evidence; in either of which cases justice demands that the evidence should be considered, unless some good reason to the contrary be shown.

3. We come now to the consideration of the main question in the case, and that is as to the correctness of the decision of the circuit court, awarding to the appellees, the general mortgage bondholders, the benefit of the 1,560 first mortgage bonds deposited with the trustee of the general mortgage as collateral security for the general mortgage bonds. The decision of the court below is assailed as erroneous on various grounds, and these, or such of them as it may be necessary to examine, will be considered as we proceed to state and apply to the facts the principles which govern the case and sustain the conclusion arrived at by the court. The very full statement of the case which has been made renders it unnecessary to again state in detail the provisions contained in the legislative enactments of the states of Virginia, West Virginia, and Maryland, respectively, incorporating the Shenandoah Valley Railroad Company, and conferring upon it certain powers, rights, and privileges, or the proceedings had and authorized by the stockholders and directors of said company in pursuance of its chartered rights, or of the voluminous facts and circumstances incident to the construction of the company's railroad, the execution by it of the two mortgages,—one of April 1, 1880, known as the "first mortgage;" and the other of April 5, 1881, known as the "general mortgage."

The first inquiry is, did the president and directors have the authority to issue these 1,560 bonds under the first mortgage? This question is readily answered by looking—*First*, to the act of incorporation, which, in express terms, confers upon the company the right to borrow money for the purposes of the act of incorporation, "and to issue proper certificates of such loans, and to pledge the property of the company, by mortgage or otherwise, for the payment of the same and the interest that may accrue thereon;" and, *second*, to the first mortgage itself, by which the company conveyed, in trust, all its line of road then and thereafter to be constructed, and all of its property and franchises then possessed or thereafter to be acquired, and declaring on its face that it shall be a continuing lien to secure the full and final payment of all the bonds "which may be created, issued, and negotiated under the security of the same, so that, however, the total amount so created, issued, and negotiated shall not exceed $15,000 per mile of completed road, single track, whether now completed or hereafter completed, * * * and * * * shall be for the benefit and security of and in trust for the holders of said bonds, without preference, priority, or distinction, as to lien or otherwise, of any over another, and so that each and all of the said bonds to be issued as aforesaid shall have the same right, lien, and privilege under and by the said mortgage, and shall be all equally secured thereby, with like effect as though they had all been made, executed, delivered, and negotiated simultaneously on the date of the said mortgage, to secure the payment of the same." And in the respects just mentioned the general mortgage contains similar provisions, except that it was for $25,000 per mile, was expressly made subject to the first mortgage, and was for interest at the rate of 6 per cent. per annum, instead of 7 per cent., as in the first mortgage. The first mortgage, then, authorized the issue of bonds to the amount of $15,000 per mile of completed single track. When the road was completed to Waynesborough $2,270,000 of these bonds

Digitized by Google

had been issued,—that being the aggregate amount at the specified rate per mile to that point,—and the railroad company was without authority to issue any more bonds under that mortgage, except in the event of the extension of its road south from that point, in which event it had, as has been shown, express authority to continue to issue them at the same rate per mile of completed track. Soon after the completion of the road from Hagerstown to Waynesborough, known as the "Northern Division of the road," the company, casting about for an extension and more desirable connection further south, determined to extend its road and to connect with the Atlantic, Mississippi & Ohio, (now the Norfolk & Western,) and finally Big Lick (now Roanake) was fixed on as the point of connection.

At a meeting of the stockholders of the railroad company, held on the 1st day of April, 1881, certain resolutions, as already stated, were passed relating to the construction of the extension of the road south from Waynesborough to Roanoke. By one of these resolutions the company's directors were "requested and advised to provide, at as early a day as in their judgment shall be prudent, for the erection and construction of such extension and the completion and equipment of the railroad of this company, and they are hereby authorized and empowered for the purpose from time to time to use and employ all the powers, resources, and property of this company, so far as in their opinion required, and to make and to authorize the making of such contracts as to them may be deemed advisable." And it is further resolved that, for the purpose of acquiring the means of retiring and canceling the bonds which had been issued under the first mortgage, and also the bonds which had been issued under a second mortgage, dated April 2, 1880, and for the purpose of increasing the facilities of the company for a speedy completion of the road, the board of directors should be, and they thereby were, authorized and empowered to execute a general mortgage, upon the security of which bonds might be issued, not to exceed $25,000 per mile then constructed or thereafter to be constructed. And the board of directors were authorized to make such contracts or agreements with the holders of bonds under the first and second mortgages as they might deem proper for the purpose of retiring and canceling the same, and of obtaining a release of said mortgages, but with this proviso: "Provided, however, in case the board of directors should at any time before the satisfaction of the first mortgage of April 1, 1880, deem it advisable to continue, or from time to time to make issue of bonds under and according to the said first mortgage of April 1, 1880, they shall have full power and authority so to do; but at all times there must be set apart and retained by the trustees of the general mortgage, out of the bonds authorized to be issued under the general mortgage, an amount equal to the bonds secured by the first mortgage of April 1, 1880, then outstanding, for the purpose of retiring the same, unless such first mortgage bonds should come into the possession of the trustees of the general mortgage; it being intended that until all the bonds which have been and may hereafter be issued under the security of the first mortgage of April 1, 1880, and second mortgage of April 2, 1880, shall come into the hands of the trustees of the general mortgage, and such trustees should request and obtain the satisfaction of the first mortgage of April 1, 1880, all the first mortgage bonds which may come into the hands of the trustees of the general mortgage shall be held by them uncanceled, for the security and benefit of the general mortgage bondholders; it being understood, however, that the coupons of such first mortgage bonds shall be canceled by the trustees of the general mortgage, and surrendered to the company as they mature, provided that at such time the matured coupons upon such of the general mortgage bonds outstanding shall have been duly paid; but the bonds issued under the general mortgage for the purpose of retiring the bonds issued under the first mortgage of April 1, 1880, may be exchanged for the said first mortgage bonds upon such terms as may be agreed upon, or sold, for the purpose of providing the means to purchase or pay off the outstanding first mortgage bonds." These resolutions having been adopted at the stockholders' meeting held on the 1st day of April, 1881, the board of directors of the company met on the 5th of April, 1881, and adopted resolutions approving the bonds and mortgage executed on that day in conformity therewith, the resolutions of the stockholders aforesaid being made, *in totidem verbis*, part of the mortgage, by way of recital. In this authoritative action of the railroad company, we have not only the indisputable evidence of the power of the company to issue these bonds, and that they were issued in exact pursuance of the authority conferred, but of the company's embarrassed condition, and the absolute necessity of husbanding all its resources in order to secure the credit essential to the achievement of its then main object, which was to extend its road south to Roanoke. It had been demonstrated that the road could not be constructed for $15,000 per mile. It was therefore resolved to resort to a general mortgage on the whole line of road, not to exceed $25,000 per mile of completed road, and the mortgage of April 5, 1881, was the result. In the execution of this mortgage it was not merely meant to execute a second or subsequent mortgage, but a general mortgage, as the instrument on its face purports to be. The obvious purpose was to retire, either by exchange or purchase, all bonds under prior mortgages, so that eventually there would be but the one general mortgage, by which all the mortgage creditors would be secured, and all would stand on the same

Digitized by Google

footing, without any priority of lien or preference of one over another. With these objects in view, and inspired with the hope of speedily extending and equipping its road, the stockholders, as we have seen, conferred upon the directors of the company authority "to use and employ all the powers, resources, and property of this company, so far, as in their opinion, required, and to make and to authorize the making of such contracts as to them may be deemed advisable." And to show that the company, in the event then determined upon of extending its road, recognized as prominent among its resources thus dedicated the right to continue to issue bonds under the first mortgage at the specified rate of $15,000 per mile of completed road, the stockholders further authorized the directors, if they should find it necessary or expedient, to "continue from time to time to make issue of bonds under and according to the terms of the said first mortgage of April 1, 1880."

But the railroad company, foreseeing that it might not succeed in effecting an exchange of its general mortgage bonds for the outstanding first mortgage bonds, and that it might in that event be seriously embarrassed in its operations, determined prudently and wisely to hedge about, and carefully reserve and protect its right to continue the issue of bonds under the first mortgage of April 1, 1880, and this was effected by the provision that "until all bonds which have been and may hereafter be issued under the security of the first mortgage of April 1, 1880, shall come into the hands of the trustee of this mortgage under this provision," (evidently meaning the provision for the exchange of the general mortgage bonds for those of the first mortgage,) "and the trustees of this mortgage shall determine the advisability of the satisfaction and release of the said first mortgage of April 1, 1880, all such first mortgage bonds which shall come into the hands of the trustee under this provision shall be held by the trustee uncanceled, for the security and benefit of the holders of bonds secured hereby; it being understood, however, that the coupons of such first mortgage bonds shall be canceled by the trustee, and surrendered to the party of the first part, as they mature, provided that at such time the matured coupons upon such of the bonds secured hereby and outstanding shall have been duly paid; but when all such first mortgage bonds shall have been acquired by the party of the second part the said bonds shall then be canceled by the party of the second part, and the said mortgage shall be satisfied and released as soon thereafter as the same can be conveniently done." On the 20th day of April, 1881, only 15 days after the general mortgage was executed, $1,545,000 of first mortgage bonds were, in pursuance of the prescribed terms, duly issued by the railroad company and delivered by its treasurer to the Fidelity Insurance, Trust & Safe-Deposit Company as trustee in the first mortgage, so that they might be ready to be certified by the trustee, and issued in pursuance of the terms of the mortgage, upon the certificate of the engineer, approved by the president of the railroad company, of the completion of additional miles of road. The $1,545,000 of bonds were issued and deposited under a mistaken under-estimate of the distance from Waynesborough to Roanoke, the true amount actually issued being $1,560,000, as explained in the statement of the case. The issue of these bonds immediately after the execution of the general mortgage, and in strict pursuance of the terms of the first mortgage, again clearly evinces the purpose of the directors of the railroad company to avail themselves of the authority conferred by the aforesaid stockholders' resolution, which was made part of the general mortgage, to issue and use for the extension of the road south of Waynesborough, all of the first mortgage bonds,—that is to say, to the amount of $15,000 per mile of road as it should be thereafter completed; all the bonds issued for the construction of the road north of Waynesborough having, as already stated, been previously certified by the trustee, and delivered to the railroad company, and by it distributed to the parties entitled thereto. At the meeting of the railroad company's board of directors, held on the 5th of April, 1881, a special committee on construction had been appointed, and to that committee was referred "all matters pertaining to the negotiation of the mortgage bonds or other securities of the company, as may be considered necessary or advisable by them, for the purpose of providing means to pay for said construction," —that is, of the road south of Waynesborough; and on the 5th of May, 1881, that committee reported a plan by means of which the amount necessary for the construction south of Waynesborough could be obtained, and, with the report, submitted a prospectus, dated June 30, 1881, and also the form of a subscription list, for the approval of the board. In that prospectus, which, after its approval, as has been shown, was issued in the form of a printed circular, it was stated that the general mortgage of $25,000 per mile, over the entire length of the road, which, it was then supposed, would be 238 miles, amounting in the aggregate to $5,950,000, had been executed; and that of the amount secured thereby there would be retained in the hands of the trustees, to retire outstanding bonds upon the road already constructed, $3,575,000, leaving $2,375,000, and that "these bonds, to the extent of the first mortgage bonds in the hands of the trustee of the general mortgage, will be entitled to part of the security of the first mortgage on the road, inasmuch as the $1,545,000 (erroneously stated in the circular at $1,436,000) bonds issued on the ninety-five and three-fourths miles of the extension, under the first mortgage of $15,000 per mile, (which covers the entire line built or to be built,) have been lodged with the trustee as

Digitized by Google

collateral on the general mortgage." In the subscription form attached to said prospectus (the circular before referred to) it was stated that the subscriptions were made "upon the terms and conditions indicated in the above prospectus." This report was "approved and accepted" by the board of directors on the 9th of May, 1881; and at a special meeting of the finance committee, held on the 20th of May, 1881, the chairman reported, *inter alia*, that the entire amount, $2,875,000, of general mortgage bonds had been subscribed in accordance with the proposition contained in the circular, and that thereby a sufficient fund was provided for the extension of the road.

The evidence in the record conclusively establishes the fact—indeed, there is no evidence to the contrary—that the general mortgage bonds, the bulk of which were purchased by a syndicate, were purchased, not only by the syndicate, but by subsequent holders of them, or some of them, on the faith of this prospectus or circular, and that one of the inducements to the purchase was the additional security for the payment of them obtained by the deposit with the trustee of the general mortgage of the first mortgage bonds. It is not perceived that the railroad company, in thus pledging these 1,560 first mortgage bonds as security for the benefit of the general mortgage bondholders, did any injustice to or violated any contract right of the first mortgage bondholders. Acting under its charter, which authorized the extension of its road, the railroad company executed the first mortgage of April 1, 1880, to secure its bonds, to an extent not exceeding $15,000 per mile of road then or thereafter to be completed. The road has been extended and completed, and bonds at the rate of $15,000 per mile, and no more, have been issued under and in pursuance of the terms of the first mortgage. The $2,270,000 of bonds held by the first mortgage bondholders, and the $1,560,000 of extension bonds, issued thereunder and pledged for the security of the general mortgage bondholders, together make the aggregate of $3,830,000 at $15,000 per mile of the line of road actually constructed. The proceeds of the bonds held by the first mortgage bondholders were expended entirely on the construction of that part of the road north of Waynesborough, not a dollar thereof having been expended south of that point; while the extension south from Waynesborough was built exclusively with funds derived under the general mortgage. Yet the first mortgage bondholders claim a lien over the entire line of road, prior and superior to that of the general mortgage bondholders. The claim is preposterous. It is true that the general mortgage was made expressly subject to the first mortgage, but, be it observed, it is subject, not to the rights of the present first mortgage bondholders merely, but to all the rights secured by the first mortgage, prominent among which is the right to issue and use the additional bonds here in controversy. Both lots of bonds were issued in virtue of one and the same authority, under the same mortgage, about the same time, and for the same purpose. Hence the rights of the first mortgage bondholders, as respects the 1,560 extension bonds, are precisely the same as those of the general mortgage bondholders; the two stand together as first lienors. Though these 1,560 first mortgage bonds, issued and deposited as collateral for the general mortgage bonds, be held to be valid securities under the general mortgage,—and they certainly are such,—how does that fact impair in any way the contract rights of the first mortgage bondholders? Both lots of bonds were issued under and in exact pursuance of the first mortgage, and, if one fails, the other must necessarily fail also; if one is not entitled to the footing of first lien, the other can have no claim to such a position. Suppose the railroad company had issued these bonds and put them on the market for the purpose of securing funds with which to aid the construction of the extension of its road,—and it undoubtedly had the right to do so,—in what worse position would the first bondholders be placed than they are by the application of them as a strengthening plaster,—as a first lien backing and support to the general mortgage bonds? It is certain that they would be in the same relative position now held by them, and that is the position of their own choosing. Nor is there anything in the objection that, if these 1,560 bonds be held to be valid, there has been an overissue. These bonds, deposited and held by the trustee of the general mortgage as collateral, are not outstanding obligations of the company in the hands of the public, but are pledged as collateral security,—as backing and bracing for the general mortgage bonds that are outstanding in the hands of the public. And, for illustration, if the railroad company were to-day to pay off, at par, all its outstanding general mortgage bonds, it would at the same time redeem from pledge these bonds held as collateral. It is therefore clear that there is nothing in the idea of overissue from this stand-point. But it is strenuously insisted that there is an overissue, inasmuch as the bonds issued under the first and general mortgages are greatly in excess of the company's authorized capital stock. And it is insisted that the court below erred in not deciding that, the charter of the Shenandoah Valley Railroad Company having been granted by the concurrent legislative action of the states of Virginia, West Virginia, and Maryland, the corporation, in the exercise of its powers, was controlled and limited by the terms and provisions of the charter, and in the mode and manner prescribed, and subject to all the requirements and prohibitions contained in the public acts and laws of each of said states, etc.

This exception is far too long and argumentative to be conveniently set out in full. It seems to proceed upon the idea—***First.***

Digitized by Google

That the act of the railroad company in issuing and depositing these bonds disregarded and violated its charter, and that its act is therefore *ultra vires*, illegal, and void. *Second.* That the court erred, in that it did not give full faith and credit to the public acts and laws of West Virginia, prescribing that no corporation shall issue any stock or bonds except for money, labor, property, and materials actually purchased, received, and applied to the purposes for which such corporation was organized, and which also prohibit the fictitious increase of the capital stock and indebtedness of any such corporations, etc. *Third.* That the court below erred in not giving full faith and credit to the public acts and laws of the state of Maryland, which limit the powers of this railroad corporation to borrow money on the credit of the corporation, and to execute bonds therefor, and to pledge the property and income of such company to secure the payment thereof, to an amount not exceeding its capital stock; and it said that this limitation is contained in the grant by said state to this railroad company. Thus there are several assignments of error under one head. As to the first and second, it is only necessary to say, in the light of what is disclosed by the record, they present nothing whatever for consideration; and as to the third it is founded in an obvious mistake, both as to fact and law. There is nothing of the kind in the grant or charter act of the state of Maryland. This railroad company was incorporated by the Virginia legislature by an act dated February 23, 1867, with an authorized capital stock of $4,000,000, but with the right to increase it from time to time as before stated. The acts of the states of West Virginia and Maryland were simply conforming acts, respectively. The West Virginia act was passed in February, 1870, and, after reciting the Virginia act, expressly grants "the same rights and privileges within the territory of West Virginia" that were granted by the Virginia act within the territory of that state. And the Maryland act, after reciting both the Virginia act and that of West Virginia, grants within the territory of that state the same rights and privileges granted by the acts of Virginia and West Virginia. Ten years thereafter (the Maryland act having been passed in April, 1870) the Maryland legislature did pass an act, which seems to have been useless, simply authorizing this railroad company to borrow money to an amount not exceeding its authorized capital stock. But that act could not affect the chartered rights of the company, which is a Virginia corporation. But grant, for the sake of the argument, that the 1,560 bonds were issued and deposited in contravention of the terms, as claimed, of certain statutes of West Virginia and Maryland, yet the objection may be met by several very satisfactory answers. In the first place, a railroad extending through two or more states, and incorporated by the laws of each, is not a joint corporation of the two states, but a separate corporation in each state, subject only to the laws of the state within the respective jurisdictions, however those laws may conflict as to the operation of the road. 1 Wood, Ry. Law. 32. This is the recognized doctrine of many courts of the highest authority, especially in the supreme court of the United States. In the case of Railroad Co. v. Wheeler, 1 Black. 286, that court said, although the company was incorporated by the states of Ohio and Indiana, and was spoken of in the laws of each state as one corporate body, exercising the same powers and fulfilling the same duties in both states, yet it has no legal existence in either state except by the laws of the state; and neither state could confer upon it a corporate existence in the other, nor add to or diminish the powers to be there exercised. If this be sound law, as undoubtedly it is, neither Maryland nor West Virginia could impose any restrictions or limitations upon the exercise of corporate powers in Virginia. Their statutes and laws could have no force in this state, nor can they impair the validity of any bonds issued under the authority of Virginia statutes. The bonds in question were issued in this state in conformity with the charter granted by this state, and they are valid here, and they are valid everywhere, and are now to be enforced by Virginia courts having complete jurisdiction of the subject. If we look to the acts incorporating the Shenandoah Valley Railroad Company, it will be seen that the first and chief act was that of Virginia, and that the acts of West Virginia and Maryland simply conformed thereto, as already shown.

Here it may be added that the objection made on behalf of the appellants to the validity of the claim of the general mortgage bondholders, on the ground that if the 1,560 first mortgage bonds are held to be valid obligations of the company, bonds will, to that extent, have been issued in excess of the $25,000 per mile allowed by the mortgage, if true, is a matter in no way to the prejudice of the first mortgage bondholders. It is a matter with which they have no concern, for it is absolutely certain that bonds have not been issued under the first mortgage in excess of the $15,000 per mile allowed by that mortgage, and, if not, the interests of the first mortgage bondholders cannot possibly be affected to their prejudice. And even had there been an excessive issue, which is not the case, the general mortgage bondholders alone could complain; for the limitation upon the issue in excess of $25,000 per mile was made for their benefit, and for their benefit only, and they would have the right to waive the inhibition, and permit bonds to a greater amount to be issued, if they chose so to do. But it is idle to contend that by holding the 1,560 first mortgage bonds to be valid obligations of the company, and enforceable for the benefit of the general mortgage bondholders, the issue of bonds will be greater than that allowed by the general mortgage; for, by the

Digitized by Google

agreement under which the bonds in dispute were to be held as security for the general mortgage bondholders, the provision for the exchange of general for first mortgage bonds became to that extent inoperative, and it would have been worse than idle for general mortgage bonds to be retained for the purpose of an exchange which never could be effected. It follows, therefore, that the issue of general mortgage bonds to the full amount for which they were issued was entirely legal and proper.

Another objection made and most earnestly pressed is that the 1,560 bonds are imperfect and void, because they have never been certified by the trustee. The all-sufficient answer is that, for the purpose of enforcing the lien of these bonds under the first mortgage for the benefit of the general mortgage bondholders, it is not necessary that they should be certified, and, were it necessary, a court of equity would, without hesitation, compel the trustee to certify them. It was his duty to do so, and his neglect, omission, or refusal to perform that duty cannot, in equity, be permitted to defeat the rights of the general mortgage bondholders, who were induced to believe, and had the right to believe, that these securities, upon the faith of which they parted with their money, were in all respects regular and complete. It is a maxim of universal application that "equity regards and treats that as done which in good conscience ought to be done." This maxim is the source of a large part of that division of equity jurisprudence which concerns equitable property, and the doctrines and rules which create and define equitable estates or interests are in great measure derived from its operation. The true meaning of this maxim is that equity will treat the subject-matter of a contract, as to collateral consequences and incidents, in the same manner as if the final acts contemplated by the parties had been executed exactly as they ought to have been, not as they might have been executed. 1 Pom. Eq. Jur. § 364, and note.

Perhaps no better illustration of the universality of the maxim can be found than is afforded in the case of Frederick v. Frederick, 1 P. Wms. 710. In that case a person had contracted to become a citizen of London, but died before he had carried this agreement into effect by taking up his freedom. His widow thereupon brought a suit to procure his personal estate to be distributed in accordance with the customs of London, which applied to citizens only, and which prescribed a very different mode of distribution from that which prevailed under the statute in other parts of England. The court, invoking the maxim, held that the deceased should be regarded as though he were actually a citizen at the time of his death. Id. note 1. So, in the same note, the remark of Lord Chancellor WESTBURY in Coventry v. Barclay, 3 DeGex, J. & S. 320, 328, is cited: "It is the rule of a court of equity to consider that as done which ought to be done, and if, therefore, I find that the accounts and valuation of July, 1860, at the making of which Mr. Bevan was not present, were afterwards accepted and agreed to by him, I shall hold that the account was, in equity, signed by him at the time when it was so accepted." It may here be said, parenthetically, that, in the light of the equitable doctrine above stated, the provision, "and, without such certificate, said bonds shall not be valid or obligatory for any purpose whatever," can in no manner invalidate the bonds pledged as additional security for the benefit of the general mortgage bondholders.

But the doctrine under discussion rises to yet higher ground, and in a large class of cases deduces the obligations of a trust from powers granted. In discussing the subject of "trusts that arise by construction from powers," it is said in 1 Perry, Trusts, § 248, that, "in dealing with the cases that have arisen upon these inquiries, courts have distributed powers into mere powers, and powers coupled with a trust. Mere powers are purely discretionary with the donee. He may or may not exercise or execute them at his sole will and pleasure, and no court can compel or control his discretion, or exercise it in his stead and place, if for any reason he leaves the power unexecuted. If the donee executes the powers, but executes them in a defective manner, courts may aid the execution and supply the defects, but they cannot exercise or execute mere naked powers conferred upon a donee. It is different with powers coupled with trusts, or powers which imply a trust. In this class of cases the power is so given that it is considered a trust for the benefit of other parties; and, when the form of the gift is such that it can be construed to be a trust, the power becomes imperative, and must be executed. Courts will not allow a clear trust to fail for want of a trustee, nor will they allow a trust to fail by reason of any act or omission of the trustee. Therefore courts will not allow a trust to fail or to be defeated by the refusal or neglect of the trustee to execute a power, if such power is so given that it is reasonably certain that the donor intended that it should be exercised." This doctrine, the soundness of which is beyond all question, so aptly applies to the case in hand as to leave no room for doubt that, if necessary, a court of equity would compel the trustee to certify the bonds in question, it being a duty expressly imposed by the terms of the trust.

We come now to the consideration of perhaps the most interesting question in the case. It is the objection that the sale of the $2,375,000 of general mortgage bonds was negotiated by the banking-house of E. W. Clark & Co., the financial agents of the Shenandoah Valley Railroad Company, and were purchased or subscribed for by said banking firm, or by members thereof, standing in a fiduciary relation to said railroad company, which rendered the whole transaction invalid, and therefore rendered the de-

Digitized by Google

posit of the 1,560 bonds as collateral also invalid. The facts, as disclosed by the record, are these: The firm of E. W. Clark & Co. were, at the time of these transactions, and long prior thereto, the recognized financial agents of the Shenandoah Valley Railroad Company, and two prominent members of said firm, Clarence H. Clark and F. J. Kimball, were also officers of said railroad company, the latter being its president and the former one of its board of directors; that said banking firm, and especially said Clark and Kimball, members thereof, were not only the financial agents of this railroad company, but were its constant and indulgent friends in the period of its infancy, financial embarrassment, and struggles for existence, and sustained its drooping credit by advancing to it from time to time large sums of money, the result of which was that the firm of E. W. Clark & Co. was forced into liquidation in the name of its successor, the present firm of Clark & Kimball, of which new firm Clarence H. Clark and F. J. Kimball are prominent members; that the firm of E. W. Clark & Co., before going into liquidation, did, as the financial agents of the railroad company, subscribe for the general mortgage bonds, or the bulk of them, some of them having been subscribed for by others, said subscription having been by E. W. Clark & Co., not for itself as a firm, but for a syndicate composed of members of the firm and others; that Clarence H. Clark and F. J. Kimball, members of said firm, became thus the individual owners, respectively, of very large numbers of said bonds, and that one of the inducements to such subscriptions was the agreement of the railroad company, put forth in its said prospectus, to pledge, as collateral for the bonds so subscribed for, the 1,560 bonds in dispute; and that the price at which the general mortgage bonds were put upon the market was fixed not by E. W. Clark & Co., as financial agents, but was prescribed by the railroad company itself, through its finance committee, in a resolution adopted thereby, at a special meeting of said committee held at Philadelphia, on the 20th of May, 1881, as follows: "Resolved, that the general mortgage bonds of the company should be offered on the following terms: Each bond of $1,000 and five shares of stock for one thousand dollars ($1,000) in cash, (less a commission of five per cent.,) and accrued interest on bond," etc. At the price thus prescribed by the railroad company the general mortgage bonds were subscribed for, and the amount so subscribed was paid to the railroad company in cash, and was actually expended in the construction of the extension of the railroad from Waynesborough to Roanoke.

In the light of these facts, which are clearly established, we discover not in the purchasers or holders of these 1,560 bonds the conduct of faithless trustees or agents, but that of generous, public-spirited friends and benefactors, whose liberality contributed largely to the building of this important line of railroad. It is not necessary to discriminate nicely as to who were the real purchasers of the general mortgage bonds, nor is it material whether they were so purchased by the firm of E. W. Clark & Co., or by a syndicate composed of members of that firm and others. Let it be conceded that they were purchased by said firm, at the time the financial agents of the railroad company, all that could be required is that their conduct was open and fair, and the transaction conducted in the utmost good faith. It is not intended to deny or in any way question the rule that whether such an agent, be he the financial agent or president or director of the railroad company, is, strictly speaking, to be called a trustee or not; for there can be no doubt that in either case the character is a fiduciary one, being intrusted by the company with powers to be exercised for the common and general interests of the corporation, and not for its or their or his private interests; and that, whether the one or the other, the doctrine applies by which equity requires that confidence shall not be abused by the party in whom it is reposed, and which it enforces by imposing a disability, either partial or complete, upon the party intrusted to deal, on his own behalf, in respect to any matter involving such confidence. The inhibitory principle announced, and universally applied under this rule, has no earthly application to the circumstances of the case in hand; for here no trust has been abused, and no advantage obtained by the trustee or agent. It will be found, on examination of the cases in which this salutary principle of equity has been applied, that they all proceed upon the idea either that the agent or trustee is so situated that he cannot make a contract, for his own benefit, with respect to the subject of the trust, or that he has gained some advantage in dealing therewith, which, in equity and good conscience, inures to the benefit of the *cestui que trust*. The agent here, whether the firm of E. W. Clark & Co., the financial agents of the railroad company, or members of that firm, composing a syndicate, or Clarence H. Clark, a director of the railroad company, or F. J. Kimball, its president, was guilty of no concealment, entered into no transaction bringing their duty as trustees or agents into conflict with their private interests; nor did they, as such trustees and agents, have in their custody any property to be sold by them in such fiduciary relations; nor did they gain any undue advantage over either the company or its creditors, or reap any profit by any transaction touching the company's property. On the contrary, they simply lent their money to the railroad company upon the terms prescribed by it, as any stranger might do, and took the security for the payment thereof pledged under the general mortgage, and against this there is no bar in either law or morals. It cannot be maintained that the rule in question, or any rule, forbids a dealing of this

Digitized by Google

character, nor has any case gone to the unreasonable extent of so holding. See note to Fox v. Mackreth, 1 Lead. Cas. Eq. 237; Oil Co. v. Marbury, 91 U. S. 587; Hotel Co. v. Wade, 97 U. S. 15.

In the last-named case it was said: "But where stockholders sanction a contract under which directors loaned money to the corporation, and its bonds, secured by mortgage, are given, if the money is properly applied, the corporation is estopped from setting up that the bonds and mortgage are void by reason of the trust relations which directors sustained to it." Here the railroad company not only obtained the loan on the terms dictated by it, but secured the cash, and actually expended it in the construction of the extension of its road. Could there be any higher sanction than this? We think not. It would be an almost barbarous rule that would forbid a transaction of this character, and one that would at least hazard the undoing of all the common transactions of mankind. Even in the cases where the equitable principle in question is given its widest sweep, the general rule is that the contract may be avoided at the election of the stockholders or *cestui que trust*, upon the terms of restoring what the trustee or agent has parted with in the transaction. The principle underlying this doctrine is favorably stated by FINCH, J., in Duncomb v. Railroad Co., 84 N. Y. 190, where it is said: "Nor is it at all questioned that, in such cases, the right of the beneficiary, or those claiming through him to avoidance does not depend upon the question whether the trustee in fact has acted fraudulently, or in good faith and honestly, but is founded upon the known weakness of human nature, and the peril of permitting any sort of collision between the personal interests of the individual and his duties as trustee, in his fiduciary character. Daroue v. Fanning, 2 Johns. Ch. 260. But the rule was adopted to secure justice, not to work injustice; to prevent a wrong, not to substitute one wrong for another; and hence have arisen limitations upon its operation, calculated to guard it against evil results as inequitable as those it was designed to prevent. Thus, the beneficiary may avoid the act of the trustee, but cannot do so without restoring what it has received. Governor, etc., v. Mackenzie, 8 Brown, Parl. Cas. 42. To cling to the fruits of the trustee's dealing while seeking to avoid his act; to take the benefit of his loan, and yet avoid and reverse its security,—would be grossly inequitable and unjust. It would turn a rule designed as a protection, into a weapon of offense and injustice."

Putting aside all mere verbiage about buying and selling bonds, and looking at this transaction in its true light, it was simply a lending of money on the one hand and borrowing on the other, and, to secure the payment of the loan thus obtained, the railroad company issued its bonds, secured under its general mortgage of April 5, 1881, by which it pledged all its line of road as aforesaid, all its property, rights, and franchises, and pledged the 1,560 bonds as collateral for said general mortgage bonds. Town of Danville v. Sutherlin, 20 Grat. 555. The pledge was a valid one, whether made for a debt simultaneously contracted or for a pre-existing debt. See Duncomb v. Railroad Co., supra; Jones, Pledges, § 74; Jones, Ry. Sec. § 209; and numerous cases cited. In the light of the authorities, there can be no doubt that the railroad company had the perfect right to issue and pledge the 1,560 bonds in dispute as collateral security for the general mortgage bonds. After a most laborious investigation of the case, as presented by the record, we feel constrained to say we discover nothing in the least calculated to cast suspicion upon the actings and doings of the Shenandoah Valley Railroad Company, or upon the acts or conduct of its officers and agents who have testified in this cause. The conduct of all of them seems to have been open and fair, and above suspicion. The same is true of the officers and agents of the Fidelity Insurance, Trust & Safe-Deposit Company, notwithstanding the failure to certify, as required, the 1,560 bonds in question, which is explained with entire satisfaction by Mr. Gest, the vice-president of the company, who also gave his deposition in the cause. We are entirely satisfied that the decision of the circuit court was eminently proper, and the same must, as respects said 1,560 bonds, be affirmed.

HINTON, J., dissenting.

(86 Va. 1)

FIDELITY INSURANCE, TRUST & SAFE-DEPOSIT CO. *et al.* *v.* SHENANDOAH VAL. R. CO. *et al.*

(*Supreme Court of Appeals of Virginia.* April 11, 1889.)

RAILROAD COMPANIES — BONDS — CONSTITUTIONAL LAW — NOVATION.

1. Act Va. March 21, 1877, was entitled: "An act to secure the payment of wages or salaries to certain employés of railway * * * corporations." It provided that employés, and persons furnishing iron, fuel, or other supplies to such a corporation, should have a lien for their debts on all its property superior to any mortgage or other lien thereafter given. Act April 2, 1879, amended said statute by adding engines and cars to the list of supplies for which a lien was given thereby. *Held*, that said acts, so far as they purported to give a lien to persons furnishing cars and engines, are repugnant to Const. Va. art. 5, § 15, requiring the object of a law to be expressed in its title.

2. One furnishing rolling stock to such a corporation, retaining the title as security, before the appointment of a receiver, after being paid by the latter for the use of the rolling stock, since his appointment, and exhausting his lien thereon, is, as to the residue of his debt only, a general creditor of the corporation, with a claim inferior to that of a mortgagee.

3. A railroad corporation owed wages and other debts of a privileged class, and also overdue coupons secured by mortgages. C. & Co. held a large amount of these coupons, and furnished the corporation money to pay portions of said debts, taking its promissory note therefor. A scheme for funding all this indebtedness was adopted, and bonds

Digitized by Google

secured on the income of the road were issued, of which C. & Co. took enough, at 60 cents on the dollar, to equal the amount of their claim, and also took an additional sum for which they paid cash. These bonds were issued, as the company stated, "to pay and provide for its floating indebtedness," and to secure their prompt negotiation the interest thereon was guarantied by another railway corporation. No express agreement was made as to whether the former claims of C. & Co. should be extinguished. C. & Co. also took prior mortgage bonds as collateral security for the payment of their income bonds. *Held*, that the acceptance of the bonds constituted a novation of the debt, and that the debt of C. & Co. was postponed to those of the prior mortgagees, as to the mortgaged property.

Appeal from circuit court of city of Roanoke; HENRY E. BLAIR, Judge.

This is an appeal from a later decree in the same cause in which the opinion in Atwood v. Railroad Co., ante, 748, was rendered. The decree was rendered in April, 1888, and decided that certain "car-trust creditors" had a lien on all the property of said railroad for rolling stock furnished, superior to that of the holders of bonds secured by mortgages. It also rejected the claims of certain "income bondholders" to priority over the other creditors, except as to the amount of the income bonds paid for with coupons of prior mortgages. For statement of facts, see the opinion, and the opinion in the case referred to above. Clark & Kimball, holders of income bonds, appeal from the portion of the decree affecting them, as do also the first mortgage bondholders.

Chas. L. Lamberton, Joseph Leedom, W. W. & B. T. Crump, W. R. Staples, and *Jos. S. Clark*, for various appellants. *Johnston, Williams & Boulware, Camm Patteson, Wm. J. Robertson, F. P. Clark, W. R. Staples, H. Gordon McCouch, R. C. Dame*, and *W. H. Travers*, for various appellees.

LEWIS, P. We are of opinion that so much of the decree of the April term, 1888, is erroneous as decides that the claims designated in the record as the "car-trust claims" constitute a lien on the franchises and all the property, real and personal, of the defendant company. These claims are for engines and other rolling stock which were furnished by the Railroad Equipment Company, E. E. Denniston, and other persons, to the defendant company, at different times, prior to the commencement of the present suit, and for which the company undertook to pay in monthly installments; the title, however, to be retained until the equipment should be fully paid for. As appears from the master's report, the aggregate amount of these claims exceeds the sum of $700,000,—a sum equal to, or perhaps in excess of, the real value of the equipment,—and they are reported by him, and adjudged by the court to be liens on the property of the company prior to the mortgages in question. This conclusion is based on certain provisions of the statute approved March 21, 1877, as amended by an act approved April 2, 1879, (Acts 1876–77, p. 188; Acts 1878–79, p. 352,) and its correctness, therefore, depends upon the validity of those provisions. The title of the first-mentioned act is "An act to secure the payment of wages or salaries to certain employés of railway, steam-boat, and other corporations." And the first section of the act enacts "that hereafter all conductors, brakemen, engine-drivers, firemen, captains, stewards, pilots, clerks, depot, or office agents, storekeepers, mechanics, or laborers, and all persons furnishing railroad iron, fuel, and all other supplies necessary for the operation of trains and engines, employed in the service of any railroad, canal, or other transportation company, chartered under or by the laws of this state, or doing business within its limits, shall have a prior lien on the franchise, the gross earnings, and on all the real and personal property of said company which is used in operating the same, for and to the extent of the wages or salaries contracted to be paid them by said company; and no mortgage, deed of trust, sale, conveyance, or hypothecation hereafter executed of said property shall defeat or take precedence over said lien." The second section then goes on to provide how the lien secured by the first section shall, in order to avail, be verified and recorded, and the third section protects the rights of an assignee of the lien. The title of the amendatory act is as follows: "An act to amend and re-enact the first and second sections of an act approved March 21, 1877, entitled 'An act to secure the payment of the wages or salaries of certain employés of railway, canal, steam-boat, and other transportation companies.'" And the only amendment made by the act which is material to the present case is that it adds the words "engines" and "cars" to the list of supplies mentioned in the first section of the original act, and for which a lien is given. The question upon which this branch of the case depends is whether this legislation, so far as it relates to what is known as supply creditors, is germane to the title of the statute, or whether it is not sufficiently indicated by the title, and therefore invalid by virtue of the constitutional requirement that "no law shall embrace more than one object, which shall be expressed in its title." Const. art. 5, § 15.

The question is a grave one, and we fully appreciate its importance and delicacy. Every act of the legislature is presumed to be constitutional, and ought to be sustained by the courts, unless the conflict between the statute and the constitution be palpable. And especially is this so in a case like the present, as it is often difficult to determine the degree of particularity which must be observed in the title of a statute in order to make the title and the body of the act conform to the constitutional requirement. But where the repugnancy between the statute and the constitution is too clear to admit of reasonable doubt the constitution must prevail, and the statute, to the extent of the repugnancy, must be declared invalid, be the consequences what they may.

As to the constitutional provision in ques-

Digitized by Google

tion, it is, as we have had occasion in a recent case to declare, not only mandatory, but of great public utility. It was introduced into the constitution for a wise purpose, and ought to be reasonably interpreted and firmly enforced. Its object is to prevent corrupt or surreptitious legislation by incorporating into a bill obnoxious provisions of which the title gives no indication, and its requirement is that the title, while it need not be a complete index of the act, must indicate its object with sufficient distinctness to enable the members of the legislature to fairly understand it by simply hearing the title read. In other words, the title is not to be used as a deceptive cover for vicious or surreptitious legislation. When the title is general, as it may be, all persons interested are put upon inquiry as to anything in the body of the act which is germane to the subject expressed. But when the title is restrictive, and confined to a special feature of a particular subject, the natural inference is that other features of the same general subject are excluded. "As the legislature," says Judge Cooley, "may make the title to an act as restrictive as they please, it is obvious that they may sometimes so frame it as to preclude many matters being included in the act which might with entire propriety have been embraced in one enactment with the matters indicated by the title, but which must now be excluded, because the title has been made unnecessarily restrictive." "Nor can the courts," he adds, "enlarge the scope of the title. They are vested with no dispensing power. The constitution has made the title the conclusive index to the legislative intent as to what shall have operation. It is no answer to say that the title might have been made more comprehensive, if, in fact, the legislature have not seen fit to make it so." Cooley, Const. Lim. 149. In a recent case in the supreme court of Pennsylvania it is said: "The purpose of the constitutional provision is to prevent a number of different and unconnected subjects from being gathered into one act, and thus to prevent unwise or injurious legislation by a combination of interests. Another purpose was to give information to the members or others interested, by the title of the bill, of the contemplated legislation, and thereby to prevent the passage of unknown and alien subjects, which might be coiled up in the folds of the bill. The provision was found necessary to correct the evils of unwise, imprudent, and corrupt legislation, and therefore is to receive an interpretation that will effectuate its true purpose. It would not do to require the title to be a complete index to the contents of the bill, for this would make legislation too difficult, and bring it into constant danger of being declared void. But, on the other hand, the title should be so certain as not to mislead." "We are not called upon," the court further said, "to show the necessity or vindicate the wisdom of the constitutional requirement. It is enough for us to know that it is an express mandate of the organic law, which the legislature ought to obey, and the courts are bound to enforce. While it may be difficult to formulate a rule by which to determine the extent to which the title of a bill must specialize its object, it may be safely assumed that the title must not only embrace the subject of proposed legislation, but also express the same so clearly and fully as to give notice of the legislative purpose to those who may be specially interested therein. Unless it does this it is useless." In re Road of Phœnixville, 109 Pa. St. 44. The constitution of Michigan contains, as do the constitutions of many other states in the Union, a provision identical with that of our own constitution above quoted; and in the case of People v. Mahaney, 13 Mich. 481, the supreme court of that state, after referring to the practice which had theretofore prevailed of including in one act subjects of diverse natures, and saying that it was corruptive both to the legislature and the state, used this language: "It was scarcely more so, however, than another practice, also intended to be remedied by the constitutional provision, by which, through dextrous management, clauses were inserted in bills of which the titles gave no intimation, and their passage secured through legislative bodies whose members were not generally aware of their intention and effect. * * * The framers of the constitution meant to put an end to legislation of this vicious character, which was little less than a fraud upon the public, and to require that in every case the proposed measure should stand upon its own merits, and that the legislature should be fairly notified of its design when required to pass upon it." See, also, Supervisors v. McGruder, 6 S. E. Rep. 232; Lane v. State, 49 N. J. Law, 673, 10 Atl. Rep. 360; City of Kansas v. Payne, 71 Mo. 159; Cutlip v. Sheriff, 3 W. Va. 588; Hingle v. State, 24 Ind. 28; Ryerson v. Utley, 16 Mich. 269; Failing v. Commissioners, 53 Barb. 70; Prothro v. Orr, 12 Ga. 36; Montclair v. Ramsdell, 107 U. S. 147, 2 Sup. Ct. Rep. 391; Carter Co. v. Sinton, 120 U. S. 517, 7 Sup. Ct. Rep. 650; Ex parte Thomason, 16 Neb. 238, 20 N. W. Rep. 312.

In the light of these principles, there can be no reasonable doubt, we think, that so much of the act, and the act amendatory thereof, as is relied on in the present case, is repugnant to the constitution, and therefore void. The simple and single purpose indicated by the titles to the two acts is to secure the payment of wages or salaries to certain employés. And we have only to regard the plain and well-understood meaning of those terms to see that by no possibility can they be made to embrace the claims in question. The price of a locomotive is not wages or salary, and a person who builds and sells locomotives, cars, etc., is, presumably, not an employé, but an employer. Bouvier defines "wages" to be "a compensation given to a hired person for his or her

Digitized by Google

services," and "salary" he defines as "a reward or recompense for services performed; * * * the price of hiring of domestic servants and workmen;" though the term is usually applied, he says, to the reward paid to a public officer for the performance of his official duties. We do not see how argument can make plainer the invalidity of the act in the particular mentioned. The title is misleading and deceptive. It gave not the remotest intimation of the provisions of the act relied on here, which are foreign to the subject expressed in the title; and to sustain the act in its entirety would be, in effect, by judicial construction, to eliminate from the constitution one of its most important provisions, or, at all events, to seriously impair its usefulness. This the courts have no power to do. Our duty in such a case is to maintain the constitution inviolate, and to declare void so much of the act as is inconsistent therewith. And a decree in the present case will be entered accordingly.

It is insisted, however, that, whether the statute be valid or not, the claims in question are privileged debts, entitling the claimants to superior equities to the mortgage creditors, according to the doctrine of Fosdick v. Schall, 99 U. S. 235; Williamson v. Railroad Co., 33 Grat. 624; and other cases of that class. In those cases the principle (now well established in the jurisprudence of the country) was announced that when the current receipts of a railroad, which are always first applicable to the payment of its current debts,—*i. e.*, debts for labor, supplies, and the like,—are used in paying the mortgage debt, or in strengthening or protecting the security, it is competent and proper for a court of equity, when asked by the mortgagees to take possession of the road, and to hold and operate it for their benefit by the appointment of a receiver, to direct that the fund thus diverted be restored from the income of the receivership, or, under some circumstances, even from the proceeds of the sale of the *corpus* of the property. Trust Co. v. Souther, 107 U. S. 591, 2 Sup. Ct. Rep. 295; Burnham v. Bowen, 111 U. S. 776, 4 Sup. Ct. Rep. 675; Railroad Co. v. Railway Co., 125 U. S. 658, 673, 8 Sup. Ct. Rep. 1011; Hale v. Frost, 99 U. S. 389. But the present case is not within this principle. Indeed, the case of Fosdick v. Schall, so far from supporting, is an authority against, the position of the claimants. There certain cars had been sold by the appellee to the railroad company, before the pointment of a receiver, to be paid for in installments, and the title was retained until all the payments should be made. Default was made in the payments, and, under orders in the cause, the receiver paid for the use of the cars during the receivership, but the vendor insisted that he was entitled, in addition to this, to take back the cars, and also to be paid the balance due him out of any funds in court to the credit of the cause, not otherwise appropriated. The supreme court held he could reclaim the cars, and that he was entitled to be paid for their use by the receiver, but that for any balance that might be due him, after his own reserved security had been exhausted, he occupied the position of a general creditor only. And the present case stands upon the same footing. Here there was, in legal effect, a conditional sale of the equipment in question, with a retention of title as a security for the purchase money. The written contracts between the parties, it is true, purport to be leases, but the mere language used is by no means conclusive of the legal nature of the transactions. As was said in Hervey v. Locomotive Works, 93 U. S. 664, which, also, was a case of a rolling stock contract: "The transaction is not changed by giving it the form of a lease. In determining the real character of a contract, courts will always look to its purpose rather than to the name given it by the parties." The claimants, moreover, had been paid by the receiver, with the sanction of the court, for the use of the equipment by him, and this was proper, as it is the duty of a court to pay from the trust fund in its possession all the debts it incurs in administering the trust. Myer v. Car Co., 102 U. S. 1. They are also entitled to enforce what is, in effect, a lien retained by them upon the equipment for whatever may now be due them,—that is to say, they are entitled to reclaim it; nor is this disputed. But, as for any balance that may remain after enforcing that lien, they are, as the supreme court said in Fosdick v. Schall, general creditors only, with no special equities in their favor.

To the same effect in Huidekoper v. Locomotive Works, 99 U. S. 258, which was the case of a conditional sale of locomotives, and in which the same principle was applied. In Burnham v. Bowen, 111 U. S. 776, 4 Sup. Ct. Rep. 675, a claim for coal furnished the railroad company, to be used on its engines, before the appointment of a receiver, was allowed on the ground that the income of the receivership had been used to pay off incumbrances on the mortgaged property, thereby increasing the security of the bondholders at the expense of the labor and supply creditors. It was held that this was such a diversion of what was denominated the "current debt fund" as to make it proper to require the mortgagees to pay it back. The court, however, added, by way of caution, as in Trust Co. v. Morrison, 125 U. S. 591, 8 Sup. Ct. Rep. 1004, it afterwards repeated: "We do not now hold, any more than we did in Fosdick v. Schall or Huidekoper v. Locomotive Works, that the income of a railroad in the hands of a receiver for the benefit of mortgage creditors who have a lien upon it under their mortgage can be taken away from them and used to pay the general creditors of the road. All we then decided, and all we now decide, is that if current earnings are used for the benefit of mortgage creditors before current expenses are paid, the mortgage security is chargeable in equity with

Digitized by Google

the restoration of the fund which has been thus improperly applied to their use." The same principle was recognized in Addison v. Lewis, 75 Va. 701, in which case, after referring to Fosdick v. Schall and similar cases, Judge CHRISTIAN, in whose opinion all the judges present concurred, said: "It has been said, and said truly, that these decisions constitute 'a new departure,' and I am not dispose to extend the doctrine one inch beyond the point to which the authority of these cases plainly points." Many other cases were referred to in the argument, which we have examined, but it is unnecessary to comment upon them. The truth is, no invariable rule is deducible from the authorities. Each case must therefore be decided in the light of its own circumstances, and, so viewing the present case, we think the claims in question are not such debts as ought in equity and good conscience to be accorded priority over the mortgage creditors. It was not alleged in the petitions of intervention filed by the claimants in the court below, nor is it proven, that any portion of the current income of the company, before the appointment of the receiver, was wrongfully diverted in the interest of the bondholders; and where there has been "no diversion, there can be no restoration." This, then, disposes of the car-trust claims.

We come next to consider the case of Messrs. Clark & Kimball, bankers, of Philadelphia, who have also appealed from so much of the decree as postpones to the first and second mortgages their claim to priority over those mortgages to the extent of the promissory notes of the Shenandoah Valley Railroad Company used by them in purchasing income mortgage bonds of the company, and now held by them. On the other hand, the appellees complain of the decree, under the ninth rule of the court, on the ground that the decree goes too far in favor of the said appellants, in giving them the benefit of the liens of the coupons which were used by them in purchasing income bonds, and who insist that this alleged error should be corrected. The ground of this contention is that the coupons, when surrendered to the company, were paid for and discharged with income bonds, and consequently the liens to secure them were, to that extent, extinguished also. A brief reference to the facts is essential to a correct understanding of the questions thus raised. The appellants, Clark & Kimball, were for a long while the bankers of the railroad company, and appear to have rendered it valuable pecuniary aid. Their unpaid loans to the company at one time amounted to nearly a half million dollars, which were evidenced by the promissory notes of the company. Much of the money thus loaned, it is claimed, went to pay off labor and supply claims, and other privlieged debts of the company. They also held a large amount of the first and general mortgage coupons of the company, maturing in 1883 and 1884. These, with the notes above mentioned, were used at par in purchasing income bonds at 60 cents on the dollar, which bonds are secured by what is called the "income" or "third" mortgage on the road. The appellants' claim is founded upon two propositions, namely (1) that, as to the coupons, there was a mere exchange of securities, without affecting the debt of which the coupons were the evidence; and (2) that, as to the promissory notes, the money for which they were given was used in the payment of preferred debts, and therefore that the appellants are entitled to be subrogated to the rights and privileges of the creditors whose debts were thus paid. There is certainly no better settled principle, nor one, perhaps, which has oftener been recognized and acted upon by this court, than that no mere change in the form of the evidence of a debt secured by mortgage, deed of trust, or a vendor's lien, will operate to discharge the debt, unless so intended by the parties. The cases of Yancey v. Mauck, 15 Grat. 300; Gibert v. Railroad Co., 33 Grat. 586; and Stimpson v. Bishop, 82 Va. 190,—may be mentioned among the many cases in this court on that subject. At the same time it is equally well settled that, where one security is accepted by the creditor in satisfaction of another, the debt evidenced by the latter is discharged. In a case, therefore, of a change of securities, the question always is, what was the intention of the parties? Or, as it is usually expressed, the question whether the transaction amounts to a novation is a question of intention, to be derived from all the circumstances of the case, although nothing positive be expressed. And, in the absence of proof of a special agreement, the giving up or the retention of the original security will, in general, be a decisive circumstance in determining that question; for, if the creditor means, in any contingency, to resort to the original indebtedness, he will scarcely be willing to surrender all evidence of that indebtedness to his debtor, without fortifying himself with some acknowledgment of the real nature of the transaction. This was decided in Morriss v. Harveys, 75 Va. 726, and such is the well-settled doctrine. In the present case there was no express agreement when the coupons in question were surrendered, and hence we must look to the surrounding circumstances to ascertain what the intention of the parties was.

It appears from the record that income bonds to the amount of $1,500,000 were issued and sold by the railroad company, which were principally paid for with the coupons and notes above mentioned. These bonds were secured, as stated, by what is called the "income" or "third" mortgage. That mortgage was executed in accordance with a previous agreement between the Shenandoah Valley Railroad Company and the Norfolk & Western Railroad Company, bearing date December 29, 1882. That agreement shows that by a previous contract between the same

Digitized by Google

parties, dated September 27, 1881, the Shenandoah Valley Company had agreed to complete its road, the southern terminus of which was then at Waynesborough, to a junction with the Norfolk & Western road, which, up to the 29th of December, 1882, it had failed to do. Accordingly it was agreed that, in order "to pay and provide for its floating and accruing indebtedness," and to raise the means to complete its road, the Shenandoah Valley Company would issue income bonds and secure them by an additional mortgage; and "for the purpose of adding to the value of said income bonds, and more promptly and advantageously negotiating the same," the Norfolk & Western Company agreed to guaranty, on certain specified conditions, the payment of interest on the bonds, which it was agreed should not be sold at less than 60 per cent. of their par value, payable in cash or obligations of the first-mentioned company, including mortgage coupons maturing in 1883 and 1884. The mortgage was accordingly executed on the 12th of February, 1883, and it set forth the object of the issue of the bonds secured by it, the terms and conditions upon which they were issued, and also the substance of the agreement aforesaid, as did the bonds themselves. The appellants, Clark & Kimball, thus had, independently of their official connection with the company, full notice of the objects for which the bonds purchased and now held by them were issued, and it is not reasonable to suppose that in surrendering their coupons at par and getting for them, at 60 cents on the dollar, income bonds secured and guarantied as already indicated, they were merely exchanging one form of indebtedness for another, leaving the original indebtedness, evidenced by the coupons, unaffected. On the contrary, the circumstances of the transaction preclude any such conclusion. Here, not only was the original security given up, but a new one was taken, secured not only on the property of the debtor, but guarantied, to a certain extent, by a third and solvent party, and the new security reciting, what was known before, that it was issued to pay the floating and accruing indebtedness of the company, a large portion of which indebtedness was used at par in purchasing the bonds at only a little over one-half of their nominal value. In addition to this, the coupons, when turned into the company, were canceled, and the transaction was treated, as in effect it was, an extinguishment of the coupons. And that such was the intention of the parties at the time hardly admits of doubt. Besides, if this be not the true view of the matter, the appellants must, upon the plainest principles of equity, be held to have waived the claim now asserted by them. In a printed statement to the New York Stock Exchange, dated May 31, 1883, accompanying their application to have the mortgage bonds of the company, including the income bonds, "listed," as it is called, statements were made by the officers of the company as to the financial condition of the company which are utterly at war with the claims now asserted. At that time Kimball, one of the appellants, was the president of the company, and Clark, the other appellant, was one of its directors. Upon the strength of these representations sales of the bonds were no doubt effected to innocent purchasers, and it would now be the grossest injustice to such persons to allow the claims in question as a prefetred charge on the mortgage property, and thereby to that extent to impair the security of the mortgages. Plainly, upon no just principle can this be done.

A decisive authority upon this point is Addison v. Lewis, 75 Va. 701. There the president of the railroad company intervened, and asserted a claim for several years' salary, which accrued before the road went into the hands of a receiver. But, as it appeared that in his published annual reports, as president, for the years in question, his salary for those years was put among the paid items, it was held that any right which he might have had to be paid in preference to the bondholders had been waived, although the salary in point of fact had not been paid. This ruling, it seems to us, is eminently just and proper, and in accordance with public policy, inasmuch as the officers of a railroad company are, in a general sense, trustees, and must therefore act in the strictest good faith in putting forth statements to the public as to the condition of the affairs of the company, upon which innocent persons, in their dealings with the company, have a right to rely. The same considerations apply to the promissory notes in question, and as to which the appellants claim the right of subrogation. But enough has been already said to show that this is not a proper case for the application of that doctrine. "The law of subrogation is the exercise of the equitable powers of the court, to afford a summary relief to a meritorious creditor, who might otherwise be subjected to loss by the operation of proceedings at law against the estate or funds of one who is indebted both to him and to others. This equitable remedy is allowed only when it does not conflict with the legal or equitable rights of other creditors of the common debtor." "It is the creature of equity, and justice is its object. It is founded upon principles of equity and benevolence, and is only to be administered in a clear case, and never to the prejudice of the rights of others." Sheld. Subr. § 4; Enders v. Brune, 4 Rand. (Va.) 438; Clevinger v. Miller, 27 Grat. 740; Miller v. Holland, 5 S. E. Rep. 701; 3 Pom. Eq. Jur. § 1419, note 1. Besides, there is no proof that when the money was loaned, for which the notes were given, there was any understanding as to how it should be applied. The company at the time was financially embarrassed, and the loans were simply made in the ordinary course of business. The lenders were pecuniarily interested in the road, and no doubt were in-

Digitized by Google

fluenced thereby in loaning the money, but with no agreement that any particular claims or class of claims should be paid with it. Indeed, Kimball himself, one of the appellants, testifies explicitly in his deposition that the money was advanced without any special agreement, written or verbal, so that it went into the treasury of the company unaffected by any special equities of the appellants, and when, afterwards, a part of it was paid out to laborers and supply-men, the debts so paid were forever discharged. It appears, moreover, that when the notes for the loans were taken the appellants received general mortgage bonds of the company as collateral security for their payment, which goes far to show, if it does not conclusively show, that the idea of a right to subrogation is altogether an afterthought. For why take general or second mortgage bonds as collateral if the understanding was that the appellants were to stand in the shoes of those whose equities were superior even to the first mortgage? To this question the answer must be that the money was loaned on the credit of the company and the collaterals so furnished, alone. At all events, such is the fair presumption, and there is no evidence to repel it.

In Addison v. Lewis, supra, a similar claim was asserted on the part of a bank for money advanced by it on collaterals, before the appointment of a receiver, and which was used by the railroad company in paying current expenses. The claim, however, was rejected. The court said: "The bank discounted the paper of the company solely upon the credit of the company, and upon collaterals deposited by the company with the bank. The acceptance of these collaterals was in itself a recognition of the subordination of the claim of the bank to the lien of the bondholders, and is sufficient to estop the bank from setting up the claim preferred in the petition." The cases of Coe v. Railway Co., 31 N. J. Eq. 105, and Atkins v. Railroad Co., 3 Hughes, (U. S.) 307, relied on by the appellants, are not in point, as in both of those cases the advancements were made on a distinct understanding, clearly established, that the parties by whom they were made should be subrogated to the rights of the creditors whose debts were paid with the money advanced. In short, we are of the opinion that the claim of the appellants Messrs. Clark & Kimball to superior equities to the bondholders cannot be sustained; that they are entitled, as to the income bonds held by them, to the security of the income mortgage only; and that so much of the decree of the circuit court as is in conflict with this opinion must be reversed and annulled.

(31 S. C. 120)

STATE *ex rel.* RUSSELL *et al. v.* BACON, County Auditor.

(*Supreme Court of South Carolina.* June 19, 1889.)

SCHOOL-DISTRICTS—TAXATION.

1. Const. S. C. art. 9, § 8, declares that the corporate authorities of school-districts "may be vested with power to assess and collect taxes for corporate purposes." Gen. St. 1882, c. 19, provides that each county shall be divided into convenient school-districts, each of which shall be a body corporate under the control of the board of school trustees for the district, which board is specially charged "to provide suitable school-houses in their districts, and to make the same comfortable." By act of 1883 (18 St. 382) the county board of examiners of Spartanburg county were authorized and required to lay off a separate school-district, which "shall be known as the school-district of the city of Spartanburg, and shall be a body politic and corporate, with such government rights, privileges, and liabilities as are provided for school-districts by the school law." Act Dec. 24, 1887, (19 St. 1119,) authorized said district to issue bonds for the building of one or more school-houses in the city of Spartanburg, and declared "the district to be a body corporate for the purpose of issuing said bonds, and when issued they shall be signed by the chairman of the board of trustees." For the purpose of paying the interest and principal when due, it was made the duty of the county auditor to compute the amount necessary to be raised, and levy the same on the property of the tax-payers. *Held*, that the district was a corporation, and a tax levied to pay for the erection of a school-house was for a corporate purpose.

2. Though the act does not in terms authorize the board of trustees to assess and collect the tax, it authorizes the corporation, which can only act through the board, to issue bonds, which implies the power to levy and collect taxes for their payment. The auditor is merely authorized to compute the annual amount to be raised, when he has been furnished with the amount assessed to pay the principal and interest.

3. As the amount of the bonds and rate of interest are fixed, a demand on the auditor to compute the amount necessary to be paid by each tax-payer for the purpose of paying the annual interest is sufficient to authorize *mandamus* to compel him to perform his duty, without any formal assessment of the amount by the board.

Application for *mandamus*.

H. E. Ravenel, for relators. *Bomar & Simpson*, for respondent.

MCIVER, J. This is an application, addressed to this court in the exercise of its original jurisdiction, for a *mandamus* to compel the respondent forthwith to assess a tax for the purpose of paying the interest on certain bonds authorized to be issued by the relators under the provisions of an act approved 24th of December, 1887. The petition sets forth (1) that the relators constitute the board of trustees of the school-district of the city of Spartanburg. (2) That the said school-district is a body corporate, duly established for the purpose of maintaining an efficient system of public schools within the limits of said district, and is invested with such powers, and charged with such duties, as are necessary and proper to carry out such purpose. (3) That the respondent is the county auditor of Spartanburg county. (4) That for the purpose of erecting suitable buildings for the public schools of said district authority was given to the relators, by an act of the legislature above referred to, to issue bonds of said school-district in the sum of $12,000, and to make all necessary contracts for the erection of such buildings, and that in pursuance of such authority the relators have had such bonds prepared for issue, and have made contracts for the purchase of a site, and the erection of buildings thereon.

Digitized by Google

(5) That for the purpose of paying the interest which will fall due on said bonds on the 1st day of July next, and on the 1st day of each succeeding January and July, it is made the duty of the county auditor of said county to levy upon all the property in said school-district, at the usual time of making the regular annual assessments, an annual tax sufficient for the payment of such interest. (6) That the relators have applied to the respondent as auditor of said county to make and enter such assessment upon the tax-books, which he declines to do. (7) That such refusal has impaired the market value of the bonds to such an extent that the same cannot be negotiated without detriment to the interests of said school-district. (8) That relators have no other remedy than by *mandamus*. The respondent, by his return, without controverting any of the facts stated in the petition, bases his refusal upon the following legal grounds, which he submits for the consideration of the court, viz.: (1) That said bonds are not valid obligations of said school-district, and there is no legal authority for him to make the required levy. (2) That the purpose for which said bonds were authorized to be issued is not a corporate purpose. (3) That the act authorizing the issue of said bonds is unconstitutional. (4) That the school-district of the city of Spartanburg is not a corporate body.

For a proper understanding of the questions presented in this case a brief review of the provisions—constitutional and legislative—relating to this subject will be necessary. First we have the constitutional provision contained in section 8, art. 9, Const., declaring that "the corporate authorities of counties, townships, school-districts, cities, towns, and villages may be vested with power to assess and collect taxes for corporate purposes," etc. Next we find the act of March 22, 1878, (16 St. 571,) entitled "An act to alter and amend the school law of South Carolina," incorporated, substantially, in General Statutes of 1882 as chapter 19, which provides that each county shall be divided into convenient school-districts, each of which shall be a body politic and corporate, under the management and control of the board of school trustees for such district, which board is, among many other things, specially charged "to provide suitable school-houses in their districts, and to make the same comfortable," etc. Then we find that by the act of 1883 (18 St. 382) the county board of examiners of Spartanburg county are specially "authorized and required to lay off a separate school-district, having Spartanburg court-house as the center, and embracing an area of not less than three miles square, and declaring "that the said district shall be known as the school-district of the city of Spartanburg, and shall be a body politic and corporate, with such government rights, privileges, and liabilities as are provided for school-districts by the school law of South Carolina, approved March 22, 1878." Finally we have the act of December 24, 1887, (19 St. 1119,) under which this controversy has arisen, entitled "An act to enable and authorize the school-district of the city of Spartanburg to issue bonds for the purpose of building public school-houses in the city of Spartanburg," which in its first section declares "that the school-district of the city of Spartanburg is hereby permitted and authorized to issue twelve thousand dollars of six per cent. bonds for the purpose of building one or more public school buildings in the city of Spartanburg: provided, that a majority of the qualified voters of said school-district shall be in favor of such issue, as expressed in an election held for that purpose." Section 2 prescribes regulations for the election and declaring the result. In section 3 it is provided "that the said school-district of the city of Spartanburg is hereby declared to be a body corporate for the purpose of issuing said bonds, and, when issued, they shall be signed by the chairman of the board of trustees," etc. Section 4 reads as follows: "That, for the purpose of paying the interest on said bonds, and the principal when due, it shall be the duty of the county auditor of the county [of] Spartanburg, or such other officer as may be charged with the assessment of taxes, to compute annually the amount necessary to be raised, and to levy the same upon all the real and personal property in said school-district, and the amount so levied shall be collected by the county treasurer of the county of Spartanburg, and held by him for the purpose of paying the said interest or principal, if any be due, and shall be used for no other purpose whatever."

From this review it is clear that the school-district in question has been duly constituted a corporation, for it is so expressly declared by the act of 1883, and this declaration is repeated, perhaps unnecessarily, in the act of 1887,—that the purpose of said corporation was to promote the educational interests of the people residing within the designated territory, and that the board of trustees, though not in terms so declared, are the corporate authorities of such corporation, for, by the provisions of the act of 1878, expressly referred to in the act of 1883, and made a part thereof, each school-district is under "the management and control" of the board of trustees appointed for the same. And we think it equally clear that the purpose for which the tax in question was authorized—to pay a debt contracted for the erection of school-houses—was a corporate purpose, for, as we have seen, one of the duties with which the boards of trustees of school-districts are specially charged is "to provide suitable school-houses in their districts, and to make the same comfortable." Now, as the provision of the constitution above cited expressly provides that "the corporate authorities of * * * school-districts * * * may be vested with power to assess and collect taxes for corporate purposes," and, as the purpose for which the tax in question

Digitized by Google

was authorized was a corporate purpose, the only remaining inquiry is whether "the corporate authorities" of the corporation known as "the school-district of the city of Spartanburg" have been invested with power to assess and collect the tax in question, and here arises the only difficulty in the case. Regarding, as we do, the board of trustees as the corporate authorities of the corporation, the precise question is whether such board has been invested with power to assess and collect the tax in question. While it is quite true that the act of 1887 does not, in express terms, authorize the board of trustees to assess and collect the tax in question, yet it does authorize the corporation,—which can only act through its corporate authorities, who, as we have seen, are the board of trustees,—to issue bonds to the amount of $12,000 for the purpose of erecting public school buildings, and this "necessarily implied the power to levy and collect taxes to provide for the payment thereof." Feldman v. City Council, 28 S. C. 57. It seems to us, therefore, that, by a fair construction of the act, it may be regarded as investing the board of trustees with power to assess and collect taxes necessary for the payment of the principal and interest on the bonds thus authorized to be issued by the corporation through its corporate authorities, the board of trustees.

It is true that the provisions of the fourth section of the act of 1887 would, at first view, seem to have the effect of conferring the power, and charging the duty, of assessing this tax upon the county auditor of the county of Spartanburg, who is not one of the corporate authorities of the corporation, and who could not, therefore, be clothed with such power under the provisions of the constitution. But a more careful examination of the terms of that section will show that such is not the proper construction. The language used is somewhat peculiar. It does not purport to confer any power upon the auditor to assess the amount of the tax, but he is simply required to compute annually the amount necessary to be raised "for the purpose of paying the interest on said bonds, and the principal when due," and to levy the same upon all the real and personal property in said school-district. This involves merely an arithmetical calculation, and implies that, when he has been furnished with the amount assessed by the corporate authorities for the purpose of paying the interest on said bonds and the principal when due, his duty is simply that of an arithmetician, to compute annually the amount to be charged against each tax-payer within the limits of the school-district, and levy the same by charging such amount on the tax-books against each individual tax-payer. This, as it seems to us, is the proper construction to be placed upon the language of the section,—which it must be admitted is not as clear as it might have been,—because best in accordance with the intention of the legislature as gathered from the whole scope and tenor of the act. When it becomes desirable or necessary to provide for the payment of the principal of said bonds, either by creating a sinking fund, or such other mode as may be deemed best, then, before the auditor can be required to discharge the duty imposed upon him by the act, it will become necessary to furnish the auditor with the amount necessary for that purpose, in addition to the amount required to pay the annual interest; but now, when the auditor is simply called upon to compute the amount necessary to be paid by each tax-payer, and charge the same upon the tax-books for the purpose of paying the annual interest, which is a certain, definite sum, as the amount of the bonds and the rate of interest are both fixed by the act, we can see no necessity for any more formal assessment of such amount by the board of trustees than is necessarily implied in their demand as set forth in the petition. It seems to us, therefore, that the writ of *mandamus*, as prayed for in the petition, should issue, and it is accordingly so adjudged.

SIMPSON, C. J., and MCGOWAN, J., concur.

(83 Ga. 143)

SWANN *et al.* v. MORRIS *et al.*

(*Supreme Court of Georgia.* May 17, 1889.)

LANDLORD'S LIEN.

Where it appears that landlords sold fertilizers to their tenant as agents for third persons, taking therefor the tenant's note payable to the third persons, they are not entitled to a lien on the tenant's crops for supplies furnished, under Code Ga. § 1978, though they are obliged to pay the note, under their contract with their principals.

Error from superior court, Newton county; BOYNTON, Judge.

James F. Rodgers, for plaintiffs in error. *Middlebrooks & Simms*, for defendants in error.

SIMMONS, J. The court below erred in overruling the *certiorari* in this case. In order for a landlord to have a lien upon his tenant's crop for supplies, under section 1978 of the Code, the landlord must furnish the articles as landlord. Scott v. Pound, 61 Ga. 579. The evidence in this record shows that Morris & Cook did not furnish the guano to Shelton as landlord, but sold it to him as the agents of Adair Bros. Shelton rented the land from Hardwick in the fall of 1886. His tenancy began in January, 1887. Before he moved upon the land, Morris & Cook purchased it from Hardwick, and Hardwick transferred Shelton's rent note to them. They were the agents of Adair Bros. for the sale of fertilizers. As such agents, they sold a certain quantity of fertilizer to Shelton, and took his note for the same, payable to Adair Bros. As merchants, they sought to sell Shelton other supplies, and take a lien therefor. Shelton refused to purchase from them, or give them a lien, stating that he had agreed to give a lien on his crop to

Digitized by Google

Swann, Stewart & Co. When the note given to Adair Bros. for the guano fell due, Shelton failed to pay it, and Morris & Cook paid it, as they were bound to do, under their contract with Adair Bros. Morris & Cook then foreclosed their landlord's lien, alleging that they had furnished guano to Shelton as landlords. This was resisted by Swann, Stewart & Co. The jury found for Morris & Cook, and Swann, Stewart & Co. sued out a *certiorari*.

Under this state of facts, we think, as said before, that the court erred in overruling this *certiorari*, because the evidence showed that Morris & Cook did not furnish the guano as landlords, but as agents of Adair Bros. Nor did the fact that they paid Shelton's note at maturity entitle them to foreclose a lien as landlords. Scott v. Pound, supra. It would make no difference that they owned the guano, if they sold it as the agents of Adair Bros. Judgment reversed.

(83 Ga. 92)

SHAW v. STATE.

(*Supreme Court of Georgia.* May 20, 1889.)

MISCONDUCT OF JURY—EVIDENCE.

1. In a murder trial, before the arguments were finished, after adjournment for the night, the bailiff took the jury from the room where he was ordered to keep them, to a prayer-meeting conducted by the active prosecutor in the case, who assigned them seats. Some of the congregation left before and some after the jury. *Held*, that the misconduct of the bailiff and jury was so gross that a new trial must be granted, though the affidavits for the state show that no reference was made to "any law case," that no one spoke to the jury, and the affidavits of the latter were to the effect that they were in no way influenced in their verdict by anything occurring while absent from the jury-room.

2. A photograph of the locality where the deceased was killed, taken after the trial, with persons placed where defendant and his accomplices were said to have stood, is not incompetent, as tending to influence the jury.

Error from superior court, Butts county; BOYNTON, Judge.

A. D. Hammond, J. W. Thurman, and *L. L. Ray*, for plaintiff in error. *E. Womack*, Sol. Gen., for the State.

SIMMONS, J Thomas Shaw was tried and convicted upon the charge of murder. He made a motion for a new trial upon the several grounds therein, which motion was overruled and he excepted. The main grounds relied upon before us for the reversal of the court below in refusing a new trial were the sixth and seventh grounds of the original motion, and the first of the amended motion, which are as follows: "(6) Because the jury, while the case was pending, went to church at night. (7) Because said jury, while at church at night, heard the prosecutor in said case talk and shout; also heard a prayer in reference to the execution of the law and the maintenance of justice." "(1) That said jury attended the Baptist Church in a body, and while there was addressed by the prosecutor in said case, and was exposed to the crowd, going to and from the church." These grounds were certified to by the trial judge, "with reference to the affidavits to sustain and rebut the same," which appear in the record. These affidavits show, in substance, that pending the trial, and after the argument to the jury had begun, night came on, and the court took a recess until the following morning, and instructed the bailiff who had charge of the jury, and the jury themselves, not to allow any one to speak to them, or to speak in their presence, about the cause, nor to discuss it among themselves, until the argument in the case was concluded; that during that night the bailiff took the jury from the jury-room (where he was ordered to keep them) to a church where a prayer-meeting was being held, conducted by the pastor, who was the active prosecutor in the case; that, upon their arrival at the church, the prosecutor, Mr. Hooten, politely assigned the jury to seats in the church, separate and apart from the congregation, and that he addressed the jury. The affidavits further show that upon the termination of the exercises the jury left the church, and mixed with the crowd, some of the congregation going out before and some after the jury. The state introduced a number of affidavits to show that, while the jury attended the meeting at the church, they were given seats wholly apart from the congregation, and that no reference was at any time made to "any law case whatever;" that they left the church in a body, in charge of the bailiff, without mixing with the crowd, and without any person having any opportunity to have a conversation with them, either while they were at the church or when they were leaving it; and that the prayer to which reference is made in the seventh ground of the motion made no further reference to the court and jury in said case than to ask "that the blessings of God might rest upon our government, with its officers, and that God would bless the officers of the court then in session, that they might be guided aright in the discharge of their duties." The bailiff, who was in charge of the jury, made an affidavit that, during the trial, no one spoke of the case in the presence of the jury, and that nothing was said about the prisoner in their presence; that he was careful to guard them, and, not thinking it was improper, had gone with them to the prayer-meeting; that on their way to and from church they did not separate, nor was anything said to them, or any of them, or in their presence, about the case; and that at the church they were seated apart from the congregation, and that the usual services were held, and nothing was said about the case. The jurors also made affidavits, in which they say that they attended the prayer-meeting in a body, and did not disperse or separate; that they were provided with seats together, apart from the rest of the congregation; that the services were such as are usual at prayer-meetings, and that nothing was said by any one in

Digitized by Google

their hearing, during, after, or before the services, directly or indirectly, about the case on trial, or about any one connected with the case; that they were not approached by any one at any time with a view of influencing their verdict; and that their verdict was not in any way influenced by the act, presence, or words of any persons present at that time, or at any other time, outside of the testimony in the case, but that their verdict was made up calmly and dispassionately from the testimony as they understood it. The trial judge, after hearing these affidavits, overruled the motion for a new trial.

1. The effect of this judgment was that in his opinion the state had shown beyond a reasonable doubt that the defendant was not injured by the misconduct of the bailiff and the jury. The law in this state is that, where misconduct of a juror or of the jury is shown, the presumption is that the defendant has been injured, and the *onus* is upon the state to remove this presumption by proper proof. When the trial judge has decided, as in this case, that the state has removed that presumption, and has shown that the defendant was not injured by the misconduct of the jury, reviewing courts are loath to interfere with his finding upon that subject. This court, however, has in several cases reviewed and reversed the decision of the trial judge upon this subject, notably in the case of Obear v. Gray, 68 Ga. 182. So it is not the rule in this state, as it is in some others, that the decision of the trial judge upon this question will not be reviewed or reversed. The only trouble we have had in coming to our conclusion in this case is the great respect that we have for the judgment of the able and impartial trial judge who presided in the court below. When these grounds of the motion, and the affidavits in reference thereto, were read to us upon the hearing of this case, the misconduct of the bailiff and the jury appeared to be so gross that our minds reached the conclusion at once that the defendant ought to have a new trial. We apprehend that the judgment of the trial judge was based upon the affidavits introduced by the state, in which the jurors swore that they were not influenced by anything they saw or heard at the meeting; his conclusion therefrom being that the defendant was not injured by the misconduct of the jury, and that he was adhering to the letter of the law in overruling the motion on these grounds. There are many things which can be done by individual members of the jury, or by the whole jury, which are susceptible of such clear explanation that the trial judge would be authorized in refusing to set the verdict aside. There are other things, however, which if done by an individual member of the jury, or by the whole jury, are so contrary to the public policy of the state in the procurement of fair and impartial trials for the citizens of the state as to require that a verdict rendered by such jury be set aside, whether the defendant has been injured thereby or not; and, in our opinion, the case under consideration belongs to this class. The state is jealous of the rights and liberties of its people. When one of its citizens is accused of crime, it throws around him all the safeguards that are possible, in order to procure him a fair and impartial trial. It requires the officer who has charge of that particular jury to swear in substance, in open court, to take them to the jury-room, and there keep them safely, and not to communicate with them himself, or suffer any one else to communicate with them, unless by leave of the court. The law contemplates that, when a jury are selected and sworn to try a citizen for felony, they shall be entirely separated from the world, and that no communication whatever shall be had with them from the beginning of the trial until the verdict is rendered, unless by leave of the court. It contemplates that no outside influences shall be brought to bear on the minds of the jury, and that nothing shall occur outside of the trial which shall disturb their minds in any way; that the minds of the jury shall be entirely occupied with the consideration of the case which they are sworn to try. Let us apply these rules to the facts in this case. Here was a defendant on trial for his life. This jury had been selected to pass upon that issue. The bailiff had been sworn to keep them separate and apart from their fellow-citizens. In violation of this oath, without permission of the judge, he took them from their room, where he had sworn to keep them, to a prayer-meeting conducted by the prosecutor in the case. When they arrived there, they were shown to their seats by the prosecutor, who provided for them a place apart from the remainder of the congregation, and who led the services and addressed the congregation. Prayers were offered for the court and its officers. How long they remained there does not appear. For aught that appears in the record, the house may have been crowded. One of the grounds of the motion alleges that there was "shouting" at the meeting. What influence this shouting and religious excitement may have had upon the minds of the jury does not appear. It does not appear that Mr. Hooten, the prosecutor, was not among those who shouted. The jury seeing this going on, and seeing this prosecutor filled with religious zeal and fervor, may have reasoned in their minds, and doubtless did, that this man, who was the active prosecutor of the defendant, who assisted in the selection of themselves as jurors in the case, and who testified before them as witness, by his conduct and declarations at the prayer-meeting showed that he was a good and upright man, and that such a man would not prosecute the defendant unless he believed him to be guilty. Some of them were perhaps members of his congregation, and looked up to him as their pastor and spiritual guide. We do not say, nor do we intend to intimate, that Mr.

Digitized by Google

Hooten designedly intended his actions to have an undue influence upon the jury, but who can say that they did not have this effect? Suppose that, instead of the jury having been taken by the bailiff to the preacher, the bailiff had brought the preacher to the jury-room, and he had there addressed them, would any one say that this would not have been such gross misconduct as to require their verdict to be set aside? Suppose, too, that in addition to carrying the preacher to the jury-room, the bailiff had carried his congregation, and that these exercises had been held in the jury-room, would any one say that their verdict should not be set aside? What difference does it make whether the jury is carried to the preacher and the congregation, or whether the preacher and congregation are brought to the jury? It is true that the jury say in their affidavits that these things did not influence their minds; but how can they tell,—how can any man tell what particular facts and circumstances influence his judgment? Woolfolk v. State, 8 S. E. Rep. 724 (last term;) Smith v. Lovejoy, 62 Ga. 373; Thomp. Trials, 962. After mature consideration of all these facts, we think the misconduct of this bailiff and jury was so gross that the public policy of the state requires a new trial for the defendant. It was such a gross violation of all order, decorum, and decency in the trial of a case of life and death that the verdict should be set aside, whether the defendant was injured or not. We have carefully examined the text-books and reports, and we can find no case of such gross misconduct as the facts show this conduct of the jury to be. Numerous cases are cited where the verdict was set aside for conduct much less gross than this.

2. During the progress of the trial a photograph of the place where the deceased was killed was offered and admitted in evidence. It appears from the evidence that the prosecution had procured a photograph of the locality and scene of the homicide. This photograph seems to have been taken before the trial, and persons were placed in the positions said to have been occupied by the defendant and his accomplices. It was insisted by the plaintiff in error that the court erred in admitting this photograph in evidence before the jury. The motion for a new trial fails to state that it was objected to by the defendant, or, if objected to, on what grounds the objection was made. The motion says it was calculated to inflame the jury. We have examined the photograph, and do not see in what respect it was calculated to inflame the jury. We do not think there was any error in admitting it on the ground alleged in the motion. The only ground that we can see why it should have been excluded was not argued by counsel for the plaintiff in error. The evidence in the record does not positively show that the defendant's position was that shown in the photograph. Wilson testifies, it is true, that the defendant was in front of the house, but does not locate him in the position the photograph does. Hooten testified that the photograph was a correct representation of the locality, but does not undertake to testify that Shaw was in the position shown by the photograph. As a new trial is to be had, we would suggest that the state, if it seeks to use the photograph again, prove more certainly that it represents the defendant's position at the time of the homicide, or that the picture be not used. We do not see any necessity ourselves for using the photograph. If Wilson is to be believed, the locality is sufficiently described in his testimony.

3. There was no error in the other grounds of the motion for a new trial, especially the first, under the explanation made by the judge in his approval thereof. Judgment reversed.

(83 Ga. 28)

SCOTT *et al. v.* MCDONALD.

(*Supreme Court of Georgia.* May 15, 1889.)

JURY—SALES—CONSIDERATION.

1. A juror who was unable to agree with his fellow-jurors, causing a mistrial, is incompetent as a juror when the case is again called for trial in the same court.

2. Code Ga. §§ 1553*a*, 1553*b*, provide for the inspection and branding of fertilizers; that the brand shall contain an analysis of the ingredients; and that the manfacturer shall guaranty the same. *Held* that, in a suit for the price of fertilizer sold, the only plea of total or partial failure of consideration is that the fertilizer sold did not contain the guarantied ingredients, and it is not sufficient to allege and show that it was of no value to the crops.

Error from superior court, Rochdale county; BOYNTON, Judge.

The official report was substantially as follows: George W. Scott & Co. sued McDonald in a magistrate's court on an account dated November, 1884, for 10 sacks guano, $36, with interest. Defendant pleaded *non assumpsit*, and also that the consideration of the account had failed because the guano was entirely worthless and of no benefit whatever. The cause was tried before a jury on an appeal. Defendant's counsel objected to one Lucas, and asked that he be stricken, because he was on a jury that tried this case, said jury failing to agree, and causing a mistrial. The jury found for plaintiffs. The defendant took the case by *certiorari* to the superior court, alleging that the court erred in not striking from the panel of jurors the name of Lucas; in submitting the law and facts to the jury without charging them; in allowing counsel for plaintiffs to read sections 1553*a*, 1553*b*, of the Code to the jury, and argue to them that defendant had no right under that law to file a plea of failure of consideration to an open account for the purchase of guano, and in allowing counsel for plaintiff to insist that that was the law of the case, thereby misleading the jury; that the verdict was contrary to law, evidence, etc. The *certiorari* was sustained, and a new trial granted on the ground that Lucas was an incompetent

Digitized by Google

juror. To this judgment the plaintiffs excepted on the grounds, among others, of error in holding Lucas an incompetent juror, and error in the direction given to the magistrate.

J. N. Glenn and *J. R. Irwin*, for plaintiffs in error. *James C. Barton* and *A. C. McCalla*, for defendant in error.

SIMMONS, J. 1. The facts of this case will be found in the official report. The court below was correct in holding that a juror who had been impaneled and sworn to try the case, and who was unable to agree with his fellow-jurors, a mistrial resulting therefrom, was an incompetent juror to try the case when it was again called for trial in the same court. Mayor, etc., v. Goetchius, 7 Ga. 139; Hawkins v. Andrews, 39 Ga. 118.

2. We think the court was right in holding, generally, that a plea of total failure of consideration could be filed in a case like this; but we think he erred in directing that the plea in this record should be submitted to the jury with the evidence adduced in this case. We do not think the plea filed in the justice's court in this case is such a plea of failure of consideration as is contemplated by the statute in this class of cases. In our opinion, the only plea of total or partial failure of consideration in such a case as this is the plea that the fertilizer purchased did not contain the ingredients as required by the statute. Code, §§ 1553*a*, 1553*b*. Before any person can legally sell fertilizers in this state, the fertilizer must be inspected by an officer of the state. It must be branded and tagged; and the brand must contain an analysis of the fertilizing properties contained therein; and the law requires that the manufacturer shall guaranty said analysis. When all this is done, the state authorizes the person to sell the fertilizer. It says, if the fertilizer contains these ingredients up to the measure of the guarantied analysis, it is sufficient. A person who buys a fertilizer, after these requirements have been complied with, does so with the knowledge that the law declares it to be a good fertilizer. The law does not require the seller to guaranty its effects upon crops; it only requires him to warrant that it contains such a per cent. of certain ingredients. The purchaser must determine for himself whether those ingredients will benefit his crops. He purchases it with the knowledge that the state's officer has inspected it, and placed his tag upon it. He purchases it with the knowledge that the manufacturer's brand is upon it, containing the analysis required by law. He purchases it with the knowledge that the state has licensed it to be sold. After so purchasing, in our opinion, he can only show that the fertilizer is worthless by proving, in case of total failure of consideration, that it did not contain the ingredients guarantied in the analysis; or, in case of partial failure of consideration, that it did not contain as much of the ingredients as the law requires. In order to make out such a plea it is necessary for him to go further than show that it had no effect on his crops. He must show by this, and by other proof, that it did not contain the ingredients of the guarantied analysis. If he only shows that it did not have any effect on his crop, that is not sufficient under the ruling of this court in the case of Hamlin v. Rogers, 78 Ga. 631, 3 S. E. Rep. 259. We have read the evidence sent up in this record, and find that the whole evidence of the defendant in the court below was as to the effect the fertilizer had upon his crop. If the case were sent back to be tried over, this evidence would not be sufficient, under our view of the law, to authorize the jury to find a verdict in his favor. Therefore, under the view we take of the law of this case, it was unnecessary to send the case back to have a new trial, although the court erred in not sustaining the motion to strike the juror for cause. Under this evidence and our view of the law any impartial jury would be compelled to find in favor of the plaintiffs; and, as litigation must have an end at some time, we reverse the judgment of the court below granting a new trial, and direct that the verdict of the jury in the justice's court be allowed to stand. Judgment reversed.

(83 Ga. 332)

HICKS v. RILEY.

(*Supreme Court of Georgia.* May 20, 1889.)

JUDGMENT—VALIDITY—AMENDMENT.

1. Where the declaration, verdict, and execution were in the name of George S. Riley, and the judgment in the name of George R. Riley, there is no material difference, and, in the absence of showing that there were two persons named George Riley, an affidavit of illegality on that ground is properly dismissed.

2. An amendment of the judgment by changing the R. to S. was immaterial, and did not vitiate the levy.

Error from superior court, Bibb county; GUSTIN, Judge.

The following is the official report: An execution in favor of George S. Riley, agent, against J. R. Hicks, having been levied on certain land, Hicks interposed an affidavit of illegality, on the grounds (1) that he was never sued or served, nor was any verdict ever had against him, in any case in which George R. Riley, agent, was plaintiff; (2) because the *fi. fa.* does not state for whom the plaintiff is agent, and no judgment in favor of one as agent, without expressing for whom he is agent, can be legally rendered; and (3) because the judgment on which the *fi. fa.* issued does not conform to the verdict in the case. He also moved, at the trial, to dismiss the levy and quash the execution, because "the verdict rendered in said case was in favor of one Geo. S. Riley, agent, and not in favor of Geo. R. Riley, as alleged and set forth in said judgment." This motion was overruled. On motion of the plaintiff the affidavit of illegality was disallowed and stricken, to which ruling, as well as to the

Digitized by Google

overruling of the motion to quash the execution, the defendant excepts.

Patterson & Hodges, for plaintiff in error. *J. P. Ross* and *Hardeman & Davis*, for defendant in error.

SIMMONS, J. The facts of this case will be found in the official report. There was no error in the trial judge in sustaining the demurrer to this affidavit of illegality. The law does not regard the middle name or middle initial of a person as material, unless it be shown that there are two persons of the same first name and the same surname. This record fails to show that there were two persons named George Riley. Hence when the declaration was in the name of George S. Riley, and the verdict was for George S. Riley, and the judgment was in the name of George R. Riley, and the execution issued in the name of George S. Riley, there was no material difference between the verdict and judgment and the execution, and the court was right in dismissing the illegality taken on this ground alone. Nor did the levy fail when the court passed an order amending the judgment from George R. Riley to George S. Riley. It was an immaterial amendment, and did not vitiate the levy. Judgment affirmed.

(83 Ga. 124)

GUNN v. SLAUGHTER.

(*Supreme Court of Georgia.* May 20, 1889.)

APPEAL—RELEASE OF SURETY—EXECUTION SALE.

1. Where there are no exceptions to the charge of the judge, and there is evidence to sustain the verdict, it will not be set aside.
2. It was proper to refuse to allow a surety on a *fi. fa.* to testify that he had been released from liability thereon, when the release was in writing.
3. A surety on a *fi. fa.*, who has been discharged from liability by reason of the release of his cosurety by plaintiff in the *fi. fa.*, must take some legal steps to have the *fi. fa.* declared invalid in order to protect his land from a sale, under the execution, to an innocent purchaser.
4. The omission of the court to charge on a subject in respect to which no request was made is not error.
5. Where no fraud is charged against any of the parties to a levy and sale of land under execution, the sale will not be set aside because the price obtained was very small; Code Ga. §§ 2647, 2742, providing that inadequacy of price will not avoid a sale.

Error from superior court, Butts county; BOYNTON, Judge.

The official report was substantially as follows: This was an action of complaint for land brought by Mary Henrietta Gunn against Isaac Slaughter. Plaintiff having died during the suit, her administrator was substituted. It appeared that both parties claimed under Alexander Saunders,—plaintiff by deed from said Saunders and wife to Whitfield, from Whitfield to Head, and from Head to plaintiff; defendant through a sheriff's deed which it was claimed conveyed the land by virtue of a sheriff's sale under levy of an execution in favor of A. W. Cozart v. Simon H. Saunders, principal, Thomas J. and Alexander Saunders, securities. The boundaries given in the levy and deed by the sheriff include the land in dispute, and the land in dispute was sold by the sheriff. Defendant showed that the land in dispute was included in the boundaries given in the levy and sheriff's deed; that Walker bid off the land at sheriff's sale, and then sold to Mallet, who was put in possession by the sheriff, and rented the land to Ogletree. It was admitted that defendant held under Mallet. Defendant introduced an *alias fi. fa.* in favor of A. W. Cozart v. S. H. Saunders, principal, and Thomas J. and Alexander Saunders, securities, issued on a judgment of May, 1866. Among the entries of this *fi. fa.* was an entry of levy December 3, 1875, on the 25 acres "known as the parcel recently sold by Alex. Saunders to T. S. M. Bloodworth," etc., and of sale thereof to E. H. Walker on the first Tuesday in July, 1877; also an entry of levy, May 25, 1877, on "250 acres of land whereon Alex. Saunders now lives, * * * bounded west by lands of R. G. Byars, north by lands of Cleveland and Treadwell, east by lands of Gunn, south by C. F. Ethridge's land, levied on as the property of Alex. Saunders," etc.; also, "claim and illegality filed by Alex. Saunders and Mrs. Gunn, damage bond given by Mrs. Gunn;" also, a readvertisement of the same levy, dated October 1, 1878, and an entry of sale to William Walker on first Tuesday in November, 1878, for $61. Defendant introduced the deed from the sheriff to Walker, and from Walker to Mallet. These deeds purported to convey the whole tract of 250 acres, less 47 acres sold to Byars and Mallet, and 65 acres exempted as homestead of Alexander Saunders. The verdict was for defendant. Plaintiff moved for a new trial upon the following grounds: (1, 2) Verdict contrary to law, evidence, etc. (3) Error in refusing to allow plaintiff to prove by Thomas J. Saunders that he had been released by the plaintiff or his attorney from all liability on said *fi. fa.*, he being one of the securities thereon, Alexander Saunders being the other; plaintiff not seeking to go into the contents of the paper releasing him, only desiring to prove the fact of release. (4) Error in refusing to allow plaintiff to introduce the record of the release given by the plaintiff to the said Thomas Saunders, exempting him from liability on the said *fi. fa.*, it appearing that the said release was recorded on the books of the clerk of said court. (5) Omission to charge as to the discrepancy between the price the lands brought at sheriff's sale and the value of said lands. The motion was overruled, and the plaintiff excepted.

Lyon & Estes and *Hardeman & Davis*, for plaintiff in error. *John I. Hall*, for defendant in error.

SIMMONS, J. 1. The facts of this case, and the motion for a new trial, will be found in the official report. We agree with the senior counsel for the plaintiff in error that the main question in this case was whether the levy set out in the record covered the land in

Digitized by Google

dispute, and whether the land was sold under that levy. The presumption is that the trial judge submitted this question fairly to the jury on the trial of the case, as there were no exceptions to the charge. The jury found by their verdict that the levy covered the land, and that the land was sold thereunder. There was evidence to authorize their finding. As the trial judge was satisfied therewith, we will not interfere with his discretion in refusing a new trial.

2. There was no error in refusing to allow Thomas J. Saunders, one of the securities, to testify that he had been released by the plaintiff from all liability on said *fi. fa.*, it appearing that the release was in writing, nor would it have been proper to allow the proof to be made by the original release itself to bind the third purchaser and defendant in this case. It appearing that this defendant purchased some time after the sheriff's sale from the person who purchased from the purchaser at the sheriff's sale, the object of proving the release was to show that, one security being released by the plaintiff, the other was also released, and, therefore, the *fi. fa.* was *functus officio*. We are inclined to think that this would not invalidate a sale made under the *fi. fa.* to an innocent purchaser, especially as the security who was not released by the written instrument took no steps to have the *fi. fa.* declared invalid by a legal proceeding, or, if he took any, withdrew them from the court. If Alexander Saunders, whose land was sold, had been discharged by reason of his co-surety's release by the plaintiff, he should have taken some legal proceedings to have the *fi. fa.* declared invalid or settled. This will also dispose of the fourth ground of the motion, wherein it is complained that the court refused to allow the record of the release of T. J. Saunders to be introduced in evidence; besides, there was no sufficient foundation laid for the introduction of the evidence, the loss of the original not having been sufficiently proven.

3. The next ground complains that the court omitted to charge as to the discrepancy between the price the land brought at sheriff's sale and the value thereof. This was not error. The record shows that no request was made to the court to charge upon this subject. The price the land brought at sheriff's sale seems to have been very small, but no fraud is charged in the record in procuring the levy to be made, or in making the sale, either on the part of the plaintiff in *fi. fa.*, the sheriff, or the purchaser at the sheriff's sale. Mere inadequacy of price will not avoid a sale. Code, §§ 2647, 2742. Judgment affirmed.

(31 S. C. 603)

BEST v. SANDERS *et al.*

(*Supreme Court of South Carolina.* June 24, 1889.)

PARTITION—ESTOPPEL.

Plaintiff, a minor about 16 years of age, instituted proceedings for partition of certain realty belonging to her deceased father, to which all of his heirs were made parties. A decree was entered, ordering partition according to their rights as ascertained. The case was afterwards marked on the docket "Ended." It appeared that commissioners were appointed, but failed to agree; that one S., who married plaintiff's mother, purchased the interests of some of the heirs, went upon the land, and remained in possession for about 15 years, when he died, and his widow, who purchased the land at a probate sale as part of his estate, went into possession, and kept it until supplemental proceedings for partition were commenced by plaintiff, some 30 years after the commencement of the original proceedings. Shortly before plaintiff became of age, S. paid to her guardian a sum of money, which, together with what he had paid her former guardian, was sufficient to pay for her interest in her father's estate. After she became of age this sum was accounted for to her by her guardian on final settlement, and she remained inactive for more than 20 years thereafter. *Held*, that a finding in the supplemental proceeding that she must be presumed to have formally conveyed her interest to S., or that he had acquired an equitable title that would estop her from having partition, was proper.

Appeal from common pleas circuit court of Barnwell county; NORTON, Judge.

J. L. Tobin, for appellant. *J. J. Maher*, for respondents.

MCIVER, J. In 1854 the plaintiff, being then an infant about 16 years of age, filed her bill, by a next friend, in the late court of equity, for partition of certain real estate, as the property of her deceased father, Lewis F. Stokes. To this bill all the heirs at law of said Stokes seem to have been made parties, and on the 16th of February, 1855, a decree was rendered, ascertaining the shares of the several parties, and a writ of partition was ordered to divide the real estate among the several parties according to their rights as ascertained by said decree. So far as the records show, no further action was taken until February term, 1856, when the case was marked on the docket "Ended." It appears, however, from certain parol evidence adduced in this case, corroborated by a blank return apparently prepared for the commissioners in partition, but not signed by them, that commissioners in partition did go upon the land for the purpose of dividing the same, but, being unable to agree, no further action, so far as appears, was taken by them. It also appears that one Jesse C. Sanders, who had married the widow of intestate, Stokes, and had bought up the interest of some of the other heirs, was a party to said bill, and claimed an interest in said land as one of the heirs of his wife, who had died in the mean time, and also under his purchases from the other heirs, and that said Jesse C. Sanders remained in possession of the land, probably from the time of his marriage with the widow of intestate Stokes until his death, in 1873. After his death his widow, Rivannah Sanders, and her three children, John E. Sanders, Jane Sanders, and Susan Sanders, remained in possession of the land, claiming, as it is alleged, as heirs at law of Jesse C. Sanders, until the land was sold, under proceedings in the court of probate, as a part of the estate of said

Digitized by Google

Jesse C. Sanders, on the 5th of December, 1877, at which sale the widow Rivannah became the purchaser, and from that time she and her children remained in possession, she claiming under said purchase, until some time in the year 1883, when, having occasion to change her place of residence, the defendant William B. Sanders without legal authority, as it is alleged, took possession. The said Rivannah Sanders died intestate in 1884, leaving as her heirs at law her three children above named, who claim the land in question as such heirs under the purchase of their mother of the same as part of the estate of their deceased father, Jesse C. Sanders, and these children are now the real contestants of the claim of the plaintiff now set up for partition of the land as the yet undivided estate of her deceased father, Lewis F. Stokes. The present proceeding, by way of supplemental complaint, was commenced in 1883 for the purpose of obtaining partition of the land as a part of the undivided estate of Lewis F. Stokes, and an account for rents and profits from the various parties who have been in possession of the same, and to it all those who are now heirs at law of said Stokes are made parties, though none of them except the plaintiff appear to contest the rights of the children of Rivannah Sanders above named, unless the defendant Mary W. Sanders a lunatic, who answers by a guardian *ad litem*, submitting her rights to the protection of the court, can be regarded as so doing. The circuit judge held that, from the lapse of time and various circumstances pointed out in his decree, the plaintiff and her husband "are presumed to have formally conveyed her interest in the land to Jesse C. Sanders. If not, then Jesse C. Sanders acquired an equitable title, which estops the plaintiff from having partition." And that, as "this is not a proper case to be retained for the adjudication of the rights of the defendants among themselves, and without such adjudication, and without prejudice to such rights, it is ordered and adjudged that the complaint herein be dismissed, and that the parties respectively pay their own costs, except Mary W. Sanders, whose costs (of course, including that of her guardian *ad litem*,) the plaintiff must pay." From this judgment the plaintiff appeals upon the several grounds set out in the record which we do not deem it necessary to repeat here, as according to our view they raise substantially only questions of fact; for, as we think the testimony fully warrants the conclusion reached by the circuit judge that the plaintiff and her husband are presumed to have formally conveyed her interest in the land to Jesse C. Sanders, it is unnecessary to consider the alternative view taken by the circuit judge that Jesse C. Sanders acquired an equitable title which estops the plaintiff from partition, which might possibly give rise to some legal questions.

Without going into any discussion of the evidence, which it is unusual and unnecessary for this court to do, it is sufficient for us to say that the silence and inaction of the plaintiff for more than 20 years after she attained her majority, especially when coupled with the circumstances tending to show that she had, through her guardian, received full payment for her interest in this land, are quite sufficient to warrant, if they do not irresistibly lead, to the conclusion adopted by the circuit judge. When it is remembered that the original proceeding for partition was instituted by the plaintiff alone, who though then a minor had, at least, attained the age of 15 years, an age at which she was certainly competent to understand what was going on, as is shown by the fact that she testifies in this case, with some particularity, as to what occurred when the commissioners in partition went upon the land for the purpose of dividing it, and were unable to agree as to the amount at which the land should be assessed; when she knew, as she says, that she had an interest in the land, and needed it; when it appears that Jesse C. Sanders was buying up the interests of the other heirs; when it appears from the testimony that a sum of money was paid to her guardian by Jesse C. Sanders shortly before she became of age, which, together with an amount previously overpaid to her former guardian on account of her interest in the personal estate of her father, was sufficient to pay for her interest in the real estate, and which cannot be accounted for in any other way; when it appears that after her marriage, and after she had attained her majority, this sum of money was accounted for to her by her guardian on final settlement; and when she remained entirely silent and inactive for more than 20 years, making no claim whatever, so far as the testimony shows, although this land, in which she now claims an interest, was in the mean time offered for sale, as a part of the estate of Jesse C. Sanders at public sale, and bid off by his widow at what seems to have been its full value,—we cannot doubt that the circuit judge was fully warranted in reaching the conclusion which he has adopted. We find among the papers furnished us points and authorities presented by counsel for the defendant Mary W. Sanders, who is characterized in the title to that paper as "appellant," but we do not find any notice of appeal or exceptions taken by that defendant. She is not so named in the title of the "case" as prepared for argument here, nor is any notice taken of her appeal either in the points and authorities presented by the counsel for plaintiff-appellant, or in those presented by the counsel for defendants, (respondents.) Her appeal is therefore not properly before us, and strictly speaking could not be considered. But as she appears to be a person *non compos mentis*, we have, *ex gratia*, considered what we understand, from the points and authorities furnished by her counsel, the grounds of her appeal. These grounds, as there stated, are as follows: (1) It is error to dismiss the complaint without

Digitized by Google

adjudication of her interest in the subject of the action submitted to the court by her answer. (2) It is error, under the evidence, with the proper parties in court, to withhold determinate adjudication of rights established. Regarding, then, these as her grounds of appeal, it seems to us that they rest upon a misconception of the circuit decree. Substantially they impute error to the circuit judge in dismissing the complaint without adjudicating the rights of this appellant, if she may be so called. Now, on turning to the circuit decree, it will be found that, so far from withholding any adjudication of this defendant's rights, the circuit judge distinctly adjudges that neither she nor her brother William B. Sanders have any rights as against the real respondents in this case, and to this ruling there is no exception in any form. The language of the decree upon this branch of the case is as follows: "The defendants William B. Sanders and Mary W. Sanders, who once had an interest in the land, were properly parties to the action in the probate court for marshaling assets of the estate of Jesse C. Sanders, deceased, under which the land was sold, and they are thereby estopped from denying the title of the purchaser at that sale from whom the defendants John E., Jane, and Susan Sanders have title." The concluding portion of the circuit decree, which has been copied above, whereby it is declared that this is not a proper case to be retained for the adjudication of the rights of the defendants among themselves, and declining to make such adjudication, must have had reference to some of the other numerous defendants, as it cannot be regarded as referring to the rights of the defendant Mary W. Sanders, in face of the fact that it had just been distinctly adjudged that she, with her brother, had been estopped by the proceedings in the court of probate from denying the rights of the real respondents in this case, and to this adjudication no exception has been taken, so far as we can discover. The judgment of this court is that the judgment of the circuit court be affirmed.

SIMPSON, C. J., and MCGOWAN, J., concur.

(31 S. C. 147)

LONDON v. YOUMANS.

(*Supreme Court of South Carolina.* June 24, 1889.)

CHATTEL MORTGAGE—RECORDING—NOTICE.

1. Defendant purchased a steam-engine from E., who bought it at a sale under a distress-warrant against R., who had had the engine in his possession and control for years. *Held*, that he will be protected against an unrecorded lien of which he had no notice, whether his vendor knew of such lien or not.

2. A chattel mortgage which is not recorded in the proper county cannot affect a *bona fide* purchaser with constructive notice.

3. A public sale under an improperly recorded chattel mortgage is not notice to the purchaser's vendee residing in a different county from that of the place of sale.

4. A question not raised in the court below, nor made in any of the grounds of appeal, cannot be considered on appeal.

Appeal from common pleas circuit court, Hampton county. ALDRICH, Judge.

Suit by John R. London against L. D. Youmans to recover possession of certain personal property. Judgment for defendant, and plaintiff appeals.

C. C. Tracy, for appellant. *C. J. C. Hutson* and *Z. A. Searson*, for respondent.

MCIVER, J. This was an action to recover possession of a steam-engine, to which, as we understand from the somewhat imperfect statement made in the "case," the only defense interposed was that defendant was a purchaser for valuable consideration without notice. The facts out of which the controversy arose are substantially as follows: One James M. Richardson, a citizen and resident of Hampton county, being the owner of the engine in question, leased certain premises in Beaufort county from one William Elliott for the term of one year from the 1st of September, 1885, at a monthly rent of $12.50, and placed the engine on said premises for the purpose of carrying on a rice-mill. No part of the rent having been paid, Elliott, on the 1st of September, 1886, demanded payment of the same, when Richardson told him "the engine, boiler, and other machinery there in the store hereinbefore named were sufficient guaranty for his rent, and that same would not be removed until his rent had been paid." Shortly afterwards, however, about the 21st of September, 1886, Elliott, discovering that Richardson had removed some of the machinery above referred to, "took actual possession for rent of the above-named engine and boiler, locked the gate, and placed watchmen in charge. That Richardson had been in possession of the above-named engine and boiler several years before, extending out to the world the idea of ownership, and that there was no record to show that plaintiff, or any other person, had any claim or interest in the aforesaid engine and boiler. That Elliott held said engine and boiler under his warrant of distress and levy some months, and, upon failing to get his rents, advertised and sold in accordance with the statute, and bought said engine and boiler for an amount much less than that due for rents," and subsequently sold the same to the defendant, who removed the property to his residence in Hampton county, where it was at the time of the commencement of this action. It appears, however, that the plaintiff held a mortgage on said property, dated 25th August, 1885, but when the debt which it was designed to secure fell due is not stated, though the inference is that such debt became payable some time in 1886, probably on or before the 28th of September of that year, as it is stated that about that time the mortgage was placed in the hands of one Rabb, with instructions to foreclose and sell said engine and boiler, and that about that time these facts were communicated to Elliott by

Digitized by Google

Rabb, who, under the advice of counsel, "in addition to his possession as aforesaid, issued a distress-warrant, and under said warrant levied on said engine and boiler, which latter levy may have been made a few days later than date of record of said mortgage." It also appears that the mortgage in favor of plaintiff was never recorded at all until the 1st of October, 1886, and then it was placed on record in the county of Beaufort instead of the county of Hampton, where the mortgagor resided. The sale under the distress-warrant was not made until the 11th of December, 1886, and in the mean time, though at what precise time, except that it was "between September and December," does not appear, the engine and boiler were sold under the mortgage, and bought in by the plaintiff, though the property was then in the possession of Elliott, and so remained until it was sold to the defendant, who, it is conceded, had no actual notice of plaintiff's mortgage when he bought.

Under an agreed statement of facts, the material portions of which have been copied or stated above, the case was, by consent, submitted to the circuit judge, without a jury, who held that two questions were presented: (1) Whether Elliott was a subsequent purchaser without notice; (2) whether the defendant was an innocent purchaser for valuable consideration without notice; and, having determined that both of these parties occupied that position, he rendered judgment dismissing the complaint. From this judgment plaintiff appeals upon the following grounds: "(1) Because his honor erred in holding, in effect, that the personal property herein referred to was liable to distress for rent due by J. M. Richardson to W. Elliott. (2) Because his honor erred in not holding that such property was not liable for rent of J. M. Richardson. (3) Because his honor erred in not holding that actual notice of plaintiff's mortgage brought home to W. Elliott, defendant's vendor, before sale to defendant, was not notice to defendant himself. (4) Because his honor erred in not holding that a public sale under plaintiff's mortgage, prior to the sale to defendant, was notice to defendant of plaintiff's claim. (5) For that his honor erred in not holding that, as against a party claiming by virtue of a levy either for rent or under execution, the mortgagee [the plaintiff] was the actual owner of the property. (6) For that his honor erred in not holding that the mortgagor had no leviable interest in the chattels mortgaged."

Under the view which we take of this case the interesting questions presented by the first, second, fifth, and sixth grounds of appeal become immaterial, and need not, therefore, be considered. For, even assuming for the purposes of this case that each one of these grounds is well taken, and that Elliott cannot be regarded as a purchaser for valuable consideration without notice, though we must not be regarded as so deciding, yet the controlling inquiry remains whether the defendant can be so regarded. In 2 Pom. Eq. Jur. § 754, the rule is stated as follows: "If a second purchaser for value and without notice purchases from a first purchaser, who is charged with notice, he thereby becomes a *bona fide* purchaser, and is entitled to protection." In a note to that section it is said: "The same rule applies under the recording acts. If A., without notice of a prior unrecorded deed or incumbrance, purchases from B., who had notice, his title is free. * * *" This rule has been, in terms, recognized and followed in the recent case of Jones v. Hudson, 23 S. C. at page 501, where other authorities are cited. Applying this rule to the present case, if the defendant, who was the second purchaser, had no notice of the plaintiff's claim at the time he bought from Elliott, he will be protected whether his vendor, Elliott, had notice or not. The property at the time he bought was in the possession and under the control of Elliott, and had been for several years in the possession and under the control of Richardson, from whom Elliott acquired it; and surely, with these *indicia* of ownership of property of that class, the defendant should be protected in his purchase against unrecorded liens or claims in the hands of the plaintiff or any one else, of which he had no notice, so that the only remaining inquiry is whether the defendant had notice. It is conceded that he had no actual notice at the time he bought, and the mortgage having been recorded in the wrong county certainly could not affect him with constructive notice.

It is urged, however, that the public sale under plaintiff's mortgage prior to the sale to defendant was notice to defendant of plaintiff's claim. Exactly when and where such sale took place does not appear, but, as the mortgaged property was not removed from Beaufort county to the county of Hampton until after the sale to defendant, the sale must have taken place in Beaufort. Now surely the sale in Beaufort of personal property under a mortgage cannot be regarded as any notice whatever to the defendant, who resided in Hampton county. The citizens of one county will certainly not be presumed to know what is going on in another county. But, however this may be, it is quite clear that a public sale under a chattel mortgage, unless knowledge of it is brought home to the party to be affected, cannot be regarded as such notice as would supersede the necessity for registration. In City Council v. Page, Speer, Eq. at pages 211, 212, HARPER, Chancellor, after adverting to the distinction between the character of notice to supply a defect of registration and to rebut an equity, lays it down as the well-established rule "that to supply the want of registration the notice must be full, explicit, and clearly proved. * * * *Lis pendens*, which is notice to rebut an equity, will not supply the want of registration."

The appellant has raised another point in the argument here which, so far as appears.

Digitized by Google

was not made in the circuit court, and certainly is not presented in any of the exceptions; and for this reason we have been careful to set out fully the grounds of appeal. That point is that it does not appear that defendant actually paid the purchase money at the time he bought the property in question, which, of course, is necessary to support the plea of purchase for valuable consideration without notice. But as no such point appears to have been taken or considered in the circuit court, and is not made in any of the grounds of appeal, which only present questions as to the matter of notice, and of the liability of the property to seizure under the distress-warrant, it cannot be considered here. The circuit judge having determined that the defendant was an innocent purchaser for valuable consideration without notice, we are bound to assume that every fact necessary to sustain such a plea was made to appear, except those specially pointed out as wanting by some exception; and certainly there is no intimation in any of the grounds of appeal that it did not appear that defendant had actually paid the purchase money before he acquired notice of plaintiff's claim. The judgment of this court is that the judgment of the circuit court be affirmed.

SIMPSON, C. J., and McGOWAN, J., concur.

(31 S. C. 125)

McCORD *et al.* v. BLACKWELL.

(*Supreme Court of South Carolina.* June 24, 1889.)

MARRIED WOMAN'S CONTRACT—TRIAL—NONSUIT.

1. In an action against a married woman on her note given for articles purchased by her husband there was no evidence that she had authorized him, before the account was contracted, to contract in her name, but there was evidence that the course of dealing between the parties had been the same for several years previous, and that she had recognized his authority by paying accounts thus contracted by him. *Held*, that it was for the jury to say whether, from the course of dealing, it could be inferred that the account in question was authorized.

2. In South Carolina, if a contract is shown to have been made with reference to the separate estate of a married woman, her liability is fixed without regard to the disposition she may afterwards make of the fruits of the contract.

3. After the jury had retired the foreman returned to get some papers, when the judge remarked to him: "Mr. Foreman, the contract must be with reference to her separate estate, or concerning it. I used the word 'benefit' in my charge, and I now withdraw it." The judge had used language in his charge which might imply that the contract must be for the "benefit" of her estate, but, his attention being called to it at the time by the attorney, he expressly charged that it was not necessary, but that the contract must have reference to her estate. *Held* that, though the remarks to the foreman were improper, the error was harmless, as they neither added to nor qualified the instructions given the jury.

4. Errors in instructions relative to the liability of the wife under the laws of a state other than that of the forum become immaterial where there is no evidence that the note was executed in such state, except that it was headed by the name of a city in that state, and made payable at any banking-house in that city, and there is direct evidence that it was executed in the state of the forum, and the court charges that if it was executed in the latter state its laws must govern.

5. The question presented by a motion for a nonsuit is not whether the evidence fails to show facts necessary to plaintiff's recovery, but whether there is any testimony whatever tending to show the existence of such fact.

Appeal from common pleas circuit court of Edgefield county; WITHERSPOON, Judge.

Sheppard Bros. and *Gary & Evans*, for appellant. *Norris & Falk* and *Robert W. Shand*, for respondents.

McIVER, J. The plaintiffs bring this action upon a note, bearing date 10th December, 1885, payable to the plaintiffs one day after its date at any banking-house in Augusta, for the sum of $1,064.75, which note is alleged to have been executed by defendant's intestate, Martha Blackwell. The only real defense interposed was that she, being a married woman at the time, had no power to make the contract in question. The plaintiffs, as was necessary, assumed the burden of showing that the contract was made in reference to the separate estate of Mrs. Blackwell, and for this purpose they offered testimony tending to show that the note was given in liquidation of an account contracted with the plaintiffs by her, through her husband as her agent, for supplies furnished for her plantation and her tenants thereon. At the close of the plaintiffs' testimony defendant moved for a nonsuit upon two grounds. (1) Because there was no testimony that J. P. Blackwell was the agent of his wife. (2) That there was no testimony that the contract was made with reference to the separate estate of Mrs. Blackwell. The motion was refused, and, the defendant offering no evidence, the case was submitted to the jury under the charge of the circuit judge fully set out in the "case." After the jury had retired the foreman returned to the court-room for the purpose of obtaining certain letters that had been offered in evidence, when the judge addressed him as follows: "Mr. Foreman, the contract must be with reference to her separate estate, or concerning it. I used the word 'benefit' in my charge, and I now withdraw it." The jury having rendered a verdict for $1,064.75, defendant moved, upon the minutes, for a new trial upon two grounds: (1) Because the court erred in giving instructions to the foreman of the jury in the absence of the other jurors. (2) Because the consideration of the note embraced articles furnished by plaintiffs that could not relate to the separate estate of the wife." This motion was likewise refused, and, the plaintiffs having entered judgment on the verdict, the defendant appeals upon the several grounds set out in the record, which we will proceed to consider.

The first, second, and third grounds impute error to the circuit judge in refusing the motion for a nonsuit: (1) Because plaintiffs "totally failed to establish the fact" of the husband's agency. (2) Because plaintiffs "totally failed to show" that the contract was made with reference to the separate estate of the wife. (3) Because the plaintiffs "failed

Digitized by Google

to establish" the fact that Mrs. Blackwell had a separate estate. It may be said of all three of these grounds that they are based upon a misconception of what will warrant the granting of a nonsuit. The question in such case is not whether the evidence "failed to establish," or "failed to show," a fact necessary to the plaintiffs' recovery, but the only question is whether there is any testimony whatever tending to show the existence of such fact, and, if there is any such testimony, the motion for nonsuit must be refused, and the question whether such testimony is sufficient to establish or show such fact must always be left to the jury. For this reason it is quite clear that neither of these grounds can be sustained.

But we are not disposed to rest our conclusion simply upon the inaccurate phraseology of these grounds of appeal, and will assume that the purpose was to present the proper question whether there was any testimony tending to establish either of the three facts referred to therein. After a careful examination of the testimony, which is all set out in the "case," we cannot say that there was an entire absence of testimony as to any one of those facts. Without going into anything like a minute discussion of the testimony, it will be sufficient to indicate such as tended to show the facts in question. As to the fact of agency, while it is quite true that there is no direct evidence tending to show that Mrs. Blackwell had, before the account was contracted, authorized her husband to contract in her name, yet the fact of agency may be proved by circumstances, or by subsequent admissions or recognition, as well as by direct evidence of antecedent authorization; and, as it seems to us, there were circumstances which pointed in that direction, and whether they were sufficient to induce the conclusion that there was an agency was a matter exclusively for the jury. There was testimony tending to show that for several years previous the course of dealing between the parties had been the same, and that Mrs. Blackwell had recognized the authority of her husband to contract in her name by paying accounts thus contracted; and it was for the jury to say whether this course of dealing authorized the inference that the account for which the note in suit was given was authorized, especially in view of the fact that the note closing such account was signed by her in person. As to the other two facts,—that Mrs. Blackwell had a separate estate, and that the account, in part, at least, was contracted in reference to that estate,—there certainly was some testimony. We do not see any error, therefore, in refusing the motion for a nonsuit.

The fourth, seventh, and eighth grounds complain of error in that portion of the charge relating to the laws of Georgia, and their effect upon this contract. Inasmuch as there was no evidence whatever that the contract sued on was entered into in the state of Georgia, except the fact that the note is headed "Augusta, Ga.," and the money secured thereby is made payable "at any banking-house in Augusta," and inasmuch as there was direct evidence that the note was executed by the defendant in this state, and in view of the fact that the jury were instructed distinctly that if the note was executed here the law of this state would govern, unaffected by any of the provisions of the Georgia law, it seems to us that anything which the circuit judge may have said in reference to the law of Georgia was wholly immaterial, and need not, therefore, be considered.

The fifth ground of appeal, which imputes error to the circuit judge in refusing to instruct the jury that, before the estate of the intestate can be made liable on an account contracted by her husband, the plaintiffs must show that he was her agent duly authorized to make such contract, is taken under a misconception of the charge, for we find that the jury were so explicitly instructed in these words: "If she did not communicate or negotiate for supplies in person, did she through her husband, James P. Blackwell? If the negotiations for these supplies were carried on by James P. Blackwell, the husband, and it is sought to bind the wife, it is incumbent upon the plaintiffs to show the agency,—that is, that the husband acted as the agent of the wife."

In the sixth ground defendant complains that the judge erred in refusing to instruct the jury that if they find that the articles purchased from plaintiffs were not expended by Mrs. Blackwell on her separate property, or for the benefit of the same, plaintiffs cannot recover. We see no error in refusing this request. The question as to the liability of a married woman on a given contract must be determined by the provisions of the constitution and laws limiting her power to contract, and we are unable to discover anything in either the constitution or any act which would warrant such an instruction. The question in all such cases is as to the nature of the contract, and not as to the disposition of its fruits. If the contract in question is shown to be a contract with reference to the separate estate of a married woman, her liability is at once fixed, without regard to the disposition she may afterwards make of the fruits of such contract.

The tenth and eleventh grounds of appeal claim that the circuit judge erred in refusing their motion for a new trial, because, as it is there assumed, the jury disregarded his instructions. There can be no doubt that, where a jury renders a verdict in plain disregard of the legal principles laid down to them by the court, it is the duty of the circuit judge promptly to grant a new trial. For example, where, as in Dent v. Bryce, 16 S. C. 14, the jury are instructed, as matter of law, that the plaintiff cannot recover, and their verdict must therefore be for the defendant, and the jury see fit to disregard such instruction, it is the plain duty of the circuit judge, for the very good reasons stated in that

Digitized by Google

case, to grant a new trial, and his refusal to do so is error. Or where, as in the case of Thompson v. Lee, 19 S. C. 489, the jury are instructed, as matter of law, that the plaintiff is entitled to recover, and that the counter-claim set up by defendant cannot be allowed in such action, and the jury, ignoring such instruction, render a verdict for the defendant, a new trial must be granted. In both of those cases it will be seen that there was, and could be, no question that the jury had rendered verdicts in plain violation of their instructions; and wherever this appears the rule will always be applied. But of course it must first appear that the jury have in fact disregarded the instructions given to them, and until this does appear the rule cannot be applied. So that our first inqury is whether the appellant is warranted in assuming, as he has done, in both of these grounds, that the jury have in fact disregarded or ignored any of the instructions of the circuit judge. The instruction which in the tenth ground is assumed to have been disregarded is that if the jury found that any of the articles embraced in the account were for the use or benefit of Sam Yeldell, or any of the other persons there named, or for the use of any other person than Martha Blackwell, the plaintiffs cannot recover for such articles, and, as the undisputed testimony showed that some of the articles were furnished to the persons named, it is assumed that the jury, by their verdict, disregarded such instruction. There are, however, two fatal objections to such an assumption: (1) The instruction did not stop at the point represented in that ground of appeal, but the circuit judge, after instructing the jury that the estate of the married woman could not be made liable for articles furnished the persons named, proceeded in these words: "unless you conclude from the testimony that he furnished those articles, and it must appear from the testimony that these articles had reference to, or were for the benefit of, her separate estate under the law of this state." The meaning of this doubtless was, as we conclude from the testimony and other portions of the charge, that the estate of the married woman could not be made liable for any of the articles furnished for the use of the persons named unless it appeared from the testimony that the articles were furnished to these persons as tenants of Mrs. Blackwell, or in some way were furnished in reference to, or for the benefit of, her separate estate. (2) The circuit judge did not, and could not properly, instruct the jury that the estate of Mrs. Blackwell either could or could not be made liable for any articles furnished the persons named, as that depended upon the view they might take of the testimony. Hence, even assuming that it clearly appears that the jury have, by their verdict, subjected the estate of the intestate to liability for all or even some of the articles furnished the persons named, it cannot be properly said that the jury have ignored or disregarded any of the instructions given them by the circuit judge, unless the court had the power to invade the jury-room, or the means of ascertaining the reasons which influenced the jury in making up their verdict, and this the court has always very properly declined even attempting to do. The second objection to the assumption upon which the tenth and eleventh grounds rest is that, inasmuch as the verdict was for a sum considerably less than the amount due on the note, we are bound to assume that the jury concluded as matter of fact that some of the articles embraced in the account for which the note was given were not purchased on account of the separate estate of Mrs. Blackwell, and, if so, then the verdict was in accordance with, rather than in disregard of, the instructions given to the jury. How many or what was the amount of the articles which, under that view, should have been rejected was a matter depending upon the testimony, and was therefore a matter of which the jury, and not the judge, were the proper arbiters.

The twelfth ground of appeal alleges error on the part of the circuit judge in refusing the motion for a new trial because the evidence of the plaintiffs showed that many of the articles embraced in the account for which the note was given "could not be for the benefit of, or concern the separate estate of, the said Martha Blackwell." This ground depends so entirely upon the view which the circuit judge took of the evidence that it is quite clear this court has no jurisdiction to consider it.

The only remaining inquiry is that presented by the ninth ground of appeal, which alleges error in the remark above quoted, made by the circuit judge to the foreman of the jury when he returned to the court-room to procure some papers which had been offered in evidence. Strictly speaking this was not exactly proper, as it is candidly admitted by his honor in rendering his decision on the motion for a new trial. There is no doubt that the safer and better practice is that all instructions should be given in open court, to the full panel, and not to the foreman or any other member of the jury. If, therefore, the remark made to the foreman had contained any new or additional instruction to the jury, or had even modified or qualified any previously given to the full panel, we should have felt compelled to grant a new trial upon this ground. But an examination of the charge, fully set forth in the "case," shows that the remark made to the foreman not only contained no new or additional instructions, but did not, in the slightest degree, modify or qualify any instruction previously given, and hence we think it furnishes no sufficient ground for a new trial.

It appears from the charge as set out that, though the judge did, in a portion of the charge, use some language which might imply that the contract must be for the benefit of the separate estate in order to render a married woman liable, yet when his attention

Digitized by Google

was specially called to this matter by the counsel for plaintiffs, during the delivery of the charge, he expressly instructed the jury that it was not necessary that the contract should be for the benefit of the separate estate, but that it must concern or have reference to the separate estate. The colloquy which, at that point of the charge, ensued between the circuit judge and the counsel for plaintiffs was well calculated to excite, and no doubt did excite, the special attention of the jury, and they were, therefore, doubtless fully impressed with the idea that it was not necessary for the plaintiffs to show that the contract was for the benefit of the separate estate. Now when the judge used the language complained of to the foreman it was manifestly nothing but a mere repetition of the very same instruction which had been previously given to the full panel in such a way as was well calculated to impress it upon them. Hence we think it would be an excess of particularity, a sacrifice of substance to mere form, and an unwarrantable straining of the rule, to grant a new trial upon this ground. The judgment of this court is that the judgment of the circuit court be affirmed.

SIMPSON, C. J., and MCGOWAN, J., concur.

(21 S. C. 161)

GREGORY *et al. v.* DUCKER *et al.*

(*Supreme Court of South Carolina.* June 24, 1889.)

CHATTEL MORTGAGES—JURISDICTION—APPEALABLE ORDERS.

1. In an action to recover personal property which plaintiffs claim under a mortgage, the condition of which is alleged to have been broken, where the defenses are (1) a general denial, (2) plea of purchase for valuable consideration and without notice of the mortgage, and (3) payment of the mortgage debt, only legal issues are raised, under Gen. St. S. C. § 1776, which provides that mortgages not recorded are null as against subsequent purchasers; and it is error to set aside a verdict for plaintiffs, and order a new trial, on the ground that the answer sets up an equitable defense, which is triable only by the court.

2. The order setting aside the verdict, and granting a new trial, is appealable.

Appeal from common pleas circuit court of Sumter county; PRESSLEY, Judge.

Action by H. J. Gregory & Co. against Ducker & Bultman. From an order setting aside a verdict for plaintiffs and granting a new trial they appeal.

John T. Greene and *Ira B. Jones*, for appellants. *Earle & Purdy*, for respondents.

MCIVER, J. This was an action to recover the possession of two horses, which the plaintiffs claimed under a mortgage the condition of which had been broken. The defendants in their answer set up three defenses: *First*, a general denial of all except the formal allegations of the complaint, as to the copartnership of the plaintiffs and defendants, respectively; *second*, the plea of purchase for valuable consideration without notice of the mortgage under which the plaintiffs claim; *third*, that the debt secured by the mortgage has been paid, and the mortgage thereby extinguished, which defense is stated in the following language: "That the defendants are informed and believe that the plaintiffs have seized and converted to their own use three horses covered by the mortgage set out in the complaint, of the value of six hundred and fifty dollars, and that the note mentioned in the complaint has been thereby paid;" and, as it seems to us, this language can only be construed as setting up as a defense payment of the mortgage debt, and a consequent extinguishment of the mortgage upon which alone the claim of the plaintiffs rests. The testimony tended to show that on the 28th of May, 1888, in the city of Columbia, the plaintiffs sold and delivered to one Adams six horses, for the sum of $1,150, $500 of which was paid in cash, and the balance, $650, was secured by a note of Adams, payable 30 days after its date, together with a mortgage on the horses, under which the plaintiffs claim possession of the two horses now in controversy. It also appeared that the plaintiffs, being informed that Adams resided in the county of Sumter, at once had the mortgage duly recorded in that county. It further appeared, on the cross-examination of one of the plaintiffs, that they had found five of the six horses,—two in York county, which were seized by the plaintiffs under the mortgage, and one or both of them sold, but not for an amount sufficient to satisfy the mortgage debt; another in Clarendon county, for which an action similar to the present is now pending; and these two in Sumter county, for which the present action is brought; but what became of the sixth horse does not appear.

It is quite clear that, under the first defense, the only issue raised was as to the truth of the material allegations of the complaint, about which there does not seem to have been any controversy, and under the testimony, if believed, could not have been. It is equally clear that the only issue raised by the third defense was whether the mortgage debt had been paid by the seizure and sale of the two horses, (if in fact they were both sold,) and the mortgage thereby extinguished. As to this issue also there does not seem to have been any real controversy, and could not have been if the undisputed testimony was credited; for, even assuming that both of the horses seized in York county were sold, although the testimony leaves some doubt as to whether both or only one had been sold, it is quite certain that there is no testimony to show that the proceeds of such sale were sufficient to pay the mortgage debt; for if those two horses were sold for $145 and $153, respectively, the only amounts mentioned in the testimony, that would not be sufficient to pay one-half of the principal of the mortgage debt. So that the only real issue in the case was that raised by the second defense,—as to whether the defendants had notice of the mortgage at the

Digitized by Google

time they bought the horses in controversy from Adams. As there was no testimony that the defendants had actual notice of the mortgage, the only question was whether they could be charged with constructive notice, arising from the record of the mortgage in Sumter county, and this depended entirely upon the question of fact, whether Adams resided in the county of Sumter at the time the mortgage was executed. It is very manifest that the real controversy in the court below was as to this question, upon which the jury were instructed in terms to which no exception has been taken. The jury having rendered a verdict for the plaintiffs, defendants immediately gave notice of a motion for a new trial upon the minutes of the court, based upon two grounds: "(1) That this is an equity case, and should have been tried by the court. (2) That the preponderance of the testimony shows that H. R. Adams was not a resident of Sumter county when the mortgage was made." On hearing this motion, the circuit judge, without considering or determining the second ground, passed the following order: "The answer in this case having set up an equitable defense, and it appearing at the trial that the said defense is, at least in part, made out, and being satisfied that complete justice cannot be done under the verdict rendered by the jury, and that this is a case that should be tried by the court, it is ordered that the verdict rendered by the jury in this case be, and the same is hereby, set aside, and a new trial granted; and it further appearing that other persons claim an interest in the horses described in the mortgage and mentioned in the complaint, other than the defendants herein, it is further ordered that the plaintiffs do amend their summons and complaint, and make all persons claiming an interest in any of the horses described in the said mortgage parties defendants to this action, and that the case be placed upon calendar 2 of the docket of this court, so that the equities of all the parties claiming any interest in the said horses may be settled." From this order plaintiffs appeal upon the several grounds set out in the record, which, under the views we shall present, need not be repeated here.

It will be observed that the circuit judge in the order appealed from does not express, or even intimate, the slightest dissatisfaction with the finding of the jury on the only question of fact seriously controverted in the court below,—whether Adams was a resident of Sumter county at the time the mortgage was executed,—and hence we must regard it as a fact established in the case that he was a resident of that county; and from that fact the legal consequence necessarily followed that the record of the mortgage in Sumter county affected the defendants with constructive notice. But, on the contrary, the verdict is set aside wholly upon the ground that the answer sets up an equitable defense, which, in the opinion of the circuit judge, being "at least in part made out," he deemed it necessary, in order that complete justice should be done, that a new trial should be granted, and that all persons who claimed an interest in any of the mortgaged property should be made parties, and the case tried as an equity cause by the court, and not by a jury. We are unable to discover any equitable defense set up by the answer. The action was an action at law, pure and simple, and the first defense—the general denial—was clearly of the same character. As to the second defense, while it may be true that the plea of purchaser for valuable consideration without notice may ordinarily be said to rest upon equitable principles, yet when, as in this case, it rests upon the express provisions of the recording acts, it seems to us that it must be regarded as presenting simply a legal issue. Under our registry act, (section 1776, Gen. St.,) a mortgage not duly recorded is practically null and void,—is no mortgage,—so far as subsequent creditors or purchasers without notice are concerned, and this is so without inquiry into the equities of the parties, but simply as a matter of express statutory enactment. Hence where, as in this case, a party seeks to recover possession of personal property, claiming through a mortgage, if the defendant undertakes to defend by showing that he is a subsequent purchaser for valuable consideration without notice, his defense does not rest upon any equitable principle, but upon his legal rights as declared by statute. He assails the validity of the mortgage, just as if he had undertaken to show that the mortgage was a forgery, or that it had been rendered void by an alteration, or in some other way. We do not think, therefore, that the second defense set up in the answer presented any features of equitable cognizance, but raised simply a legal issue.

The third defense, as we have said above, only raised the issue as to whether the mortgage had been discharged by payment of the debt which it was designed to secure, and that, too, was a clear legal issue. It may be true that, where a mortgage covers various different articles, or several distinct tracts of land, and the mortgagor has sold the same to different persons, at different times, the first purchaser, under the rule laid down in Norton v. Lewis, 3 S. C. 25, recognized and followed in Lynch v. Hancock, 14 S. C. 66, may have an equity, upon proper allegations and proofs, to require the mortgagee to sell the property in the inverse order of the sales by the mortgagor, but in this case we find no such allegations or evidence. But, in addition to this, it is quite clear that a defense resting upon such an equity is wholly different from any of the defenses set up in the answer; and it was error, therefore, after the case had been tried on the issues presented by the defendants and decided against them, to allow, or rather require, an amendment for the purpose of enabling the defendants to present an entirely new defense. Whaley v. Stevens, 21 S. C. 221; Kennerty

Digitized by Google

v. Etiwan Phosphate Co., Id. 226. An order thus changing the entire nature and scope of the action after it had been tried on the issues as framed by the parties, by the circuit judge of his own motion, is erroneous. Skinner v. Hodge, 24 S. C. 165.

From what has been said it follows that the position taken by counsel for respondents, that the order is not appealable, cannot be sustained. The plaintiffs having established their mortgage, and the breach of the condition thereof, were unquestionably entitled to recover possession of such of the mortgaged property as was found in the possession of the defendants, unless they could make good some one or all of the defenses set up in their answer; and it was ascertained by the verdict of the jury that they had failed to do so, and as that verdict has not been set aside upon any ground which authorizes the circuit judge so to do, it follows necessarily that the plaintiffs were entitled to judgment on the verdict. The judgment of this court is that the order appealed from be reversed and set aside, and that the case be remanded to the circuit court in order that judgment may be entered in conformity with the verdict.

SIMPSON, C. J., and MCGOWAN, J., concur.

(31 S. C. 151)

HARLEY *v.* EUTAWVILLE R. CO.

(*Supreme Court of South Carolina.* June 25, 1889.)

STOCK-KILLING CASES—STOCK-LAW—INSTRUCTIONS.

In an action against a railroad company for negligently killing a cow, where it appears that the general stock-law was in force at the place, it is error to refuse to charge that, "where the stock-law is in force, the defendant is not required to use the same care and caution as in localities where such law is not in force."

Appeal from common pleas circuit court of Colleton county; NORTON, Judge.

Action by T. W. Harley against the Eutawville Railroad Company. Verdict for plaintiff, and defendant appeals on exceptions.

Howell Murphy & Farrow, for appellant. *Fishburne & Tracy* and *J. S. Griffin*, for respondent.

SIMPSON, C. J. The action below was an action by respondent against the defendant, to recover damages for certain stock alleged to have been negligently killed by defendant company, to-wit, a cow alleged to have been run over by the locomotive of defendant and killed. The verdict was for the plaintiff, and the defendant has appealed upon several exceptions, which will be found in the "Case." Only one of these exceptions, however, has been pressed here, and that is as follows: The defendant requested his honor to charge "that, where the stock-law is in force, the defendant is not required to use the same care and caution as in localities where such law is not in force." It is stated that his honor unqualifiedly refused this request. It seems to have been in evidence that the stock-law was in force where the cow was killed, or at least it is stated that in the course of the trial it was found that the general stock-law was of force at that point. Therefore what effect it should have upon the question of negligence, which was the gist of the action, was a material matter, bearing upon the effort of the defendant to remove the *prima facie* presumption of negligence arising upon the mere fact of the killing. We think, therefore, that the request was an appropriate request, and the circuit judge was in error to refuse it. And, inasmuch as this court has several times had this matter under consideration, we deem it unnecessary to do more than to refer to the following cases, where this question was discussed and adjudged: Simkins v. Railroad Co., 20 S. C. 258; Joyner v. Railroad Co., 26 S. C. 49, 1 S. E. Rep. 52; Jones v. Railroad Co., 20 S. C. 249; and Molair v. Railroad Co., 7 S. E. Rep. 60. Under these cases it was error in the circuit judge to overrule defendant's request. It is the judgment, therefore, of this court that the judgment of the circuit court be reversed.

MCIVER and MCGOWAN, JJ., concur.

(82 Ga. 570)

JONES *v.* GORDON, Governor.

(*Supreme Court of Georgia.* April 8, 1889.)

BAIL-BOND—OBJECTIONS WAIVED.

Where a defendant in a criminal case voluntarily gives a bail-bond, and is released from custody thereby, and makes no question as to the jurisdiction of the magistrate taking the bond, he cannot afterwards avoid liability on the bond because the magistrate had no jurisdiction.

Error from superior court, Baldwin county; JENKINS, Judge.

This was an action on a bail-bond. Defendant brings error from a judgment for plaintiff.

J. T. Jordan, for plaintiff in error. *Robert Whitfield*, Sol. Gen., for defendant in error.

SIMMONS, J. The only point insisted on before us for a reversal of the judgment of the court below was the fact that the bail-bond was taken before a magistrate in a different county from that in which the crime was committed; the plaintiff in error contending that the magistrate who took the bond from the defendant and his securities had no jurisdiction. Conceding that the magistrate had no jurisdiction in the case, the defendant made no question as to this at the time the bond was taken, but voluntarily gave it, and thereby was released from custody. If the trial had before the magistrate were absolutely void, that would not have released the defendant from custody, but the arresting officer should, and doubtless would, have continued to hold him under arrest. By giving the bond he was released from custody. He had a right to waive a legal trial, or any trial

Digitized by Google

at all, and give the bond. In the case of Weldon v. Colquitt, 62 Ga. 449, a bond was taken by the magistrate on Sunday, and this court held that the magistrate's order requiring the bond was invalid for that reason, and that his judgment "had no binding force, and compliance with it was wholly voluntary on the part of the prisoner. He accepted and complied with it when he was under no obligation to do so. Thereby he recovered his liberty, and that was the main end in view, and was, of itself, a sufficient consideration for his contract." See, also, Smith v. Spencer, 63 Ga. 702; Dennard v. State, 2 Ga. 137; Park v. State, 4 Ga. 329; Adams v. Governor, 22 Ga. 417. Judgment affirmed.

(82 Ga. 578)

TAYLOR v. STATE.

(*Supreme Court of Georgia.* April 8, 1889.)

APPEAL—DISMISSAL—REINSTATEMENT.

A motion to reinstate an appeal dismissed for want of prosecution will not be granted when the attorney neither makes a statement of the grounds for reinstatement in open court, nor makes an affidavit of the truth of the grounds.

Error from superior court, Monroe county; BOYNTON, Judge.

Motion to reinstate appeal.

J. A. Hunt, for plaintiff in error. *E. Womack*, Sol. Gen., for the State.

SIMMONS, J. When this case was called in its order on the docket of this court, no counsel appeared for the plaintiff in error, nor was there any brief filed in the case. The case was therefore dismissed for want of prosecution. Subsequently counsel for the plaintiff in error appeared, and moved in writing for a reinstatement of the same, upon the ground that he was detained from the court by providential cause. The hearing of his motion was put to the heel of the docket of the October term. All the cases on that docket having been disposed of, this motion comes up in its order. The rule of practice in this court, when a case has been dismissed and it is sought to reinstate the same, is for the counsel in his place in open court to state his grounds for reinstatement, or to make an affidavit of the truth of the grounds. Neither was done by the counsel in this case. He made no statement in his place in open court, nor has he filed an affidavit to the truth of the grounds of his motion. It is true that attached to his motion there is an affidavit with his name signed thereto, but it is not sworn to before an officer authorized to administer an oath, or indeed before any one else, and for this reason we decline to reinstate the case. Motion denied.

(83 Ga. 367)

GILES v. STATE.

(*Supreme Court of Georgia.* May 8, 1889.)

RAPE—INSTRUCTIONS.

On a trial for rape it is manifest error to charge the jury that if they credit the testimony of the injured female, or if they believe she swore the truth, they must find the defendant guilty. Such a charge is in effect a decision by the judge of the whole case, except the credibility of the witness. Whether the accused be guilty or innocent, he is entitled to be tried by a jury as to all the elements of fact involved in the charge.

(*Syllabus by the Court.*)

Error from superior court, Hall County; WELLBORN, Judge.

J. M. Towery and *S. C. Dunlap*, for plaintiff in error. *Howard Thompson*, Sol. Gen., for the State.

BLECKLEY, C. J. Giles, being convicted of rape, moved for a new trial on 13 grounds, all of which were overruled, and a new trial denied. In the argument here the solicitor general furnished no brief. He discussed the case chiefly on its merits, with reference to the sufficiency of the evidence to warrant the conviction. We needed assistance on some other points in the case, but got none. For instance, we needed authority upon the question whether the good character of the female was competent evidence for the state before it was attacked by the accused. The court charged the jury: "Now, if you credit the testimony of the injured female in this case, then you will have to find the defendant guilty;" and: "After all, it comes back to this proposition,—whether you will believe her or not. If you believe she swore the truth, why, then, the defendant is guilty. If you believe she has not, you will find him not guilty." Anything more manifestly erroneous could not have been embodied in the court's instructions to the jury in the trial of any criminal case. This charge virtually withdrew from the jury every question except that of the credibility of the injured female,—the court decided all the rest; and this notwithstanding it had been ruled by this court in Habersham v. State, 56 Ga. 61, that it was error so to restrict the jury. However guilty the accused may be, he is entitled to be tried by a jury, and we are obliged to remand the case, in order that that may be done. The other special questions embraced in the motion for a new trial we leave to be reconsidered by the court below if they should again arise, and in the mean time to be studied by the solicitor general in the light of authority. Judgment reversed.

(83 Ga. 281)

JOHNSON v. HALL *et al.*

(*Supreme Court of Georgia.* May 8, 1889.)

TRESPASS—INJUNCTION.

Plaintiff, on filing a bond, obtained an injunction against defendants from boxing trees for turpentine purposes, on land which he claimed to own. Defendants, also claiming to own the land, filed a cross-petition to enjoin plaintiff from boxing the trees for the same purpose. *Held* that, on defendants giving bond, plaintiff should be enjoined until the title to the land could be determined.

Error from superior court, Appling county; ATKINSON, Judge.

One Johnson filed a bill to enjoin Hall & Bro. from boxing turpentine trees. From

Digitized by Google

a decree enjoining plaintiff from so doing, on cross-petition by defendants, plaintiff brings error.

G. J. Holton & Son and *J. H. Lumpkin*, for plaintiff in error. *Graham & Carter*, for defendants in error.

SIMMONS, J. Johnson filed his petition against Hall & Bro., alleging that they were trespassing upon a certain lot of land to which he claimed title, and that they were boxing the trees thereon for turpentine purposes. Upon hearing the case, the court enjoined the defendants, and required Johnson, the plaintiff, to give a bond according to the act approved October 13, 1885, (Acts, 1884–85. p. 93.) It seems from this record that, shortly after this injunction was granted restraining the defendants from cutting the trees on the disputed lot of land, Johnson, the plaintiff, hired a large number of hands, and entered upon the land, and commenced to cut and box the trees thereon. Hall & Bro. then filed a cross-petition against Johnson, in which they set up title to the land, and alleged that Johnson was doing the very acts which they had been restrained from doing on his application, to-wit, cutting and boxing the trees, and prayed that he be enjoined. Upon hearing this application, and the answer thereto, and the affidavits filed by both parties, the court enjoined Johnson, but did not require Hall & Bro. to give a bond, as had been required of Johnson in the first injunction. To the ruling of the court granting this injunction Johnson excepted, and brought the case here. The court committed no error in the ruling complained of. It appears from the record in this case that both of these parties are *bona fide* claimants to this lot of land. When Hall & Bro. were enjoined from trespassing thereon, upon the application of Johnson, Johnson had no right to commit the very act which Hall & Bro. had been enjoined from committing. Where both parties in good faith claim title to the same tract of land, and one of them is enjoined from entering or trespassing thereon upon the application of the other, the object of the injunction is to preserve the land *in statu quo* until the title is settled by the proper proceedings. The plaintiff has no more right to disturb the *statu quo* than the defendants had; and it follows, as a matter of course, that, when the plaintiff undertook to commit the same acts that the defendants had been enjoined from committing, the court should have restrained him also, it appearing that both parties *bona fide* claimed the land. 1 High, Inj. § 679. But we think that the court should have placed both parties upon equal terms, and therefore should have required Hall & Bro. to give a similar bond to the one required of Johnson in the first injunction, and we therefore direct that the court below require Hall & Bro. to give such bond, allowing them such reasonable time as he may think proper in which to give the same, and, if they fail to comply with this order, that he dissolve the injunction as to Johnson. Judgment affirmed, with direction.

(83 Ga. 190)

GINN *v.* LINN.

(*Supreme Court of Georgia.* May 13, 1889.)

ELECTIONS—CONTEST.

In so far as election to a county office is evidenced by the returns merely, a commission issued by the governor is made final by section 60 of the Code, where no hearing has been sought before the governor prior to the commission being issued; and this is so whether the returns sent up be complete or incomplete.

(*Syllabus by the Court.*)

Error from superior court, Bartow county; MILNER, Judge.

E. D. Graham, for plaintiff in error. *Baker & Heyward* and *Jas. M. Neel*, for defendant in error.

BLECKLEY, C. J. This is a contest over an office,—the office of tax collector of Bartow county. Apparantly there is very little doubt that Ginn was elected and Linn defeated; but the commission issued to Linn, and, as the matter in controversy related to something that the governor was competent to decide upon the face of the returns, we think the case is controlled by Corbitt v. McDaniel, 77 Ga. 544, 2 S. E. Rep. 692. Here, it is true, the returns are alleged to have been incomplete, an important omission having been made in sending them up to the capital; but we are to regard the state of the returns as the governor acted upon them, and if parties interested in the election neglected to see that all the precincts were included, and failed to discover the omission, if any, before the commission issued, we think the courts cannot aid them, as the Code now stands. Perhaps this subject needs further legislation, but, if so, the legislative department of the government will doubtless discover in due time what amendment ought to be made. We think that without some amendment the courts cannot reverse or evade the decision of the executive department upon the fact of election as shown by the returns and the executive commission founded thereon. Judgment affirmed.

(83 Ga. 89)

BECKHAM *et al.* *v.* HOWARD *et al.*

(*Supreme Court of Georgia.* May 20, 1889.)

INTOXICATING LIQUORS.

1. Respecting the incorporated towns in Pike county, the act of 1887 is no less a prohibitory law against the sale of spirituous and intoxicating liquors than was its predecessor, the act of 1883. These towns being expressly excluded from the only method of granting license provided for, and, the statute making it penal to deal in liquors anywhere in the county without such license, there can be no liquor traffic at all in the incorporated towns. Such towns are absolutely and unconditionally "dry."

2. As a license granted by the commissioners of the incorporated town of Zebulon must be nugatory and void, no writ of prohibition is necessary to restrain the grant of such license. At all events, the judgment denying the writ in the present case will not be reversed; the presumption being that

Digitized by Google

the commissioners will abide by the statute as above expounded.

(*Syllabus by the Court.*)

Error from superior court, Pike county; BOYNTON, Judge.

W. J. Iverson and *A. B. Pope*, for plaintiffs in error. *J. F. Redding* and *S. N. Woodward*, for defendants in error.

BLECKLEY, C. J. The argument of this case was able and admirable. It furnished a conspicuous instance of adherence to the record which on one side was spontaneous, and on the other reluctant at first, but at last voluntary and altogether satisfactory. After studying the three statutes discussed, to-wit, the acts of 1873, 1883, and 1887, (Acts 1873, p. 285; Acts 1883, p. 586; Acts 1887, p. 857,) we find that a correct construction of the last is decisive against the power of the commissioners of Zebulon, or any other person or persons, to grant license to sell spirituous or intoxicating liquors within an incorporated town in Pike county. The act of 1887 is no less a prohibitory law as to incorporated towns than was the act of 1883. By a proviso in the seventh section, "the provisions herein contained as to the manner of obtaining license shall not be construed to apply to any incorporated towns in said county;" and the body of the section makes it unlawful, after the previous prohibition law is superseded, "for any person to engage in the sale of spirituous or intoxicating liquors," etc., "without first obtaining from the ordinary of said county a license." The eighth, ninth, tenth, and eleventh sections develop a system, somewhat confused and contradictory, for obtaining license by filing an application with the ordinary; and then the twelfth section declares that "any person engaged in said sale in said county without first having obtained such license in the manner hereinbefore set forth, or otherwise violating this act, shall be deemed guilty of a misdemeanor," etc. The result is that no person can procure a license to sell in an incorporated town, and that any person engaging in the sale anywhere in the county without a license commits a misdemeanor. It follows necessarily that it is a misdemeanor to engage in the sale within any incorporated town of the county, as no license can be had for so doing, and the business cannot be carried on without a license. The act of 1873 cannot now be administered in Zebulon, because that act is held in check as effectually by the act of 1887 as it was by the act of 1883. While it may be practicable, notwithstanding the confused phraseology of the act of 1887, to obtain a license to sell in Pike county elsewhere than in incorporated towns, the incorporated towns are excluded from the license system, and are absolutely and unconditionally "dry." Such is our conclusion from a careful and thorough study of the subject. Nevertheless, we will not reverse the judgment of the judge below denying the writ of prohibition prayed for. The exposition which we have made of the act of 1887 in this brief opinion renders a reversal unnecessary. Judgment affirmed.

(82 Ga. 788)

McGHEE *et al.* v. McCUTCHEON *et al.*

(*Supreme Court of Georgia.* May 13, 1889.)

NEW TRIAL.

Though a partner has no right to apply the firm assets to his individual debt without the assent of his copartner, yet where the latter testifies as a witness, and does not deny that he gave his assent in one instance out of two, and where the circumstances call for such denial if consistent with truth, and the opportunity of making it was ample, a new trial may contribute to clear up the justice of the case.

(*Syllabus by the Court.*)

Error from city court, Floyd county; MEYERHARDT, Judge.

Dean, Ewing & Smith, by *Harrison & Peeples*, for plaintiffs in error. *E. P. Reed*, for defendants in error.

BLECKLEY, C. J. The suit was by McCutcheon & Kirksey against McGhee & Co., for the price of a car-load of cross-ties and a car-load of lumber. It seems that the order for both was given by McKee, who was a clerk or agent of McGhee. The evidence indicates that the sale of both was made by Kirksey as an individual, and that the lumber was sold to McKee, but shipped to McGhee & Co. by mistake. It was proved that according to the original contract the price of the ties was to be credited on Kirksey's account with McGhee & Co., and it was also proved that after the mistake in shipping the lumber was discovered, it not being such as McKee wanted, Kirksey directed McKee to sell the same, and credit the proceeds on the same account. There is no question that this was done, and that in point of fact Kirksey's account with McGhee & Co. was credited with both car-loads,—the ties and the lumber. The recovery below was had on the theory that Kirksey, dealing with the firm property of McCutcheon & Kirksey, had no right to apply the same to his individual debt. The question whether such application, in the absence of notice to the individual creditor, is valid, may be found discussed in 1 Lindl. Partn. (Amer. Ed. 1888,) bottom pp. 328, 329, 369 et seq., notes; 1 Bates, Partn. § 410; 2 Bates, Partn. §§ 1036–1046; Wiley v. Allen, 26 Ga. 568; and see Code, § 1913. There is no doubt that such an application may be effectual where the copartner consents to it, and in this case McCutcheon was a witness; and, although he testified that he got the order to send the ties from Kirksey, he did not say or insinuate that he did not understand the whole terms of the order as given by McGhee & Co. through McKee. Kirksey told McCutcheon that McKee would let the firm have supplies for the lumber, but so far as appears did not say that the firm was to get anything for the ties. If McCutcheon understood that the price of the ties was to be credited on the account of

Digitized by Google

Kirksey with McGhee & Co., and sent them forward accordingly, he ought to submit to that mode of accounting for them. On another trial he may explain this more fully than has been done. Another advantage from a second trial will be that it will afford opportunity to give notice to McGhee & Co. to produce the bills of lading which it is alleged the firm of McCutcheon and Kirksey sent to them after the ties and lumber were shipped. We think it will contribute to substantial justice to have the case tried over. If when McCutcheon shipped the ties, he did not know of the contract made with Kirksey to credit the same on his (Kirksey's) account, why did he not so testify? He stated what Kirsey told him as to the lumber. Why did he not also state what he said as to the ties? Judgment reversed.

(83 Ga. 393)

GEORGIA M. & G. R. CO. *v.* HARRIS.

(*Supreme Court of Georgia.* May 24, 1889.)

STOCK-KILLING.

When the killing of stock by a locomotive is fully explained by the uncontradicted testimony of the engineer that the accident occurred at night, in a fog so dense as to prevent the animals being seen in time to save them by the exercise of every possible precaution, the presumption of negligence arising from the fact of killing is rebutted, and a verdict for plaintiff should be set aside. Following Railroad Co. v. Wall, 7 S. E. Rep. 639.

Error from superior court, Harris county; SMITH, Judge.

Goetchius & Chappell, for plaintiff in error. *Thornton & Cameron*, for defendant in error.

SIMMONS, J. Mrs. Harris sued the railroad company for damages, alleging that the company had killed three of her cows. The defendant admitted that the cows were killed by the running of its train, and undertook to remove the presumption cast upon it by the law. The explanation of the defendant by the railroad employés was that it was a dark, foggy night; that the cows could not have been seen more than 25 or 30 yards, on account of the mist that prevailed at the time; that the train was a passenger train, and was running on schedule time, about 25 miles an hour; that the engine and the train were both in good condition, and the appliances for stopping the train were first class, it being supplied with air-brakes in perfect condition, and that the engine had a good head-light; that the rails were wet, and the brakes did not hold as well when the track was wet as when dry; and that the light from the head-light was intercepted by the fog. The engineer testified that he was looking ahead at the time, and was the first to see the cattle before they were struck, and that as soon as they were seen he applied his air-brakes, and sounded the cattle-alarm whistle; that there was nothing else he could have done to prevent the killing of the cattle. The testimony of the fireman was not introduced, the other witnesses swearing that their information was that he was somewhere in Alabama. The jury found for the plaintiff, and the defendant moved for a new trial, on the ground that the verdict was contrary to law, to the evidence, etc.; which motion was overruled, and the defendant excepted. Under the facts as disclosed by this record, we think the court erred in refusing to grant a new trial. The facts are exactly like those in the case of Railroad Co. v. Wall, 80 Ga. 202, 7 S. E. Rep. 639, and the decision in that case controls this. Judgment reversed.

(83 Ga. 173)

RIDDLE *v.* HODGE.

(*Supreme Court of Georgia.* May 20, 1889.)

LANDLORD AND TENANT—DEATH OF TENANT.

1. Where an owner rents land for a year to a tenant, who, besides giving his promissory note for the stipulated rent, payable in cotton, contracts in writing that title to all the crops shall remain in the landlord until the rent and all advances are paid, and the tenant dies before the cultivation of the crop is finished, the landlord, by himself or his agent, may enter and finish the cultivation without being an intruder, if, under all the circumstances, the entry for such purpose be reasonably necessary to protect his interest. On the trial of an issue involving the charge of intrusion, the written contract is admissible in evidence.

2. On the death of a tenant for one year only, leaving a widow, she, and not the administrator, is entitled to possession of the dwelling-house, and the outhouses appurtenant thereto, for the residue of the term. The landlord will not be an intruder as to these, if he resumes possession of them with the widow's consent.

(*Syllabus by the Court.*)

Error from superior court, Houston county; GUSTIN, Judge.

J. W. Haygood and *Duncan & Miller*, for plaintiff in error. *A. S. Giles* and *R. M. Holtzclaw*, for defendant in error.

BLECKLEY, C. J. 1. By written contract, title to all the crops was to remain in the landlord until the rent and advances were fully satisfied and paid. A note was given for the rent, payable in cotton. The tenant died in July, the cultivation of the crop being unfinished The landlord, as we infer from the record, put Riddle in possession to finish the cultivation. Whether he could do this rightfully depended on circumstances. As the crop was his, if it was reasonably necessary under all the circumstances for him to enter to preserve his rights, he could do so lawfully. This does not militate with Wadley v. Williams, 75 Ga. 272. In that case the renting seems to have been without any special contract reserving title to the crop. Here such a contract was made, and was legal. De Vaughn v. Howell, ante, 173, (this term.) The county court erred in excluding that contract when it was offered in evidence.

2. The warrant for intrusion, issued at the instance of the temporary administrator of the tenant, embraced the dwelling-house and outhouses appurtenant thereto. There is some indication in the record that the opposite party offered to prove that the entry into these houses was with the consent of the tenant's widow. If so it was lawful. We think

Digitized by Google

that, by analogy to section 1768 of the Code, the widow was entitled to the possession of these houses, and, if the entry was with her consent, the administrator had no right to complain. The court erred in not sustaining the *certiorari*. Judgment reversed.

(83 Ga. 34)

ATKINSON *v.* ORR *et al.*

(*Supreme Court of Georgia.* May 20, 1889.)

LEASE—INJUNCTION.

1. Where one enters into possession, and at his own expense erects buildings on the city lots of another, under a parol contract that he is so to do, and is to pay a certain annual ground-rent each and every year, and that he is to retain possession as long as he so pays, but on failure to pay the owner is to take possession of the premises, including the buildings, as his property absolutely, and where this is done in contemplation of reducing the contract to writing, which is not accomplished in the life-time of the owner, but after his death his executor, with the assent and approbation of all persons interested, does, in connection with the other party, reduce it to writing, under seal, the latter stipulating in writing to pay the agreed rent for each and every year, or, on default, after 90 days' notice, to surrender the premises and the buildings thereon, or be considered as a tenant holding over, and the former stipulating that the latter, his heirs or assigns, shall retain possession as tenant so long as the rents are paid, etc., the contract does not create a tenancy from year to year, but is *prima facie* a perpetual lease, on condition of prompt payment of the ground-rent annually; the written contract being, by its own terms, only an embodiment of the previous parol contract.

2. Though an injunction be not absolutely necessary to prevent a threatened wrong, yet where the bill has been pending for several terms, with no demurrer thereto filed by the defendants, a motion to dismiss ought to be denied; the relief by injunction sought, or some of it, being such as the court has power to grant on the facts, equitable and legal, alleged in the bill.

(*Syllabus by the Court.*)

Error from superior court, Morgan county; JENKINS, Judge.

Billups & Mustin and *Calvin George*, for plaintiff in error. *A. M. Speer* and *Foster & Butler*, for defendant in error.

BLECKLEY, C. J. By parol, both parties intending afterwards to reduce the contract to writing, Atkinson leased from Foster two vacant city lots, upon condition that the lessee might erect houses thereon, paying the lessor for ground-rent $300 annually, on or before the 1st day of July in each and every year, the lessee to retain possession so long as he so paid, and upon his failure to pay the lessor was to take absolute possession of the premises, including the buildings thereon, as his property. The contract was made and took effect in the year 1869. The lessee went into possession; erected buildings at a cost of $8,000, about $4,000 on each lot; paid his rents promptly up to 1880, in which year the lessor died testate, and his son qualified as his executor. The executor and the lessee at once reduced the contract to writing, both of them executing the writing under seal, and all the persons interested in the lessor's estate assenting, also in writing, to the executor's act. By the terms of the contract so verified under seal, which terms were recited to be the same as those embraced in the parol contract, the lessee obligated and bound himself to pay to the executor, (or to whomsoever might be the legal holder of the written instrument under a division and distribution of the lessor's estate,) on or before the 1st day of July in each and every year, the sum of $300, and, on his failure so to do after 90 days' notice, to surrender to the legal holder of the instrument the possession of "said lots, houses, and premises;" otherwise to be considered as a tenant holding over. And on his part the executor agreed that so long as the lessee, his heirs or assigns, should pay said rent and comply with his contract, he, his heirs or assigns, should remain in the quiet and legal possession of the premises as tenant. In 1885, A. W Foster, another son of the testator, having become the legal holder of the written instrument, granted to one Orr permission to enter upon part of the premises, and erect a building thereon, in a way not only to encroach upon the lot in question, but to obstruct an alley used in connection with the premises. Atkinson thereupon filed his bill praying that Orr be restrained by injunction from erecting the building, and from otherwise interfering with complainant's rights; and praying also that A. W. Foster be enjoined from renting or leasing "said land," or undertaking to do the same, or otherwise interfering with complainant's rights in the premises, etc. An interlocutory injunction was sought, but was denied at March term, 1886. At September term, 1887, the defendant filed a written motion to dismiss the bill, which at September term, 1888, was granted. The grounds of the motion were that the bill was without equity, and that it showed no title in the complainant to the property so as to entitle him to an injunction.

1. The first question is as to the construction of the contract. We think the *prima facie* interpretation is that the parties intended a perpetual lease, defeasible by failure to pay the ground-rent as stipulated. This may be the conclusive interpretation. Folts v. Huntley, 7 Wend. 210; Tayl. Landl. & Ten. § 74. But we can safely hold that it is the apparent meaning of the parties as set out in the written contract, and if there be a competing interpretation fairly grounded in ambiguity, patent or latent, the case is open to extrinsic evidence. See "Ambiguity," as dealt with by the Code. Two special features of the parol contract, as recited in the writing, are to be noted: There was no specification or limit as to the character or value of the buildings to be erected by the lessee, and all buildings, however extensive or valuable, were to become the absolute property of the lessor in the event of non-payment of rent for a single year. These features of the contract, in our opinion, conclusively negative any intention to create

Digitized by Google

nothing but a tenancy from year to year. The lessee had the right to erect any and all buildings he chose, and these were to go with the land, and he was to lose both them and the land if he failed to pay rent, but otherwise he was to part with neither. What else can deprive him of either? In equity, nothing else; and here law and equity agree, or if they do not equity must prevail. It may be quite rational to suppose that some term short of perpetuity might have been in the minds of the parties, but that they contemplated only a tenancy for a year, or from year to year, although the rent might be promptly paid, is, in view of the contract as a whole, incredible. The letting was for the purpose of having improvements made, and with a stipulation that they, on default of the lessee to pay rent, should become the property of the lessor. There was no value, or little value, in the premises for use, without the improvements. Being city property, and not agricultural land, the lessee must have counted on his improvements to make the lots available for use, and this the lessor must have known and understood. It would simply be absurd to construe the contract as a letting from year to year, with a right in the lessor to terminate the holding by notice for anything but the non-payment of rent, or non-compliance otherwise with the terms of the contract. We have no doubt upon the subject.

2. It was urged that there was no need for injunction, as the remedy was complete at law. But the case was pending for several terms, and the defendants did not demur. Treating their motion to dismiss as a general demurrer, this motion came, not at the first, but at the fourth, term, and was not decided until the sixth term. We think it was too late to raise the question of a common-law remedy. See cases on the subject in the Georgia Reports. Besides, there is obvious utility in having the contract construed by a court of equity, its effect declared, and the complainant quieted in his possession and use of the premises. The circumstances are peculiar. The executor had no legal right to make or manifest the contract, save by reason of the parol contract previously entered into with the testator, and thus equitable as well as legal facts, both of them material, are involved in the litigation. The court erred in dismissing the bill. Judgment reversed.

(83 Ga. 266)

CENTRAL R. R. v. DENSON.

(*Supreme Court of Georgia.* May 22, 1889.)

PLEADING—AMENDMENT.

1. A declaration alleged that plaintiff's intestate "was killed by the gross negligence of the agents of said company, [defendant,] and [the killing] could have been avoided by ordinary care and diligence on their part in running the cars of said company; that he was run over without any attempt to avoid it, thereby killing him,"—to plaintiff's injury, etc. *Held* that, while the declaration was very inartistically drawn, it contained enough to amend by, and a new cause of action was not set out by an amendment alleging that the intestate "was on the railroad track where persons were accustomed to walk; that he was between the blow-post and the crossing on said track; and that the agents of said company failed to give any signals or to blow its engine, as required by law; and that they, without any fault on his part, did by said negligence run over and kill him," etc.

2. Defendant may except to the overruling of a demurrer to the declaration, interposed on the ground that no sufficient cause of action is alleged, and may bring the question to the supreme court for review before final judgment.

Error from city court of Macon; HARRIS, Judge.

Action for damages for wrongful killing of plaintiff's husband. Defendant brings error.

R. F. Lyon, for plaintiff in error. *M. G. Bayne*, for defendant in error.

SIMMONS, J. It appears from the record in this case that, when the case was called for trial in the court below, the defendant demurred to the plaintiff's declaration, on the ground that it contained no sufficient cause of action to warrant a recovery; whereupon the plaintiff amended her declaration, which the court allowed her to do, over objection of the defendant,—the defendant contending that there was not enough in the original declaration to amend by, and because the amendment thus made set out a new and independent cause of action from that set out in the original declaration. The defendant also demurred to the declaration as amended, and the demurrer was overruled. The plaintiff then introduced her evidence, and at the close thereof the defendant moved for a nonsuit, on the ground that the evidence was insufficient to authorize a verdict for the plaintiff. The record discloses that there was a mistrial in the case. The defendant then filed its bill of exceptions, assigning error in the rulings of the court (1) in not sustaining the demurrer to the plaintiff's declaration; (2) in allowing the plaintiff to amend her declaration; (3) in not sustaining the demurrer to the declaration as amended; and (4) in not granting the defendant's motion to nonsuit the plaintiff, after she had closed her evidence.

1. It appears from the record that when the defendant demurred to the declaration, and before the decision of the court thereon, the plaintiff amended her declaration by setting out more specifically the acts of alleged negligence on the part of the defendant. We think there was enough in the original declaration to authorize its being amended. The original declaration alleged that Denson "was killed by the gross negligence of the agents of said company, and [the killing] could have been avoided by ordinary care and diligence on their part in running the cars of said company; that he was run over without any attempt to avoid it, thereby killing him,—to her injury," etc. While the declaration is very loosely and inartistically drawn, we think it contains the seed of a good cause of action; and, the seed be-

Digitized by Google

ing planted, the plaintiff should be allowed to water and cultivate it by amendment, so that it might grow into a perfect plant. This, we think, the plaintiff did by amendment when she alleged that her husband "was on the railroad track where persons were accustomed to walk; that he was between the blow-post and the crossing on said track; and that the agents of said company failed to give any signals or to blow its engine as required by law; and that they, without any fault on his part, did by said negligence run over and kill him, to her injury," etc. When these allegations were made in the amendment, we think that, under our liberal system of pleading, the declaration was sufficient to authorize a recovery, if the evidence should warrant the same, and there was no error in the court's allowing the amendment to the declaration, or in the court's refusal to sustain the demurrer after the declaration was amended.

2. When this case was called for a hearing in this court, counsel for the defendant in error made a motion to dismiss the same, on the ground that the case is still pending in the city court of Macon, and that the bill of exceptions cannot be heard while the case is pending in the court below for trial. We withheld our decision upon this motion until we could examine the record, and allowed the case to be argued. Upon an examination of the record, we find exceptions to the ruling of the court upon the demurrer as above set out. We think the plaintiff in error had a right to except to the overruling of the demurrer to the declaration, on the ground that there was no sufficient cause of action set out therein, and to bring the same here for review; because, if her declaration had no cause of action set out therein, the court should have sustained the demurrer, and that would have been a final disposition of the case. If the bill of exceptions had been predicated solely on the fourth ground taken therein, to-wit, the refusal of the judge to grant a nonsuit, we are inclined to think that the motion to dismiss in this court would prevail. Where a motion to nonsuit is made in the court below, and is overruled, and the case proceeds to trial, and a mistrial is had, we do not think the defendant has a right to file a bill of exceptions, and bring the case here upon that ground alone. But, as said before, there being a good ground in the bill of exception, to-wit, the overruling of the demurrer to the declaration, we will not grant the motion to dismiss, but affirm the judgment overruling the demurrer to the declaration. Judgment affirmed.

(83 Ga. 338)

FLEMING *et al.* *v.* SHEPHERD.

(*Supreme Court of Georgia.* May 22, 1889.)

EVIDENCE—PLEADING.

1. In an action by a firm on an open account one of the partners testified that the account was correct, and had not been paid; that the goods were sold by the other partner and their employés; that he had personal knowledge of the facts from being generally in and about the store, and never hearing the account disputed by defendant. *Held*, that it should have been left to the jury to say whether the witness testified to the account from his own knowledge, or merely from the state of the books, and it was error to grant a nonsuit.

2. The marking of counsel's name on the docket for defendant amounts to a plea of the general issue, and is a sufficient "defense," under Code Ga. § 3457, authorizing judgment by default in actions on open account, where the writ or process has been served personally, "and there is no defense" by the defendant either in person or by attorney.

3. A plaintiff cannot prove the account sued on, in a court of record, by his *ex parte* affidavit.

4. Where some part of a witness' answers is admissible, a general objection to his evidence is properly overruled.

Error from city court of Macon; HARRIS, Judge.

Code Ga. § 3457, is as follows: "When any defendant shall fail to appear and answer at the return term of the petition and process, the court shall enter default on the docket, which shall be considered a judgment by default, without a formal entry thereof, and the plaintiff's claim, allegation, or demand shall be tried in all cases of default by a jury, except as provided elsewhere in this Code; but no such trial shall, in any case, be had at the first term, except specially provided for by the law: provided that in all cases of suits on open accounts in the several courts of this state, where the writ or process has been served personally, as the law now directs, on the defendant, and there is no defense made by the party sued, either in person or by attorney, at the time the case is submitted for trial, the case shall be considered in default, and the plaintiff shall be permitted to take [judgment] as if each and every item were proved by testimony."

S. A. Reid, for plaintiffs in error. *Claude Estes* and *Turner & Willingham*, for defendant in error.

SIMMONS, J. It appears from the record in this case that Fleming & Loflin, for the use, etc., sued Shepherd on an open account. The writ was served personally upon Shepherd. No formal plea was filed by the defendant at the appearance term. Shepherd's counsel had his name marked on the docket, and demanded a trial by jury for Shepherd. The account sued on had attached thereto an affidavit of its correctness by Loflin, one of the plaintiffs. On the trial of the case the plaintiffs tendered this affidavit in evidence as proof of the correctness of the account. It was objected to by the defendant, and the objection was sustained. The plaintiffs then tendered in evidence the interrogatories of Fleming, which was objected to by the defendant, and the objection was overruled. The plaintiffs then closed the case. On motion of the defendant the court granted a nonsuit. The plaintiffs filed their bill of exceptions, alleging that the court erred in not allowing them to read in evidence the affidavit of Loflin as to the correctness of the account, and in granting the nonsuit: (1) because the evidence was sufficient to authorize

Digitized by Google

a verdict in their favor, and (2) because there was personal service of the writ and copy of the account, and (3) because no defense had been made by the defendant, as contemplated by section 3457 of the Code. The defendant filed his cross-bill of exceptions, alleging error in the court's allowing the interrogatories of Fleming to be read to the jury, and insisting that the same was illegal and contrary to law, because the proof of the account was secondary and hearsay on the part of Fleming.

1. Under the facts of this case, as disclosed by the record, we think the court erred in granting this nonsuit. After he had admitted the interrogatories of Fleming over objection of counsel for the defendant, we think that he should have submitted to the jury, under proper instructions, the question as to whether the answers to the interrogatories were sufficient to prove the correctness of the account. He should have left it for them to say, taking the whole answers together, whether Fleming testified to the correctness of the account from his personal knowledge, or simply from his knowledge of the books as he kept them. Upon an examination of the answers to the interrogatories we find that Fleming, in his answer to the second interrogatory, testifies that the account is correct, and had not been paid; and in his answers to the cross-interrogatories that the goods were sold by Loflin, and the employés, Savage, Newman, and Reynolds, and, while he sold none of them himself, he had personal knowledge of the fact from being generally in and about the store, and never hearing the correctness of the account disputed by the defendant, and that the defendant had been a customer of Fleming & Loflin prior to the making of this account. If the jury had believed that the witness swore to these facts from his personal knowledge, they would have been authorized to find for the plaintiffs, especially as the defendant had filed no formal plea, but only had the name of his counsel marked on the docket, which, under previous rulings of this court, amounted to the plea of general issue. I think, however, that it is bad practice in any court to go into the trial of a case without requiring the pleadings to be reduced to writing. Written pleadings ought never to be dispensed with on the trial of any case in a court of record. The plaintiff has as much right to know what defense the defendant will make as the defendant has to know the plaintiff's ground of action. We think the court erred in granting a nonsuit in this case, under the facts as disclosed by the record.

2. There was no error in ruling out the affidavit of Fleming to the correctness of the account. We know of no law which allows a plaintiff to prove his account by his *ex parte* affidavit. It is allowed in justice's court, under special circumstances, by statute.

3. When the counsel's name was marked on the docket for the defendant, which amounted to a filing of the plea of the general issue, that was a sufficient defense under the Code to put the burden upon the plaintiffs of proving their account, although there had been personal service thereof.

4. The defendant filed his cross-bill of exceptions, alleging that the court erred in allowing the answers of Loflin to be read to the jury as evidence. We do not think that this exception is well taken. Some of the answers, or some portions of them, were certainly admissible. The defendant objected to the answers as a whole, and did not point out, nor undertake to point out, to the court, the illegal parts thereof. Some parts being admissible, we will not reverse the trial judge for overruling the general objection to the answers as a whole. Fletcher v. Collier, 61 Ga. 653; Allen v. Brown, ante, 674, (this term.) The judgment of the court below is reversed as to the original bill of exceptions and affirmed as to the cross-bill.

(83 Ga. 322)

BAER *v.* CHRISTIAN.

(*Supreme Court of Georgia.* May 24, 1889.)

CONTRACTS—CONSIDERATION—PAYMENT—PLEADING.

1. A promise by a judgment creditor, made to the debtor, to attend the execution sale, and make the property bring the amount of the debt, is without consideration, and does not bind the creditor.

2. An allegation in a plea of payment that plaintiff, on a certain date, accepted certain land belonging to defendant for the balance due on the notes sued on, is sufficient, and a general demurrer to the plea is properly overruled, though other parts thereof are insufficient.

3. The objection that a plea of payment fails to specify the time of payment is not available, under a general demurrer, which does not point out such defect.

Error from city court of Macon; HARRIS, Judge.

Hardeman & Davis, for plaintiff in error.
Dessau & Bartlett, for defendant in error.

SIMMONS, J. Baer sued Christian on four promissory notes. Christian pleaded (1) the general issue, and (2) that "before the commencement of the suit he had fully paid off and discharged each of said notes in money, according to their tenor and effect." He amended his plea, and alleged, in substance, as follows: That he gave the plaintiff two mortgages to secure the note sued on, on certain personal and real estate; that in 1884, when they foreclosed the mortgages and had the real estate levied on and advertised for sale, such realty was of the value of $1,250; that before the day of sale, when the defendant was making and could make arrangements to have the property bring its value or to pay said debt, the plaintiff agreed with defendant that he would attend said sale and buy the property in at an amount sufficient to pay off the said balance due, and would take, and did then and there accept, the same for the balance due upon the said debt; that he would buy in said property for the full amount due on said notes, and would cancel said debt and mortgages, and that the defend-

Digitized by Google

ant need not attend said sale; that, relying on this promise of the plaintiff, the defendant did not attend the sale, nor continue his effort to make any further arrangement; that the plaintiff wholly failed to carry out said agreement, but after he had made it, and knowing that the defendant would not be present at the sale, bought in the property for $643.66, which was not its full value nor the full amount of said debt; and, after Baer had thus fraudulently got possession of said property, he declined to carry out his promise to accept the property in full payment of said debt, but now seeks to hold the defendant liable for said balance; which to permit him to do would be a fraud upon defendant, for he shows, that but for the understanding with plaintiff, he would have made arrangment to have the property bring its full value, and to pay off said debt in full, and the property would have brought more. The plaintiff demurred to the plea of payment, on the ground that the same was not sufficiently specific, and demurred to the amended plea, on the ground that it set up no valid legal defense. The demurrers were overruled, and the case proceeded to trial. The jury found for the defendant. The plaintiff made a motion for a new trial on the several grounds set out therein, which was overruled, and he excepted. Two of the grounds of the motion for a new trial were the overruling of demurrers to the pleas.

1. We think the trial judge was right in overruling the demurrer to the second plea, to-wit, the plea of payment, inasmuch as the demurrer was general, and did not specify the defect in the plea. It was defective, in that it did not specify the time of payment, but this ought to have been pointed out by the demurrer. There was no evidence to sustain the plea.

2. We think that the court was right in overruling the general demurrer to the amended plea, as some parts of the plea are sufficient. In this plea the defendant alleges that the plaintiff then and there accepted the land for the balance due upon the debt. If the defendant had proved this allegation in his plea, we think it would have been sufficient to authorize the jury to find in his favor. We have carefully read the testimony in the record, and find that the defendant failed to sustain this allegation, either by his own testimony or by that of any of his witnesses. He does not say in any part of his testimony that the plaintiff ever in fact accepted the mortgaged property in payment of the amount of his indebtedness to the plaintiff. All that he testifies to is that the plaintiff agreed that he would attend the sale, and make the property bring the amount of the indebtedness. The defendant does not show in his testimony that, if he had been present, the property would have brought more than the plaintiff gave for it, or that any one else would have bid more for the property than the plaintiff did. Nor does he show that he was in any manner injured by the action of the plaintiff. If the plaintiff had demurred to these allegations specifically, the court doubtless would have stricken them from the plea, as they were not proper allegations in a plea of payment. They might have been proper in a plea of set-off against the notes, if the defendant had alleged and could have shown that he was injured by the plaintiff's failure to comply with his promise. For instance, if he could have shown that he had a friend who would have attended the sale, and given more for the property than the plaintiff did, and that by reason of the agreement between him and the plaintiff his friend failed to attend the sale and bid upon the property, he might set-off the difference between what his friend would have bid and what the plaintiff bid, if his friend would have bid more. If the plaintiff made this agreement with the defendant that he would attend the sale and make the property bring the amount of the indebtedness, he may have been morally bound to do so, but we do not see that he was legally bound to do so. There was no consideration passing to him for the promise. He had his judgment against the property, the execution had been issued and levied, and we fail to see any legal benefit that the plaintiff received by such a promise, if he made it. There being no consideration in the way of benefit for the promise, and no injury being shown to the defendant because of the plaintiff's non-compliance therewith, the plaintiff was not legally bound thereby.

3. The defendant having failed to sustain the only good part of his amended plea by proper evidence, the verdict of the jury was contrary to the evidence, and the court should have granted a new trial. Taking this view of the case, it is unnecessary to pass upon the other grounds of the motion. Judgment reversed.

(83 Ga. 103)

SMITH v. SHEFFIELD *et al.*

(*Supreme Court of Georgia.* May 24, 1889.)

PRACTICE IN CIVIL CASES—DISMISSAL—REINSTATEMENT.

A judgment denying a motion to reinstate a claim case will not be reversed in the absence of evidence, by affidavit or otherwise, going to show that the property involved in the litigation really belonged to the claimant.

(*Syllabus by the Court.*)

Error from superior court, Bibb county; GUSTIN, Judge.

W. F. Clark and *A. S. Erwin*, for plaintiff in error. *Steed & Wimberly* and *B. H. Wilkinson*, for defendant in error.

BLECKLEY, C. J. An attachment in favor of Sheffield & Co. was levied on certain personal property. A claim was interposed by Smith, the affidavit and bond being made by his agent, and the agent swearing to the best of his knowledge and belief. The claim case was pending for several terms of the court. Counsel for the plaintiffs and counsel for the claimant had an agreement by

Digitized by Google

which each undertook to give the other notice of when the claim case would come up for trial, but on account of certain circumstances counsel for the claimant failed to receive notice. His name was not marked upon the docket, and, so far as appears, the court had no knowledge that he was of counsel, or that the claimant had any counsel. The case was regularly called, and the claim dismissed. The plaintiffs contended for damages, and the jury found a verdict against the claimant for such damages, judgment on which finding was entered up. At a subsequent term the claimant moved to set aside this judgment, and to reinstate the claim case, the cause of the motion being the failure of plaintiff's counsel to give notice according to the agreement. No affidavit or other evidence showing that the property belonged to the claimant was filed in support of this motion. The overruling of the motion is the error complained of. We think the court was warranted in refusing the motion, for the reason that it was unsupported by any evidence going to the merits of the claimant's right to the property. If the property really belonged to the claimant, he should have made this appear to the reasonable satisfaction of the court, in order to have the claim reinstated. A judgment, though irregular, will not be set aside upon motion, without an affidavit or some other evidence of merit. The claimant points out defects in the attachment, but what are these defects to him if the property did not belong to him? He could have taken advantage of them, had they been pointed out when the claim came up for regular trial, but certainly the case ought not to be reinstated in order that he may have an opportunity to take advantage of such defects, unless he is the real owner of the property levied upon; and, as we have already said, he makes no showing whatever upon this branch of the case. While we might have supported the court below in granting the motion, even with this defect in the evidence, we are unwilling, with the evidence unsupplied, to reverse the judgment denying the motion. We think the sounder ruling was the one which the court made. Upon a bill filed equity would not set aside a judgment merely to give opportunity to make deadly shots at the writ or the pleadings. On the contrary, equity would put the question, has substantial injustice been done? The same question is pertinent in a court of law when it is proposed to vacate a judgment on motion. The silence of the record touching this question seems deliberate as well as profound. Judgment affirmed.

(31 S. C. 171)

GERALD *v.* GERALD *et al.*

(Supreme Court of South Carolina. July 1, 1889.)

MORTGAGES—FORECLOSURE—ESTOPPEL.

1. On a rule to show cause after foreclosure of a mortgage why defendant, who was in possession of the mortgaged premises under a junior lien, and who was a party to the foreclosure proceedings, should not surrender possession to the purchaser at the foreclosure sale, a return stating that the mortgage did not include the entire parcel alleged to have been sold under it does not raise a question of title to land, as that is a question which could have been pleaded in the suit for foreclosure, and defendant is estopped to set it up afterwards.

2. Where the mortgage describes the land as all of a certain lot, designated on the plat of the town by a particular number, the words, "whereon is situated a two-story building," etc., and which follow the description by number, both in the mortgage and order of sale, may be rejected as surplusage. MCGOWAN, J., dissenting.

3. A judgment foreclosing a mortgage on land is not a judgment for its delivery, under Code Civil Proc. S. C. § 305, providing that a judgment for the delivery of real property may be enforced by execution.

Appeal from common pleas circuit court of Kershaw county; ALDRICH, Judge.

C. L. Winkler, for appellant. *J. T. Hay*, for appellee.

MCIVER, J. Under proper proceedings for the foreclosure of a mortgage of real estate, the plaintiff obtained a judgment of foreclosure and sale of a certain lot in the town of Camden, S. C., and at the sale the appellant became the purchaser, and, having complied with the terms of sale, received a deed from the master, and demanded possession from the respondent George W Witte, who was in possession under a deed from the sheriff, who had sold the mortgaged premises under an execution to enforce a judgment against the mortgagor junior to the plaintiff's mortgage. In response to this demand the respondent surrendered to the appellant that portion of the lot situate on the corner of Broad and De Kalb streets, having a front of 43 feet on Broad street, and running back on De Kalb street 207 feet, whereon is situated the two-story building formerly used and occupied by W. C. Gerald as a storehouse, but declined to surrender the possession of the balance of the lot on which two other store-houses formerly owned by W. C. Gerald stand. Thereupon the appellant gave notice to respondent of a motion, based upon two affidavits, which will be hereinafter more particularly stated, for an order to put the appellant in possession of the entire mortgaged premises sold under the said judgment of foreclosure. This motion was heard by his honor, Judge FRASER, who refused the motion, "holding that the judgment of foreclosure and sale, with direction to the master to execute a deed of the premises so sold, to be in all respects the equivalent of an order to deliver possession;" but he granted an order requiring the respondent George W. Witte to show cause "why he should not be attached for failing and refusing to deliver to Cornelius L. Winkler, the purchaser, all the tract or lot of land sold under the proceedings in this case, and conveyed by the master for this county to said Cornelius L. Winkler, a demand for such possession having been made upon him as appears by the said affi-

Digitized by Google

davits." To this rule Witte made a return, which will be hereinafter more particularly stated, on the hearing of which his honor, Judge ALDRICH, holding that the return raised a question of title to real estate, which, in his judgment, could not be tried on a rule to show cause, granted an order discharging the rule, with costs.

From this order Winkler appeals upon the several grounds set out in the record, which, in effect, impute error to the circuit judge (1) in holding that the return raised a question of title to real estate; (2) in refusing to require the respondent to surrender to the appellant the possession of the entire lot; (3) in failing to leave the return open, and framing an issue to be tried by a jury to determine the amount of land sold under the judgment of foreclosure, and bought by appellant.

It appears from the affidavits served with the notice of the motion, in addition to the facts above stated, that in the judgment of foreclosure and sale, under which appellant claims, the land ordered to be sold is described as follows: "All that piece, parcel, and tract of land lying, being, and situate in the town of Camden, in said county and state, known and designated in the plan of said town as lot number seven hundred and thirty-three, (733,) fronting on Broad street, and running back on De Kalb street, whereon is situated the two-story brick building formerly used and occupied by W. C. Gerald as a store-house;" that the dimensions of said lot No. 733, as ascertained by a surveyor, are 100 feet fronting on Broad street, and a depth of 382 feet on De Kalb street, designated on a plat made by said surveyor, and attached to his affidavit, which plat also shows that portion of said lot surrendered by respondent to appellant as having a frontage on Broad street of only 43 feet, and a depth of only 207 feet on De Kalb street. In the return to the rule none of these facts are denied, but the respondent therein claims that the only premises sold under the mortgage, and purchased by appellant, was that portion of lot No. 733 which has been surrendered to the appellant; "that W C. Gerald had on his lot, on Broad street, three stores: (1) That at corner of Broad and De Kalb streets, formerly occupied by him as a store-house, of which C. L. Winkler, attorney, is the purchaser, and of which he is now in possession; (2) a brick store, with tin roof, upon which, with the lot upon which it is situated, W. C. Gerald executed a mortgage in favor of Witte Bros. nearly one year before the mortgage to Fannie C. Gerald; (3) a wooden store, next to the premises of the Baptist Church; that these three stores were all used and occupied by W. C. Gerald as separate premises for years preceding the mortgage to his wife, Fannie C. Gerald, and that the vacant lot on De Kalb street, now also claimed by C. L. Winkler, attorney, was also used and held by W C. Gerald as property separate and apart from that mortgaged to his wife;" and that when the action to foreclose the mortgage, under which appellant claims, was commenced, respondent was in possession of the entire lot known as "No. 733," embracing all three of the storehouses, and the vacant lot above mentioned, under a deed from the sheriff to him as a purchaser at a sale under judgments against W. C. Gerald.

Respondent George W. Witte having been a party defendant in the principal action, in which this proceeding *in re* has been taken, he is, of course, bound by the judgment therein, and cannot now raise any question which was or should have been raised in that case. It does not appear that any question was there raised as to what property was covered by the mortgage, or as to any antecedent claims to that mortgage, either by respondents Witte Bros., or any one else; but, on the contrary, it does appear that the only question then raised was as to the validity of such mortgage, and that question was adjudged against respondent. The mortgaged premises were ordered to be sold, and the proceeds applied to the debt due to the mortgagee Fannie C. Gerald, as appears by the judgment set out in the case, which, on appeal, was affirmed by this court. Gerald v. Gerald, 28 S. C. 442, 6 S. E. Rep. 290. So that the only question that could be raised under this proceeding is, what premises were ordered to be sold, and what were in fact sold and conveyed to the purchaser? It is conceded that the entire mortgaged premises were sold and conveyed to appellant, and we have in the judgment of foreclosure, set out in the case, a full description of the mortgaged premises, which has been copied above. We learn from that description that the property which was ordered to be sold, and which was in fact sold, was: "All that piece, parcel, or tract of land [not a portion of it] lying, being, and situate in the town of Camden, in said county and state, known and designated in the plan of said town as lot number seven hundred and thirty-three, (733,) fronting on Broad street, and running back on De Kalb street, whereon is situated the two-story building formerly used and occupied by W. C. Gerald as a store-house." When the court orders "all" of a certain piece of land, known and designated on the plan of an incorporated town by a specified number, to be sold, it is difficult to conceive what warrant there would be for saying that only part of such lot was intended to be sold.

Every one knows that it is very commonly, if not universally, the case that incorporated towns are divided into lots, and designated by numbers on the plans of such towns for the very purpose of identifying the same; and it seems to us too clear to admit of question that when the court orders a sale of a lot, more especially all of a lot, designated by its number, it must be regarded as ordering the sale of the entire lot, and not a part of it, unless there is something to indicate that the intention was to sell only a part. There is

Digitized by Google

certainly nothing whatever in the description of the mortgaged premises, as set forth in the judgment of foreclosure in this case, indicating any such intention. The language in the concluding part of the description—"whereon is situated the two-story building formerly used and occupied by W. C. Gerald as a store-house"—is wholly insufficient for that purpose. There is nothing more common than to find in the description of real estate conveyed similar superadded words,—as, for instance, the tract of land whereon the dwelling-house of the grantor or the defendant in execution is situated,—which, so far as we know, were never held sufficient to confine the estate conveyed to that portion of the land actually covered by such dwelling-house itself or its appurtenances. Indeed, the case of Bratton v. Clawson, 3 Strob. 127, shows that the rule is exactly the other way, and that, where land is described in a conveyance by certain definite boundaries, the further description of it as "the land on which the defendant resided" is merely incidental and may be rejected. The present case is much stronger than that, for the question there was whether the gin-house of the defendant in execution had been sold by the sheriff, and, as it appeared that the gin-house was located upon a piece of land which did not form originally a part of the tract upon which the defendant resided, but had been subsequently bought for the purpose of erecting the gin-house, it was contended that that portion of the description—"the defendant's land, whereon he resides"—limited the land sold to the tract on which the defendant's dwelling-house was located, and did not include the piece of land on which the gin-house stood. But as the sheriff's deed, following the levy, specified boundaries which included the gin-house, the court held otherwise, as above indicated. FROST, J., in delivering the opinion of the court, used this language: "But the deed is conclusive evidence of the plaintiff's right to the gin-house. It does not present a case of latent ambiguity, which parol evidence may be received to explain. The description of the land, which seems certain, and without ambiguity for anything appearing on the face of the deed, is not rendered uncertain by extrinsic facts. The land is identified by the boundaries mentioned in the deed. If the deed had contained no other description of the land than as that on which Strait resided, parol evidence would have been proper to locate and show its extent. But when it is designated with certainty, by definite boundaries, the further description of it as 'the land on which Strait resided' is merely incidental, and may be rejected. On this subject the rule laid down in Sheppard's Touchstone is 'that, when there is in the first place a sufficient certainty and demonstration, and an additional term of description, which fails in point of accuracy, it shall be rejected as surplusage.' Visible marked lines and natural objects present the greatest certainty. These do, in effect, enter into a description by boundaries."

That case, as we have said, is much weaker than the present; for there the superadded words of description—the land on which Straight resided—tended to so limit the thing conveyed as not to include the gin-house, while here the superadded words—"whereon is situated the two-story building formerly used and occupied by W. C. Gerald as a store-house"—have no such tendency, but, on the contrary, are entirely consistent with the preceding and more definite terms of description; for it is conceded that the said store-house is in fact situated on lot No. 733, which, being described as a lot known and designated on the plan of the town, is quite as specific and certain as if the plan or plat had been annexed, instead of referred to merely, and there is nothing in the superadded words at all inconsistent with the previous and more precise description, and therefore nothing to qualify or limit such previous description. If the intention had been to limit the property mortgaged and the premises ordered to be sold to that portion of the lot No. 733 which was covered by the store-house mentioned, it would have been very easy and most natural to say so. But such is not the language used, and, on the contrary, the language is "all" that parcel of land known as lot No. 733; and we do not see how there can be a doubt that the intention was to embrace the entire lot, and not a part of it merely. We do not see how the facts stated in the return, that there were two other store-houses located on the same lot, one of which had been made the subject of a previous mortgage, can affect the question. It is conceded that W. C. Gerald was originally the owner of the entire lot known as "No. 733," including the three store-houses mentioned, and as such he had the right to mortgage either the whole or any part of the lot, and what his intentions were in regard to a given mortgage must be determined by the terms he has used in such mortgage. Here we have a mortgage in which such terms are used as conclusively show that his intention was to mortgage the entire lot, and not a part of it merely; and if Witte or Witte Bros. held a senior mortgage upon a portion of the lot covered by one of the stores, they, being parties to the action for foreclosure, should have then set up such mortgage, and, having failed so to do, it is too late for them to do so now. Indeed, we do not understand from the return that any such claim is now set up, as the respondent manifestly bases his right to the possession of that portion of the lot which he has refused to surrender upon his purchase at sheriff's sale under judgments junior to the mortgage under which appellant claims. We suppose, therefore, that the statement in the return in regard to the senior mortgage on one of the store-houses located on the lot was made merely to show that the original owner, W. C. Gerald, had on a previous occasion

Digitized by Google

mortgaged only a part of the land. Assuming that to be so, the fact that the original owner had upon one occasion given a mortgage on a part of the lot certainly has no tendency whatever to show that in making the mortgage under which appellant claims he did not intend to embrace the whole of the lot. That must be determined by an examination of the terms of the mortgage, which, as we have seen, conclusively show an intention to include the whole of the lot, and not by what the mortgagor may have done on a previous occasion. It seems to us, therefore, that so much of the several grounds of appeal as impute error to the circuit judge in refusing to hold that appellant was entitled to the possession of the entire lot known and designated on the plan of the town of Camden as "Lot No. 733," the limits of which were clearly and indisputably defined, must be sustained.

It is urged, however, that the return raised a question of title to real estate which could not be determined on a rule to show cause, and it was upon this ground that the circuit judge acted in discharging the rule. In this we think there was error. The return does not, and could not, set up any claim of title paramount to the mortgage under which appellant claims. The respondent, having been a party to the proceedings to foreclose that mortgage, is, of course, bound by the judgment therein; and the only question now is, what was that judgment? and that must be determined by its terms. Or, to be more precise, the only question is, what property was ordered to be sold by that judgment, and what was sold under that judgment? The return does not raise any issue of fact in reference to this, and could not well do so, but simply claims that, under a proper construction of the terms of that portion of the judgment in which the property ordered to be sold is described, only a part, and not the whole, of the lot was ordered to be sold. We are unable to discover anything in the return which can be regarded as raising an issue of title to real estate. It does not even raise the question, which for the first time was raised in argument here, as an additional ground upon which the order discharging the rule might be sustained, though no notice of such additional ground, as required by the proper practice, was given, to-wit: That the court has no power, under a rule to show cause, to require a person in possession of mortgaged premises to surrender the possession to the purchaser at a foreclosure sale, where the person in possession was a party to the action for foreclosure. And even if such position had been properly taken we do not see how, under the case of Trenholm v. Wilson, 13 S. C. 174, it could have been sustained; for there it was held that a purchaser of the mortgaged premises, at a foreclosure sale, could, by rule to show cause, require the widow of the mortgagor to surrender the possession to him, although she was in possession, claiming that the sale was invalid; that she had a valid claim of dower in the premises; and that her right to retain possession could not be determined under a rule to show cause. Indeed, as was said by that eminent jurist, Chancellor KENT, in Kershaw v. Thompson, 4 Johns. Ch. 612: "It does not appear to consist with sound principle that the court, which has exclusive authority to foreclose the equity of redemption of a mortgagor, and can call all the parties in interest before it, and decree a sale of the mortgaged premises, should not be able even to put the purchaser into possession against one of the very parties to the suit, and who is bound by the decree." In the comparatively recent case of Le Conte v. Irwin, 23 S. C. 106, the propriety of a proceeding by a rule to show cause, in a case like this, is recognized. In fact, if a mortgagor, or a purchaser from him, who is a party to the action for foreclosure, should be permitted to force a purchaser at the sale under the judgment of foreclosure to an action of ejectment to recover possession of the mortgaged premises by surrendering such portion of the mortgaged premises as he may see fit, and retaining the balance under a claim that such balance was not covered by the mortgage, it is very manifest that the value of that class of securities would be very much impaired, and tedious, expensive, and unnecessary litigation encouraged. It seems to us that, where a mortgagor or his vendee, who is a party to the action for foreclosure, in good faith, desires to contest the amount of property covered by the mortgage, the proper time to raise such question is before the judgment of foreclosure is obtained, and not afterwards, when he is ruled to show cause why he should not surrender possession to the purchaser, though it may be possible that cases may arise in which such question may afterwards be raised. But in this case it is sufficient for us to say that the return in this case, resting, as it does, solely upon the ground that the portion of the lot which respondent refuses to surrender was not embraced in the order of sale, when we think it clearly is so included, raises no question of title to real estate, and that the circuit judge erred in ruling otherwise.

As intimated above, the respondent, in the argument here, has undertaken to sustain the order appealed from upon another ground than that upon which it was placed by the circuit judge, which, so far as appears, was not taken in the court below. While it is entirely competent for the respondent to do this, provided proper notice be given according to the practice prescribed in Weinges v. Cash, 15 S. C. 44, and other cases to the same effect, yet where, as in this case, no such notice is given, the question thus raised is not properly before us, and according to strict practice would not be considered. But inasmuch as the question raised is an important one, and is rested upon a misconception of the former decision of this court, upon another branch of this same case, (Ger-

Digitized by Google

ald v. Gerald, ante, 274,) we will *ex gratia* consider it. The point raised is that under section 305 a judgment for the delivery of real or personal property can be enforced only by execution, and not by attachment following upon a rule to show cause, and it is supposed that, in the former decision just alluded to, this court held that a judgment of foreclosure was a judgment for the delivery of real property, and hence that a judgment in a case like this cannot be enforced by attachment, but can only be enforced by execution. Aside from the fact that this question has already been expressly decided in the case of Trenholm v. Wilson, supra, and that the proceeding by rule to show cause was plainly recognized in Le Conte v. Irwin, supra, it seems to us that the same result would be reached, even were the question still an open one. Without stopping now to consider whether a judgment for the delivery of real property can only be enforced by execution, inasmuch as the language of the section is permissive,—"may be enforced,"—and not imperative, it is sufficient for us to say that we do not regard a judgment of foreclosure and sale of mortgaged premises as a judgment for the delivery of real property, but, on the contrary, is a judgment for the sale of such property, unless the debt is paid within a prescribed time. When the sale has been made, and the person in possession, if a party to the proceeding, refuses to surrender the same to the purchaser, the court, by virtue of its inherent power to enforce obedience to its mandates, requires such person to complete the sale—the thing adjudged to be done—by surrendering possession of the thing sold. This is a very different thing from a judgment for the delivery of real or personal property from one person to another. The court, having all the parties in interest before it, and having power to order a sale of all of such interests, and having made such order, must necessarily have the power to carry its order into full effect, by requiring the party in possession to surrender the same to one whom the court has invited to buy. It is a mistake to suppose that, in the former decision, it was held that a judgment of foreclosure was a judgment for the delivery of the mortgaged property. The question in that branch of the case was whether this same respondent could be made liable on an undertaking into which he had entered, for the purpose of staying the sale under the judgment for foreclosure, pending the appeal from such judgment, whereby he had undertaken to pay the value of the use and occupation of the mortgaged premises pending such appeal; and it was then argued by the present respondent that a judgment for foreclosure was not a judgment for the delivery of real property, and therefore, under section 352 of the Code, it was not a case in which such an undertaking could be required. But this court held that the provision in that section for the giving of an undertaking was not confined to cases in which the judgment was for a delivery of real property, but embraced also cases in which the judgment was for a sale of such property, and that, a judgment for foreclosure being a judgment for the sale of real property, the case fell within the provisions of the section, and the undertaking was properly required. In that case the court, after quoting the language used in section 352, said: "This language shows that the intention was to embrace appeals from judgments of foreclosure, for that is a judgment directing the sale of real property, and the language of the section (if the judgment appealed from direct the sale or delivery of possession of real property) plainly indicates the intention to embrace two classes of judgments,—those which direct a sale, as well as those which direct delivery of possession." This shows very clearly that the court did not then decide that a judgment of foreclosure was a judgment for the delivery of real property, but was a judgment for the sale of such property. A judgment of foreclosure does not entitle the party in whose favor it is rendered to demand the delivery of any real property, but only entitles him to have a sale thereof made. After the sale has been made by the order of the court, the purchaser then becomes entitled to the aid of the court in obtaining possession of that which the court has ordered to be sold, where such possession is withheld by a person who was a party to the proceedings under which the sale was made. It seems to us, therefore, that, in any view of the case, the circuit judge erred in discharging the rule. The judgment of this court is that the order appealed from be reversed, and that the case be remanded to the circuit court for such further proceedings as may be necessary to carry out the views herein announced.

SIMPSON, C. J., concurs.

MCGOWAN, J., (*dissenting.*) It is manifest that the description of the property mortgaged was not set out with care and particularity. There were three stores on lot No. 738, in the plan of the town, all belonging to the same person, but used entirely separate from each other. Without going into the argument, I incline to think that the whole lot in the plan was referred to merely to indicate the general locality of the property mortgaged, and that the parties intended to place under the mortgage only so much of that lot as belonged to the separate lot "whereon is situated the two-story building formerly used and occupied by W. C. Gerald as a store-house;" or, at least, there is so much doubt about it that, in the interest of justice, the parties should have an opportunity to try the question in an issue framed for that purpose.

Digitized by Google

(31 S. C. 133)

ANDERSON *et al. v.* BUTLER *et al.*

(*Supreme Court of South Carolina.* July 1, 1889.)

TRUSTS—PURCHASE BY TRUSTEE—WILLS.

1. The executor of a will, in which he was himself a legatee, and who was the trustee of certain other legatees, became the purchaser of lands sold by him under an order of court to pay the debts of the estate. It appeared that he was a *bona fide* purchaser, that there was no chilling, combination, or conspiracy, and that he paid the highest price the land would bring. *Held*, that these facts did not show the relation of vendor and vendee on the part of the trustee, and that the rule that the *cestui que trust* may at his option abide by or set aside a purchase made by the trustee is not applicable.

2. Where in the body of a will authority is given the executor to sell certain lands, and in codicils to the will the lands are given to different legatees from those first named, without revoking in express terms the authority to sell, that authority remains and must control, unless suspended or vacated for cause by the court.

3. Where testatrix directs in her will the division of lands in certain proportions among her children, and gives her executor full power to sell the whole or any part, and on such terms as he may deem best to carry out the terms of her bequest, it is discretionary with him to divide the land by partition in kind or by sale.

Cross-appeals from common pleas circuit court of Aiken county; FRASER, Judge.

W. T. Gary, for plaintiffs. *Henderson Bros.*, for defendants.

SIMPSON, C. J. Seth Butler, late of Aiken county, died in 1876. He left a will, with codicils, in which he disposed of his estate, consisting almost entirely of two tracts of land,—one known as the "Welborn Tract,"—in certain proportions, to his children, to-wit, Anna K. Shaw, Lucinda Lanham, to Mary Ann Anderson, and her children, (the plaintiffs,) and to the defendant A. Pickens Butler, who was appointed executor and also trustee of his sisters, Mrs. Lanham and Mrs. Anderson. The estate of the testator being somewhat involved in debt, the executor, A. P. Butler, instituted proceedings in the probate court with all necessary parties to sell the lands to pay debts and for partition, which resulted in an order of sale at public outcry, at which sale the said executor, A. P. Butler, became the purchaser of the Welborn tract at the price of $1,100, receiving a deed from the probate judge. The other tract was bought at same sale by one John A. Butler. About this last tract, however, there is no contest, and it may be dismissed without further remark. Mrs. Catherine M. Butler, the widow of the above-mentioned Seth Butler, died in 1880, possessed of a certain tract of land containing some ——— acres, known as the "Red House Tract," and some household furniture. She also left a will, with several codicils thereto attached. Under this will and codicils the plaintiff Mrs. Anderson and her children and the defendant A. P. Butler were the devisees, to-wit, one-half to A. P. Butler, and the other half to Mrs. Anderson and her children, as will be seen from said will, copy of which will be found in the case, and reported herewith. The defendant A. P. Butler was appointed executor with full power and authority to sell the whole or any part of the tract of land devised, to-wit, the Red House tract, in such way, and upon such terms, as to him might seem best to carry out the directions and provisions of the will. The executor, A. P. Butler, has been in possession of the Red House place since the death of his mother, and Mrs. Anderson has been in possession of the Welborn tract, mentioned above, with some negotiations going on for an exchange of the Welborn place to Mrs. Anderson for her interest in the Red House place. These negotiations, however, having failed, in October, 1884, A. P. Butler advertised the Red House place for sale, by virtue of the power which he supposed he had under the will of his mother, for cash, whereupon the suit below was commenced, praying an injunction restraining the said A. P. Butler from selling the said land, and that it be partitioned by metes and bounds. Also for an accounting by said A. P. Butler as executor of both the wills mentioned above, and as trustee of the said Mrs. Anderson, and also for vacating the sale of the Welborn place to the said A. P. Butler at the probate court sale, *supra*, and for the partition of the same, the said sale being alleged as beyond the jurisdiction of the probate court; or in any event that the said A. P. Butler be required to account for the same at its true value, it having been alleged in the complaint that it was bought by the said A. P. Butler at an under-price in consequence of the bidding being chilled by the said A. P. Butler, etc. There was also certain stock in the Georgia Railroad involved in the controversy originally, but this has been settled between the parties, and therefore needs no further mention here. A temporary injunction was obtained, restraining the sale of the Red House place, and finally the case came up for hearing before his honor, T. B. FRASER, who pronounced the following decree, from which both parties appealed, upon exceptions attached:

"JUDGE FRASER'S DECREE.

"This case was heard by me at the term of the court held in September and October, 1888. It was heard on the pleadings and testimony taken in open court, and on argument of counsel. I have given to this unfortunate case mature consideration, and I think it better to announce my conclusions without entering into the reasons for them. I am satisfied that it is at the option of the *cestui que trust* to abide by or set aside a purchase made by the trustee. While, therefore, I am satisfied that the purchase was made, by the trustee, of the Welborn place, in good faith, and at the highest price it would bring, and even in competition with parties interested, there must be a resale of the interest of Mrs. Anderson, (who alone contests the sale,) the *cestui que trust* for life, and of those in remainder after her death as to her share, if it will bring more than it sold for at the sale under the judgment of the probate judge. The power of sale given to the executor and

Digitized by Google

trustee under the will of Mrs. Butler is one of those administrative powers which is in some sense discretionary, but is at the same time a power coupled with a trust, and within the control of the court. 2 Perry, Trusts, § 508. Green v. McBeth, 12 Rich. Eq. 254, does not apply, as the power was more than a mere power of sale. There is nothing in the testimony before me which I think would render an interference with the court in the exercise of the power of sale of the 'Red House' place, except that there would be complications attending a sale made by the trustee, in a case where he is entitled to one-half of the proceeds of sale, and the *cestuis que trustent* are entitled to the other half, if he should desire to become a purchaser at the sale. I have carefully considered the testimony as to the expediency of making a partition in kind of the 'Red House' place. There can be no question that a surveyor can cut into two or more parcels, but I am satisfied that this cannot be done without injury to some one or other of the parties interested. I am satisfied that Mrs. Anderson is entitled to a transfer to herself of the seventeen shares of the capital stock of the Georgia Railroad and Banking Company, there being no remainders after her death, and no restriction on the trust as to the manner of its use, they being held by the trustee simply as trustee for her. Lewin, Trusts, 598. It may be desirable to wind up this trust so far as the present trustee is concerned, and therefore an accounting will be ordered. It is therefore ordered and adjudged that the master of Aiken county, after due advertisement, do sell at the usual place of sale, on sales-day in March next, or on some subsequent sales-day, the interest of the trust-estate of Mrs. Mary Ann Anderson in the said Welborn tract, being (1/3) one-third of (11-12) eleven-twelfths thereof, at a price not less than (1/3) one-third of (11-12) eleven-twelfths of eleven hundred dollars, to the highest bidder for cash, and, in the event there shall not be so much bid, therefore the master shall withdraw the same from sale, and the said A. P. Butler shall have leave to apply to the court for an order confirming his title thereto, under the sale heretofore made. It is also ordered and adjudged that the said master, after due advertisement, do sell at the usual place of sale on sales-day in March next, or on some subsequent sales-day, the 'Red House' place, for one-half cash and the balance on a credit of one year, with interest from the day of sale; the credit portion to be secured by a bond of the purchaser and a mortgage of the premises. It is ordered that at the above ordered sales either Mrs. Anderson or the trustee and executor, A. Pickens Butler, or any other party to this action, have leave to become a purchaser. It is further ordered that A. Pickens Butler do account before the master for his actings and doings as executor of the last will and testament of Seth Butler, and as executor of the last will and testament of Mrs. Catherine M. Butler, and as trustee for Mrs. Mary Ann Anderson, under the said wills of Seth Butler and Catherine M. Butler. In said accounting the master is directed to take an account of the value of the use and occupation and timber and wood cut from the Welborn place by, or by the direction of, Mrs. Mary Ann Anderson, since the purchase of the same by A. Pickens Butler at the sale under the decree of the probate court referred to in the proceedings. The master will also take an account of the use and occupation of the Red House place by A. Pickens Butler since he took charge of the same as executor, and of any improvements made by him on said Red House place; the question as to his right to be refunded the amount therein reserved until the coming in of the report showing the character and value of such improvements.

"I do not find in this case sufficient facts to warrant the court in charging the trustee and executor with the costs of this proceeding; and it is difficult to separate the cost attending the litigation about the Welborn place from those attending the question as to the sale or partition of the 'Red House' place, as most of the witnesses were examined in reference to both places. It is therefore ordered that one-third of the costs up to date be paid out of the interest of the trust-estate in the 'Welborn' place, and the remaining two-thirds paid out of the proceeds of the sale of the 'Red House' place; this order to include all costs up to this date, and the costs and expenses of the sales made under this order. All questions raised by the pleadings and not herein passed upon, and all questions as to costs not herein provided for, are reserved for the future order of the court. Parties may apply at the foot of this decree for any orders necessary to carrying out the same. It is further ordered that on or before the 15th day of February next the said A. Pickens Butler, trustee, do transfer in writing, in proper form, to Mrs. Mary Ann Anderson, the said seventeen (17) shares of the capital stock of the Georgia Railroad and Banking Company, to be held by her in her own right, and for her own use.

"T. B. FRASER, Presiding Judge."

"7th January, 1888."

"DEFENDANTS' EXCEPTIONS.

"Please to take notice that the defendant A. Pickens Butler, as executor, and in his own right, excepts to the decree of his honor, Judge FRASER, dated the 7th January, 1888, and will appeal therefrom to the supreme court of this state, and ask a reversal thereof on the following grounds: (1) Because it is submitted that his honor erred in ordering a resale of the Welborn place in any event, and especially as he found that said A. Pickens Butler had purchased it 'in good faith, and at the highest price it would bring.' (2) Because it is submitted he erred in ordering the Red House place to be sold by the master, whereas he should have permitted the executor to sell the same under the plain

Digitized by Google

powers given him by his testatrix, Mrs. Catherine M. Butler. (3) Because it is submitted that he erred in ordering any accounting by this defendant as trustee or executor, and instead thereof should have dismissed the complaint. (4) Because it is submitted that he erred in ordering this defendant to transfer to Mrs. Anderson the Georgia railroad stock, in plain violation of the terms of the trust. HENDERSON BROS.,

"Att'ys for Defendant A. Pickens Butler.

"27th January, 1888.

"To W. T. Gary, Esq., Att'y of the Plaintiffs."

"PLAINTIFFS' EXCEPTIONS.

"Please take notice that the plaintiffs in the above-stated case except to the decree of his honor Judge FRASER, dated 7th January, A. D. 1888, and will appeal therefrom to the supreme court of this state, and ask for a reversal and modification thereof upon the following grounds: (1) Because it is submitted his honor erred in finding that a power of sale is given to the executor and trustee under the will and codicils of Mrs. Catherine Butler. (2) Because it is submitted his honor erred in deciding that there is nothing in the testimony which would render proper an interference by the court with the exercise of the power of sale by the executor except the complications stated. (3) Because it is submitted his honor erred in deciding that 'the Red House place' could not be divided in kind without injury to some one or other of the parties interested. (4) Because it is submitted his honor erred in considering and deciding the question of fact as to whether partition in kind could be made of the Red House tract, both counsel for the plaintiffs and defendants in open court at the hearing having agreed to submit to the court the construction of the will and codicils of Mrs. Catherine Butler, the court to decide whether a power of sale was thereby given to the executor and trustee; and whether the court, under the evidence, had authority to make partition of said lands, the court to decide the legal issues, and to refer the question of fact as to whether partition could be made in kind to the master or commissioners, that further evidence might be submitted. (5) Because his honor erred, it is submitted, in directing the master to take account of the value of the use and occupation and timber and wood cut from the Welborn place by, or by the direction of, Mrs. Mary Ann Anderson, since the purchase of the same by A. Pickens Butler at the sale under the decree of the probate court, and in not requiring an accounting to be taken of the timber and wood cut or sold by, or by the authority of, said A. Pickens Butler from 'the Red House' tract. (6) Because, it is submitted, his honor erred in finding that the purchase of 'the Welborn tract' was made 'by the trustee in good faith, and at the highest price it would bring,' and also in charging the interest of the plaintiffs in said trust-estates with the payment of any part of the costs of the case, and in not finding from the evidence that the trustee and executor was properly chargeable with the costs of the proceedings. WM. T. GARY,

"Appellants' Attorney."

The original scrip of the stock of the Georgia Railroad & Banking Company, mentioned in Judge FRASER's decree, stood in the name of Seth Butler. He in his life-time transferred it to A. P. Butler, Trustee for Mary Ann Anderson, and the present scrip stands in that way.

Without taking up these exceptions separately and considering them in their order, we think it sufficient to state the questions involved when they are read as a whole. These seem to us to be as follows: (1) Did his honor err in finding as a matter of fact that the defendant A. P. Butler purchased the Welborn place in good faith, and at the highest price it would bring? (2) Did he err in setting aside this sale, and in ordering a second sale of the interest of Mrs. Anderson? (3) Did he err in ordering a sale of the Red House place by the master, or should he have allowed the executor to sell under the power claimed by him under the will of his mother, or should he have referred the question of partition in kind to the master or to commissioners? (4) Did he err in directing an accounting by the defendant Butler, as executor and trustee, or should he have dismissed the complaint? (5) If the accounting should take place, should defendant Butler be required to account for timber cut from the Red House place, Mrs. Anderson having been ordered to account for the use, occupation, and timber cut from the Welborn place? And (6) did he err as to the matter of the costs?

The first question is a question of fact, and we have carefully examined the testimony reported, under the established rule applicable to appeals on the facts, and, while we find some conflict, yet there is abundant evidence to sustain the finding of his honor that the defendant bought the Welborn place in good faith, and at its market value. It is our duty, therefore, to regard that finding as one of the facts of the case.

As to the second question above. It is a well-established principle that a trustee cannot buy at his own sale. He cannot be vendor and vendee, at the same time, of trust property; that is, he cannot make a binding contract with himself in the purchase of the trust property under his control. On the contrary, all such purchases are subject to be vacated and set aside by the *cestui que trust*, at his option, and this, too, without regard to the fact whether said purchase was made in good faith, at full price, or was fraudulent and delusive. This doctrine has been long settled, both in England and in this country, and it is a wise and wholesome principle. It strikes at once at the root of danger, and destroys it. It removes from the trustee the temptation to do wrong, and guaranties the faithful execution of his trust in the sale of

Digitized by Google

the property of his *cestui que trust*. See Fox v. McKreth, found in Leading Cases in Equity, 35 Law Lib. (3d Ser. ——,) and the numerous cases there cited; Ex parte Wiggins, 1 Hill, Eq. 353; Hill, Trustees, 538; Ex parte Lacey, 6 Ves. 626; 1 Story, Eq. Jur. §§ 322, 323. But while this doctrine obtains, and will be uniformly enforced when the trustee is both vendor and vendee, as said above, yet we fail to see its applicability to all judicial sales, where a trustee may happen to become the purchaser of the property sold. We see no reason why, in every such sale, the rigid doctrine above should be applied, and that a trustee should be precluded from purchasing the same as if he was the vendor. In sales ordered by the court of trust property, and conducted by the officers of the court, there is no necessary conflict of interest in the mind of the trustee in every such sale, like that which would exist when he is both vendor and vendee. On the contrary, sometimes he himself might have an individual interest in the property which would make it his duty to become the purchaser to prevent sacrifice. Nor have we found any decided case which has carried the doctrine to the extent of invalidating all such purchases by trustees at such sales, at the option of the *cestui que trust*, as held by the circuit judge below. His honor cites no authority, nor has the counsel of appellant (plaintiff) sustained this position by his citations. The strongest case in our reports for appellant (plaintiff) is Ex parte Wiggins, 1 Hill, Eq. 353, in which Chancellor HARPER delivered the opinion. In that case the doctrine of inhibition, when the trustee was both vendor and vendee, was clearly presented and announced, and it was applied to the facts of that case, inasmuch as the sale, though ordered by the court and made by the commissioner, was yet under the superintendence of the assignees of the property sold, who were directed to join in the conveyance to the purchaser. One of the assignees became a purchaser, and the court, holding that the sale was substantially a sale by the assignees, and that the purchaser was one of the vendors, of course applied the doctrine above, and gave the creditors a right of resale, if they so desired. These facts are not present, however, in the case at bar. The case of McCelvey v. Thomson, 7 S. C. 185, is also relied upon. There the sale was made by the commissioner under an order of the court, and one of the solicitors became the purchaser, who very soon thereafter transferred an interest in his purchase to the commissioner himself, these two immediately reselling the property at considerable profit. The court held upon the testimony that these parties were agents of McCelvey, and should be required to account to him for the profit made. Such is not the case at bar. It is said, however, that there is still another principle of equity, far-reaching in its consequences, which should control here, to-wit, that no party should be permitted to purchase an interest, even at a judicial sale, where he has a duty to perform that is inconsistent with the character of purchaser; and McCelvey v. Thomson, supra, and the cases there cited, are referred to. This is doubtless a sound and a wise principle, but its application must depend upon the facts of each particular case; and, in looking into the facts here, we fail to see in the purchase by the defendant of the Welborn place at the sale by the probate court any inconsistency with his relation as executor of his father's estate, or as trustee of the plaintiff Mrs. Anderson. The sale was in open market. He had considerable interest in the property, as one of the devisees. There was no chilling, no combination or conspiracy, and, as found by the circuit judge, he gave the highest price it would bring. The case of Huger v. Huger, 9 Rich. Eq. 217, is also cited. In that case the executors bought a large amount of the property at their own sale, and the main and principal question on appeal was as to the validity of this purchase, which was contested by some of the parties in interest on the ground, in part, of the doctrine announced above, to-wit, that trustees could not buy at their own sales,—could not be both vendors and vendees. The sale, however, was confirmed, not in violation of said doctrine above, but by virtue of the act of assembly (then, the act of 1839) which expressly authorized executors and administratoys to become purchasers at their own sales. The court further held that, although the bond which that act required to be given in such cases to account for the true value of the property had not been given, yet that this did not invalidate the sale; and, the court being satisfied in that case that the purchasers had given the full value, there was no necessity to refer that question back for further investigation; and still further it held that by the purchase the title to the property had passed to the executors, and that it was not open question to whom it then belonged, —and the sale was confirmed.

Our conclusion is that his honor was in error in applying the principle here that it is at the option of a *cestui que trust* to abide by or to set aside the purchase by a trustee of property bought at his own sale, the facts of this case not being subject to that principle, because, in our judgment, the evidence fails to show the relation of vendor and vendee on the part of the defendant. But, even conceding that this sale was substantially a sale by the executor, as in Ex parte Wiggins, supra, in view of the fact that he instituted the proceedings in the probate court for said sale to pay debts and partition, then, under section 1974, Gen. St., embodying the provisions of the act of 1839, we think he had the right to purchase; and it appearing, as found by the circuit judge, that he bought in good faith, and at the highest price, said purchase should have been confirmed, as in Huger v. Huger, supra.

Next, as to the Red House place. This was a tract of land owned by Mrs. Catherine

Digitized by Google

M. Butler, and directed by her will to be divided in certain proportions among her children, the defendant A. P. Butler being appointed executor; and in the last paragraph of her will she gave her executor full power and authority to sell the whole or any part of the said tract, in such way and on such terms as he might deem best to carry out the directions and provisions of her will. To this will she attached two codicils, altering the disposition made of said land, and finally, in the last codicil, after referring to the fact that she had devised certain interests in said land to her daughter Mrs. Lanham, and to her granddaughter Anna K. Shaw, she revoked these, and directed in substance that said land be divided equally, share and share alike, between her children A. P. Butler and the plaintiff Mary Ann Anderson, the share of Mrs. Anderson to be for life, then to her children. Now, the questions are whether the power to sell, found, as stated above, in the body of the will, was revoked by the codicils, and, if not, whether the circuit judge erred in restraining the executor in exercising this power, and in ordering a sale by the master. There is no reference made in the codicils to the power in question, and the only express revocation is as to the interests which she had devised to the parties other than Mrs. Anderson, and to the defendant A. P. Butler. The rule as to the construction of wills and codicils is as stated in defendants' (appellants') argument, to-wit: "Not to disturb the dispositions of the will further than is absolutely necessary for the purpose of giving effect to the codicils." 1 Jarm. Wills, 343. Now, it could hardly be denied that, had Mrs. Butler left her will as first executed, without the codicils, that the executor would have had full power to sell, to carry into effect the provisions and dispositions made in said will. The power conferred is full, ample, and unlimited, the only limitation being that it should be exercised to carry into effect the foregoing provisions. The codicils, as we have said, refer only to the previous devises to her other then intended beneficiaries, which she revokes in terms. True, in the last codicil she directs that the tract of land shall be divided, share and share alike, between her daughter and son A. P. Butler, but there can be no significance given to the word "divide," used in this connection in the codicil, because in the body of the will, when she intended that her other children should have an interest in the land, she used the same term, "divide," and yet in the conclusion she gave her executor the ample power of sale referred to. She must have intended originally to leave the whole matter of the division to the sole discretion of her executor,—mode, and manner, and everything connected therewith; and we cannot see that there is any inconsistency in the terms of the codicil with the continued existence of the power of sale as conferred in the will. There is certainly no express revocation of this power, nor any necessary implication of such revocation, as far as we can see. Nor does the circuit judge hold that this power was revoked. Now, this power having been conferred, and the testatrix having the undoubted right to confer it, and it not being revoked, it is the law of the case, and must control, unless suspended or vacated by the courts for some reason authorizing the court thus to suspend or to vacate. Doubtless an executor may be removed from his office, and his powers revoked by the courts, for subsequent insolvency, incompetency, or fraudulent conduct in reference to the management of the estate, but in the absence of these and of all similar causes, we know of no authority in the courts to take from the executor the powers and duties conferred upon him by the testator. Society v. Noble, 11 Rich. Eq. 156. As we have said, every one has the right to make his own will, and to appoint his own agents for carrying it into effect, and, when not against the law of the land, it would be an usurpation of power, and a dangerous infringement of a sacred right, for the courts to change or in any way modify the wishes and purposes of a testator as solemnly expressed in his last will and testament. The circuit judge seemed to have recognized the rights of the executor, but thought it was proper that the master should make the sale, so as to save the matter from complication, in the event that said executor might desire to become the purchaser. We do not think this was a sufficient legal reason for revoking the executor's powers, especially as he protested against it. Inasmuch as in our opinion the power of sale given in the will remained intact after the execution of the codicils, and inasmuch as we think the discretion is with the executor as to the manner of the division of the land, to-wit, whether it shall be by partition in kind or by sale, we do not regard the question made and argued as to the question of partition by metes and bounds as before us for adjudication. If that was before us, we would incline to a reference to commissioners to make the partition, as the best and fairest mode of settling this controversy, and as the one most likely to give satisfaction to all parties; and we venture to express the hope that that mode may be ultimately adopted, but we do not see that we have any power in the premises. We therefore make no adjudication in reference thereto. We see no reason why the accounting ordered below should not proceed, nor why both parties should not account for timber cut from the respective places mentioned.

The question as to the jurisdiction of the probate court was not pressed in the argument on either side, and we have only to say in reference to it that it furnishes no foundation for the appeal. The matter of the costs was for the circuit judge, and his decree in that respect is not disturbed.

It is the judgment of this court that the judgment of the circuit court be reversed.

Digitized by Google

except as to the accounting ordered and the matter of the costs, which are affirmed. Let the case be remanded for such further proceedings as to the parties may be advisable, in accordance with the principles herein.

McIVER and McGOWAN, JJ., concur.

(31 S. C. 605)

STATE *v.* SEABROOK *et al.*

(*Supreme Court of South Carolina.* July 6, 1889.)

ACTION ON BOND—PLEADING.

The state sued on a bond given to it by defendants, which stipulated that they would make returns to the state of the tons of phosphate mined by them, and would pay the royalty provided by law. The complaint did not set out the bond, but sufficiently alleged its execution and the granting of a mining license, and further alleged that one of defendants proceeded to mine and became indebted for the royalty, which was not paid. *Held*, that the complaint was insufficient in not alleging a failure to make the necessary returns, and setting out the facts which gave rise to the indebtedness.

Appeal from common pleas circuit court of Beaufort county; NORTON, Judge.

W. J. Verdier, for appellant. *W. P. Murphy*, for respondent.

SIMPSON, C. J. The defendants at the trial interposed an oral demurrer to the complaint, on the ground that it did not state facts sufficient to constitute a cause of action, which was overruled. The appeal alleges error to this ruling, which raises the only question in the case. This question necessitates an examination of the complaint, which was as follows: "*Complaint.* The complaint of the above-named plaintiff respectfully shows to this court: (1) That the defendant Joseph W. Seabrook, being desirous of engaging in the business of mining and digging phosphate rock and phosphatic deposits in the navigable streams and waters of the state, applied for and received a license so to do, and in pursuance of the laws of the said state, on the 1st day of May, A. D. 1885, together with his co-defendants, N. Christensen and William H. McLeod, made, executed, and delivered to the plaintiff their joint and several bond in writing, dated on that day, in the penal sum of five thousand dollars, conditioned that the said Joseph W. Seabrook should make true and faithful returns to the comptroller general of the state of the number of tons of phosphate rock and phosphatic deposits by him, the said Joseph W. Seabrook, dug, mined, and removed, and shipped or otherwise sent to market, at the end of each month; and that the said Joseph W. Seabrook should punctually pay to the state treasurer at the end of every quarter, or three months, the royalty provided by law to be paid thereon. (2) That in pursuance of said license the said Joseph W. Seabrook proceeded to dig, mine, and remove and ship, and otherwise dispose of and send to market, phosphate rock and phosphatic deposits, taken from the navigable streams and waters of the state, and became indebted to the plaintiff on account of royalty due thereon for the quarter ending November 30, 1885, in the sum of five hundred and twenty-two dollars and twenty cents, no part of which has been paid. Wherefore the plaintiff demands judgment against the defendants for the sum of five hundred and twenty dollars and twenty cents, together with interest thereon from the 30th day of November, A. D. 1885, and the cost of this action."

We may say, generally, that to entitle a party to recover in any action he must show a primary right in himself, and a delict on the part of the defendant,—in other words, a right to some duty from the defendant, and a failure on the part of the defendant to observe said duty; and, inasmuch as the plaintiff is confined by the rules of evidence to testimony in support of the allegations in his complaint, his complaint must contain a statement of the facts, showing both this primary right and this delict; otherwise it will be obnoxious to a demurrer of the kind interposed here. True, there is no special mode required in these statements as to manner and form, nor does the Code require that this should be couched in any special phraseology. On the contrary, the pleader may adopt any mode deemed advisable, and may, in his own language, state his case; but he must be careful to state the facts upon which he founds his right, and also the facts showing an invasion of that right by the defendant, avoiding mere conclusions of law. Now, testing the complaint here by these principles, we think it will appear that the demurrer should have been sustained. The action was founded upon a bond, executed by the defendants to the plaintiff, in which it was stipulated that the defendant Seabrook, who had obtained a license to mine and dig phosphate rock and phosphatic deposits in the navigable streams of the state, would make true and faithful returns to the comptroller general of the state of the number of tons of such rock so mined and removed, etc., at the end of each month, and that he would punctually pay to the state treasurer at the end of every quarter, of three months, the royalty provided by law, etc., under a penalty of $5,000. The bond itself is not set out, but its execution by the defendants is alleged, and the terms thereof, as above, are also stated,—sufficiently so, we think, to show the primary right of the plaintiff to a performance of the stipulations on the part of the defendants. The granting of the license is alleged, and in consideration thereof the execution of the bond. But we fail to find any allegation of the delict, to-wit, non-performance of the stipulations by Seabrook. It is not alleged that he failed either to make the required returns to the comptroller general or to pay the royalty into the state treasury. Certainly, there is no express allegation as to these matters, nor any necessary intendment or implication thereto. The nearest approach is in the alle

Digitized by Google

gation that Seabrook, having proceeded to dig and mine under the license, became indebted to the plaintiff in the sum of $522.20, on account of the royalty due for the quarter ending November 30, 1885, no part of which had been paid. This is a mere legal conclusion, without any facts upon which to base it. The facts which would give rise to any indebtedness by the defendants to plaintiff would be a failure on the part of Seabrook to make the stipulated returns and to pay the royalty incident to said returns; in other words, facts showing a breach of the bond. We do not think that the vague statement in the complaint, that the defendants had become indebted to the plaintiff in the sum of $522.20, on account of the royalty, etc., was sufficient. While the Code, and the practice thereunder, is liberal, and questions of the kind here should be so adjudged as not to sacrifice substance to a shadow, yet there must be conformity to established rules, and in the matter of pleading especially. Inasmuch as one important rule of evidence demands that the *allegata* and *probata* should correspond, the facts should be sufficiently stated in the complaint to authorize the introduction of testimony by the plaintiff necessary to a recovery. It is the judgment of this court that the judgment of the circuit court be reversed, and that the case be remanded.

McIver and McGowan, JJ., concur.

(31 S. C. 153)

MARINES *et al.* v. GOBLET *et al.*

(*Supreme Court of South Carolina.* June 25, 1889.)

ESTOPPEL.

In an action to recover land, involving the statute of limitation, if plaintiff deliberately stands by for years, without offering any objection, and sees defendant buying the land and making improvements on it, under the supposition that he has a good title, he will be estopped to set up a claim as against defendant.

Appeal from common pleas circuit court of Berkeley county; WALLACE, Judge.

Smythe & Lee, for appellants. *W. St. Julian Jervey*, for respondents.

SIMPSON, C. J. The action below was brought to recover a lot of land located in Christ Church parish, alleged to belong to the plaintiffs, and in the possession of the defendants. The defendants "denied that the plaintiffs, their ancestors, predecessors, or grantors, had been seised or possessed of the premises in question, or of any part thereof, within ten years before the commencement of the action, and alleged that they, their ancestors, predecessors, and grantors, had held and possessed the said premises adversely to the title of the plaintiffs for ten years, at least, past before the commencement of said action, under a claim of title in fee, exclusive of any other right." At the trial the defendants requested his honor to charge "that if the jury find that the plaintiffs deliberately stood by for years, and without objection saw Goblet or others buying the land in dispute, and making improvements thereon, under the supposition that they had a good title, then the plaintiffs will now be estopped to set up their claim against them." This his honor declined to charge, saying: "That does not state sufficient facts to raise the rule of estoppel,"—referring to the case of Phinney v. Johnson, 13 S. C. 28, as containing the law upon this subject. From this refusal of his honor to charge as requested the case is now before us on appeal. It will be seen from the statement made above that the question before us is not whether the facts testified to on the trial were sufficient to constitute an estoppel, but whether the facts stated in the request to charge, if found by the jury as facts of the case, would amount as matter of law to an estoppel. The first question was a question of fact involving the sufficiency of the evidence introduced, and was alone for the jury, but the second raised a question of law, upon which it was proper for the judge to charge, and upon which he did charge; and therefore the correctness of his charge is the only question in the case. There are several kinds of estoppel, and among them is the estoppel *in pais*, to-wit, estoppel by conduct, etc., to which class this case belongs. That class, therefore, is the only class which need be considered here. Without going into an elaborate discussion of this character of estoppels, we think it will be sufficient for the purposes of this case to refer to the case of Lessee of Tarrant v. Terry, 1 Bay, 241, which is the first case in our own reports upon this subject,—a case in which the facts were very similar to those presented in the defendants' request to charge, and where the court ruled that the plaintiff had forfeited his claim to the land in dispute. BAY, J., said: "That with respect to the subsequent conduct of Lewis, who was in the neighborhood, and saw Tarrant erecting his mill, under an impression that the land was included in his grant, without once hinting that the land was his, or forbidding him from going on, was of itself such a conduct, even if there had been no fraud in the survey, as would have forfeited his claim to the land in question." We do not find that this principle has been at all modified or weakened by any subsequent case in this state. The case referred to by his honor—Phinney v. Johnson, supra—did not have that effect. That was a case of claim for dower, where the land had been sold under an execution against the demandant as administratrix of her deceased husband, in which land she afterwards claimed dower. This claim was resisted in part on the ground of estoppel, as she gave no notice of her claim when the land was sold. The probate judge, however, found as matter of fact that "the purchasers, who successively took title under the sheriff's deed, had knowledge of the existence of the petitioner's claim of dower in

Digitized by Google

the land sold,'" and it was upon this fact that the defense of estoppel was overruled. The English case of East India Co. v. Vincent, 2 Atk. 83, and which was cited in the case in Bay, supra, may also be cited as authority here. In that case Lord HARDWICKE said: "There are several instances where a man has suffered another to go on with building upon his ground, and not set up a right till afterwards, when he was all the time conusant of his right, and the person building had no notice of the other's right, in which the court would oblige the owner of the ground to permit the person building to enjoy quietly and without disturbance." Now, we do not know the character of the testimony introduced in the trial below, nor how far the defendant may have made out his defense of estoppel, nor is that a question which in any event could come within our province, and therefore we decide nothing on that subject. But we think that the defendant was entitled to a ruling from the trial judge that, if the jury found the facts of the case as stated in the request, that then an estoppel was made out. The request stated the fact of the plaintiffs not simply standing by in silence, seeing the improvements of the defendant going up, but deliberately doing so, the defendant acting under the supposition that he had a good title to the land. This, it seems to us, was at least as strong, if not stronger, than the case of Lessee of Tarrant v. Terry, supra, and should have been charged. It is the judgment of this court that the judgment of the circuit court be reversed, and the case be remanded.

McIVER and McGOWAN, JJ., concur.

(31 S. C. 13)

BLOUNT *v.* WALKER *et al.*

(*Supreme Court of South Carolina.* April 15, 1889.)

TESTAMENTARY TRUSTS.

1. A devise to a trustee "and his heirs," of "all the estate, real and personal, of which I may die seised, possessed, and entitled to," to hold for the use of another, with power of sale, etc., there being no residuary clause in the will disclosing that any of the estate was left undisposed of, confers a fee on the trustee, and disposes of all testator's estate, and the fee does not descend to the testator's heirs as a qualified or determinable fee, subject to be divested by the exercise of the power of sale, and becoming absolute if such power was not exercised.

2. The trustee was to hold the estate for the sole and separate use of B. during her life, so that it could not be reached by her creditors or disposed of by her, but with power in the trustee, on her written request, to sell the same, or any part, if he should deem it expedient, and either reinvest the proceeds or "turn the same over to B. for her sole, separate, and absolute use, freed and discharged of all trusts." *Held*, that neither the power of sale, nor turning over the proceeds to B., could be accomplished by the trustee, if he took a less estate than a fee, so that if he took only such estate as was necessary to carry out the purposes of the trust, he must have taken a fee, and the fact that he was never actually called on to exercise the power of sale does not affect the question.

3. The estate did not pass out of the trustee by virtue of the statute of uses, on the death of B. without issue, and without having made the appointment, (1) because a use was limited upon a use, and (2) because the duties required of the trustee rendered it necessary that the legal estate remain in the trustee.

4. Equity in such case will not permit the trustee to hold the estate for his own benefit, but will raise a resulting trust in favor of those who are heirs of the testator at the time the trust arises, but not those who were heirs at the death of the testator.

5. The resulting trust in favor of the heirs arises at the time of the death of the beneficiary.

SIMPSON, C. J., dissenting.

Appeal from common pleas circuit court of Richland county; HUDSON, Judge.

The will of Mrs. Harris, construed in the opinion, is as follows:

"In the name of God, amen. I, Sarah J. Harris, widow, of the city of Columbia, in the state aforesaid, being of sound mind, memory, and understanding, do make, publish, and declare this, my last will and testament.

"*Item* 1. I give, bequeath, and devise to my nephew, Julius H. Walker, and his heirs, to the use of the said J. H. Walker and his heirs, all the estate, real and personal, of which I may die seised, possessed, and entitled to, in trust, nevertheless, to permit my daughter, Mrs. Mary Delia Blount, for and during the term of her natural life, (unless the trust be sooner executed, as in hereinafter provided in item 2,) to receive unto her sole, separate, and exclusive use, benefit, and behoof, all the rents, issues, and profits of the said estate, upon her own receipts and acquittances; and to the said J. H. Walker, in his character as trustee as aforesaid, full power and authority is given to sell, exchange, or transfer, if in his judgment expedient, any part of the estate hereby given to him in trust, and to execute all necessary papers to that end, whenever he is thereunto requested by a paper in writing executed by said Mrs. Blount in the presence of some clerk of a court of record, who shall certify, under his hand and official seal, that the said request was so signed separately and privately, in his presence; and the said trustee, upon such sale, exchange, or transfer, shall either reinvest the proceeds, or else turn the same over to the said Mrs. Blount, for her sole, separate, and absolute use, freed and discharged of all trusts, as the said Mrs. Blount may direct by her writing, executed in manner and form as required aforesaid, for the request to sell, exchange, or transfer: provided, that the said J. H. Walker, as trustee as aforesaid, is satisfied that the disposition so requested by said Mrs. Blount is her free and untrammelled wish, and is for her own exclusive benefit and behoof; but, if not so satisfied, he shall reinvest the proceeds according to his best judgment, and under the rules of law. The power hereinbefore given to the said J. H. Walker, as trustee as aforesaid, is a continuing power, and shall not be exhausted by one or more exercises thereof, but shall continue in full force so long as the

Digitized by Google

trust remains unexecuted and any portion of the trust-estate remains.

"*Item* 2. But if, at any time, the said property, or any part thereof, shall be legally advertised for sale for payment of the debt or debts of said Mrs. Blount, under or by virtue of any attachment, execution, or decree or order of court, or under any power of sale given by the said Mrs. Blount, to or for the use of any creditor or other person, (such attachment, execution, decree, order, or power of sale being valid in law or equity;) or if at any time said Mrs. Blount shall execute a valid power, authorizing a sale of the said property, or any part thereof, without advertisement; or if at any time process or order of any court of competent jurisdiction shall take the interest of said Mrs. Blount in said property, or any part thereof, away from her, then, in any of the cases specified in this item of this will, the uses above declared shall instantly shift to the issue then living of said Mrs. Blount, to them and their heirs forever, *per stirpes*, and not *per capita*, to the extent of the property affected by any of the advertisements, orders, or papers aforesaid, and to the same extent the trusts by this will declared shall instantly become executed; but, in default of issue of Mrs. Blount then living, then the said J. H. Walker shall continue to hold such property in trust to preserve the rents, issues, and profits thereof, and to accumulate the same until the death of said Mrs. Blount, when the property so affected, and its accumulations, shall pass under the provisions of item 3 of this will.

"*Item* 3. Upon the death of the said Mrs. Blount, the said property, or so much thereof as remains unconsumed and undisposed of in the hands of said J. H. Walker, trustee as aforesaid, is hereby bequeathed and devised to the issue of the said Mrs. Blount, to them and their heirs forever, *per stirpes*, and not *per capita;* and, if the said Mrs. Blount die without issue surviving her at the time of her death, then the same is devised and bequeathed to such person or persons, and in such proportions as the said Mrs. Mary Delia Blount may appoint, by her last will and testament duly executed, to the said appointees and their heirs forever; and, upon the death of the said Mrs. Blount, the trusts of this will shall become instantly executed, (so far as the same have not been before that time executed under the provisions of item 2 of this will,) in favor of the person or persons in this item designated as remainder-men, without any relinquishment or transfer of trust by the said trustee.

"*Item* 4. I hereby nominate and appoint Julius H. Walker executor of this will."

Pope & Shand, for appellants. *Allen J. Green*, for respondent.

McIver, J. The fundamental question in the case, as it seems to me, is, what estate did the trustee take under the will of Mrs. Harris? If he took an estate in fee, then there can be no intestacy, for the testatrix devises her whole estate to the trustee, and there was no room for any intestacy. If, however, the trustee took an estate only for the life of Mrs. Blount, then, as the ulterior limitations after the death of the life-tenant have failed by reason of her dying without issue, and without executing the power of appointment, there is a case of intestacy, and the estate, subject to the life-interest of Mrs. Blount, descended immediately upon the death of the testatrix to her heirs, and, as Mrs. Blount was then her sole heir, became vested in her, and the personal property passed under her will, while the real estate goes to her heirs; her will being sufficient to pass personal property, but insufficient to pass real estate. I think that, under a proper construction of the will of Mrs. Harris, the trustee took a fee. There can be no doubt that the testatrix intended to dispose of her entire estate, and did not intend to die intestate as to any portion thereof. This appears from the terms she has used, for she gives to the trustee "all the estate, real and personal, of which I may die seised, possessed, and entitled to." That this language imports an intention to dispose of the fee is shown by the case of Canedy v. Jones, 19 S. C. 300, 301, and the authorities there cited. Next, it will be observed that she uses technical terms which are apt and appropriate to convey a fee,—"to my nephew Julius H. Walker, and his heirs," and finally we observe that there is no residuary clause in the will, disclosing even an apprehension that she had left any portion of her estate undisposed of. We have then a case in which the testatrix has, in express terms, declared her purpose to dispose of her entire estate, which, the authorities above cited show, means not merely the entire *corpus* of the property, but the whole of her interest therein, which is conceded to have been a fee; and we find her using the most apt and appropriate technical words to convey such an interest,—to the trustee "and his heirs,"—and therefore I cannot doubt that she intended to confer a fee upon the trustee, and that she executed that intention in the most approved form of law. If this be so, then, as it seems to me, it follows inevitably that there could have been no intestacy. If the entire interest of the testatrix—the fee—passed to the trustee by the terms of the will, there could, of course, be nothing left to descend to the heirs or representatives; no intestacy.

It is said, however, that this being a devise to a trustee, who, it is conceded takes no beneficial interest, the well-settled rule is that, however ample may be the terms in which a devise to a trustee is made, he will only take such an estate as may be necessary to the complete execution of the trusts created; that a devise to a trustee and his heirs does not necessarily create in him an estate in fee, though the terms used are sufficient to create such an estate; but that his estate will be measured by the purposes for which it was created, and will be cut down to such

Digitized by Google

an estate as will be sufficient to serve those purposes. Conceding, for the purposes of this discussion, the correctness of that rule in its broadest extent, before it can have any practical application to this case, it would be necessary to show that the objects of the trust created by the will could be fully accomplished by an estate in the trustee less than a fee. We must therefore inquire into the objects of the trusts created. Without going into any detailed statement of these trusts which are minutely specified in the will, a copy of which will doubtless be embraced in the report of this case, it will be sufficient to say, in general terms, that the trustee was to hold the estate for the sole and separate use of Mrs. Blount during her life, in such a way as that the same could not be reached by her creditors, or disposed of by her, but with power in the trustee, upon her written request to sell the same or any part thereof, if he should deem it expedient to do so, and either reinvest the proceeds, "or else turn the same over to the said Mrs. Blount for her sole, separate, and absolute use, freed and discharged of all trusts." Now, while it may be conceded that, so far as what may be called the primary object of this trust—protecting the estate during the life of Mrs. Blount—is concerned, such object might be fully accomplished by placing an estate for the life of Mrs. Blount in the trustee, or cutting down his estate in fee to an estate *pur autre vie*, yet I do not see how the next object—the power of sale—could be accomplished except by leaving in the trustee an estate in fee, exactly what the testatrix had in express terms conferred upon him; for it seems to me to be well settled, both upon principle and authority, that a devise to trustees and their heirs, with power to sell, necessarily imports a fee, as they cannot convey any greater estate than that which they hold, —they cannot sell and convey the fee, unless the fee is in them. As is said by HARPER, Ch., in Ex parte Gadsden, 3 Rich. Law, at page 477: "The power to sell relates to the whole estate, and to satisfy that the whole must remain in them." See, also, Ayer v. Ritler, 7 S. E. Rep. 53, where the more recent cases are collected. It is true these cases were concerned with the question as to whether the statute of uses had executed the use, but still they serve to show that where the power of sale is conferred upon trustees it is necessary to the execution of such power that the legal estate should remain in the trustees. If, therefore, the estate in fee vested in the trustee, Julius H. Walker, by the terms of the will, it must remain in him in order to accomplish one of the objects of the trust, and it could not, under the rule invoked, be cut down to any lesser estate. So, too, if his estate should be thus cut down, I do not see how he could have performed another duty required by the terms of the trust,—turn over the proceeds of any sale he might make "to the said Mrs. Blount for her sole, separate, and absolute use, freed and discharged of all trusts," if she so directed in writing.

It is said, however, that as this power of sale does not appear to have been exercised, the event shows that there was no necessity for the fee to remain in the trustee. But it must be remembered that we are now considering the question of intestacy, and must therefore look at the case as it was presented at the time of the death of Mrs. Harris, when the fee must necessarily have passed to some one, as it could not be in abeyance. If it then vested in the trustee, it could not afterwards be taken out of him, except by the operation of the statute of uses, or by his own conveyance, or by some provision in the will by way of executory devise. It could never afterwards pass to the heirs as intestate property. As is said by HARPER, Ch., in Ex parte Gadsden, supra: "But if the fee be once vested in the trustees, the inheritance remains in them, unless, perhaps, a shifting use should be created, by the terms of the deed or will." Now, as the testatrix in this case made a devise to the trustee not only in terms amply sufficient to create a fee, but also imposed upon the trustee a duty, to the proper performance of which it was necessary for the trustee to have the fee, it would seem to follow necessarily that the fee then passed to the trustee, and the fact that he was never afterwards called upon to exercise the power of sale cannot affect the question. He might have been called upon at any moment, up to the time of Mrs. Blount's death, to exercise this power, and the testatrix knowing this, and intending to provide for such a contingency, invested him with such an estate as was necessary to enable him to execute such power, whenever its exercise might be called for. But it is contended that immediately upon the death of Mrs. Harris the fee descended to and was vested in her heirs as a qualified and determinable fee, subject to be divested by the exercise of the power of sale, and, such power not having been exercised, the fee became absolute in the heirs. Without stopping to inquire whether such an estate could arise by descent, inasmuch as the heir is supposed to take the same estate with which the ancestor was clothed, it is sufficient to say that the only authority cited (Peay v. Peay, 2 Rich. Eq. 409) was a case in which the estate was created by deed, and did not arise by descent. In that case Taylor, in consideration of $20,000 paid to him by Austin F. Peay, conveyed to a trustee in fee certain property, real estate, "in trust for the use of said Austin F. Peay, his heirs and assigns, forever, and to permit the said Austin F. Peay to have and possess the same, and to enjoy the profits thereof, and in trust to convey the same to such person or persons as the said Austin F. Peay shall, by deed or will, or other writing under his hand, direct and appoint." The only question was whether the widow of Austin F. Peay was entitled to dower in the premises, the power of appointment never

Digitized by Google

having been exercised. The court held that the statute executed the use in Austin F. Peay, creating in him a qualified fee, subject to be divested by the exercise of the power of appointment, upon the principle laid down by Lord ELDON in Maundrell v. Maundrell, 10 Ves. 264: "That where there is a power to A. to appoint, and till he makes an appointment, or, for want of appointment, to him and his heirs, the fee in the mean time is vested in him, as that qualified fee, to yield the estate to arise out of the execution of the power." The case of Peay v. Peay is so wholly different in all its features from the one under consideration that I do not see how it can afford any authority for the proposition contended for. It was manifestly a futile attempt to defeat the wife's right of dower, and the court so held. There the manifest object of the deed was to create such an estate in Austin F. Peay as would not be subject to dower, while here it is quite clear that the testator did not intend to create any estate of any kind in her heirs as such.

If, then, the trustee was invested with a fee-simple estate by the terms of the will, the next inquiry is whether such estate has ever passed out of him. Inasmuch as Mrs. Blount died without issue, and without having exercised the power of appointment, it is quite clear that this estate has not passed out of the trustee by the provisions of the third clause of the will, and therefore the real question on this branch of the case is whether the estate in fee has been carried out of the trustee by the operation of the statute of uses. As that statute has no application to personal property, (Harley v. Platts, 6 Rich. Law, 315; Lanier v. Brunson, 21 S. C. 41,) there can be no question as to that class of property. As to the real estate, it seems to me that the overwhelming weight of authority shows that the statute did not execute the use for two reasons: (1) Because a use is limited upon a use; (2) because certain duties were required of the trustee which rendered it necessary for the legal estate to remain in the trustee. See Ayer v. Ritler, supra, and the cases there cited. It follows, therefore, that the estate still remains in the trustee, and can only pass out of him by his own conveyance. But as it is conceded that the trustee can take no beneficial interest under the will, equity will not permit him to hold the estate for his own benefit, but will raise what is called a resulting trust in favor of the heirs of the testatrix, and the vital question remains, who are such heirs? Are they those who could bring themselves within that class at the time of the death of the testatrix, or are they those only who can bring themselves within such class at the time the resulting trust arises? I do not find any authority directly in point upon this question, but it seems to me upon principle, and from the analogies of decided cases, that the trust results in favor of those only who can bring themselves within the class of heirs at the time such trust arises. It is necessary, then, to inquire when such trust arose; and it seems to me clear that it could not arise until after the death of Mrs. Blount, for up to the time of her death she might have had issue, might have died in giving birth to issue, or might have executed the power of appointment in her last moments, and therefore, until she was dead, there could be no resulting trust. No trust could result in favor of Mrs. Blount, who, at the time of the death of the testatrix, was her sole heir; for as long as she continued to live the trust could not possibly arise. Up to the time of her death it was a mere possibility, not an estate, or even an interest in an estate, with the right of possession postponed. If this resulting trust had arisen under a deed instead of a will, and the grantor were still living, the trust would have resulted to the grantor; but this right of reverter, so to speak,—for, strictly speaking, it is not a reverter,—would not be an estate in the grantor capable of being passed by devise or inheritance to the devisee or heir of the grantor, but would be a mere possibility, until the happening of the events which would give birth to the trust. When, however, the event happened which gives rise to the trust, it would become an estate in the grantor, and would then be capable of passing by devise or inheritance. Upon the same principle it seems to me that in this case, where the resulting trust arises under a will, it must result to those who are able to bring themselves under the class of heirs of the testatrix at the time when the trust arises; and, as Mrs. Walker was then the sole heir of the testatrix, the trust results in her favor, and she is entitled to demand from the trustee a transfer of the whole estate to her. It is analogous to the possibility of reverter, after the termination of an estate in fee conditional, which is not an estate, but a mere possibility. It is neither a present nor future right, but a mere possibility that a right may arise upon the happening of a contingency, which is not the subject of either devise or inheritance. This is because the grant or devise of a fee conditional passes the whole estate to the tenant in fee, leaving nothing in the grantor or devisor which can be the subject of devise or inheritance; and hence it is settled that, upon the termination of such an estate, it goes to those who can bring themselves into the class of heirs of the person creating the estate, at the time when the estate terminates, and not to those who were heirs at the time of the death of such person. Adams v. Chaplin, 1 Hill, Eq. 265; Deas v. Horry, 2 Hill, Eq. 244; Pearse v. Killian, McMul. Eq. 231. Now, if the possibility of reverter after the termination of an estate in fee conditional inures to the benefit of those who answer the description of heirs of the person creating such estate, at the time when the estate terminates, because a conveyance of such an estate leaves nothing in the grantor or devisor, as the case may be, capable of being

Digitized by Google

devised or inherited, it would seem to follow that, for the same reason, a resulting trust which arises after the conveyance of an estate in fee-simple ought to take the same course.

It only remains to notice some of the cases which seem to be mainly relied on to support a contrary view. Pulliam v. Byrd, 2 Strob. Eq. 134, was very different from the case under consideration. In that case the testator gave his whole estate to his wife for life, with power to dispose of one-half thereof at her death, and, the wife having died without exercising the power, the question was as to the proper distribution of the estate. The court, holding that a gift to one for life, with a general power of appointment, will not enlarge the life-estate into a fee, unless the power is exercised, determined that the will made no disposition of the remainder after the termination of the wife's life-estate, and hence such remainder became distributable as in case of intestacy. I do not see how that case has any application to the present. There the testator did not even undertake to dispose of the fee, and, of course, immediately upon his death it descended to his heirs, subject only to the life-estate of the wife, and upon the termination of that estate became divisible among those in whom it had previously vested. Here, however, the testatrix did dispose of the fee, leaving nothing in her to descend to her heirs. So in Rochell v. Tompkins, 1 Strob. Eq. 114, the devise was to the wife for life only, "and at her death to return to and become a part of his estate;" and as this reversion, as it was called, was not disposed of by the will, there was clearly a case of intestacy, so far as it was concerned, and it descended immediately to the heirs of the testator, of whom, of course, the wife was one. In Seabrook v. Seabrook, 10 Rich. Eq. 495, the testator devised real estate to his son for life, with remainder to his issue, and in default of issue he directed that the land should "revert to his estate;" and he then devised "the lands so reverting unto my right heirs forever." The son having died without issue, the question was as to the disposition of the lands so reverting. Held, that the heirs of the testator, including the widow, took the reversion, not under the will, but by descent, upon the principle that, where a testator devises his estate to those upon whom the law would cast the estate if there were no will, the devise is nugatory and void, and the parties take by descent, and not under the will. This case is not applicable, for the reason that, there being no trustee, there was no one in whom the fee could vest, and hence it could not pass out of the testator, except upon a contingency which never happened, and remaining in him it, of course, descended immediately upon his death to his heirs, as his attempt to dispose of it was nugatory. Indeed, the real controversy in that case was whether the widow was barred of any right to share in the reversion by another clause in the will, and as she was unquestionably one of the heirs of the testator, both at the time of his death and at the time the reversion fell in, no such question as that with which we are concerned could have arisen in that case. In Glover v. Adams, 11 Rich. Eq. 264, followed in Shaffer v. McDuffie, 14 Rich. Eq. 146, property of the wife was conveyed by marriage settlement to trustees in trust for the joint use of husband and wife during coverture, and, if the husband survived, to his use during life, and after his death to such person or persons as the wife by will might appoint, and, failing such appointment, to her legal heirs and representatives. The wife having died without exercising the power of appointment, leaving the husband surviving, upon his death the question was, who were entitled? Held, that the remainder, after the termination of the life-estates, having become vested in the heirs of the wife at the time of her death, among whom was the husband, his share became transmissible to his representatives. There is plainly no analogy between that case and this; for in that case the remainder, by the terms of the deed, became vested in the heirs of the wife immediately upon her death, and there could not have been any resulting trust. In Farrow v. Farrow, 12 S. C. 168, property was devised to a trustee "in trust for the use and benefit of my son John W. Farrow during his life, and at his death to be equally divided between his wife, Emma Farrow, and the children he may leave living, share and share alike." The wife survived the testator, but died before her husband, the life-tenant; and the question was whether the legal representatives of the wife, upon the death of the life-tenant, were entitled to any interest in the property. Held, that the wife, under the terms of the will, took a vested remainder, which, of course, was transmissible to her representatives. So that in that case there was no resulting trust, and I do not see its applicability to the present controversy. Indeed, in none of these cases was there any resulting trust, and the property passed under the terms of the deed or will, while here it does not pass under the terms of the will, but remains in the hands of the trustee, to whom it had been devised in fee, subject to a resulting trust which the law raises, and which a court of equity will require the trustee to execute. The same remarks will apply to the case of Hicks v. Pegues, 4 Rich. Eq. 413, and Buist v. Dawes, reported in a note to that case. The judgment of this court is that the judgment of the circuit court be reversed, and the case remanded to that court for the purpose of carrying into effect the views herein set forth.

McGOWAN, J., concurs.

SIMPSON, C. J., (*dissenting.*) Mrs. S. I. Harris, late of this state, died in the city of Columbia, leaving of force a last will and

Digitized by Google

testament, a copy of which is found in the record, in which she devised and bequeathed her whole estate, real and personal, to her nephew, the defendant Julius H. Walker, and his heirs, to the use of the said Julius H. Walker and his heirs, in trust, nevertheless, for her daughter Mrs. Mary Delia Blount during the term of her natural life, upon certain terms and conditions, with certain powers of sale, etc., to the trustee; and, upon the death of Mrs. Blount, the said property, or what remained unconsumed and undisposed of, was bequeathed and devised to the issue of Mrs. Blount, etc., and, upon default of issue surviving her, then the same was devised to such person or persons, etc., as the said Mrs. Blount might appoint by her last will and testament, etc.; and upon the death of Mrs. Blount the trusts of the will were to be regarded as executed, etc., in favor of the person or persons designated as remaindermen in the third clause of the will, without any relinquishment or transfer of trust by the said trustee. At the death of Mrs. Harris she left surviving her Mrs. Blount, an only daughter; her next of kin, after the daughter, being the defendant Mrs. Walker, an only sister. Mrs. Blount died shortly after her mother, leaving no issue surviving her, and without having executed the power of appointment given to her in the will of Mrs. Harris. See Blount v. Walker, 28 S. C. 545, 6 S. E. Rep. 558. Now, upon this state of facts, the question has arisen, who is entitled to the property mentioned in the will of Mrs. Harris? Should it go to the estate of Mrs. Blount, the daughter, who was the sole heir of Mrs. Harris at her death, or should Mrs. Walker, the sister of Mrs. Harris, be entitled, as the heir, when the life-estate of Mrs. Blount fell in by her death, leaving no issue, and having failed to appoint? His honor, Judge HUDSON, who heard this question below, holding that, the trusts of the will of Mrs. Harris having failed, the property became intestate property; and Mrs. Blount, being the sole heir of Mrs. Harris at her death, was entitled, (Pulliam v. Byrd, 2 Strob. Eq. 135;) who, having died leaving her husband and her aunt Mrs. Caroline Walker as her heirs, the said property should go to them according to their rights, to-wit, the personal property to the husband, the plaintiff, and the real-estate, one-half each, to the husband and Mrs. Walker. The defendants in their appeal, deny the correctness of this decree, contending that the time for ascertaining the heirs of Mrs. Harris to whom the property should go, as intestate property, was the death of Mrs. Blount, and that, Mrs. Walker being the only surviving heir at that time, she became entitled to the whole estate.

As appropriate to the discussion of the issue here, we may state the following legal propositions, which we suppose will be conceded without question: (1) Where a party dies leaving no last will and testament, he dies intestate as to the property, real and personal, of which he was seised and possessed at the time of his death. (2) Where he leaves a last will and testament, and yet fails to dispose of some of his property, or of some interest or estate therein, he dies intestate as to such undisposed of property, or interest or estate. (3) While a decedent may by his last will and testament direct that such of his heirs as may be in existence at a certain time after his death shall take his estate, (for instance, where he gives a life-estate, and then the remainder to go to such of his heirs as may be in existence at the termination of said life-estate, said heirs will take the estate,) yet where he dies without such a disposition,—in other words, intestate,—his heirs at his death alone can claim; the reason being that in such last case the heir claims by operation of law, and not by virtue of the will, and the law never casts the estate upon any except the heir in being at the death of the decedent. An "heir" is defined to be he upon whom the law casts an estate immediately upon the death of the ancestor. These propositions, we think, present familiar legal principles, and, without citing authority now, we may say that, in our opinion, they are absolutely unassailable; and, if so, it must follow that, if Mrs. Harris died intestate as to any portion of her property, her daughter, Mrs. Blount, being her sole heir at the time of her death, she was entitled thereto, and upon her death it would go to her heirs as decreed by the circuit judge.

The vital question, then, in the first instance, is, did Mrs. Harris die intestate as to the property in question. There is no doubt but that Mrs. Harris left a will, and yet it is equally as certain that there was no beneficial interest disposed of to any one, except a life-estate to Mrs. Blount. There was a contingency, which if it had happened would have accomplished a disposition of the whole estate; but, it not happening, it was the same as if no such contingent disposition had been attempted, and the will should now be read as if such provision had not been incorporated therein. And suppose the will had been left in such condition, without the suggested disposition incorporated. Suppose the will had simply given to Mr. Walker the property in trust for the use and benefit of Mrs. Blount during her natural life, and nothing more. Could there be a doubt but that Mrs. Harris would have died intestate as to the entire remainder or reversion, and that the law would have cast the same upon her heir or heirs in being at her death, who in this case was Mrs. Blount? Certainly not.

It is said, however, in the argument of appellants, that Mrs. Harris did not really die intestate,—or, at least, we so understand the argument; that, on the contrary, she disposed of her whole estate—the entire fee—to Mr. Julius H. Walker, and in such way that even it was put beyond the reach of the statute of uses. Admit this to be true, to-wit, that the entire fee was given to Mr. Walker, and yet it would not follow, it seems to us, that Mrs. Harris did not die intestate; or, if

Digitized by Google

so, where is the foundation of Mrs. Walker's claim? She certainly cannot claim under the will of her sister. Her name is not mentioned therein, nor is there any indication there that Mrs. Harris intended that any portion of her estate should go to Mrs. Walker. In fact, if Mrs. Harris did not die intestate, neither of the parties contending here is of right before us. But we think that Mrs. Harris did die intestate, as to all but the life-estate given to Mrs. Blount, and that the fact that her entire property was given in fee to Mr. Julius H. Walker makes no difference.

It is conceded that no beneficial interest in the property was given to Mr. Walker, and therefore that he cannot hold it for himself, and enjoy it, although the statute of uses may not be able to extract it. It is conceded, too, that he must give it up to some one. It must be also conceded that he cannot yield it to any one as a legatee or devisee under the will, because the will has provided for no legatee or devisee. He must give it up, then, as intestate property, which, of course, he could not be required to do, unless Mrs. Harris died intestate. In any event, it being perfectly clear that Mr. Walker, the trustee, having no beneficial interest in any part of the estate, and no beneficial interest therein being found bequeathed or devised to any one else after the termination of the life-estate of Mrs. Blount, Mrs. Harris died without a final disposition of said beneficial interest, intestate thereof; and in such case, though the statute of uses cannot be invoked as a means of passing the property to the heirs at law, it would be a reproach to the law and the courts if no way could be found by which it could be thus passed. It will be admitted, however, we suppose, that if Mrs. Harris had simply bequeathed and devised her estate to Mr. Walker in trust for Mrs. Blount for life, without giving the fee to him, or without fixing it in him so indelibly, as contended for, but had put him in control to manage, etc., for Mrs. Blount, then the statute of uses would not have carried the legal estate to Mrs. Blount, nor would such a state of facts have prevented Mrs. Harris from dying intestate as to the estate beyond the life-estate.

Now, we think that notwithstanding the entire fee in the property was given to Mr. Walker, and given in such way and by such language as would ordinarily have put it, as we have already said, beyond the reach even of the statute of uses, yet when we look at the purposes of the trust imposed upon Mr. Walker we are warranted by well-established equitable principles, applicable to such cases, to hold that his legal estate should be no larger than demanded by the trust-estate under his charge, and, although he may have technically a fee, yet said fee will be cut down to the proportion of the said trust-estate. And inasmuch as here the trust estate put in charge of Mr. Walker was only a life-estate, the complete execution of which could be accomplished by a legal life-estate in him, the courts, for the protection of the interests of the heirs of Mrs. Harris, should hold that the fee to Walker has been thus cut down to a life-estate, and upon the death of Mrs. Blount, the life-tenant, the trust is ended, and the heirs of Mrs. Harris became entitled to the possession of the property. See Sugd. Powers, p. 9, § 5; Perry, Trusts, § 312; several of our own cases, to-wit, Farrow v. Farrow, 12 S. C. 172; Williman v. Holmes, 4 Rich. Eq. 476; and many other cases might be cited.

The doctrine is fully stated in Perry on Trusts, from which valuable work the following is copied, at section 312. "In all cases" says Mr. Perry, "where an estate is given to one for the use of another, in such manner that the statute of uses steps in and executes the estate in the *cestui que trust*, the statute executes in the *cestui que trust* only the estate that the first donee or trustee takes; that is, the statute executes or transfers the exact estate given to the trustee. * * * While this is the rule in respect to estates which the statute executes, a very different rule applies to estates upon a trust or use not executed by the statute. In these cases, the extent or quantity of the estate taken by the trustee is determined, not by the circumstance that words of inheritance in the trustee are or are not used in the deed or will, but by the intent of the parties; and the intent of the parties is determined by the scope and extent of the trust. Therefore the extent of the legal interest of a trustee in an estate given to him in trust is measured, not by words of inheritance or otherwise, but by the object and extent of the trust upon which the estate is given. On this principle, two rules of construction have been adopted by courts: *First*, 'wherever a trust is created, a legal estate, sufficient for the purposes of the trust, shall, if possible, be implied in the trustee, whatever may be the limitation in the instrument, whether to him and his heirs or not;' and, *second*, 'although a legal estate may be limited to a trustee to the fullest extent, as to him and his heirs, yet it shall not be carried further than the complete execution of the trust necessarily requires.'" This seems to us to be directly in point; so much so, as to justify the long quotation above.

But even if this is an erroneous view of this subject, and it be true that Mr. Julius Walker was invested with the fee, which the statute of uses with all of its mysterious power to transfer title from one to another could not touch, yet how could that determine which of the two, whether Mrs. Walker or Mrs. Blount, was the heir of Mrs. Harris, upon whom the law would cast the estate as intestate property? Supposing the fee in Mr. Walker is of the character claimed by appellant's counsel, we think they have clearly demonstrated that it was not executed by the statute; but we fail to see that such a result redounds to the benefit of Mrs. Walker.

Digitized by Google

We fail to see that that fact fixes Mrs. Walker as the heir of Mrs. Harris, ahead of Mrs. Blount. But it is said there was a resulting trust here. What is a resulting trust? In brief, a resulting trust is where no express trust is created by the parties, but the law implies one from the acts of the parties, whether they were intended to create a trust or not. It arises from the operation of law. One example of a resulting trust is when a trust is declared only as to a part of an estate, and nothing is said as to the residue. The residue, remaining undisposed of, remained to the heir at law. So, where a conveyance is made upon such trusts as shall be appointed, and there is a default of appointment, or where it is made of a particular trust, which fails of taking effect, or is not declared, or is illegal, the trust in such cases would result to the settler or his heirs, and thus it is said in Perry, Trusts, § 152: "If, upon a conveyance, devise, or bequest, a trust is declared of a part of the estate only, or the purposes of the trust do not exhaust the whole beneficial interest, the trust in the remaining part or interest will result to the settler or his heirs." So that, if there was a resulting trust here, arising either from the fact that there was a failure of appointment or failure of a particular trust, or that a trust had been declared of only a part of the estate, or that the whole beneficiary interest had not been exhausted by the trust declared, then such resulting trust, arising, as it does, in a last will and testament, which could only take effect at the death of the testatrix, would be a resulting trust in favor of her heirs at law alone; and the question would again return, who is the heir at law? To which question, we repeat the response already made above, taken from that great law-writer, Blackstone: "That it is he upon whom the law casts the descent immediately upon the death of the ancestor;" and Mrs. Blount was such heir here.

(31 S. C. 156)

STATE v. COLCLOUGH.

(*Supreme Court of South Carolina.* June 25, 1889.)

CRIMINAL LAW—WAIVER—VARIANCE.

1. Though under the statute of South Carolina defendant in a criminal action is allowed three days to prepare for trial after receiving a copy of the indictment, this right may be waived by failure to ask for continuance when the case is called for trial. Defendant may also waive the right to a copy of the jury panel by failing to demand it at the proper time.

2. The fact that the place alleged in the indictment and the one proved as the place of the commission of the crime are several miles apart, does not constitute a variance, if the place proven is not essentially descriptive of the crime, is within the county, and is alleged merely to show jurisdiction.

Appeal from general sessions circuit court of Clarendon county; NORTON, Judge.

Galluchat & Alsbrook, for appellant. *John S. Wilson*, for respondent.

SIMPSON, C. J. This case is before us upon an agreed case hereto annexed:

"CASE AGREED UPON.

"This case was tried before his honor, Judge J. J. NORTON, and a jury, at the February, 1889, term of the general sessions court for Clarendon county. The case was called on Monday, the prisoner arraigned, and asked if she was ready for trial. She replied, 'I am ready.' Her counsel immediately corrected her, demanded a copy of the indictment, and claimed all that the law gave the defendant; but, when asked by the court if the defendant could go to trial on the Wednesday following, her counsel answered that 'they thought they would be ready,' and were furnished with copy of the indictment upon their demand for same. The case was continued until Wednesday. Copy of indictment furnished Monday afternoon. The case was again called for trial 10 o'clock A. M., Wednesday following. Upon being asked if they were ready for trial, counsel for defendant had the crier to call four of defendant's witnesses, none of whom responded, and announced themselves 'not ready.' Shortly afterwards counsel for defendant stated, upon the recall of the case, that they would not interpose as an objection to the trial proceeding the absence of witnesses, but that they were not prepared. The court asked what the solicitor had to say. The solicitor insisted upon going on with the trial. The judge then asked the counsel for defendant if they had any motion or request to make, and their answer was, 'We are not ready for trial.' The judge repeated the question, and the same answer was given, and counsel for defendant made no motion whatever, and did not claim the three days at that time. The judge then ordered the trial to proceed. When the jury were being called counsel for defendant demanded a copy of the jury panel. No certified copy was furnished, but a newspaper containing a list of the jury was furnished them, they making no objection to same, and making no motion or request. The solicitor then proved the state's case, and announced that the state closed. When the state closed, the defense moved for a continuance on the ground that the three days allowed the prisoner by law to prepare her case had not expired, and no time had been waived. Motion overruled. No testimony was offered by the defense. The proof was that two barns, one having fodder in it, from which some of the fodder had been removed, and the other having the corn and produce of the owner thereof in it, belonging to the party named in the indictment and proven as owner thereof, were burned, said proof showing the defendant to be the incendiary, on the night of January 16, 1889, in Clarendon county, seven miles from Manning, the county-seat of said county. The indictment charged the burning of 'two certain barns at Manning, in the county of Clarendon and state aforesaid.' His honor was requested to charge that 'the state must prove two barns were burned, and they at Manning.'

Digitized by Google

Request refused, and the jury charged that it was not necessary for the state to prove that the barns were burned at or in the town of Manning, but that, Manning being proven to be the county-seat of the county of Clarendon, that the place was properly laid in the indictment, and that if the burning took place anywhere in said county it was sufficient; nor was proof of two barns being burned required, but proof of the burning of one only was sufficient. The jury returned a verdict of guilty, and recommended to mercy. Counsel for defendant moved in arrest on the ground that the variance between the crime as laid and the proof was fatal to the indictment. Motion overruled. The prisoner was then sentenced to ten years at hard labor in the state penitentiary. Counsel for defendant moved for a new trial on the ground that copies of the indictment and jury panel were not served three days previous, and on the further ground that three days had not expired since the term of court commenced. Motion refused. Notice of appeal from sentence then given.

"GALLUCHAT & ALSBROOK,
"Defendant's Attorneys."

"NOTICE OF APPEAL.

"State of South Carolina, Clarendon County. In the Supreme Court. State v. Eliza Colclough. Arson. His honor, Judge J. J. NORTON, and Solicitor John S. Wilson, will please take notice that the defendant, Eliza Colclough, intends to and does appeal to the supreme court of this state from the sentence of the circuit court.

"GALLUCHAT & ALSBROOK,
"Defendant's Attorneys.

"February 15, 1889.

"Service due and legal. Admitted February 23, 1889. JOHN S. WILSON,
"Solicitor 3d Circuit."

"EXCEPTIONS.

"It is respectfully submitted: (1) That his honor erred in ordering the trial to proceed on Wednesday; the three days for preparation, to which the defendant was entitled, having not expired. (2) That his honor erred in ordering the trial to proceed without having a certified copy of the jury panel furnished the defendant. (3) That his honor erred in overruling defendant's motion in arrest, the variance between the crime as described in the indictment and the proofs being fatal. (4) That his honor erred in refusing to charge the jury as requested, to-wit: 'The state must prove two barns were burned, and they at Manning;' and for that his honor did charge that it was not necessary for the state to prove two barns were burned, nor to prove that they were at Manning.

"GALLUCHAT & ALSBROOK,
"Defendant's Attorneys."

It will be seen that the questions involved are—*First*, whether his honor erred in ordering the case to trial on Wednesday of the term, the three days not having expired from the time when the defendant was furnished with a copy of the indictment, and no certified copy of the jury panel having been furnished him; *second*, whether he erred in not granting defendant's motion in arrest of judgment on account of alleged variance between the crime as described and the proof; and, *third*, whether his honor erred in refusing to charge the request, to-wit: "The state must prove two barns were burned, and they at Manning,"—and in charging "that it was not necessary for the state to prove two barns were burned, nor to prove that they were at Manning." Without stopping to determine what the precise rights of a prisoner charged with felony are in reference to being furnished with a copy of the indictment and a copy of the jury panel before the trial, it is sufficient in this case to say that the defendant has no ground of complaint,—certainly, no sufficient ground to warrant this court to grant a new trial. It seems that a copy of the indictment was furnished on Monday, and the defendant's counsel, when at that time being asked if he would be ready for trial on Wednesday, answered that "they thought they would," interposing no objection as to the three days, nor intimating in any way that they would claim the three days. No demand was made at that time for a certified copy of the jury panel. When the case was called on Wednesday the defendant's counsel simply answered "Not ready," giving no reason, and making no motion for a continuance, although asked several times by his honor whether they had any request or motion to make. No claim was made for the three days, nor any demand or request for a copy of the jury panel. The case was then ordered on, and during the calling of the jury the defendant for the first time asked for a copy of the jury panel, when a newspaper containing a list was furnished, which was received without objection or protest. See State v. Briggs, 27 S. C. 80, 2 S. E. Rep. 854; State v. Winningham, 10 Rich. Law, 268. Under this state of facts we do not see that his honor below committed any legal error, subject to reversal by this court. He made no ruling as to the right of the prisoner, either to a copy of the indictment or of the jury panel. No question was raised upon either of these matters, nor any intimation given that the prisoner desired a ruling thereon. The province of this court in a law case, either civil or criminal, extends only to the consideration of alleged errors of law. Here the error alleged, when the facts and circumstances are analyzed, amounts to nothing more than that his honor ordered the case to trial when the defendant announced that she was not prepared, declining to give any reason or make any request or motion for continuance or delay. We do not see any legal error in this. But, in addition, we think that defendant waived by her conduct whatever right she may have had both as to the indictment and the jury panel. 1 Bish. Crim. Proc. §§ 931, 944. The next exception complains that the motion in arrest of judgment was not granted, which was based upon an alleged

Digitized by Google

variance between the proof and the crime charged. The variance alleged is not pointed out in the exception, but we suppose it to be that the crime charged was alleged to have been committed at "Manning," in Clarendon county, when the evidence showed that it was committed some miles distant from Manning, in said county. It is true, as contended, that where an allegation is made in the indictment, whether it be of a place or other fact, which is essentially descriptive of the crime, it must be proved as alleged, whether it was necessary to be alleged or not. But where the allegation of place was merely intended to show jurisdiction in the court, then this necessarily does not exist. This matter was fully discussed in State v. Moore, 24 S. C. 155, where the county in which the crime was committed was alleged, but the usual formula of the court-house was left out; the court holding that, although it was the custom and the better practice, perhaps, to allege the court-house as well as the county, yet, as the allegation was a matter of jurisdiction, the allegation of the county was sufficient. In the indictment here both the county and the place of holding the court, to-wit, Manning, were alleged. We do not think the word "Manning," as used in this indictment, could be construed as a word of description; on the contrary, it was intended as a word of jurisdiction, and was in conformity with the usual mode, and the better practice, as suggested in State v. Moore, supra. The last exception is met by what has just been said, in so far as his honor refused to charge that it was necessary for the state to prove that the crime was committed at Manning, and in so far as he charged that this was not necessary. As to the other portion of this exception, to-wit, that his honor charged that it was not necessary to prove that two barns were burned, this is untenable. Besides, it was wholly immaterial, as it is conceded that the evidence fully sustained the indictment, charging the burning of two barns. It is the judgment of this court that the judgment of the circuit court be affirmed.

McIver and McGowan, JJ., concur.

(31 S. C. 604)

SANDERS v. SANDERS.

(*Supreme Court of South Carolina.* June 26, 1889.)

PLEADING—TIME OF FILING.

An order was made in open court vacating a judgment "with leave to the defendant to put in his answer and defend the suit, the answer served with the motion papers herein being allowed to stand as the defendant's answer in the case." The answer was not thereafter formally served. *Held*, that the answer must be considered as filed on the date of the order, within the meaning of the Code provision requiring a reply to be served within 20 days after the filing of the answer. McIver, J., dissenting.

Appeal from common pleas circuit court of Barnwell county; FRASER, Judge.

J. C. Davant, for appellant. *Robert Aldrich*, for respondent.

McGowan, J. This was an action on a note by the plaintiff, as executor of the will of William Sanders, deceased, in which there was a judgment in favor of the plaintiff for $455.11, and for some reason not now important Judge Cothran, on March 31, 1886, granted an order "to vacate and set aside the judgment, with leave to the defendant to put in his answer and defend the suit, the answer served with the motion papers herein being allowed to stand as the defendant's answer in the action, with leave to the said defendant to serve an amended answer within thirty (30) days from the date of this order, should he be so advised. It is further ordered, as a condition precedent to the taking effect of this order, that the defendant file with the clerk an undertaking in the sum of six hundred dollars, with ample security, to be approved by the clerk, to pay whatever may be recovered of him for debt, interest, and costs herein, should the plaintiff finally prevail in the suit. It is further ordered that upon the said undertaking being filed and approved as aforesaid the clerk do serve a certified copy of this order on the sheriff," etc. The undertaking was filed by the defendant as required, but he never availed himself of the "leave" to put in an amended answer within 30 days, and there was no further notice or subsequent service of a copy of the answer filed with the motion papers on March 31, 1886. On February 24, 1887, nearly eight months thereafter, the plaintiff gave notice of a proposed reply to the answer, and, a copy of the same being served a few days after on the attorney of the defendant, he returned it as not being within time. On the trial the judge ruled out the reply, and instructed the jury that the amount of the defendant's counter-claim must be allowed because not denied by the plaintiff. The jury found accordingly, and the plaintiff appeals upon the ground "that there was error in the ruling of the circuit judge that, under the terms of the order opening the judgment, made by Judge Cothran, the reply served on February 24, 1887, and returned February 26, 1887, was irregularly served, promptly returned, and inadmissible at the trial," etc.

If the plaintiff wishes to reply, he has 20 days after the answer is filed to do so. Here the answer was filed by leave of the court on March 31, 1886, and there was no effort to reply to it until February 24, 1887, (nearly a year after.) It is conceded that the time had long passed, if it is to be considered that the answer was "filed" at the date of Judge Cothran's order, (March 31, 1886,) and of this we can have no doubt. When there is no express direction on the subject, we think it is a good, general rule that the copy of a pleading which is amended should be served upon the adverse party or his attorney. But upon a motion for leave to answer, as in the

Digitized by Google

case of a judgment set aside or a demurrer overruled, the circuit judge has the discretion to grant the order upon such terms as he thinks just. In this case the order of the judge, in express terms, directed that "the answer filed with the motion papers should be allowed to stand as the defendant's answer in the action." The order was granted in open court, which was notice to the plaintiff's attorney, without serving him formally with a copy of the answer "filed." As it seems to us the order was within the discretion of the judge, and is the law of the case. The judgment of this court is that the judgment of the circuit court be affirmed.

SIMPSON, C. J., concurs in the result.

MCIVER, J., (*dissenting.*) I cannot concur in the proposition that the order of Judge COTHRAN operated as service of the proposed answer, but only as a permission to serve such answer, notwithstanding the fact that the time within which it might have been served had elapsed, and, as it is conceded that the answer never was served in any of the modes prescribed by the Code for the service of the pleadings and other papers in an action, I do not think the reply was served too late. The Code having prescribed the manner in which papers shall be served, I do not see by what authority we can recognize service by the order of the court or a judge thereof, which is not one of the modes prescribed. It is true that a copy of the proposed answer was served with the notice of the motion to open the judgment by default, and for leave to answer, but surely that could not then be regarded as service of the answer, for the motion might not be heard until after the lapse of 20 days, and the plaintiff thus lose the right of replying to the answer before it had been determined that the defendant's default was excusable, and consequently before the defendant could be entitled to answer. If so, then the sole question is whether legal service can be made by a simple order of the court or a judge that a certain paper shall stand as an answer, and for this I am unable to find authority, and none has been cited. This, at first view, may seem technical, but it is not really so, for the Code which was designed to prescribe what shall be lawful modes of proceeding informs parties that they are entitled to 20 days after service of any pleading to answer or reply thereto, and until such service has been made in the manner prescribed by law they are under no obligation to take any action. It may be that in this very case, although the plaintiff must be presumed to have had notice of Judge COTHRAN's order, yet regarding it as simply a permission to answer, and not a service of the answer, correctly, as I think, he felt secure in waiting until such service should be legally made, for he could not know until he was served that the defendant intended to avail himself of the permission granted, especially as the defendant did not avail himself of the permission to serve an amended answer. I cannot think that the provision of the Code which invests the court below with discretion to grant an order for leave to answer, after the time has expired, upon such terms as may be deemed just, has any application to the present case. The terms to be imposed in such a case are manifestly terms to be imposed on the party in default and not upon the party who is in no default. It seems to me, therefore, that if there were nothing else in the case the judgment below should be reversed; but, as I understood it to be conceded at the hearing that it appears from the records of this court that the judgment now appealed from has already been affirmed by the judgment of this court, under a previous appeal in which the question now presented might have been made, it seems to me that the judgment below must now be affirmed on that ground.

(31 S. C. 199)

CLAYTON *v.* MITCHELL.

(*Supreme Court of South Carolina.* July 2, 1889.)

REFERENCE—REPORT—RECOMMITMENT.

Where an action at law has been referred to a master, and the court finds that his conclusions of fact and law are correct, and overrules all the exceptions to his report, it is error to recommit the report to enable the losing party to introduce testimony to sustain new issues to be raised by an amendment of his answer, especially where he might have amended at the hearing, but made no effort to do so, being of opinion that no amendment was necessary.

Appeal from common pleas circuit court of Barnwell county; NORTON, Judge.

James E. Davis, for appellant. *Skinner & Williams*, for respondent.

MCIVER, J. This was an action to recover possession of real estate, the allegations of the complaint being in the usual form, to which the only defense interposed was a general denial. When the case was called for trial an order of reference was made (by consent, as we assume, inasmuch as such an order, in such a case, could not otherwise have been made) whereby all the issues were referred to the master for trial. In pursuance of this order the master made his report, finding as matter of fact that one Joseph J. Clayton went into possession of the land in dispute in the year 1842, and, after holding it as his own for more than 20 years, by his deed bearing date 30th March, 1875, conveyed the same to a trustee for the sole and separate use of his wife, who is the plaintiff herein, for and during the term of her natural life, with remainder to her children, etc.; that the defendant is in possession of the land, and withholds the same from the plaintiff, and that the rental value of the land is one hundred dollars per year; and he found as matter of law that the plaintiff is entitled to recover the possession of the land from the defendant, together with $600 damages. To this report the defendant filed exceptions, combined with a notice of a motion

Digitized by Google

to set aside the report, and recommit the case to the master with leave to amend his answer by "pleading of former judgment and title, if necessary, and for any other appropriate relief on the ground set forth in the foregoing affidavit" of one of his attorneys, which is set out in the record. His exceptions, as incorporated in this notice of motion, appear to be (1) that the evidence as reported by the master shows title out of the plaintiff and in the defendant; (2) that "the several findings of fact and law by the master are opposed to the evidence, inaccurate, or superfluous, and he should have reported in favor of the defendant in all respects." It seems that at the opening of the reference the plaintiff moved to continue the case upon the ground of the absence of a material witness who had been duly subpœnaed, whereupon defendant's attorneys offered to accept the affidavit of what such witness would testify to if present. Accordingly the plaintiff's motion for a continuance was refused, and the affidavit of plaintiff's attorney as to what he expected to prove by the absent witness was received as the testimony of such witness. At the close of plaintiff's testimony the defendant offered to introduce evidence tending to show that he had been in adverse possession of the land for more than 10 years prior to the commencement of the action, which, upon objection, was ruled inadmissible under the simple defense of the general denial. Defendant then offered evidence tending to show that the matter in dispute was *res adjudicata*, and the master, though holding that such a defense could not be interposed under the general denial, but should have been specially pleaded, nevertheless permitted defendant to introduce the evidence, which the master in his report states as follows: "On the 30th of March, 1875, an action was commenced in this court, entitled 'John W. D. Clayton, trustee of Sylvania A. Clayton, vs. John Mitchell,' for the recovery of this same tract of land. This action resulted in a nonsuit. Several years afterwards, perhaps in 1879, the same action was recommenced, bearing the same title; the issues were referred to the late I. M. Hutson, Esq., and upon the coming in of his report a decree was rendered in favor of the defendant against the said trustee." It appears, however, from the testimony taken by the master, which is set out in the "case," that there was also certain parol evidence adduced in support of the plea of *res adjudicata*, as well as the records of the two actions referred to in the report. The master concluded as matter of law that the deed of trust under which plaintiff claimed, having been executed since the adoption of the constitution of 1868, vested the absolute title in the plaintiff free from any trust, on the ground, as we presume, that the statute of uses executed the use, and carried the legal title to her; and hence, she not being either party or privy to the actions brought by the trustee, she was not bound thereby.

In the affidavit of one of the attorneys for the defendant heretofore mentioned as accompanying his notice of motion and exceptions, various errors and imperfections in the statements contained in the master's report are alleged, and then the affidavit concludes in these words: "Diligent search and inquiry were from time to time made by defendant's counsel to find the report of Mr. Hutson, and the judgment thereon mentioned on the second and third pages of the master's report, but the same were not found until a short time before the reference, and in a place where they were not before suspected to be, and deponent had no suitable opportunity of pleading them. Deponent further states that in his best judgment it was not necessary to plead the estoppels of the former judgments against the plaintiff, or title in the defendant, in order to obtain their benefit; but it is observable that the affidavit does not state, nor does it anywhere appear in the record, that any motion to amend the answer was ever submitted to the master. On the contrary, the conclusion seems to be irresistible that the defendant stood upon his legal opinion that no amendment was necessary, and that he declined, or at least omitted to make any effort to amend until after his case had been heard and determined against him by the master. The motion, together with the exceptions embraced therein, was heard by his honor, Judge NORTON, who rendered his decree, in which he says he accepted the report of the master as a correct statement of what occurred at the trial before him, and sustained his findings of fact and conclusions of law, though not expressing any opinion as to whether the defense of *res adjudicata* should have been specially pleaded, but placing his concurrence in the result reached by the master as to that defense upon the ground that it was not sustained by competent evidence; "but," he adds, "it appears from the affidavit submitted in behalf of defendant and the record in one of the cases which were excluded from the evidence, that defendant has the defense of *res adjudicata* and of the statute of limitations, which he may probably prove, and of which he has been deprived partly by circumstances beyond his control and partly by his failure to plead, as he ought to have done." He thinks it fair "to this defendant that at this stage of the case it should be recommitted to the master that he may have an opportunity to fully defend himself." He therefore rendered judgment "that the defendant have leave to amend his answer by pleading the statute of limitations and *res adjudicata*, if he shall be so advised," within a certain prescribed time, and upon certain specified terms, and that upon his failure to comply with such terms within the time prescribed that the report of the master be confirmed, and that plaintiff have judgment against defendant tor the land described in the complaint, together with $600 damages, and the costs of the action. From this

Digitized by Google

judgment plaintiff appeals upon the several grounds set out in the record, which need not be repeated here, as we propose to consider what we regard the material points raised by these grounds, without following in detail the several grounds of appeal.

It will be observed that this was an action at law, pure and simple, involving no equitable features; and in such case the findings of a master or referee operate as the verdict of a jury, except that they may be reversed, affirmed, or modified by the circuit court upon exceptions to the report; whereas, in case of a verdict of a jury, the power of the court is limited to the granting of a new trial. Meetze v. Railroad Co., 23 S. C. 1. Hence, when a case is heard by the circuit court upon the report of a referee or the master, and his findings of fact and law are neither reversed nor modified, the same should be affirmed, and judgment ordered accordingly, subject, of course, to appeal to this court. It seems to us, therefore, that when, in this case, the circuit jndge found that "the master was correct in his findings of fact and conclusions of law," nothing remained but to confirm the report, and order judgment accordingly. He had no authority to hear additional testimony in the form of an affidavit or otherwise, which was not before the master, and base his judgment upon that. Griffin v. Griffin, 20 S. C. 486. His jurisdiction was in the nature of an appellate tribunal, and should have been confined to a review of the case as presented to the tribunal whose action the exceptions called upon him to review. This, of course, does not preclude the right of the circuit judge, in hearing the report of a referee or master on exceptions, to recommit the report for further testimony as to some or all of the issues involved, where the evidence as presented is insufficient to enable him to form a satisfactory conclusion, as in Westfield v. Westfield, 13 S. C. 482, or Lowndes v. Miller, 25 S. C. 119. But where, as in this case, the circuit judge has found that the conclusions, both of fact and law, reached by the master are correct, and overrules all the exceptions to the report, we do not think he has any authority to recommit the report for the purpose of enabling the losing party to introduce testimony to sustain new issues to be raised by an amendment of the pleadings; especially where, as in this case, the proposed amendments change substantially the defense originally interposed. A party, after he has lost his case, cannot be permitted by amendment to change substantially his claim or defense, and thus raise new issues with his successful adversary. Whaley v Stevens, 21 S. C. 221; Kennerty v. Phosphate Co., Id. 226. Such a practice, besides being in direct conflict with the provisions of the Code, § 194, would encourage carelessness in pleading, and lead to the trial of cases by piece-meal, thus involving needless delay and expense. The provisions of the Code in respect to amendments are certainly liberal enough to save parties from the effects of a mistake, which even the most careful persons may sometimes fall into, but such amendments must be applied for at the proper time, and a party cannot be permitted, after planting himself upon a certain ground of action or defense and finding it unsuccessful, to shift his ground, and renew the controversy upon other grounds which he might have taken in the first instance. This would lead to interminable litigation, whereas the time-honored maxim is, *Interest reipublicæ ut sit finis littium.* Now, in this case it is quite apparent that the defendant had abundant opportunity to apply for leave to amend his answer in the manner allowed by the circuit judge, at the proper time, and that there was nothing to prevent his doing so, except his counsel's deliberate judgment that such amendment was not necessary, as is frankly stated by him in his affidavit. The failure to find Mr. Hutson's report could not have had any influence, for it was found "a short time before the reference," and yet when the reference was opened no motion for leave to amend was made. On the contrary, defendant pressed for a hearing on the pleadings as they originally stood, and succeeded in defeating plaintiff's motion to continue. So that, if defendant really desired to amend, and had found the report of Mr. Hutson such a short time before the day appointed for the reference as to prevent his giving due notice of the motion to amend, all he had to do was to acquiesce in plaintiff's motion to continue, and thus obtain the requisite time to give the notice of a motion to amend; but instead of this, without intimating any desire to amend, he opposed the motion to continue, and succeeded in forcing the trial at that time. So, too, when the master made his ruling that the defendant could not, under the state of the pleadings, offer evidence in support of the defense of the statute of limitations or of *res adjudicata*, he did not then make any effort to amend, but manifestly relied upon his opinion that such amendment was not necessary. The exceptions to the master's report are couched in such general terms as to make it somewhat difficult to understand what were the precise questions intended to be presented. The circuit judge, however, seems to have regarded them as presenting but two questions of law: (1) Whether the master erred in ruling out the evidence to support the defense resting on the statute of limitations because that defense was not specially pleaded; (2) whether the master erred in excluding the evidence offered to support the defense of *res adjudicata* upon the same ground. Now, as both of these exceptions were in terms overruled,—the latter upon a different ground from that taken by the master,—and his findings of fact were approved, and as the defendant has taken no exceptions to the judgment of the circuit judge, we think the inevitable result must be that the master's report should be confirmed. The

Digitized by Google

question as to the correctness of the master's rulings is not before us, and therefore we have not considered the same, and must not be regarded as expressing any opinion in reference thereto. The judgment of this court is that the judgment of the circuit court, in so far as it recommits the case to the master, with leave to the defendant to amend his answer, be reversed, and that the case be remanded to the circuit court with instructions to confirm the report of the master, and render judgment in accordance therewith.

SIMPSON, C J., and MCGOWAN, J., concur.

(31 S. C. 604)

WEATHERSBEE v. BLANTON *et al.*

(*Supreme Court of South Carolina.* July 6, 1889.)

GUARDIAN AND WARD—ACCOUNTING.

Where unauthorized expenditures by a guardian from the *corpus* of his ward's estate were for her board, maintenance, and education, she being very deficient in the latter respect, and her father having by his will directed that all his children be given an education suitable to their condition, the discretion of the court in confirming such expenditures will not be interfered with on appeal.

Appeal from common pleas circuit court of Barnwell county; J. D. WITHERSPOON, Judge.

The following is the decree referred to in the opinion:

"John M. Sanders, the father of plaintiff, died testate, December 24, 1861. After providing for payment of debts, he devised and bequeathed his estate, real and personal, to John C. Nimmons, in trust, to be equally divided among his children, subject to certain limitations, in the event that either of his children should die without issue surviving them. The real estate of testator has not been sold, and for some unexplained reason the sale of the personal estate was postponed until December, 1866, and January, 1867, some five years after testator's death. One Owen R. Parker was duly appointed guardian of plaintiff, the daughter of testator, whose maiden name was Annie Sanders. The former guardian, being in embarrassed circumstances, consented to surrender the estate of his ward, and on the 19th November, 1873, the defendant Isaac A. Blanton was duly appointed guardian of Annie Sanders, the plaintiff, and the defendants W. T. Blanton and Henry P. Williams became sureties on the guardian bond of the defendant Isaac A. Blanton. On the 11th January, 1877, the ward (the plaintiff) married Ashley M. Weathersbee, and on the 12th February, 1879, plaintiff attained her majority. On the 29th August, 1879, plaintiff, being of age, instituted the above-entitled action for the purpose of compelling her guardian, Isaac A. Blanton, to account and pay over to her the amount in his hands due her. Plaintiff alleges that her said guardian has not only refused to settle, but instead thereof has filed an account in the probate court, showing that he has expended for her, not only all of the income, but also the major portion of the *corpus* of her estate. The defendant Isaac A. Blanton, guardian, submits as an exhibit with his answer his final account with his ward, approved by the probate court for Barnwell county, showing a balance of $1,032.44 due his ward, and alleges that on the 25th March, 1879, he tendered this balance to his ward, which she refused to receive. He further states that said balance has been reduced to $1,015.44 by taxes he has since been compelled to pay on said balance. The guardian denies that he has expended any part of the *corpus* of his ward's estate, as alleged, but submitted that, even if he has encroached upon the *corpus* of the estate, the expenditure was necessary for the board, education, and maintenance of the ward; and, being such as this court would have allowed, the court will now sustain it. The defendant's sureties adopt the answer of the guardian. By consent of counsel, it was referred to the master to take the account, and report the exact state thereof to the court. The master, by request of counsel, has stated the account of the guardian, Isaac A. Blanton, as contended for by the respective counsel.

"It should be borne in mind that this is an action between the ward and her guardian, that cannot affect or prejudice the rights of remainder-men who are not parties. The court does not feel called upon, of its own motion, to have the remainder-men made parties, and will consider the case as presented by the pleadings. The plaintiff contends that all the guardian received was the *corpus* of the ward's estate. In this view, the plaintiff's action cannot be maintained, as under her father's will she is only entitled to the income or usufruct. No decree can be rendered in this action as to the *corpus* of the estate, as the remainder-men are not represented. Both the guardian and sureties are liable to account to the plaintiff for income received and not paid by the guardian. Neither are liable to account to plaintiff for any portion of the *corpus*. The defendant Isaac A. Blanton, the guardian, on the other hand, contends that $2,669.18 of the amount received by him from Parker, former guardian, was proceeds of sale of articles produced upon plantation subsequent to death of John M. Sanders, and should be treated as income, and not as *corpus*, and, as the total expenditure ($2,477.11) does not equal amount of income, ($2,669.18) his expenditures for ward have not exceeded the income. It is difficult to determine what is *corpus* and what is income. The guardian admits in his answer that the balance of $1,015.44 tendered plaintiff is income, and in his account acknowledges that he has $195.85 of trust fund. As already stated, proper parties not being before the court, no decree, except as to interest, can be made in this action with reference to the $195.85 trust fund in hands of guardian. But let it be assumed, as contended for by plaintiff, that the entire estate

Digitized by Google

received by the guardian is *corpus*, and belonging to ward, (instead of a life-estate simply,) and how does the matter stand, according to the accounts?

The guardian's total debt is...		$5,359 48
Deduct income:		
Rents received.....	265 47	
Interest embraced.....	493 48	
		$ 758 95
The *corpus* is.....		$4,600 53
Guardian has invested.....	$1,200 00	
Paid ward by order of court...	500 00	
Tendered ward by guardian...	1,014 13	
Special *corpus*, trust fund.....	195 85	
		$2,909 98
Amount of *corpus* expended by guardian.....		$1,690 50
Expended income.....		758 95
Total expenditures of guardian.....		$2,449 45
Of this sum guardian expended on ward.....	$1,799 20	
Paid taxes..... $136 37		
Paid legal and court expenses..... 218 60		
Paid guardian's commissions..... 295 28	650 25	
		$2,449 45

"The $1,799.20 expended by guardian on ward included the board, education, and maintenance of ward for the last five years of the ward's minority; being an average annual expenditure of $359.84. Deduct the $758.95 of income received by guardian from the total expenditure of $1,799.20 for ward, and it will appear that the guardian has encroached $1,040.25 upon the *corpus;* being an average annual encroachment on *corpus* of $208.05. Add to this $151.79, the annual average of income received, ($758.95,) and it gives $359.84, the annual average of total expenditure by guardian for the board, education, and maintenance ($1,799.20) for the five last years during the ward's minority. In the education and maintenance of the ward, the guardian cannot expend more than the ward's income. If the guardian's expenditures are within the income, they are presumed to be proper and necessary. If the guardian exceed the income in expenditures for the ward, the guardian must show a necessity for the invasion of the *corpus*, as the court would have permitted upon application of the guardian.

"Now, the question to be determined is, will the court now sanction the expenditure of the $1,799.20 (regarding it either as *corpus* or income) by the guardian, for the board, education, and maintenance of the ward (plaintiff) for the last five years of her minority? In his will, plaintiff's father, John M. Sanders, in providing for his daughter (plaintiff) expresses the desire that his daughter should be well educated, according to her degree and circumstances in life. The guardian testifies that his ward (plaintiff) was about 16 years of age, and very deficient in education, when he became her guardian; that under the advice of counsel that most all of the ward's estate was income, in order to carry out testator's wishes as expressed in his will, he, the guardian, had his ward taught at home for a time, and then sent her to school at Salem, N. C. Upon the assumption that all of the balance was *corpus* except the $758.95 income, it is clear that $151.79, the average annual income, was wholly inadequate to maintain and educate the ward. If the guardian had neglected to educate his ward as directed by the father, on account of the inadequacy of the income, he would have been derelict in his duty. In view of the neglected condition of the ward, I cannot see how the guardian could have expended the $1,799.20, viewed either as income or *corpus* to a better purpose, or more in conformity with the father's will, than in furnishing the ward a good education. All of the expenditures of the guardian are properly vouched. The only breach of duty by the guardian is the alleged encroachment upon the *corpus* of the estate. As already stated, plaintiff can have no cause of complaint on this ground. The facts not disputed are stated in the report of the master.

"I conclude, as matter of law, (1) that the expenditures by the defendant Isaac A. Blanton, guardian, for the board, education, and maintenance of plaintiff, (his ward,) as represented in the final account accompanying the answer of the guardian, were necessary, and such as the court should approve and sustain; (2) that defendant Isaac A. Blanton is not liable to account to plaintiff for more than the balance represented in the final account above referred to, which has been tendered to plaintiff by the guardian; (3) that out of the balance tendered as due plaintiff by the guardian in said account enough must be retained to pay any taxes incurred by the defendant Isaac A. Blanton on account of said fund so tendered. (4) That plaintiff's complaint must be dismissed, with costs.

"It is ordered and adjudged that the expenditures by the defendant Isaac A. Blanton, guardian, on behalf of his ward, the plaintiff, as appears by the final account accompanying the guardian's answer herein, be, and the same are hereby, approved and sustained, and that plaintiff's complaint be dismissed, with costs. It is further ordered and adjudged that Isaac A. Blanton, guardian, do pay to the clerk of this court the balance due by him to plaintiff as appears by his final account, and which plaintiff refused to receive. It is further ordered and adjudged that the costs of this action, as taxed by the clerk, and any taxes that Isaac A. Blanton may be liable for as guardian, on account of the balance admitted to be due and tendered plaintiff, be first paid by the clerk of this court out of said balance due plaintiff, and herein ordered to be paid said clerk by said guardian, and that said clerk do pay the remainder of said balance to plaintiff."

Robert Aldrich, for appellant. *H. M.*

Digitized by Google

Thompson, Geo. G. Thompson, and *I. M. & E. P. Hutson*, for respondents.

SIMPSON, C. J. This is a contest between a ward and her guardian, and the appeal is before this court from a decree below, pronounced in an action by the ward against her guardian and his sureties on the guardianship bond, for an accounting. The decree from which the appeal comes, gives a concise statement of the facts of the case, and the legal points involved will also appear therein. The reporter will therefore attach said decree to this opinion. It appears that one John M. Sanders, late of Barnwell county, died on the ——— day of ———. He left a will, in which, among other provisions, he bequeathed and devised all the balance of his estate, real and personal, etc., to one John C. Nimmons, in trust for all of his children, to be equally divided between them, share and share alike, and at their respective deaths to go to their children, to them and their heirs, but, should any of them die leaving no child or children, then to the survivors, etc. The estate was kept together for some years after the death of the testator before any portion of it was sold, but ultimately the personal estate, together with the increase in the way of annual crops, etc., was sold, to-wit, on the ——— day of ———. The appellant Annie was one of the children, and one Owen R. Parker was appointed her guardian, who received her share of the proceeds of said sale. Afterwards the guardianship of Parker was revoked, and the defendant Isaac A. Blanton was appointed in his stead, to-wit, in November, 1873, who received from Parker the amount for his said ward. Upon the arrival at age of the ward, who before that time had intermarried with one Weathersbee, the action below was instituted. The guardian, however, before suit brought, had made an *ex parte* accounting before the probate judge for Barnwell county, and, finding the sum of $1,015.44 due his ward, had tendered the same to said ward, which being refused, he brought said sum into court with his answer, subject to some small deductions on account of taxes, etc. It appears from a statement in the decree of his honor, the circuit judge, that Blanton, the guardian, had received from the former guardian $4,600.48, and that in addition to this he had received rents and interest amounting to $758.95; making in all received $5,359.68. Of the $4,600.48, *supra*, a portion was from the proceeds of the sale of the personal property embraced in the will of testator, and the remainder was from the sale of the increase made between the death of testator and the said sale. It also appears that Blanton, the guardian, had expended for his ward $1,040.25, exclusive of the $758.95 received by him from rents and interest. This $1,040.25 was considerably less than the amount received by the guardian from the proceeds of the sale of the property produced on the plantation subsequent to the death of the testator, and which constituted a part of the entire amount ($4,600.48) received, *supra*. This amount was claimed by the guardian as income, as well as the $758.95, and which he had the right to expend for his ward. On the contrary, the ward contended that the whole amount received by the guardian, to-wit, the $4,600.48, was *corpus*, and that, the guardian having no authority to encroach upon said *corpus*, he should not have credit for the said sum of $1,060.25. The figures given above may not be entirely accurate, but they are taken from the decree of his honor, and they are sufficiently accurate to show the questions of law involved.

His honor, the circuit judge, without determining the question how much of the amount received by Blanton was *corpus* and how much was income, assumed for the case that the entire amount received, except the $758.95, was *corpus*, and based his decree upon that assumption; and holding that notwithstanding the guardian had encroached upon said *corpus* to the extent of $1,040.25, without previous authority from the court, yet that, this being a reasonable and proper expenditure under the injunction of the will of the testator as to the education of his children, he should have credit for it upon his final accounting; and it appearing that payments had been made sufficient to satisfy the demand of the ward, with this sum credited, he dismissed the complaint. Now, the appeal involves simply the correctness of this ruling of his honor, to-wit, admitting that the whole amount received by the guardian was the *corpus* of his ward's estate, whether he should be allowed a credit of the amount expended by him, taken from said *corpus*, to-wit, the sum of $1,040.25, or, in other words, whether his honor was in error in approving and sustaining the expenditures of the guardian on behalf of his ward, as appeared in his final accounting accompanying the guardian's answer to the complaint below, where these expenditures objected to were set out in full.

There is no doubt as to the proposition that primarily the guardian is restricted to the income of the ward's estate for support, maintenance, and education; and, while it is true that the court may authorize an expenditure beyond said income, or may approve and confirm said expenditure after it has been made without previous authority, yet where it has been made without such previous authority it is at the peril of the guardian, and, if the court fails to approve and sustain it, the loss will be the guardian's. It is also true that before such expenditures should be approved and sustained by the court, when made without a previous application and an order from the court, they should be fully investigated and carefully considered, and no extravagance or waste should be sanctioned. But at the same time, upon the question of confirmation, much should be left to the discretion of the presiding judge, inasmuch as

Digitized by Google

there is no positive rule or principle defining a precise limit beyond which the guardian cannot go, other than necessity, to be determined from the facts of each particular case, with the burden on the guardian to show the propriety of the expenditure claimed. In the cases relied on by the appellant will be found the law upon this subject as settled in this state, and no further reference is necessary. These cases are McDowell v. Caldwell, 2 McCord, Eq. 43; Teague v. Dendy, Id. 210; and Holmes v. Logan, 3 Strob. Eq. 31. In the first of these cases it was said: "It is a well-settled rule that the guardian is not entitled to break in upon the capital of his ward for his subsistence, except under peculiar circumstances, which do not enter into this case, and generally it is limited within the income." In the second: "Cases may and do frequently occur in which prudent men are from necessity compelled to depart from this rule, [that is, confining expenditures within income,] but they are out of the ordinary course of events; and, before the court will permit a guardian, trustee, executor, or administrator to break in upon the capital for subsistence, it will require them to show clearly and distinctly its necessity." In the last: "The general rule is that a guardian shall not exceed the annual income of the ward's estate in expenditures. When he ventures to encroach upon the capital, there must be some emergency to justify it. He ought to make a clear case of its being necessary and expedient to his ward," etc. See, also, the cases of Villard v. Chovin, 2 Strob. Eq. 40, and Prince v. Logan, 1 Speer, Eq. 33, to the same effect.

Sometimes the question coming up to the appeal court is on a refusal of the court below to sanction the expenditures. In the case at bar, however, the object of the appeal is to reverse a decree below approving and sustaining the expenditures made. The circuit judge gives in his decree his reasons for the approval of said expenditures. He states that they were made during the last five years of the minority of the ward, and they amounted annually to $359.84, for the board, education, and maintenance of said ward; that she was very deficient in education when Blanton became her guardian; that the will of testator directed that his children should be well educated, according to their degree and circumstances in life; and that under all the circumstances he could not see that the expenditure, "whether viewed as *corpus* or income, could have been devoted to a better purpose, or more in conformity with the father's will, than in furnishing the ward with a good education." The expenditures were all vouched, and the ward received their benefit, and we cannot say that the circuit judge, in sustaining and approving them, transcended his power. It is the judgment of this court that the judgment below be affirmed.

McIVER and McGOWAN, JJ., concur.

(31 S. C. 212,

HODGES *v.* FABIAN *et al.*

(*Supreme Court of South Carolina.* July 5, 1889.)

SALES UNDER ORDER OF PROBATE COURT.

1. Code S. C. § 40, provides that "whenever it shall appear to the satisfaction of any judge of probate" that the personalty of a decedent is insufficient for his debts, and all persons interested are summoned before him and show no cause to the contrary, such judge "shall have power to order the sale of the real estate, * * * or so much thereof as may be necessary for the payment of the debts, * * * upon such terms and in such manner as he may think best." *Held* that, where the judge has obtained jurisdiction, his order of sale cannot be collaterally attacked, as by showing that an unnecessarily large quantity of land was sold.

2. On application to the probate judge to sell certain real property of decedent for payment of debts, plaintiff, who was a defendant in that proceeding, suffered a default, and the judge ordered that a sale be had of two lots, but that, as there was some dispute in regard to the title of the remaining parcel, "the court reserves the question for future consideration." Afterwards that parcel was also ordered to be sold. *Held*, that plaintiff could not complain that the jurisdiction was exhausted by the first sale.

3. Exceptions that the evidence does not support the master's findings of fact and conclusions of law are too general to be considered.

Appeal from common pleas circuit court of Colleton county; NORTON, Judge.

J. C. De Treville, for appellant. *Howell, Murphy & Farrow*, for appellees.

McGOWAN, J. As well as can be gathered from a voluminous brief, in indistinct manuscript, the leading facts of this case are as follows: In the year 1882 James E. Fabian, of Colleton, died intestate, seised and possessed of a small estate of realty and personalty, and leaving as his heirs and distributees seven children, viz., Elvira R., (now Hodges,) the plaintiff, John M., James T., George B., Franklin, Claudius D., and Amanda B. Fabian, of whom Franklin, Claudius, and Amanda are still minors. John M. Fabian administered upon the personal estate, and, finding that it was not sufficient to discharge the debts of the intestate, on December 1, 1882, he filed a petition in the probate court of the county, as administrator, stating, among other things, that the intestate at the time of his death was seised and possessed of two houses and lots (lots Nos. 24 and 26) in the plan of the town of Ridgeville, and also a parcel of land, containing 29 acres, more or less, and praying that the said lots and small parcel of land should be sold, and the proceeds thereof, or as much thereof as may be necessary, be applied to the debts of his intestate. A copy of the probate record was in evidence, and showed that the plaintiff, whose name at that time was Elvira R. Hill, and not, as now, Hodges, and the other adult children were summoned and regularly made parties. None of the defendants answered but the minor children, and the probate judge, JOHN B. STOKES, Esq., decreed by default "that as it appears that the personal estate of the intestate is not sufficient for the payment of the debts of the estate, and on proof of the intestate's title to the two lots," (Nos. 24

Digitized by Google

and 26,) he ordered those lots sold for cash in aid of the personalty in the payment of debts, and then proceeded as follows: "There being some dispute as to the title of the estate in the remaining 29 acres mentioned in the complaint, the court reserves that question for future consideration," etc. The sale of the two lots ordered took place, and we suppose the proceeds were applied to the debts, as we hear nothing more of these lots. After the sale of these lots, the probate judge, on January 7, 1884, made a supplemental decree, by which he decided that the remaining parcel (29 acres) should be divided into lots not less than one or more than five acres each, (with an unimportant exception,) and sold upon the terms of one-third cash and the remainder in two equal annual installments. The land was divided and sold as directed, and at that sale the defendants Baxter, Cummings, Way, and Ward became purchasers of some of the lots, and, having complied with the terms of sale, received titles, and were let into possession of the same. These purchasers were made parties, and stoutly resisted the plaintiff's prayer to set aside the sales, claiming that they had purchased and paid for their respective lots at a judicial sale, ordered by the probate judge, under proceedings in all respects formal and regular, the court having jurisdiction of the subject-matter and with all proper parties before it; that, the plaintiff having had regular notice of the probate proceeding, and having made no objection, but, on the contrary, having acquiesced therein, and actually received her full share of the excess of the sales over paying the debts of the estate, she was bound thereby and estopped from averring against the sale; and that, besides, she had received a lot valued at $70, which was assigned to her at her request. It was referred to John D. Edwards, Esq., as special master, to take the testimony and report his conclusions both of law and fact. He did so, and made a long and very careful, clear, and full report, in which, after stating the facts and the law, he said: "I find, therefore, that the proceedings in the probate court were regular on the face of the record, and cannot be thus assailed; but, even if not entirely regular, there is not sufficient apparent infirmity as to render them void or susceptible to collateral attack. I hold, therefore, that the action is not maintainable, and should be dismissed," etc. Upon exceptions this report was confirmed by Judge NORTON, who made it the judgment of the court, remarking that "the infants do not seek any relief in the action, and it is not adjudged whether, upon proper proceedings begun for that purpose, they might not be entitled to some relief." From this decree the plaintiff appeals, upon the following grounds: "(1) Because his honor erred in not sustaining plaintiff's exceptions to the master's findings of fact, said findings not being in accordance with the testimony taken; (2) because plaintiff's exceptions to the eighth finding of fact should have been sustained, there not being sufficient evidence to prove that the plaintiff received as an heir at law a house and lot, at the valuation of ($70) seventy dollars; (3) because plaintiff's exception to the master's fourth finding of fact, viz., that the proceedings were regular and according to law, and that a copy of the petition and summons were served on the plaintiff, should have been sustained, there being no evidence to support his finding; (4) because plaintiff's exception to the seventh finding of fact, 'that George D. Baxter, one of the defendants, was the husband of one of the heirs,' should have been sustained, there being no testimony to support the finding; (5) because his honor erred in not sustaining plaintiff's exceptions to the master's conclusions of law, there not being sufficient facts on which such conclusions could be based; (6) because his honor erred in not decreeing that the probate judge had exhausted his jurisdiction at the time of his second decree, there being no necessity for the same; (7) because the exception to the third conclusion of law should have been sustained, as it was error to hold that the probate judge had the discretion vested in him to sell so much of the lands, and in such manner as may seem to him best, whereas the law says 'so much as may be necessary,' etc.; (8) because his honor erred in not decreeing that the probate court was without jurisdiction in making the sale of the 30 acres of land, and that said sale was void; (9) because his honor erred in dismissing the complaint without granting the relief prayed for, and should have referred the case back to the master to correct his findings of fact and errors of law," etc.

Exceptions 1 and 5 state no specific objection, and therefore are too general to be considered; 2, 3, and 4 relate to findings of fact by the special master, concurred in by the circuit judge; and in such case it is well known to be the rule of this court not to disturb the finding unless manifestly against the weight of the evidence. Whether G. Baxter did or did not marry one of the children of the intestate was really of no importance in the case. We have read the record of the probate proceedings carefully, and we entirely concur with the master and circuit judge that the plaintiff was regularly served in that case under the name of Elvira R. Hill. Strobel, the officer, so swears. And we further concur, upon the testimony of the probate judge, Stokes, that a lot, appraised at $70, was assigned to the plaintiff, and that she also received money advanced by him (said Stokes.) Exceptions 5, 6, 7, and 8 substantially make the point that, conceding the jurisdiction of the probate judge in the first instance, to sell the lands of the intestate in the proceeding of John M. Fabian, administrator, v. Elvira R. Hill et al., yet such jurisdiction was exhausted by the first order of sale, which order was in the nature of a final judgment, and no further order of sale under the proceedings could be made without a new

Digitized by Google

case and fresh service of the parties. If the probate judge had been merely the appointee of another court to sell certain portions of the estate, which had been done, there would have been some force in the view. Ex parte Knight, 28 S. C. 484, 6 S. E. Rep. 330. But it will be observed that he was also the judge, and that the first order of sale did not purport to be a final judgment; that the petition prayed for the sale of the whole land in aid of the personalty, and that the plaintiff, who was a defendant in that proceeding, allowed the prayer of the petition to be taken by default against her; and the probate judge only refrained from selling all the land at the first sale, for the reason that there was "some dispute" whether the title to the parcel not then sold was in the estate; and on that account alone "the court reserved the question for future consideration." Afterwards, probably finding that the estate had title, the second parcel was sold. It seems to us that those who were parties to that application have no right to complain that the sale which they had allowed to be ordered and adjudged should be made at different times, and that we must consider the matter precisely as if all the lands, according to the prayer of the petition, had been disposed of at the first sale. But it is further urged that, if it must be considered that there really was but one order of sale, more lands were sold, as it turned out, than was necessary for the payment of the debts, and to the extent of such excess the probate judge did not have jurisdiction, and, as a consequence, the sales were absolutely void; that is to say, they were part good, but in part bad, depending upon the result of the sales. Section 40 of the Code declares that "whenever it shall appear to the satisfaction of any judge of probate that the personal estate of any person deceased is insufficient for the payment of his debts, and all persons interested in such estate being first summoned before him, and showing no cause to the contrary, such judge of probate shall have power to order the sale of the real estate of such person deceased, or of so much thereof as may be necessary for the payment of the debts of such deceased person, upon such terms and in such manner as he may think best," etc. This act gives to the probate judge important judicial functions. Whenever it shall appear to "his satisfaction" that the personal estate is insufficient for the payment of the debts of an intestate, he is to judge of the necessity of the sale, lands to be sold, etc. Although the insufficiency of the personal property for the payment of the debts is the foundation of his jurisdiction, we cannot suppose that his judgment in the matter must go for nothing, and that his order of sale *ipso facto* must be absolutely void the moment the proceeds of sale touch the point of full payment of the debts. It is not always easy to foresee what lands will sell for at public auction, and the construction contended for would emasculate the judicial powers given to the probate judge, tend to great confusion, make titles uncertain, and destroy the value of such sales, by raising a well-grounded distrust of them. We think the inquiry should be whether the probate judge had jurisdiction of the subject-matter and of the parties, and, if so, that his order of sale must be regarded as the judgment of a competent court upon a matter within its jurisdiction, and not subject to collateral attack. See Turner v. Malone, 24 S. C. 398. "The jurisdiction of the court (probate) over the subject-matter attaches on the filing of a petition sufficient in form. The matter stated in the petition may or may not be true. * * * The heirs, when jurisdiction over them is obtained, may be treated as entering a general denial. The order of the court, granting or refusing the prayer of the petition, is in the nature of a judgment conclusively establishing that the sale is or is not necessary. If erroneous, it must be corrected by appeal or some other appropriate proceeding. It cannot be collaterally avoided by showing that the petition was false." Freem. Jud. Sales, § 14. "If, upon hearing of the petition, the court is 'satisfied' that a proper case exists, it will enter an order or license for the sale of the land. If the court had jurisdiction, this order, until vacated or reversed, is binding upon all parties in interest. The purchaser under it is in no danger of losing his title by proof being made that the order was erroneously given. It cannot be collaterally attacked for error, fraud, or irregularity, if the court had jurisdiction," etc. Id. § 20, and notes. The judgment of this court is that the judgment of the circuit court be affirmed.

SIMPSON, C. J., and MCIVER, J., concur.

(31 S. C. 206)

SEIBERT *v.* TODD *et al.*

(*Supreme Court of South Carolina.* July 2, 1889.)

DOWER—HOW DIVESTED.

Where a husband purchased land subject to a purchase-money mortgage, which was foreclosed during coverture, and the land sold, the wife's inchoate right of dower was thereby destroyed.

Appeal from common pleas circuit court of Laurens county; HUDSON, Judge.

Johnson & Richey, for appellant. *Ferguson & Featherstone*, for respondents.

SIMPSON, C. J. The petitioner (appellant) demanded dower in certain lands in the possession of the defendant Janie C. Todd. This demand was allowed in the probate court, but upon appeal to the circuit court the decree of the probate judge was reversed, except as to a small portion of the land, described in the petition. The case is now before us on appeal from the decree of the circuit judge, in so far only as said decree reversed and overruled that of the probate court. This appeal, therefore, does not involve that portion of the circuit decree which allowed the claim of dower in a certain part

Digitized by Google

of the land. The facts of the case were as follows: Mr. Z. L. Holmes purchased a tract of land containing some 120 acres, at the sale of the real estate of the late Col. J. H. Irby, deceased, sold for partition under an order from the court. He gave bond to the commissioner in equity for the purchase money, which, under the act in such cases, was secured by a statutory mortgage. Act 1791. Robert Seibert, the husband of the demandant, also purchased at the same sale a small portion of land, this purchase being also secured by the statutory mortgage aforesaid. Some time after this Mr. Holmes sold his land to Mr. Seibert; the purchase money, however, to the commissioner had not been paid, nor the statutory mortgage satisfied, or in any way released. Some time after this Seibert went into bankruptcy, and these lands were sold by his assignee, and the proceeds applied to the unpaid purchase money represented by the bonds of Holmes and Seibert in the hands of the commissioner or his successor, at which sale S. R. Todd, Jr., the then husband of the defendant Janie C. Todd, became the purchaser. Todd subsequently died, and also Robert Seibert, and the petitioner, the widow of Seibert, commenced the action below against Janie C. Todd, the widow of said S. R. Todd, Jr. The circuit judge, in overruling the decree of the probate court, finds as a matter of fact "that the assignee of Seibert sold these lands under the decree of the bankrupt court to satisfy the liens thereon, and to pay the other debts of the bankrupt; that these liens were duly established in the bankrupt court; and that the lands were sold by order of the court, and the proceeds applied first to their extinguishment,—all this in the life-time of the debtor, the demandant's husband." Upon these findings he adjudged that demandant's right to dower in said lands was defeated. The appeal questions the findings of fact, *supra*, and on that account first denies the application of the principle of law mentioned. It also denies that the right of dower could be defeated in such cases, except by a strict foreclosure, claiming that the bankrupt sale was not such a foreclosure. In looking into the testimony, we think the findings of his honor must be sustained, under the established rule in such cases, there being neither an entire absence of evidence, nor a manifest preponderance against them. The purchase money of these lands due the commissioner had not been paid; the proceeds, or at least a large portion thereof, were applied by the assignee to the bonds representing the original purchase money. We think the circuit judge was warranted in holding that these claims were established before the bankrupt court, and that the sale took place under the orders of said court, and that therefore it was substantially a foreclosure sale. Now, what is the law of dower under such circumstances? No doubt of the general doctrine, that where a man is seised of lands during coverture, with no lien or incumbrance attaching or in existence at the time of seisin, the wife has an inchoate right to dower, which becomes complete upon her surviving her husband. And in such a case we know of no law or power that could defeat this right, except the consent, legally expressed, of the wife herself. Where, however, the seisin is accompanied at its inception with a lien, mortgage, or judgment, the inchoate right of dower of the wife attaches in subordination and subject to said lien. Jones v. Miller, 17 S. C. 380. And if it becomes necessary to sell the land to pay off this lien, and it is legally sold for such purpose, the dower in the land is gone, whatever may be the rights of the widow as to an interest in any surplus arising, if any. A mortgagee or a judgment creditor, having a lien prior to the attaching of the inchoate right of dower of the wife of the debtor, has such lien upon the whole land, and has the right to sell the whole in payment of such lien; and when such sale is made by proper proceedings the purchaser takes the land free from said lien, and as well from all others. When the sale is made after the death of the husband, and the right to dower has become complete, then, if there be a surplus, the widow may claim dower in that, or she may redeem, and receive her dower; but where the sale is made in the life-time of the husband, and in foreclosure and satisfaction of the lien, the land cannot afterwards be pursued for dower on the part of the widow; and, if there should be a surplus, that has already passed into the hands of the husband, before the inchoate right has ripened into a perfect right.

Now, applying these principles to the facts of this case, there is no doubt as to the correctness of his honor's ruling below. Here there was a statutory lien or mortgage over the land at the inception of demandant's husband's seisin, to which her inchoate right was subject and subordinate. This mortgage gave a right of sale, free from the incumbrance of said inchoate right of dower. Has such sale been made? The circuit judge has so found, and that it was made in the life-time of the husband. This finding we have not felt at liberty to disturb. It follows, therefore, that the decree of his honor, predicated upon the facts found, must be sustained. The cases of Tibbetts v. Manufacturing Co., 12 S. C. 465; Jones v. Miller, 17 S. C. 380; and Agnew v. Renwick, 27 S. C. 562, 4 S. E. Rep. 223, cited by appellant, do not conflict here; on the contrary, when analyzed, they sustain our conclusion. In the last case the land was not sold at a foreclosure, but at a private sale. In the next the sale of the personal property was held sufficient to extinguish the antenuptial judgment. And in the other the mortgage lien attached after coverture. It is the judgment of this court that the judgment of the circuit court be affirmed.

McIver and McGowan, JJ., concur.

Digitized by Google

(31 S. C. 161)

NATIONAL EXCHANGE BANK OF AUGUSTA v. HOLMAN.

(Supreme Court of South Carolina. July 1, 1889.)

CHATTEL MORTGAGES—FORECLOSURE.

1. Where, in an action to recover a deficiency after foreclosure of chattel mortgage, the defense relied on is that the mortgagee had accepted the mortgaged property in full satisfaction and discharge of the debt, defendant cannot assert, as a ground of defeating the action, that the mortgagee had converted the property and forfeited all rights under the mortgage by removing the property out of the county contrary to the statute relating to foreclosure of chattel mortgages.
2. In such case a judgment for plaintiff should be affirmed, even though the trial court erred in charging the jury as to the effect of removing the property into another county.

Appeal from common pleas circuit court of Barnwell county; NORTON, Judge.

J. O. Patterson, for appellant. *Croft & Chafee*, for respondent.

MCGOWAN, J. It seems that in the year 1885 James E. Davis purchased from J. Z. Dunlap, of Aiken, a lot of law-books, for which he gave his note, and, to secure it, a mortgage of the books; that Dunlap transferred the note and mortgage to the plaintiff bank, and when it fell due, Davis not being able to pay the debt, sold the books, with the consent of the bank, to Holman, the defendant, took his note for the same, and transferred it to the bank, the agreement being that the mortgage given by Davis was still to stand and bind the books in the possession of Holman, the object being, as it would seem, to substitute for the note and mortgage of Davis to Dunlap the note and mortgage of Holman to Davis, assigned to the bank. Holman was a citizen of Barnwell county, and, being unable to pay his note when it fell due, he wished to surrender the books in discharge of the debt; but the bank was unwilling to do that, and, the condition of the mortgage being broken, they, (the bank,) through W. R. Peoples as their agent, took possession of the mortgaged books, had them carried to Aiken, an adjoining county, where, after full notice and advertisement, they were sold at auction, and the net proceeds of the sale ($174.60) credited on Holman's note, leaving still due a balance of $150.40, to recover which the action was brought. The defendant made two defenses: *First*, a general denial; and, *second*, "that the note described in the complaint has long since been discharged by payment by the defendant delivering to W. R. Peoples, the agent of the plaintiff, a certain lot of law-books; and further, that the said books were delivered to the said Peoples as agent as aforesaid upon the express condition that the said note should be at once returned and delivered to the defendant herein, fully satisfied and discharged," etc. The facts were proved as herein stated, and under the charge of the judge the jury found for the plaintiff the balance still due upon the note, $178.15, and the defendant appeals to this court upon the following exceptions: "(1) Because his honor, the presiding judge, erred in charging that a seizure of a mortgaged chattel by the mortgagee for the purpose of a sale, and a sale irregularly made, not in compliance with the statute regulating such sales, as to time, place, and manner, was a mere irregularity, and not a conversion by the mortgagee, and would not entitle the mortgagor to a satisfaction in full of the mortgage debt. (2) Because he erred in charging that if there was an irregularity in the sale the defendant would have a right to sue the plaintiff for any damages caused by that irregularity. (3) Because he erred in charging that the taking of the property and selling it at a place not contemplated by law, or after advertisement not in accordance with the law, would be an irregularity in the sale, which, if pleaded as a counter-claim, might be admissible as a defense for whatever damages defendant had sustained by reason of that irregularity. Whereas it is respectfully submitted that he should have charged the jury that when a mortgagee takes possession of the mortgaged property, and converts it to his own use without a sale, or, when a sale is made, neither in conformity with the statute nor the consent of the mortgagor, it operates as a satisfaction of the mortgage debt," etc.

It was shown that the defendant executed the note sued on; that with his assent it was assigned to the plaintiff, and that the books in his possession were still subject to the mortgage executed by Davis. The defendant failed to show that at the time of the seizure there was any agreement in fact that the books were taken in satisfaction of the debt, and the rights of the parties must be determined by law. It is quite clear that the defendant mortgagor owed the note sued on, and was liable to a personal judgment for any balance that might remain unpaid after properly selling and applying the proceeds of sale of the mortgaged property on the note. If the plaintiff had gone into equity to foreclose his mortgage, the first order would have been to sell the mortgaged property, and, after crediting the proceeds of sale upon the debt, then, second, to give a personal judgment against the debtor for the balance left unpaid. But the plaintiff was not bound to go into equity to foreclose. The subject being personalty, and the condition broken, he had the legal title and the right to take the property into his own possession, and sell it fairly after proper advertisement at public sale, and, crediting the net proceeds of the sale on the debt, to recover judgment against the mortgagor debtor for the balance. Straub v. Screven, 19 S. C. 449; 3 Pom. Eq. Jur. § 1229, where it is said: "Upon a breach of the condition contained in the mortgage, the legal title vests so completely in the mortgagee, that all the rights incident to ownership and possession in law at once arise. By taking possession of the property, and selling

Digitized by Google

it at public sale upon due notice, he will then extinguish every right and interest at law of the mortgagor," etc. This certainly was the general law down to 1882, when the legislature passed the act (18 St. 124) regulating the advertisement and sale of personal property under a chattel mortgage, which provides that the "mortgagee or person holding the instrument * * * shall advertise the time and place of said sale by posting a notice thereof, in writing, at least (15) days before such sale in (3) public places in the county in which such personal property may be found, one of which shall be at the courthouse door, or shall publish the same at least two weeks in a newspaper published in his county, unless the person making such pledge, mortgage, or hypothecation, or his legal representative, shall consent, or shall have consented, to a sale in some other mode or at some other notice, "etc. It is insisted that, the alleged sale of the books not having been made in precise accordance with the act, in that they were not sold in the county of Barnwell, where they were "found," but in the adjoining county of Aiken, it must be considered that the whole proceeding was void. It is not suggested that there was any unfairness in the sale, or any want of full notice both by advertisement in a newspaper and printed hand-bills, or that the property brought less in Aiken than it would have done in Barnwell. But the naked point is made that in law there was no sale at all, and the plaintiffs, having converted the property to their own use without sale, must be held to have incurred the penalty imposed in such case, viz., "satisfaction" of their whole debt, without any reference whatever to the value of the mortgaged property. The circuit judge charged the jury that the seizure of the property under the mortgage for the purpose of a sale, and a sale, was not a conversion to their own use by the plaintiffs which avoided the whole proceeding; that the sale of the property in Aiken instead of Barnwell county was a mere irregularity, and, if the defendant was damaged thereby, he had his recourse by suing the plaintiffs. Was this error? This must depend upon the construction of the act. If it had created a new right, not before allowed by the general law, —as, for example, the right of a mortgagee in a chattel mortgage, after condition broken, to seize and sell the property at public sale, and credit the proceeds upon the mortgage, —and in granting such new right the act had prescribed the forms and terms of the sale provided for, we would have no doubt that all the regulations stated would be regarded as mandatory in character, and, as a consequence, to be strictly pursued, as the condition on which alone the party could entitle himself to the benefit of the act. As, however, the act did not grant a new power, but only imposed certain duties as to an old one, —did not create a right to sell, but only undertook to regulate one already existing,— does it follow that the legislature must have intended that all the regulations declared should be followed at all events, and in exact conformity with the prescribed details, as a condition precedent to the validity of the sale? It will be observed that the act simply prescribes certain regulations as to the sale without negative words, or imposing any penalty for non-compliance. As no injury really resulted from the sale being made at Aiken instead of Barnwell county, we do not see why the plaintiffs should be precluded from recovering the remainder of their debt, after crediting the proceeds of the sale of the mortgaged property. The question is not whether the statutory regulations should be conformed to as law, but whether in character they are so exclusive as that technical non-conformity in a single particular must operate as a discharge of the whole debt. The object being to secure a fair sale and application of the proceeds, it would seem that the error complained of was not of the essence but merely the manner of the thing.

In Monk v. Jenkins, 2 Hill, Eq. 9, Chancellor HARPER said: "Where a statute is passed, authorizing a proceeding which was not allowed by the general law before, and directing a mode in which the act shall be done, here the mode pointed out must be strictly pursued. It is a condition on which alone a party can entitle himself to the benefit of the statute, that its directions shall be strictly complied with; otherwise the proceeding will be void. But when a proceeding is permitted by the general law, and an act of the legislature directs a particular form and manner in which it shall be conducted, then it will depend on the terms of the act itself whether it shall be considered merely directory, subjecting the parties to some disability if it be not complied with, or whether it shall render the proceeding void," etc. In State v. Massey, 2 Hill, (S. C.) 379, it was held that the act of 1799, directing jury-lists to be made out from the tax returns once in every three years, was purely directory to public officers in the discharge of their duty; and if the requirement was disregarded, and the act was nevertheless done, such act was not thereby rendered void. In McNamee v. Huckabee, 20 S. C. 200, it was stated that the act which required the county auditor to put his indorsement upon every deed of real estate before it was recorded was directory merely, and the registry was good without such indorsement. In Darnall v. Darlington, 28 S. C. 256, 5 S. E. Rep. 620, (under this very act of 1882,) the point made here did not arise, for there the mortgagor "consented" that the sale might be made in Savannah, which made long notice unnecessary. It was held that the mortgagee was entitled to recover the deficiency which remained after applying to the debt the proceeds of sale, "especially in the absence of testimony that the sale was not fairly made, and for a good price." The judgment of the court is that the judgment of the circuit court be affirmed.

Digitized by Google

SIMPSON, C. J. I concur in the result, on the ground stated in the separate opinion of Mr. Justice MCIVER.

MCIVER, J. I concur in the conclusion that the judgment of the circuit should be affirmed upon the ground that the defendant having, by his answer, rested his defense of payment upon the ground that the plaintiff had agreed to receive the mortgaged property in satisfaction of the mortgage debt, and having wholly failed to adduce any evidence of any such agreement, judgment necessarily followed in favor of the plaintiff so soon as the mortgage and the debt which it was intended to secure were established, as to which there was no real controversy. It is true that the defendant, in his argument, having made the question whether the mortgage debt had not been extinguished by reason of the sale of the mortgaged property at a different place from that prescribed by statute, the circuit judge proceeded to instruct the jury that this was a mere irregularity, and that such irregular sale would not operate as a conversion of the mortgaged property by the mortgagee to his own use and a consequent extinguishment of the mortgage debt, or a waiver of all claim for any deficiency of the mortgage debt that might be left unpaid by such irregular sale. But that was a point not raised by the pleadings, and could not properly arise in the case thus made. The defense really relied on by the defendant was the second defense set up in the answer; the first defense—the general denial—having been practically abandoned. So that as a matter of fact the only issue raised by the pleadings, and the only issue which the jury were called upon to try, was whether the plaintiff had accepted the mortgaged property under an agreement to receive the same in satisfaction of the mortgage debt. That defense rested solely on an alleged agreement, and the defendant having wholly failed to establish such agreement, or, indeed, to offer any competent evidence tending to establish the same, the plaintiff was, of course, entitled to judgment; and it was not competent for the defendant to insist in argument upon another defense, resting upon a wholly different ground from that of contract, which was pleaded. It is one thing for a mortgagee to agree to receive, and actually receive, the mortgaged property in payment of the mortgage debt, and quite another thing for the mortgagee to waive or destroy his claim for any deficiency by violating the law in the sale of the mortgaged property. One is a defense of payment, resting on contract, upon the principle that anything accepted as payment shall operate as such, while the other rests upon a totally different principle,—a forfeiture consequent upon a violation of law,—and has in it no element of contract whatever. Hence, even if the circuit judge did err in instructing the jury as to a point which could not properly arise under the pleadings, this would constitute no more ground for a new trial than if he had erroneously laid down an abstract principle of law entirely foreign to the issues raised by the pleadings.

I am not, however, prepared to assent to the proposition upon which Mr. Justice MCGOWAN'S opinion rests,—that the failure to advertise and sell the mortgaged property in the manner prescribed by statute was a mere irregularity; but, on the contrary, it seems to me that the true rule was laid down in the *dictum* (for it is conceded to be nothing more than a *dictum*) in Darnall v. Darlington, 28 S. C. 258, 5 S. E. Rep. 621, which may be more correctly stated as follows: Where a mortgagee of personal property takes possession thereof, and converts it to his own use, without a sale, or where a sale is made neither in accordance with the terms of the statute nor in accordance with the wishes and consent of the mortgagor expressed in writing, he thereby waives all claim for any deficiency, and can maintain no personal action against the mortgagor based upon the mortgage debt. This view is not only supported by authority, (Jones, Chat. Mortg. § 711,) but is founded in good reason. The power with which a mortgage creditor is invested to seize and sell the property of his debtor without the aid of judicial process, and before the validity and amount of his debt have been judicially ascertained, is a very high power, and should be strictly guarded against abuse. Accordingly the legislature has, very properly, by the act of 1882, (18 St. 124, amending section 2348, Gen. St.,) undertaken to declare how this high power shall be exercised, and I do not see by what authority this court can undertake to dispense with any of the safeguards which the legislature has seen fit to throw around persons exposed to the exercise of such power. True, it may be said that after condition broken the mortgagee of personal property is the absolute owner of such property, and therefore when he seizes and sells it he is selling his own, and not the property of another; but, while it may be true that the mortgagee has the absolute legal title, yet it is well settled that he does not hold the property as his own, but subject to the mortgagor's right to redeem before sale, and even after sale, subject to the mortgagor's right to demand an accounting for the proceeds of sale. So that in fact the mortgagee is not the real owner of the property absolutely in such a sense as to enable him to use it as his own. And if he undertakes to convert it to his own use he is still liable to account to the mortgagor for any excess in its value over and above the mortgage debt, and, if such value is less than the mortgage debt, he forfeits or waives all claims against the mortgagor for any deficiency by reason of his illegal conduct in dealing with property intrusted to him for a specific purpose, and to be dealt with in the manner prescribed by law. So, if the mortgagee undertakes to sell in any other way than that prescribed, he thereby converts the property to his own use, and the same consequences fol-

Digitized by Google

low. It does not seem to me that the cases cited in the opinion above referred to are sufficient to sustain the view there taken. The first case was Monk v. Jenkins, 2 Hill, Eq. 9, in which the plaintiff, as administrator of Judy, a woman of color, filed a bill against the executors of her former master for the delivery of certain property alleged to have been given her by the will of her former master, under the allegation that she had been duly emancipated on the 14th of April, 1806, by a deed of manumission. The defendants set up two defenses: (1) That no such deed as was required by the act of 1800 had ever been executed; (2) that the alleged deed had never been recorded within the prescribed time. The circuit chancellor dismissed the bill for want of jurisdiction, as the proper remedy was at law; but he also overruled both defenses. Notwithstanding this, the defendants appealed from so much of the decision as overruled their pleas; and made the further ground that the plaintiff, or rather his intestate, had no civil *status*, having never been legally emancipated, and hence the bill could not be maintained. Inasmuch as the bill had been dismissed, and there was no appeal therefrom by the plaintiff, it is somewhat difficult to understand how the appellants could have any standing in the court of appeals. Nevertheless that court did entertain the appeal, and Chancellor HARPER, after sustaining the decision below overruling the two defenses set up in the answer, proceeds to consider the question whether Judy had been legally emancipated, (a question which, so far as I can perceive, was not considered below,) and reaches the conclusion that neither the former master of Judy nor his executors could dispute the validity of her emancipation, even if there had been no deed, because it appeared that she had been in the uninterrupted enjoyment of freedom from the date of the deed to the time of her death, and was recognized as a free person by the will of her former master. It is quite clear, therefore, that anything said in the opinion as to the validity of the mode of emancipation was a mere *dictum*. The learned chancellor, however, did proceed to consider the question whether the failure to observe all of the requirements of the act of 1800 would invalidate the emancipation, and, as even *dicta* from such an eminent jurist are entitled to the highest respect, I will proceed to consider whether that which he said is applicable to the present case. After laying down the general rule as quoted in the opinion of Mr. Justice MCGOWAN, he proceeds to consider the terms of the act of 1800, in which he finds "a plain recognition by the act itself that slaves may be emancipated or set free, otherwise than according to its direction," and hence he reaches the conclusion that, even if all the terms of that act had not been complied with, the emancipation might still be valid, inasmuch as prior to that act a slave might be emancipated in any manner by which the master might signify his intention to do so; so that, even if that decision be regarded as something more than a mere *dictum*, and even as absolute authority, it seems to me that it is not applicable to the present question. The act of 1882 contains no plain recognition of the legality of sales made otherwise than as therein prescribed. On the contrary, the only departure from the mode there prescribed which is recognized by the act is where the mortgagor consents in writing that some other mode may be pursued. The other case, of State v. Massey, 2 Hill, (S. C.) 379, as it seems to me, has still less application. In that case it was held that the failure to comply with the provisions of the act of 1799, requiring a new jury-list to be prepared every three years, did not vitiate the array, because, as was said by O'NEALL, J., in delivering the opinion: "This is purely directory to public officers in the discharge of their duty. * * * It was not intended to secure any right, benefit, or privilege to the defendant. It was merely to regulate the drawing of the jury in such a way as to divide the duty of serving upon the jury among the inhabitants of a district." Surely no such remarks as these would be applicable to the provisions of the act of 1882.

(83 Ga. 83)

CENTRAL RAILROAD & BANKING CO. v. KITCHENS.

(*Supreme Court of Georgia.* May 22, 1889.)

NEGLIGENCE—PLEADING—AMENDMENT—DECLARATIONS.

1. Homicide being alleged, the mode of committing it may be particularly specified by amendment, without adding a new cause of action.
2. Though declarations be no part of the *res gestæ*, their admission in evidence, unless objected to on the proper ground, is no cause for a new trial.
3. A rule of a railroad company, applicable alike to all persons of a given class, is not to be evaded by the failure of one person of the class to observe the rule, when another person of the same class is injured thereby.
4. Negligence is a question for the jury.
5. An employé of a railway company being himself at fault, and thus contributing to his death, his widow cannot recover.

(*Syllabus by the Court.*)

Error from city court of Macon; HARRIS, Judge.

R. F. Lyon, for plaintiff in error. *M. G. Bayne*, for defendant in error.

BLECKLEY, C. J. The declaration alleged that the company had injured and damaged the plaintiff in the sum of $25,000, for that on the ——— day of May, 1888, by the careless running of its cars, the company ran over, mutilated, and killed her husband, Abe Kitchens, without any carelessness or fault upon his part, but entirely by the negligence of the agents of said company in running the cars thereof; whereby she was injured and damaged, etc. The company demurred to the declaration, on the ground that it set forth no sufficient cause of action, there being no specific or particular act of negligence alleged. The demurrer was overruled, and the plaintiff was allowed to amend her decla-

Digitized by Google

ration, to the effect that her husband was an employé of the company, and was under a car at work in the line of his duty, in pursuance of an order of Tom Troutman, who was his superior, and while doing said work a switch-engine struck back against a large number of cars, including the one he was under, and without any fault on his part he was run over, and so injured that he died. This amendment was objected to, on the ground that there was nothing to amend by, and that the amendment made a new cause of action. The case was tried, and, a motion for nonsuit being overruled, there was a verdict for the plaintiff. The company made a motion for a new trial on the general grounds, and on several special grounds, one of which was that certain declarations of the deceased were admitted in evidence; another that the court erred in charging that it was the duty of Troutman to put up the danger signal for the protection of Kitchens as well as himself, and Troutman failed to do it, and if Kitchens relied upon this, and it was not done, then the jury might be justified in finding negligence on Troutman's part, and none on the part of Kitchens, and that they might then find a verdict for the plaintiff; adding that all this depends, however, upon whether there was fault or negligence in Kitchens, the jury being the exclusive judges of the negligence. The overruling of the demurrer to the declaration and of the objection to the amendment and the denial of the motion to nonsuit were excepted to, as was the refusal to grant a new trial.

1. The declaration, though it might have been too general, embraced a cause of action, and was amendable. The amendment introduced no new cause of action, but only explained more specifically and with greater particularity that which the original declaration comprehended. The cause of action was the homicide of the plaintiff's husband, and the amendment served to describe more minutely than did the original declaration the mode in which the homicide was committed. Harris v. Railroad Co., 78 Ga. 525, 3 S. E. Rep. 355.

2. We think the record indicates that the sayings of the plaintiff's husband were not a part of the *res gestæ*, and, had they been objected to on the proper grounds, they should have been excluded. Railroad Co. v. Holland, post, ——, (last term.) But there is no statement in the record that they were objected to at all, and consequently we cannot hold that there was any error in admitting them.

3. The charge as to putting up the danger signal was error, the evidence being that the rule of the company as to that duty applied no less to the deceased than to Troutman. It was no excuse on the part of the deceased that Troutman failed to obey a rule which was applicable equally to both persons concerned in the violation of the rule. Railroad Co. v. McDade, 59 Ga. 73.

4. Of course, there was no error in referring the question of negligence to the jury after the motion to nonsuit was overruled. See Georgia Reports, *passim*. If the case were trimmed down to the legal evidence only, very likely a nonsuit might have been granted.

5. The verdict was clearly contrary to law and evidence, inasmuch as the homicide resulted from the failure of the plaintiff's husband to observe a rule of the road requiring him to display a signal when at work under a car. According to the evidence, if this signal had been put out, there is every probability that the calamity would not have happened. Employés cannot be permitted to violate the rules of the service in which they are engaged, and thereby create a cause of action in favor of themselves or their widows. Indirect suicide gives no title to *post mortem* reward. The court erred in not granting a new trial. Judgment reversed.

(82 Ga. 563)

KINE *v.* BECKER *et al.*

(*Supreme Court of Georgia.* April 8, 1889.)

CHARITIES—DEVISE.

Under Code Ga. § 2419, enacting that no person leaving a child shall devise more than one-third of his or her estate to any charitable institution to the exclusion of such child, and unless a will containing such devise is executed at least 90 days before testator's death the devise shall be void, a devise is "to the exclusion of such child" if it vests the child with an estate for life, remainder to her issue, if any, in fee, and in default thereof in trust for a charitable purpose, and is therefore invalid.

Error from superior court, Chatham county; ADAMS, Judge.

This suit involved the construction and validity of a clause in the will of Ellen Kine, deceased, reading as follows: "(2) I give, devise, and bequeath unto my beloved daughter Mary Elizabeth Kine all my undivided half interest in the real and personal property of the estate of my late husband, Wm. Kine, and all other property owned, (except lot 21, Currietown ward, and improvements, city of Savannah,) for and during the term of her natural life; and should my said daughter marry, and have issue or children at her death, then in fee-simple to said children; or, if she should die leaving no children, then to whosoever may be the Roman Catholic Bishop of Savannah, in trust for the erection of a Roman Catholic hospital in the city of Savannah, and for no other use or purpose whatsoever." It was contended on behalf of said daughter that the provision was void under Code Ga. § 2419. The court held it valid, and said daughter brings error.

J. R. Saussy, for plaintiff in error. *Garrard & Meldrim* and *R. R. Richards*, for defendants in error.

SIMMONS, J. The facts of this case will be found in the official report. The only question for us to decide is whether that portion of the second item of Ellen Kine's will, giving her property to the Roman Catholic

Digitized by Google

Bishop of Savannah in case of her daughter's death without issue or children, is void, under section 2419 of the Code. That section provides that "no person leaving a * * * child, or descendants of child, shall, by will, devise more than one-third of his estate to any charitable, religious, educational, or civil institution, to the exclusion of such * * * child; and in all cases the will containing such devise shall be executed at least ninety days before the death of the testator, or such devise shall be void." This will was made in less than 90 days before the death of the testatrix. The daughter was a single woman at the death of the mother. The question is, was she excluded from this property by the terms of this item of the will? It was argued by counsel for the defendants in error that she was not excluded, because the will gave her a life-estate in the property, remainder over to her children if she had any, and, if she should die leaving no children, then to the church. It was argued that this was not an exclusion of the daughter from the enjoyment of the property, but simply a restriction of the title. We cannot bring our minds to this conclusion. Under the law of Georgia, if Ellen Kine, the testatrix, had died intestate, her daughter Mary would have been entitled to an absolute or fee-simple estate in this property. "An absolute or fee-simple estate is one in which the owner is entitled to the entire property, with the unconditional power of disposition during his life, and descending to his heirs or legal representatives at his death intestate." Code, § 2246. This will, therefore, deprives her of a fee-simple estate in this property, and gives her only a life-estate therein. She is deprived of or excluded from one of the main ingredients in the ownership of property,—the absolute title thereof. She is excluded from another right, and that is the power of disposition. Under this will she can only enjoy the income of the property for and during her life. She has no right to the ownership of it, except for her life, nor to dispose of it, except her life-estate in it. A bill having been filed for partition by the other tenant in common, and the property having been sold and converted into money under the decree of the court, it is doubtful whether she would be entitled even to the possession of the money now in the hands of the court. The court could require her to give a bond for its forthcoming at the time of her death, or could order it to be invested in real property if it should think proper to do so; and if the court should pass such an order, either requiring her to give bond or requiring the money to be invested in realty, she would only be entitled to the income. The mother having died leaving a child, and having made this will within 90 days before her death bequeathing this property to a charity in the event of her daughter's death without issue or children, to the exclusion of the daughter, we think that part of the will is void, under section 2419 of the Code. Judgment reversed.

(82 Ga. 723)

TAYLOR *et al.* v. STREET.

(*Supreme Court of Georgia.* May 13, 1889.)

ESTOPPEL—BONA FIDE PURCHASER.

As against a *bona fide* purchaser without notice, the heirs of a grantor who himself caused his deed to defendant's vendor to be recorded are estopped to deny that such deed was ever delivered.

Error from superior court, Dade county; FAIN, Judge.

In the declaration a demise was laid in name of E. T. Rogers, survivor of Rogers & Taylor, a firm composed of E. T. Rogers and C. C. R. Taylor. Plaintiff Mrs. McCord was formerly wife of C. C. R. Taylor, and plaintiff Willie Taylor is their child, and is about 22 years old. They are his only heirs. He died in February, 1873. On February 10, 1871, Mary McGlohorn and her husband, Tandy McGlohorn, conveyed the property in dispute to Rogers & Taylor in consideration of $5,000. On same day a deed was made by Rogers & Taylor to R. L. Taylor in consideration of $5,000. Both deeds were recorded May 11, 1871. On December 13, 1882, Reuben L. Taylor conveyed to the defendant, consideration $2,500; and the deed was recorded January 30, 1883. In 1872 Mrs. McCord applied for and had set apart a homestead of $2,000, in lands of C. C. R. Taylor. The premises in dispute were not described in her petition. The plaintiffs did not give in the premises for taxes in 1871, 1872, or 1873. The plaintiffs introduced testimony to show that the deed to R. L. Taylor was never delivered to him, and that it had been made to secure a contemplated indebtedness to R. L. Taylor. A witness testified that he drew this deed and a deed from the McGlohorns at the same time; the former was executed first; that they were handed to C. C. R. Taylor, who gave them to another person; and asked him to get the McGlohorn deed executed. Some time afterwards this was done. Taylor, before the deeds were made, talked with witness about having land conveyed to his father, whom he wished to be his security to enable him to buy more goods. That C. C. R. Taylor showed him the deeds shortly before his death, to ascertain if they were all right. Mrs. McCord testified that four days after the death of her husband Dr. Brock asked her for the valise containing the McGlohorn deeds. He took them and said: "These are your McGlohorn deeds. I give them to your pa Taylor, who will give them to you at the proper time." That R. L. Taylor (who was present) repeated the promise and took the papers away. The papers had been in that valise a year or more, where her husband had kept them. When he wanted it she would get it and give it to him. In part she was corroborated by her father. A witness testified that C. C. R. Taylor put him in possession of the land in the fall of 1871, as tenant; that he remained in possession two years, and paid rent to C. C. R. Taylor, whom he recognized as landlord. After his death, R. L. Taylor claimed the land. Before the death of C. C. R. Taylor, he told witness that his

Digitized by Google

father had a deed to the land, and that he (C. C. R.) had it secured so he could sell it, and use the proceeds. In the fall of 1873 witness gave possession to R. L. Taylor.

The evidence for the defendant tended to show that he bought the land from R. L. Taylor, without notice of adverse claim; that defendant had improved it; that R. L. Taylor made large advances to the firm of Rogers & Taylor, and took the deed of C. C. R. Taylor in payment therefor, and after his death settled the firm business with Rogers. R. L. Taylor testified that he had his deed to the land some months before the death of C. C. R. Taylor. He denied Mrs. McCord's testimony about getting the deeds out of the valise. The jury found for the defendant, and plaintiff moved for a new trial on the following grounds: (1) The verdict was contrary to the law and the evidence. (2) Because the court charged as follows: "If C. C. R. Taylor and Rogers, on 10th of February, the day they received a deed, made a deed to R. L. Taylor to this land, and kept it for a time in their possession, it is made by them jointly, and Taylor pays a consideration to them for that deed, valuable consideration for the land, and C. C R. Taylor takes a deed as the vendor, and has it recorded, and thereafter R. L. Taylor, the father, takes possession of that land, and gets possession of that deed, and holds possession of that deed and the land, and the deed is on record made to him, and Street after that buys the land in good faith, with the deed on record, R. L. Taylor being in possession at the time he sells to Street, whether he pays a valuable consideration or not, if these parties, Rogers & Taylor, have done that, and R. L. Taylor then sells to Street, and Street has no notice whatever that the deed was not actually delivered by Rogers & Taylor or by Taylor, he would be an innocent purchaser, and would have a good title." Error because there was evidence that the deed from Rogers & Taylor to R. L. Taylor was never in fact delivered to R. L. Taylor, but was in possession of C. C. R. Taylor at time of his death, and was taken possession of by R. L. Taylor or obtained from C. C. R. Taylor's widow, and therefore R. L. Taylor never had legal title, and could convey none. (3) Because the court charged: "If there was no delivery by C. C. R. Taylor to his father, but R. L. Taylor got hold of that deed and held it, and put it upon record, and had possession of the land, and Street bought it without notice, if he bought it with notice the other would make it good, but if he bought it without notice, and bought in good faith, and paid a valuable consideration, then he would have a good title." Error specified same as in preceding ground. (4) After charging that if there was no delivery of the deed to R. L. Taylor, and Street had notice of that fact, he would not be an innocent purchaser, and would not have a good title against plaintiffs, who stand with the rights of C. C. R. Taylor, if any, the court charged: "While this may be the case, if a purchaser comes along and purchases from the vendee, and the deed is on record, and the land in possession of this vendee, (its being on record being *prima facie* evidence,) and he pays a valuable consideration for the property, then C. C. R. Taylor would be estopped from denying the title of M. Street, because he then placed the property in a condition where a wrong might be perpetrated upon a third party,—might be perpetrated upon Street; and if there is a deed upon record, placed there by the vendee as stated, and the vendee has been placed in possession, and Street comes along without any notice whatever, and pays a valuable consideration for the land, then he would get a good title, and his heirs would be estopped." This was alleged as error because, under the evidence for the plaintiffs, the makers of the deed never placed it in the power of R. L. Taylor to convey the land; and this charge withdrew from the jury all evidence of the non-delivery of the deed from Rogers & Taylor to R. L. Taylor and compelled the verdict found. The motion was overruled, and plaintiffs excepted.

Graham & Graham, for plaintiffs in error. *R. J. McCamy* and *Lumpkin & Brock*, for defendant in error.

SIMMONS, J. Emma McCord and Willie Taylor, as heirs at law of C. C. R. Taylor, brought ejectment against Street for a certain tract of land. The evidence will be found in the official report. On the trial of the case, under the evidence and charge of the court, the jury returned a verdict for the defendant. A motion was made for a new trial, based principally upon alleged errors in the charge of the court to the jury, which motion was overruled by the court, and the plaintiffs excepted. Whatever error may have been committed by the court in the charge to the jury, we think the verdict was right, and should not be set aside. The evidence shows that C. C. R. Taylor, under whom the plaintiffs claim, sold this land to his father, and made and executed a deed therefor to his father; and that Taylor, the son, had the same recorded in the clerk's office according to law. The son lived several years after this deed was recorded. After his death the father went into possession of the land, occupied it, and exercised acts of ownership over it for years, when he sold it to Street, the defendant. Street purchased without notice of any claim of the plaintiffs to the land. If C. C. R. Taylor, under whom these plaintiffs claim, were alive, and had brought this suit, under the facts of this case he would be estopped from setting up title to this land. These plaintiffs, claiming under him, are likewise estopped. Whether the deed was ever actually delivered or not, the plaintiffs' intestate had it placed upon record, thereby giving notice to the world that the title passed out of him into his father. Street seeing this record, and the father in possession, purchased the land without no-

Digitized by Google

tice, and in good faith, and it would be wrong to allow him, under these circumstances, to be ejected from the land by the heirs at law of C. C. R. Taylor; Taylor having put it in the power of his father to sell the land to an innocent purchaser. Judgment affirmed.

(83 Ga. 311)

HAMBY MOUNTAIN GOLD MINES, Limited, v. CALHOUN LAND & MIN. CO.

(*Supreme Court of Georgia.* May 13, 1889.)

PARTITION—ABATEMENT—PARTIES.

1. After filing their petition in a suit for partition, plaintiffs disposed of all their interest in the property, and thereafter procured an order for service of process on non-resident defendants. *Held*, that such order and service were valid, and that the original plaintiffs' purchaser was properly made a party plaintiff, and the cause allowed to proceed.

2. The deed under which plaintiffs claimed was made in 1830, and included two persons as co-grantees who were not made parties to the suit for partition. The evidence showed that the original plaintiffs had claimed all of the land, except defendants' interest, for over 30 years, and during all that time had received the rents and profits, and had never seen or heard anything of the two grantees mentioned. *Held*, that the trial court was justified in finding an actual ouster as against such grantees, and in decreeing partition between the parties.

Error from superior court, White county; WELLBORNE, Judge.

The pleadings and proceedings preliminary to the trial are sufficiently reported in the opinion. Counsel for petitioners introduced the following deeds: (1) A deed to the entire property from William Hunt to Henry Branham, John G. Lumsden, and Charles P. Gordon, in trust for themselves and for John Hudson, L. W. Hudson, Thomas Hoxie, Thomas Hardeman, and John H. Gordon, dated May 17, 1830. This deed recited receipt of the consideration named therein from Branham, Lumsden, and Charles P. Gordon, and conveyed the property to them, their heirs and assigns. The *habendum* is unto them, their heirs and assigns, in trust for themselves and the other parties named, "agreeable to an article of agreement between them." (2) A deed conveying one-eleventh part of the property, stated in the deed to be the entire interest of the grantor, by John W. Hudson to John G. Lumsden, dated August 19, 1830. (3) A deed conveying "his entire interest, being one share and a half," in the property, from Thomas Hardeman to John G. Lumsden, dated September 4, 1841. (4) A deed conveying all his interest, "consisting of one-tenth part" of the property, from Thomas Hoxie to John G. Lumsden, dated October 30, 1841. (5) A deed conveying all his undivided interest, "consisting of one-tenth" of the property, from James Merriwether to John G. Lumsden, dated October 1, 1841. (6) A deed from Thomas R. Lumsden and others, the heirs at law of John G. Lumsden, deceased, to Jesse R. Lumsden, conveying all of their interest in the property, described as six undivided eighths, but warranting the title only as to five-eighths, dated February 16, 1888. (7) A deed conveying six undivided eighths from Jesse R. Lumsden to Andrew Simonds, but warranting only as to five-eighths, dated February 20, 1888. (8) A deed from Simonds and others, who, it is recited, contributed equally to the purchase money for the last-mentioned deed, to the Calhoun Land & Mining Company, conveying six undivided eighths, but warranting only against themselves and heirs, dated June 1, 1888. Counsel for petitioners also introduced Jesse R. Lumsden, who testified that for 10 years he had been in charge of the interest of the heirs of John G. Lumsden in the property. They had claimed to own six-eighths all the time. Witness had never heard of anybody claiming an interest in the property before or after he had charge of it, except Lumsden's heirs and Charles P. and James H. Gordon, and their heirs; the Hamby Company now owning the J. H. Gordon interest. No one else had anything to do with the land, or claimed any interest in it, save these parties. Had never heard of any heirs of L. W. Hudson or Henry Branham ever coming to claim any interest. The property has been leased from time to time, though not continuously, and the rent-gold not paid to the two Gordons, or their heirs or representatives, was paid to witness, as the agent for the Lumsden heirs. There was a cabin built on the land in 1876, and it has been on it ever since, though not continuously occupied. The Lumsdens claim their title to six-eighths to be perfect by their deeds, and by prescription. The Narchoochee Company paid witness five-eighths of the toll-gold as agent for the Lumsden heirs while they worked the property. Said heirs had claimed six-eighths interest for 30 years. They claimed to have had deeds to more than these deeds cover, but that they were lost in a fire. Witness has examined the records, and finds only the deeds here shown. They claim that the Merriwether deed covers the L. W. Hudson interest. The property is a gold mine, and cannot be divided. At the close of this evidence the defendant corporation insisted on its objections made, and urged that the evidence failed to show title in petitioners to as much as they claimed, but showed that Henry Branham and L. W. Hudson each owned an one-eighth interest, and they and their heirs or representatives should be notified of the proceedings before an order appointing commissioners to make sale should be granted. The court overruled said objections, and appointed commissioners to make sale of the property at a certain time after advertisement, requiring them to make return of actions to next term of court. To this order the defendant corporation excepted.

W. K. Williams and *Perry & Dean*, for plaintiff in error. *J. J. Kinsey*, for defendant in error.

SIMMONS, J. Thomas R. Lumsden and others, heirs at law of John G. Lumsden, deceased,

Digitized by Google

filed a petition for partition in the superior court of White county against the Hamby Mountain Gold Mines, Limited, *et al.* The petition set forth that they, as heirs at law of John G. Lumsden, owned six undivided eighths of the property in question; that the Hamby Mountain Gold Mines, Limited, a corporation, owned an eighth, and that Charles P. Gordon owned the remaining eighth; that the tract, being valuable as a gold mine, could not be divided equally,—and prayed the appointment of commissioners by the court, and an order authorizing said commissioners to sell the same. Service was made upon the Hamby Mountain Gold Mines, Limited, and upon the heirs at law of Charles P. Gordon. The Hamby Mountain Gold Mines, Limited, was the only one of the defendants who appeared. This corporation appeared and objected to the partition and order applied for, on the ground that the petitioners had no title to the premises sought to be partitioned, and because Henry Branham and L. W. Hudson were co-tenants and part owners of the property, and were necessary parties to the proceedings, and that they had not been notified of the application, or made parties thereto. Counsel for the corporation then proposed to show that in February, 1888, and before the order was passed to perfect service on the non-resident heirs of Charles P. Gordon, the petitioners had ceased to have any interest in the premises sought to be partitioned, having on the 16th of February, 1888, conveyed all their title to one Jesse R. Lumsden, who was not a party to the proceedings, and insisted that, therefore, the present application could not be entertained. Counsel for the petitioners admitted that they had conveyed their interest to other parties, and that the Calhoun Land & Mining Company had become the purchaser and was now the owner thereof, and moved that said company be made a party plaintiff, and the cause proceed, said company consenting thereto in open court. Counsel for the defendant corporation objected to this motion, on the ground that it would be adding a new and distinct plaintiff, and objected to the court taking action on the application, even with such party added, on the ground that the order to serve and the service of the notice on some of the cotenants, especially the non-resident defendants, had been in the name of the original petitioners, after they had ceased to have any title in the premises or right to partition, and were therefore invalid, and that an order to sell and a sale based on such notices would be invalid, and not binding on such defendants as did not appear, and insisted that the present application should be dismissed. The court overruled these objections, and refused to dismiss the application, and passed an order directing that the said Calhoun Land & Mining Company, it having become the purchaser of the petitioners' interest *pendente lite*, be made a party plaintiff, and that the cause proceed. The Hamby Mountain Gold Mines, Limited, excepted to the decision of the court refusing to dismiss the application, and assigned the same as error. It also excepted to the order of the court making the Calhoun Land & Mining Company a party plaintiff, and assigned the same as error It also excepted to the action of the court in proceeding with the cause after it appeared that the proceeding aforesaid to make the non-resident defendants parties, the service upon them, and the notice upon the other defendants, had been made in the name of the original petitioners after they had parted with their title; which action it assigned as error, and says the court should have quashed the present application, and directed service upon the co-tenants in the name of the Calhoun Land & Mining Company. before proceeding to order a sale of the property, or to hear the case. The said defendant also objected to the court's proceeding to grant the order to appoint commissioners to sell the property, on the ground that if the petitioners or their successor, the Calhoun Land & Mining Company, owned any interest in the same, it did not own six-eighths, as alleged in the petition; and on the ground that Henry Branham and L. W Hudson were each the owner of an undivided eighth of the property, and were necessary parties to the proceedings, but had not been served with notice of the application, or in any way made parties to the proceedings. Counsel for the petitioners admitted that no notice had been served on or given these persons, and no effort had been made to ascertain there whereabouts, or whether they were dead or alive. They denied that Branham and Hudson owned an interest in the mine, and claimed that they owned six undivided eighths of the property, and recognized no other owner except the heirs of Charles P. Gordon and the Hamby Mountain Gold Mines, Limited, who each owned an eighth; thus making up the entire eight-eighths of the property.

The trial proceeded before the court without the intervention of a jury. The petitioners introduced several deeds, which will be found in the official report, as evidence of their title. They also introduced Thomas R. Lumsden as a witness, who testified that for the past 10 years he had had charge of the interest of the Lumsden heirs in this property; that these heirs had claimed to own six-eighths of the property all the time; that he had never heard of any one claiming any interest in the property before or after he had had charge of it, except the Lumsden heirs and the two Gordons, C. P. and J. H., and their heirs; that the Hamby Mountain Gold Mines, Limited, now owns the J. H. Gordon interest; that no one else had anything to do with the land, or claimed any interest in it, except these parties, that he had never heard of any heirs of L. W. Hudson or Henry Branham ever coming to claim any interest in it; that it has been leased from time to time, but not continuously, and the rent-gold not paid to the two Gordons, or

Digitized by Google

their heirs or representatives, was paid to him as the agent for the Lumsden heirs; that there was a cabin built on the land in 1876, which has been on it ever since, though not continuously occupied; that the Narchoochee Company paid him, as agent for the Lumsden heirs, five-eighths of the toll-gold while they worked the property, (but at what time the Narchoochee Company worked the mine the record does not disclose;) that the Lumsden heirs had claimed a six-eighths interest for over 30 years; that they claim to have had deeds to more than the deeds in evidence call for. At the close of the evidence, counsel for the Hamby Mountain Gold Mines, Limited, still insisted on his objections that the evidence failed to show title in the plaintiff to as much as they claimed, but showed that Henry Branham and L. W. Hudson each owned an eighth interest, and that they or their heirs at law should be notified and made parties before the order appointing commissioners to make a sale of the premises was passed. The court, on motion of the plaintiff's counsel, over the objection made by the defendant's counsel, passed an order directing a sale of the property by the commissioners therein named. To this order the Hamby Mountain Gold Mines, Limited, excepted, and says it was error, because some of the defendants had been made parties, and notice given them by the original petitioners, after they had parted with all their title to the property, and because the evidence showed that Branham and Hudson were co-tenants in the property, and had not been made parties.

1. We do not think the court erred in refusing to dismiss the application after it appeared that the original petitioners had sold their interest to the Calhoun Land & Mining Company, or that he erred in allowing said Calhoun Land & Mining Company to be made a party plaintiff in the petition for partition. It does not appear that when the Calhoun Land & Mining Company was made a party the original petitioners were dismissed from said application. The object of the petition was to procure a partition of the mine, and when the original petitioners sold their interest to the Calhoun Company pending the application for partition it did not, in our opinion, vacate the proceedings. In the case of Griffin v. Griffin, 33 Ga. 107, this court, in speaking of the statute for partition which is now embraced in the Code, § 3996 et seq., said: "The proceedings under that act for partition of lands are in the nature of a proceeding at equity, in which the court has all the power and jurisdiction for hearing and determining the various matters in dispute between the parties, in respect to their respective titles, and awarding a partition, according as he shall find the parties entitled, as fully and completely as if it were a bill of chancery for that purpose." This, therefore, being a proceeding in the nature of a bill in equity, we see no reason why parties plaintiff, as well as parties defendant, may not be added as often as necessary for a proper adjudication of the titles to the land. Nor would the service made on some of the defendants after the original petitioners had sold their interest, and before the purchaser had been made a party, be illegal and void, as contended for by counsel for the plaintiff in error. We therefore hold that the court did not err in refusing to dismiss the application upon this state of facts, or in allowing the Calhoun Land & Mining Company to be made a party plaintiff.

2. It is insisted by counsel for the plaintiff in error that the court erred in ordering the sale of this land, when it appeared from the evidence that Hudson and Branham owned an interest therein, and had not been made parties. This objection is based upon the deed of William Hunt, dated May 17, 1830. It appears that at that date William Hunt sold the land on which this mine is situated to Henry Branham, John G. Lumsden, Charles P. Gordon, John Hudson, L. W. Hudson, Thomas Hoxie, Thomas Hardeman, and James H. Gordon. The petitioners showed no paper title from L. W. Hudson or Henry Branham, and counsel for the plaintiff in error alleged that, as the deed from Hunt showed them to be the owners of two-eighths interest, they or their heirs still own said interest, and they were necessary parties. Counsel for the defendants in error replied that it was true that the deed from Hunt, in 1830, did show that Hudson and Branham were two of the original grantees. But he claimed that the evidence showed that these persons had not been heard of for a long number of years; that the original petitioners had claimed six-eighths interest in this land for more than 30 years; that they had exercised unequivocal acts of ownership over the same for a long number of years; that they had rented the same, and had received six-eighths of the profits thereof, for 30 years, except the short time it was rented to the Narchoochee Mining Company, and that it paid them for only five-eighths, (what time this was done the record does not disclose;) that they had built a house on the land, which had been occupied by their tenants since 1876, but not continuously; that neither Branham nor Hudson, nor their heirs at law, had ever made any demand on them for any of the profits or rents arising from the land or from the mine; and that after this length of time, and these unequivocal acts of ownership, and this long claim of the six-eighths interest by the Lumsden heirs, the court, acting as a jury, had a right to presume an actual ouster as against Branham and Hudson; and that the court, acting as a jury, having so found, this court should not interfere with said finding by granting a new trial. Under the evidence in the case, and considering the parties thereto, we are not disposed to interfere with the finding of the judge. As far as this record discloses, Hudson and Branham have never been heard from, from the time this deed was made, in 1830, up to the present

Digitized by Google

time. The deed from Hunt recites that they resided in the county of Putnam, which is about 125 or 150 miles from where the mine is located. From the price paid Hunt for this mine and land, the mine must have been considered valuable, even as early as 1830. Persons who are acquainted with the history of those times, from 1830 up to the present, will remember that at intervals there was considerable excitement over the gold mines in this section of the state. It seems to us that, if Branham or Hudson had had an interest in this mine, either they or their heirs at law would have made some claim therefor in the long period of 58 years. During all that time no notice of any interest or claim of interest has ever been made by them or their heirs at law, they having given no notice of any claim during that period, and, it not appearing now, we think the evidence was sufficient to authorize the finding of the judge as between the parties to the action. As for myself, I am inclined to think, under the facts of the case, that the judge, acting as a jury, had a right to presume that an actual ouster had taken place on the part of the Lumsden heirs against Hudson and Branham. Fishar v. Prosser, Cowp. 217, 1 Amer. & Eng. Cyclop. Law, 233, and authorities cited; Freem. Co-Tenancy, §§ 241, 242; Jackson v. Whitbeck, 6 Cow. 633; Frederick v. Gray, 10 Serg. & R. 182; Mehaffy v. Dobbs, 9 Watts, 377. Judgment affirmed.

(83 Ga. 38)

REID *et al.* v. WRIGHT, Comptroller General.

(*Supreme Court of Georgia.* April 10, 1889.)

TAX COLLECTORS—EXECUTION.

1. Under Code Ga. § 909, providing that, "if any [tax] collector shall fail to settle his accounts with the comptroller general in the terms of the law, he shall issue execution against him and his sureties for the principal amount, with the penalty and costs" such execution may be issued against a defaulting collector for the amount of taxes collected by him after they had been credited to the collector as insolvent.

2. Under Code Ga. § 884, providing that, when an officer collects money on any process issued by the comptroller general, "he shall without delay remit the same to him by some safe and speedy method," and under section 912, providing that executions issued against defaulting tax collectors shall not be suspended or delayed by any judicial interference, a sheriff who collects money on executions issued by the comptroller general against a defaulting tax collector must pay it to the comptroller directly, and has no right to retain it until claims of third persons thereto can be passed upon by a court. The courts have no authority over the comptroller's judgment.

Error from superior court, Fulton county; MARSHALL J. CLARKE, Judge.

Wright, comptroller general, by petition to the superior court of Fulton county, alleged that the sheriff of said county had in his possession $5,255.64, proceeds of the sale of property of J. M. Wilson, late tax collector of that county, under a *fi. fa.* issued by the comptroller against Wilson and the sureties on his bond for taxes due the state for 1886, $5,790.36; also a *fi. fa.* against Wilson and the sureties on his bond for taxes due the state for 1887, $4,384.99; also a *fi. fa.* against Wilson and the sureties on his bond for taxes due the state for 1888, $10,860.10. That the sheriff had in his hands the further sum of $1,250 paid him by McCool, one of the sureties, and that petitioner had demanded the $5,255.64 and the $1,250 from the sheriff, and instructed him to credit the same on *fi. fa.* in his hands in favor of the state, and pay out the money as provided by law, which the sheriff refused to do. Petitioner prays for a rule *nisi* against the sheriff, calling on him to show cause why he should not so pay out the money, etc. The sheriff answered, in substance, that the comptroller placed in his hands a *fi. fa.* in favor of the state against Wilson, principal, and Wells, A. H. Wilson, McCord, Longino, Martin, Harville, Bonnell, and S. A. Wilson, for $10,860.10, with 20 per cent. per annum on the principal sum from October 23, 1888, with costs, the *fi. fa.* being dated November 15, 1888. Respondent levied it on the property of said principal. At the same time he had in his hands a *fi. fa.* issued by the clerk of the commissioners of roads and revenues for said county against Wilson, principal, and the same securities, with the exception of Longino, Martin, Harville, and Bonnell, and the addition of Adair, Latham, McLarin, and Tanner, for $5,029.45, with 20 per cent. per annum on said principal sum from November 7, 1888, for alleged default in county taxes for 1886; and another *fi. fa.* of like character against the same principal, W. L. Wilson, Parker, Cole, and McLarin, sureties for $2,744.87, with 20 per cent. per annum thereon from November 7, 1888, for alleged default in county taxes for the year 1887; and another of like character for $4,827.60 for county taxes of 1888. These county *fi. fas.* were issued November 24, 1888. They were levied on the same property, and the property was sold under all the *fi. fas.* mentioned, state and county, in January, 1889. The net proceeds of the sale were $5,255.64, which respondent reported to the comptroller, whereupon the latter placed in his hands two other *fi. fas.*, one for $5,790.36, with 20 per cent. per annum from February 20, 1887, dated November 15, 1888, against said principal and McCool, Parker, Cole, Longino, W. L. and A. H. Wilson, sureties, for alleged default in state taxes for 1886. On this *fi. fa.* the sheriff of Campbell county had made certain payments to the comptroller amounting to $3,250 in December, 1888, and January, 1889, out of the proceeds of other property of the principal sold by him. The other of said *fi. fas.* was of like character, for $4,384.96, for alleged default in state taxes in 1887, against the same principal, and Wells, McCool, Longino, Martin, Harville, Bonnell, A. H. and S. A. Wilson, which appears also to have been levied by the sheriff of Campbell county, and proceeds of sale applied to same. On January 14, 1889, the comptroller directed respondent to apply said $5,255.64, as follows:

Digitized by Google

$4,564.37 on the executions of 1886, which would settle the principal and penalty of 20 per cent. due on said *fi. fa.* up to January 7th, after deducting Wilson's commissions; and to apply the remainder to the *fi. fa.* for 1887. Afterwards, on the same day, attorneys for McCool, Parker, Longino, and others of Wilson's sureties, (some of said sureties being on more than one state bond of Wilson, and some also on the county bonds,) to avoid a levy on McCool's property paid to respondent, for McCool, $1,250, with direction to apply it to the *fi. fa.*, state or county, against him as surety, having the prior lien in law, and advised respondent to make no disposition of said funds until directed by the court. On the same day the attorney for Fulton county notified respondent that the county claimed that the money paid in by McCool, security on Wilson's bond to the county for 1886, should be applied to the county *fi. fa.* for 1886. Respondent asked for direction.

The attorneys for W. L. and A. H. Wilson, Reed, administrator of McCool, Parker, and Longino, presented the petition of said parties in which they made the following allegations, in substance: Wilson was elected tax collector for Fulton county for 1885 and 1886, and again for 1887 and 1888, acting as such until October 22, 1888, when he was removed. On his bond to the state for 1885 and 1886 as securities were McCool, Parker, Cole, Longino, W. L. and A. H. Wilson. On his bond to the state for 1887 and 1888 the securities were Wells, Longino, Martin, Harville, Bonnell, A. H., S. A., and J. A. Wilson. On his bond to Fulton county for 1885 and 1886 were Adair, Wells, Latham, McLarin, and A. E. Wilson as securities, but this bond, on September 31, 1886, was so modified as to strike Adair and Latham and add McCool, Tanner, and S. A. Wilson as securities. His bond for 1887 and 1888 had on it as securities Parker, Cole, McLarin, and W L. Wilson, and possibly O. I. Culberson was added as security on April 23, 1888. The books of the comptroller and Wilson's accounts as tax collector for 1886 and 1887 were duly balanced after a settlement with him in those years, respectively. Among the items to his credit, allowed him according to law by the comptroller, were the following: for 1886, by insolvent, general, capital, and poll tax, $8,678.15; for 1887, by the same items, $10,888.28. Afterwards, in 1888, a committee of the grand jury of Fulton county reported to the county commissioners that Wilson was in default, and furnished an itemized statement of money collected by him and not paid over. Among said items to make up the reported default were the following: for 1886, alleged to have been collected after his insolvent list for that year had been allowed, insolvent, general, capital, poll, and professional taxes, less commissions, $3,997.97, the entire default for that year being reported $5,495.10; and for 1887 the following sum alleged to have been collected after his insolvent list for that year had been allowed, insolvent, general, capital, poll, and professional taxes, less commissions, $3,595.89. Thereupon the comptroller issued the three *fi. fas.* mentioned in the same answer, the latter three *fi. fas.* being issued upon a like report, and for insolvent taxes in large part which had been duly allowed and credited for 1886 and 1887, upon said report that Wilson had, after said allowance and credit of his insolvent list by the county officers, collected sums thereon in 1887 and 1888.

Petitioners contended that under the facts no executions against Wilson's securities could be legally issued by the comptroller for insolvent taxes which had been allowed to Wilson on the books of the comptroller, and were afterwards collected by Wilson. They pray to be made parties to the rule to set up this defense, that said insolvent items be written off, with the 20 per cent. thereon, and then the cash on hand be applied to pay off, first, the state *fi. fa.* of 1886, and then of 1887, and, if any balance, then to that of 1888. They presented no objections to the county *fi. fas.*, as in no event could they get any of tnese funds. Attached to the petition as exhibits were final statements of Wilson's account with the comptroller for 1886, showing the amount allowed for insolvent, general, and poll tax for 1886; and for 1887 showing the amount allowed for insolvent, general, and poll taxes as stated in the petition of the securities; also, a copy of the statement made by the examining committee to the county commissioners referred to, and a copy of Wilson's bonds to the state for 1886 and 1887. Counsel for the comptroller objected to said sureties being made parties, but subsequently, upon the statement of the attorneys for the sureties that they were willing that the money in the sheriff's hands should be paid to the comptroller, but desired only to have a ruling on the questions made in the answer and petition, the objection to their being made parties was withdrawn, and counsel for the comptroller demurred orally to their petition. Thereupon it was adjudged that the court had no right to review the action of the comptroller in issuing said *fi. fas.*, and the court refused the petition, and ordered the money in the hands of the sheriff to be paid to the comptroller. To this action and judgment the sureties excepted.

Code 1882, § 884, provides that "when an officer collects money on such process, [for collection of taxes,] or on any other issued by the comptroller general, he shall, without delay, remit the same to him by some safe and speedy method, and on failure to do so is liable as he would be to other plaintiffs." Section 909 provides that, "if any collector shall fail to settle his accounts with the comptroller general in the terms of the law, he shall issue execution against him and his sureties for the principal amount, with the penalty and costs. Section 912 provides that "executions so issued shall not be suspended

Digitized by Google

or delayed by any judicial interference with them, but the governor may suspend the collection not longer than the next meeting of the general assembly."

N. J. & T. A. Hammond, for plaintiffs in error. *C. D. Hill, Mayson & Hill*, and *W. S. Thomson*, for defendant in error.

SIMMONS, J. 1. Under the facts reported in this case the trial judge did not err in the judgment complained of. We have no doubt, under the law and facts of this case, of the authority of the comptroller general to issue these tax executions. It is conceded that Wilson, the defaulting tax collector, had collected these taxes, and had failed to pay them over to the comptroller general, and the law is plain under that state of facts that the comptroller general has the right to issue executions against him and his securities.

2. Another question made was upon the legality of the appropriation of the fund in court as directed by the comptroller general. As to this question we do not think courts have any jurisdiction to hear or determine the same. The law seems to place matters of this sort entirely upon the comptroller general, and does not allow courts to supervise or control his judgment. Whenever a sheriff has money in his hands collected from a defaulting tax collector, it is his duty to pay it over to the comptroller general at once. There is no lawful authority for any person to give him notice to hold it up until his claim to the fund can be passed upon by a court. Code, §§ 884, 912; Goldsmith v. Kemp, 58 Ga. 106.

3. It does not appear in this record whether Wilson, the collector, received these taxes under his bond for 1885 and 1886, or whether he received them under his bond for 1887 and 1888. If he received them while acting under the first bond, we see no reason why the securities on that bond would not be liable for the amount received while he was acting under that bond. If, however, he received them after his re-election, in the years 1887, 1888, and after he had given a new bond and security for these years, it seems to us that the security on the first bond ought not to be held liable therefor, and it is possible that if this state of facts be made to appear to the comptroller general he might relieve the first securities. If he should not have power or authority to do this, an appeal could be made to the legislature, which would doubtless afford appropriate relief. Judgment affirmed.

(83 Ga. 25)

COTHRAN *et al.* v. WESTERN UNION TEL. CO.

(*Supreme Court of Georgia.* May 13, 1889.)

TELEGRAPH COMPANIES — DAMAGES — CONTRACTS — PUBLIC POLICY.

Contracts for fictitious or option "futures," made in Georgia, being illegal, whether between principal and principal, or broker and principal, where both parties are in complicity touching the unlawful purpose, such contracts, or the loss or gain resulting from them, cannot be invoked to measure the damages sustained by the sender of a telegram in consequence of a mistake made by the company in transmitting the message. If Telegraph Co. v. Blanchard, 68 Ga. 299, is to be regarded as involving a Georgia contract respecting transactions in "futures," it stands overruled in principle by Bank v. Cunningham, 75 Ga. 366.

(*Syllabus by the Court.*)

Error from superior court, Floyd county; MADDOX, Judge.

The official report is as follows:

"Cothran & Co. sued the Western Union Telegraph Company in a magistrate's court for damages. The damage was alleged to have been sustained by the omission, by the carelessness of defendant's agent, of the word 'sell' from the following telegram:

"'Check. ROME, GA., 10 Mch., 1887.

"'6 P. M. 30 Paid mch.

"'(8) *To S. H. Phelan, Atlanta, Ga.:* Close hundred barrels May pork. Continue instructions remainder. Sell fifty bags June coffee all to day's close. Close four thousand bushels short May wheat, if reaches eighty-two three-quarters or eighty.

"'C. H. COTHRAN & Co.'

"The case was taken by appeal to the superior court. On the trial there the plaintiffs introduced the original telegram, copied above. Also Jas. Cothran, one of the plaintiffs, who testified, in substance, as follows: The telegram was given by him to an operator of defendant on the day it bears date, for transmission to Phelan, but was not properly sent. Plaintiffs were damaged in this way: On March 4, 1887, they sold fifty bags of coffee at 12½ cents per pound, and on March 10, 1887, it had advanced to .1295, so they wished to sell fifty bags more, and sent the telegram. The defendant omitted the word 'sell,' and the word 'close' included the coffee also, so that, instead of having fifty bags of coffee sold, fifty bags were closed out. The actual loss on the coffee by this transaction was $32.50, besides $10 paid for commissions, and 37 cents for the telegram, and all this loss occurred because of the error in sending the telegram. * * * Defendant moved for a nonsuit, on the ground that the basis of the suit is a contract dealing in futures; that there was no property in hand, and it was to be settled by paying the difference when the day of judgment arrived; insisting that it is a gaming contract, and that, under the law, there can be no recovery. The motion was sustained, and the plaintiffs excepted, and say the court erred (1) because plaintiffs had shown a case of negligence on the part of defendant, which would have entitled them to recover had the case been submitted to a jury; (2) because the loss by the transactions of plaintiffs with Phelan was only a way of arriving at the measure of damages accruing to plaintiffs by the negligence of defendant; (3) because the question as to whether the transaction between plaintiffs and Phelan was a dealing in 'futures' cannot affect the liability of defendant to respond for its negligence."

Plaintiffs bring error.

Digitized by Google

C. Rowell, for plaintiffs in error. *Bigby & Dorsey*, for defendant in error.

BLECKLEY, C. J. The facts in detail will be found in the official report. It is quite apparent from the face of the dispatch, and from the evidence on the trial, that the transaction contemplated by the senders of the dispatch was a dealing in "futures." The court below, so construing the evidence, granted a nonsuit, and we are called upon to say whether that disposition of the case was correct. We think it was. It may be that, on account of the error in transmitting the dispatch, the plaintiffs would be entitled to recover what they paid for the transmission, —that is, the compensation the company received for the telegram; but there is no indication in the record that the court below was called upon to decide this narrow question. On the contrary, the whole tenor of the record is to the effect that the plaintiffs claimed their full damages, and sought to measure the same by the market changes; thus resorting to the fluctuations in "futures" in order to arrive at the amount of their recovery. We think this standard cannot be invoked, for the reason that contracts relating to "futures" are illegal, and we see not how an illegal contract can be called in to measure the damages sustained by reason of the breach of a legal contract. It is true that according to Telegraph Co. v. Blanchard, 68 Ga. 299, a recovery in this case might be had. But that decision was made at a time when contracts between brokers and their principals were considered obligatory, notwithstanding the vitiating element of speculation in "futures;" but since the case of Bank v. Cunningham, 75 Ga. 366, the principle of the former case has stood virtually overruled. Besides, the question in 68 Ga. related to a broker in the state of New York, whereas the broker in the present case was located in this state. His contract with his principals was a Georgia contract. We think the court did not err in granting a nonsuit. Melchert v. Telegraph Co., 11 Fed. Rep. 193, and notes. Judgment affirmed.

(83 Ga. 333)

BLITCH v. BREWER.

(*Supreme Court of Georgia.* July 8, 1889

LIMITATION OF ACTIONS—COMPUTATION.

Under a statute which declares that all actions upon promissory notes, bills of exchange, or simple contracts shall be brought within six years after the same become due and payable, the creditor, as a general rule, has six years, exclusive of the day of maturity, to bring the action. Hence a promissory note made payable generally on or before the 15th of October, 1880, is not barred on the 15th of October, 1886, but an action brought on the latter day is in time.

(*Syllabus by the Court.*)

Error from superior court, Ware county; ATKINSON, Judge.

J. S. Williams and *G. J. Holton & Son*, for plaintiff in error. *J. L. Sweat, S. W. Hitch, W. A. Wilson* and *E. H. Meyers*, for defendant in error.

BLECKLEY, C. J. By statute the filing of the declaration in the clerk's office is the commencement of action. The declaration was filed October 15, 1886. The promise in the note declared upon was to pay on or before the 15th of October, 1880. The instrument was an ordinary promissory note, payable generally; not at bank or any other specified place. The action was complaint, the declaration being in the ordinary short form provided for by statute. There was no averment of demand for payment on the date the note became due, nor was there any evidence of such demand submitted to the jury. The statute of limitations being pleaded, the court instructed the jury, in effect, that the action was barred; and, adhering to his opinion on this point, the presiding judge refused to grant a new trial. The sole question is whether he misconstrued or misapplied section 2917 of the Code, which reads as follows: "All actions upon promissory notes, bills of exchange, or other simple contracts in writing, shall be brought within six years after the same become due and payable." The note in this case having become due and payable on the 15th of October, 1880, the precise question, reduced to its lowest terms, is whether the phrase "within six years after the same become due and payable" is to be construed as inclusive or exclusive of that day. We think there can be no doubt that the legislature intended to give six full years during which the action might be brought. Could it, without demand for payment and refusal, have been brought on the day the note became due? We think not; at least not within business hours; and surely the statute would not begin to run after such hours until the next day. "There is strong reason for holding that a party bound to pay has the whole of the day of maturity; and that, without demand and refusal, an action cannot be maintained unless it is brought after sunset, or perhaps after business hours, on that day." 2 Pars. Notes & B. 460, 461. "We should consider the correct rule to be that, where the note is payable generally, it is not dishonored until the close of the day, and, when payable at a bank, not until the close of bank hours." 1 Pars. Notes & B. 417. "In the case of ordinary contracts, to be performed upon a certain day, they are really solvable within that day; and, as the promisor has the whole of the day for their performance, suit cannot be commenced until that day has passed. But when the maker of a note, or the drawer or acceptor of a bill, makes it payable on a day certain, his contract is to pay it on demand on any part of that day, if made within reasonable hours. The protest must be made on that day, which presupposes a default already made; and, whether it be the last day of grace, or the day of maturity, when there is no grace, it is clear, upon principle, that, as soon as payment is refused, the action may be commenced. We are not aware of any decision which determines that the maker may be sued on the day

Digitized by Google

of maturity, if the note is payable without grace, though the affirmative opinion has been expressed; but, if payment has been demanded and refused, we should say that the action would lie, for the contract to pay on demand within reasonable hours is then broken, and, in the language of Parsons, 'he has declared he will not pay, and can want further delay only to arrange the means of avoiding payment.'" 2 Daniel, Neg. Inst. §§ 1208, 1209. "An action should not, however, be begun on a bill or note on the day on which it is made payable, although it has been held that, after an express refusal, suit may be at once begun on that day. * * * The day of maturity is also to be excluded in reckoning the period for the running of the statute of limitations on a bill or note." 3 Rand. Com. Paper, § 1037. "The day of payment is included as the last of the currency of the note or bill, so that a suit begun on that day is premature. For the same reason the statute of limitations does not begin to run until the day after the day of payment." 2 Amer. & Eng. Cyclop. Law, 396. In Taylor v. Jacoby, 2 Pa. St. 495, it was ruled that an action on a promissory note, payable one day after date, cannot be maintained until the day after the day of payment, and that the maker was entitled to the whole of the last day to make payment. To the same effect, apparently, as to the first of these propositions, is the case of Raefle v. Moore, 58 Ga. 94. In Menges v. Frick, 73 Pa. St. 137, the statute provided that actions of account should be commenced "within six years next after the cause of such actions, and not after." The last item of an account was dated October 6, 1862. An action thereon was commenced October 6, 1868, and it was held that the action was not barred. In Blackman v. Nearing, 43 Conn. 56, it was decided that in computing the time of the limitation of an action on a promissory note, the day on which it matures is to be excluded. And in Michigan, in a learned and well-considered opinion by Judge COOLEY, it was held that, even upon a judgment, an action was well brought if within 10 years from the date of its rendition, the day of its date being excluded. Warren v. Slade, 23 Mich. 1. Possibly this last decision could not be followed in Georgia, since in Barrett v. Devine, 60 Ga. 632, and in Railroad Co. v. Carson, 70 Ga. 388, it was held that, where judgment in the first case, verdict in the second, was rendered on the 12th day of the month, the three months for bringing *certiorari* thereon had expired before the 12th day of the third month thereafter. We do not consider these two Georgia cases as applicable to the question now before us, for the reason that *certiorari* can be brought upon a judgment or verdict upon the same day of its rendition; whereas we think that, in the absence of an express demand and refusal, no action can be brought upon an ordinary promissory note until the day after its maturity. We will add, also, that it is doubtful whether the rule for computing time for the bringing of *certiorari*, indicated, though not distinctly expressed, in Jones v. Smith, 28 Ga. 41, would not, if correctly understood and applied in computing months, be consonant to the one laid down in the Code, § 4, par. 8, for computing days, which is that only the first or the last day shall be counted, not both days. In English v. Ozburn, 59 Ga. 392, it was held that in computing the three-months time for serving a rule *nisi* to foreclose a mortgage the day of service was to be included. That case is also distinguishable from the one now before us, because the object of service is to enable the party to make preparation for trial, and there is no obstacle to beginning such preparation on the day of service. It may be said, too, that the rule of the Code for counting days, though invoked, was perhaps not very successfully applied, since in computing the time allowed for preparation both the first and the last were apparently included; neither of them excluded. Our conclusion is that the action was brought in time; that it was not barred by the statute of limitations; and that the court erred in charging the jury, and in not granting a new trial. In Favors v. Johnson, 79 Ga. 553, 4 S. E. Rep. 925, which was the foreclosure of a landlord's lien, there was a demand for payment on the day of maturity, but whether the proceeding to foreclose was rightly commenced on that day, after payment was refused, was not decided, the question not being made. Judgment reversed.

(83 Ga. 304)

DAWSON *v.* GARLAND.

(*Supreme Court of Georgia.* July 8, 1889.)

RENT—DISTRESS—JURISDICTION.

Where, to a general distress warrant for rent, the tenant files a counter-affidavit with the levying officer, the papers should be returned for trial of the issue to the court having jurisdiction in the county of the tenant's residence; and, if the return is made, not to that court but to another, and after judgment of dismissal in the primary court an appeal be taken to the superior court, the discretion of the latter court in allowing the case withdrawn and the papers to be returned to the proper court in the county of the defendant's residence, will not be controlled. Such a disposition of the case is equivalent to dismissing it finally from the court having no jurisdiction, and granting leave to the landlord to return the papers to the court which has jurisdiction.

(*Syllabus by the Court.*)

Error from superior court, Macon county; FORT, Judge.

John W. Haygood and *E. A. Hawkins*, for plaintiff in error. *F. T Snead* and *J. A. Hunt*, for defendant in error.

BLECKLEY, C. J. A general distress warrant for rent was issued by the county judge of Macon county in favor of a landlord against his tenant. The affidavit upon which it was based disclosed no jurisdictional fact; neither the residence of the defendant in the county, nor the location there of any of his property. On its face the warrant was made returnable to the county court of Macon

Digitized by Google

county. After levy by the sheriff upon certain personal property, the tenant filed an affidavit denying that the rent claimed was due, or that the relation of landlord and tenant existed at the time of suing out the warrant, and setting up that he was in possession of the premises as a purchaser. The proceedings being returned to the county court, that court, upon motion of the tenant, ordered that the distress warrant be dismissed for insufficiency of the affidavit and bond, at the same time denying a motion made to amend the affidavit. The landlord appealed to the superior court; and when the case came up for trial in that court the tenant moved to dismiss the warrant for want of jurisdiction, demurring orally both to the affidavit and the warrant. Pending this motion, the landlord moved to transfer the cause to Upson superior court, and submitted proof that the tenant resided, when the proceeding commenced, in Upson county, which fact was not denied. Thereupon the court overruled the motion to dismiss, and granted the motion to transfer, the order of transfer reciting that the court passing it had no jurisdiction to try the case on account of the tenant's non-residence. Both these rulings were excepted to. Precisely what is meant by dismissing a distress warrant admits of doubt. Had the motion been to dismiss the levy, or to quash or set aside the distress warrant, the meaning would have been clear enough. Inasmuch as the case was brought to the superior court by appeal and not by *certiorari*, it is questionable whether the superior court had any possession of the matter; the judgment of the county court appealed from involving no question of fact, but questions of law only. Small v. Sparks, 69 Ga. 745; Rogers v. Bennett, 78 Ga. 707, 3 S. E. Rep. 660. But this question was not made. The action of the court was based on the non-residence of the tenant, which fact was proved by testimony on one hand, and not disputed on the other. The tenant declined to waive the objection to the jurisdiction, and it devolved upon the court to get rid of the case in some way. The method taken was equivalent to granting permission to the landlord to withdraw the papers for return to the court of his choice in Upson county. They should have been returned originally to the proper court of that county, and doubtless would have been so returned had the fact of residence appeared in the landlord's affidavit, as it should have done. The result of transferring the case will simply be to do now what should have been done at first, and will work no prejudice to the tenant, since all the costs of proceeding in the Macon courts will fall upon the landlord, and any resistance to the legality of the warrant can be made in the court of Upson county, which could have been made had the case never been seen or heard of by any other court. In Tharpe v. Foster, 52 Ga. 79, which was the case of a laborer's lien, the court ordered the execution to be set aside for defect of jurisdiction in Bibb county, the defendant residing in Morgan county; but no motion to withdraw the papers or transfer the case was made. On the contrary, a trial was had by consent of parties on an agreed statement of facts. Moreover, in that case the question of jurisdiction was directly made in the counter-affidavit which brought the controversy into court. In Bryant v. Mercier, ante, 166, (March 18, 1889,) the distress warrant was transferred from the county court of one county to that of another; and the case falling under the act of October 5, 1887, and the proper amendments being made to the affidavit under that act, with leave of the court having the rightful jurisdiction on appeal, this court held that all defects, both of issuing and returning the proceedings, were healed. The act referred to, being confined in its operation to cases arising after its passage, will not apply to the proceedings now before us, for they were commenced before its passage; and it may be that when the case comes up for hearing in Upson county, the affidavit will prove so defective that the landlord can take nothing under it; but this we leave to be decided by the court having jurisdiction of the matter. We think the order granted was equivalent to a final dismissal from the court of Macon county, with the addition of leave to return the case to the proper court of Upson county. If this leave had been denied, we should not have reversed the judgment. We think it was discretionary to grant it or not; and what we rule is that there was no abuse of discretion, although the landlord, who ought to have disclosed in his affidavit the residence of the tenant, but failed to do so, had no absolute right to the favor which the court granted. Judgment affirmed.

(83 Ga. 233)

HENDERSON v. FOX.

(*Supreme Court of Georgia.* July 8, 1889.)

SLANDER — PLEADING — JUSTIFICATION — MALICE — JURY — CHALLENGES.

1. Construed altogether, the charge of the court in this case did not encroach upon the province of the jury.

2. A plea of justification to a declaration containing several counts, each laying actionable words, goes to the whole declaration, unless the plea is restricted in its terms to certain parts or certain counts, and such plea waives the general issue.

3. A plea treated as one of justification by both parties and by the court throughout the trial is to be so treated after verdict, though it may be defective. Such a plea, in an action of slander, reaffirms the charge or charges justified, and avers the truth of the words spoken. If the words impute a crime punishable by law, and are not in the nature of privileged communications, the filing of a plea of justification may be attended with one of three results: (1) If wholly unwarranted, the jury may treat it as an aggravation; (2) if proved true, it defeats the action; (3) if not proved true, the evidence given under it may mitigate the damages.

4. No amount of evidence going to negative malice will wholly defeat the action under a plea of justification, the words being actionable *per se*, and not privileged. Nothing short of proving the plea will suffice.

5. Nothing material was done or omitted to the

Digitized by Google

prejudice of the plaintiff in error, by the charge of the court, or in refusing to charge as requested.

6. It is not the duty of the court to instruct the jury in an ordinary action at law for a tort, though both justification and set-off be pleaded, that they may return a special verdict.

7. Causes of challenge to a juror *propter defectum* must be discovered and urged before verdict, and improper language or conduct attributed to a juror proved by one witness only, and denied on oath by the juror, is not cause for a new trial.

8. The verdict being a second one, for the same amount of damages, the supreme court cannot pronounce, under the evidence in the record, that it was excessive or not warranted by the evidence and the law, the judge below being satisfied therewith. Though it seems a harsh verdict, it is not illegal.

(*Syllabus by the Court.*)

Error from city court of Savannah; HARDEN, Judge.

R. R. Richards and *Gerard & Meldrim*, for plaintiff in error. *Denmark & Adams*, for defendant in error.

BLECKLEY, C. J. This is the second appearance of the same case, the first being in 80 Ga. ——, 6 S. E. Rep. 164. At successive trials two verdicts, each for $1,500 damages, were found for Fox, the plaintiff below. From the first a new trial was granted by this court for error in instructions to the jury. A second new trial was applied for by Henderson, and to the refusal of that application the present writ of error was brought. The declaration was in three counts. The first charged the speaking on the 1st of March, 1886, of these slanderous words: "He is a thief, and ought to be in the penitentiary." The second charged the speaking on the 22d of December, 1886, of these slanderous words: "That damn scoundrel, Fox, he is going to run. He ought to be in the penitentiary. If I had taken the advice of my friends, he would be there, instead of running for coroner." The third charged the speaking on the 5th of January, 1887, of these slanderous words: "He is a damn thief. He ought to be in the penitentiary." The defendant Henderson pleaded (1) the general issue; (2) justification; (3 and 4) set-off,—one of the pleas of set-off alleging slander, and the other assault and battery. The plea of justification consisted, first, of a long enumeration of particular facts relating to certain copartnership transactions between the parties, and to certain acts of Fox with reference to the partnership assets; false entries in the books; omissions to make entries, etc., —the plea concluding as follows: "And this defendant says that the words charged against him were only spoken in reference to his business matters between them as partners. He admits that he said the plaintiff was a thief, and ought to have been in the penitentiary, but denies that they were uttered falsely or maliciously; and that whatever he may have spoken at any time was without malice, and under an honest belief that he had been wronged by the plaintiff; and wherefore the defendant says that he might lawfully have spoken as aforesaid, for the cause aforesaid." The plea was not restricted in its terms to any one count, or any one part of the declaration. It was not demurred to. At the trial the defendant took the opening and conclusion as to the whole case, and the record indicates that the plea was considered an answer to the whole action.

The charge of the court is complained of in the motion for a new trial as expressing or intimating an opinion on the evidence, or touching the facts in controversy. We think it amenable to no such criticism. Taking the whole charge together as found in the record, it not only separates, clearly and distinctly, the functions of the jury from those of the court, but is extremely careful not to encroach in any manner upon the province of the jury. In this respect we consider it remarkably free from any ground of exception whatever.

The legal doctrine that a plea of justification, going to the whole case, waives the plea of the general issue, is now well established as the rule in Georgia under the Code. Rigdon v. Jordan, 7 S. E. Rep. 857, Parker v. Lanier, 8 S. E. Rep. 57.

However loose and informal the plea of justification may be, when it is not demurred to, but is considered by the parties and the court as a sufficient plea of that character, and a trial is had under it, defects in it are not to be scrutinized after the trial is over. Indeed, it has been held that, where the parties treat it as sufficient, the trial court should do so likewise. Bryan v. Gurr, 27 Ga. 378.

The necessary legal effect of every strict plea of justification in actions of slander not involving privileged communications is to reaffirm the charge or charges justified, and aver the truth of the words spoken, if they impute a crime punishable by law. Such reaffirmation may or may not be an aggravation of the original slander. Whether it is so or not is to be determined by the jury. Where the plea is filed in good faith, and under an honest expectation of being able to establish the alleged justification, the jury should consider it warranted, and add nothing to the damages on account of it, although the proof should fall short of establishing it. On the other hand, if they should believe it unwarranted and unfounded, they ought to treat it as an aggravation, and as cause for augmenting the damages. Unless proved to the satisfaction of the jury, such a plea cannot and will not defeat the action; but there may be evidence under it which, though insufficient to establish it, may disclose facts and circumstances in mitigation, and this may be considered by the jury to reduce in any degree they deem proper the amount of damages they would otherwise have found. Thus a plea of justification may, according to the evidence introduced under it, have one of three effects in the action. (1) The plea being established, the action is simply defeated; (2) failure to establish it, connected

Digitized by Google

with failure to show any reasonable or proper cause for filing it, may aggravate the damages; (3) the partial or imperfect establishment of it, or the production of evidence strongly tending to establish it, may mitigate the damages. While only one of these effects can be realized in the same case, there is no inconsistency among them as referable to different cases, or cases of different classes, the classification being made by the jury according to the facts of the case on trial. The charge of the court complained of, construed in the light of the whole charge, was substantially in accordance with this view of the law. We think the jury could not have understood it as constraining them to treat the plea of justification as an aggravation, but simply as authorizing them so to do if they thought proper under the evidence, and certainly the charge very distinctly announced that the facts proved under the plea might be looked to in mitigation of the damages, although they fall short, or might fall short, of establishing full justification. Rightly construed, although some criticism may be made on isolated passages, the charge, we think, conforms substantially to the case of Ransone v. Christian, 49 Ga. 491

With respect to defeating the action wholly and entirely by evidence going to negative malice, we think there is no soundness whatever in the position, as applied to a case like this, where the words impute a crime, and where no element of privileged communication is involved. We think all the cases of any authority hold that such words must be made good by proving their truth, or else there must be a recovery of some damages in favor of the plaintiff. By an examination of Lewis v. Chapman, 16 N. Y 369, and of Wilson v. Noonan, 35 Wis. 321, cited by Mr. Freeman in his notes to Terwilliger v. Wands, 72 Amer. Dec. 430, it will be found that these cases have in them nothing to the contrary of this doctrine, but that the latter distinctly recognizes it, and the former does not discuss it.

Looking to the evidence, the charge of the court as given, and the explanation of the same by the judge in his order denying a new trial, we are unable to hold that there was any material error in declining to charge the jury as requested, in addition to the charge given. It seems to us that the case was fully and fairly submitted to the jury on its substantial merits. No doubt the charge was in some respects imperfect, and no doubt any review of it which we might attempt would be imperfect also, for what earthly court can attain perfection? But slight blemishes in the work of a court are not to be regarded as cause for a new trial, and, so far as we can discover, nothing material was done or omitted to the prejudice of the plaintiff in error.

We know of no law applicable to Georgia practice which constrained the court to instruct the jury that they might find a special verdict in an ordinary action at law, as this was. We were cited to no precedent on the subject, and, had the instruction been given, we should have had more difficulty in upholding it than we meet in sustaining the refusal of the court to give the instruction. There is no air of novelty about the ruling which the court made, as there certainly would have been if a reverse holding had taken place.

That causes of challenge to jurors *propter defectum* must be discovered and urged before trial, and that improper language or conduct attributed to a juror, proved by one witness only, and which he denies on oath, is not cause for a new trial, will be recognized as law by most of the enlightened members of the legal profession. Those not prepared for concurrence in the common opinion will become so by further study.

Touching the general grounds of the motion for a new trial, and the special ground that the damages found are excessive, we need only say that the evidence is not such as to warrant our interference; this being a second verdict, and the trial judge being satisfied to let it stand. We consider it a harsh verdict, in view of the many palliating facts set forth in the evidence, but not an illegal one. It teaches a most energetic lesson in favor of holding one's tongue, and it is well for that lesson to be learned, sooner or later, by us all. We are not without sincere sympathy for this aged and irascible man, but our duty is best performed by leaving his case to stand as the jury and the presiding judge have settled it. Judgment affirmed.

(83 Ga. 245)

GRACE v. MARTIN.

(*Supreme Court of Georgia.* July 8, 1889.)

NEW TRIAL—MISCONDUCT OF PARTIES—EJECTMENT.

1. A verdict will not be set aside on an affidavit that defendant embraced two men in the court-room, whom the affiant believed to be jurors, where defendant denied that they were jurors.
2. Neither will it be set aside because defendant, after the dismissal of the jury for the term, treated two of the jurors with soda-water, they being unwell at the time.
3. Where the motion to set aside the verdict alleged that defendant had been in the habit of entertaining jurors during the terms of court, the charge was too general, and was properly disregarded.
4. That defendant had given one of his witnesses, who had no money, a dinner before he was sworn is no ground for setting aside the verdict.
5. Where appellant objects generally to long extracts from the charge of the judge, as inapplicable to the case, and does not specify what part is erroneous, the judgment will not be set aside if any part of the extract is applicable.
6. A verdict in ejectment for the land in dispute, without describing it, is sufficient.
7. After the evidence on motion for new trial had been closed, and argument heard, it was in the discretion of the court to refuse to consider an affidavit handed to him on the street.

Error from superior court, Pulaski county; KIBBEE, Judge.

W. L. Grice, for plaintiff in error. *C. C. Smith*, for defendant in error.

Digitized by Google

SIMMONS, J. Martin brought an action of complaint against Grace for a lot of land in the town of Hawkinsville. The jury returned a verdict for the plaintiff. The defendant moved for a new trial on various grounds, which motion was overruled, and the defendant excepted.

1. There was no error in overruling the motion on the first and second grounds. There was sufficient evidence to sustain the verdict.

2. There was no error in overruling the third ground, because, even if it had been sufficient in law to set aside the verdict, there was no evidence to sustain it. There was only one affidavit on this point, and that affidavit fails to state that the two persons whom Martin is alleged to have embraced in the court-room were jurors. Martin, in his affidavit, denied the charge made against him in the third ground, and his positive denial of this should outweigh the mere belief of Grace that the persons were jurors.

3. The fourth ground, as approved by the court, alleges that Martin treated two of the jurors who tried the case to soda-water, after they had been discharged for the term. The court did right to overrule this ground of the motion, especially under the explanation given of the act by Martin and the two jurors, which was that, after they were discharged for the term, and being near a soda fountain, the two jurors complained of feeling sick, whereupon Martin advised them to drink soda-water and acid phosphate, saying that he thought the acid would benefit them. This ground contained originally the following words, to-wit: "Said treating not being casual, but part of a regular system of caressing and entertaining traverse jurors during the terms of the court, which has been practiced by the said Martin for years." The court struck these words from the motion, and refused to hear evidence to sustain the charge contained therein. The plaintiff in error, in his bill of exceptions, assigned error upon these rulings. We do not think the court erred in striking these words from the original motion and in refusing to hear evidence to sustain them. The charge contained therein was too general. They referred to the conduct of Martin during the terms of the court for years past, and proof of the charge, if made, would not have authorized the court to set aside the verdict in this case. If the charge had been that during the term at which this case was tried, and before the case was tried, it was the regular practice of Martin to treat and caress the particular panel of jurors from which the jury in this case were selected, the judge would doubtless have entertained the motion; and, if the fact had been proved to his satisfaction, would have set aside the verdict; and this court would have approved his action. If counsel should so far forget the dignity and decency of his profession as to make it a habit or custom, when jurors are about to try cases in which he is engaged as counsel, or when they have returned a verdict in his favor, to treat the jury or jurors to spirits, soda-water, or anything else, the trial court should not only set aside the verdicts rendered in such cases, but should punish the counsel who is guilty of such conduct. If such indecent and reprehensible practices were allowed by the courts, an upright lawyer, who would scorn to act in this manner, could not compete with one given to such practices. We do not know, and are unwilling to believe, that any lawyer in this state is guilty of such misconduct but, if such be true, the trial court, when such misconduct is brought to its attention by proper allegations in a motion for new trial, should take cognizance of it, and, if proved, the verdict rendered under such influence should be set aside. We do not intend to intimate by these remarks that there is anything in this record showing that Mr. Martin is guilty of such misconduct. We know him too well to believe or suspect that he is. Our remarks are intended to refer more specially to future cases, if unfortunately they should arise.

4. The fifth ground complains that Martin furnished one of his witnesses a dinner before he was sworn. We see no error in the overruling of this ground. It appears from the record that Martin had this witness summoned in his behalf, and the witness being without money, and unable to obtain his dinner otherwise, Martin gave him his dinner. The most that can be said about this is that it is a fact which could go to the credit of the witness before the jury.

5. The sixth and seventh grounds contain long extracts from the charge of the court, and the error assigned thereon is that the charges complained of were inapplicable to the case. We have read these extracts, and think that at least some of the principles announced therein were inapplicable. It is the duty of counsel for the plaintiff in error, under the practice in this court, where he sets out in his motion long extracts, and excepts to the same, to specify what part of the same is erroneous or inapplicable. Counsel not having done this, and some parts of the extracts being applicable to the case, we hold that the court did not err in refusing a new trial on these grounds.

6. The eighth ground complains that the verdict is too indefinite and uncertain. The verdict seems to be in the usual form of verdicts in ejectment. It is for the land in dispute. The land in dispute was fully described in the declaration by metes and bounds, number of feet, etc. When the writ of possession is issued by the clerk, it will be an easy matter for him to read the declaration in the case, and copy into his writ the description set out therein, so as to make the writ of possession certain and definite.

7. The ninth ground complains that the court refused to entertain an affidavit handed to him in the street after the evidence on the motion for a new trial had been closed, and

Digitized by Google

the argument heard. This was a matter within the discretion of the court. The testimony in the case must be closed at some time, and we will not control the discretion of the trial court in receiving it or rejecting it after the trial is closed, unless that discretion has been abused. It was not abused in this case. Judgment affirmed.

(82 Ga. 757)

SEIFERT *et al.* v. HOLT.

(*Supreme Court of Georgia.* July 8, 1889.)

PRACTICE—VERDICT.

1. It is no violation of the statute of Georgia requiring cases to be called in their order for the court to call the cases from the docket in order, and set those ready for trial for hearing three days thereafter.
2. Under Code Ga. § 3561, providing that verdicts are to have a reasonable construction, and to be avoided only from necessity, in a suit where a distress warrant has issued, and defendant has filed a counter-affidavit, a verdict that the jury "find the warrant proceed" is not void for uncertainty.
3. Defendants, against whom a judgment is rendered in their absence, cannot have it set aside because of such absence, where they have shown no diligence in ascertaining when the case was set for trial.

Error from superior court, Monroe county; BOYNTON, Judge.

Lofton & Moore, for plaintiffs in error. *Berner & Turner*, for defendant in error.

SIMMONS, J. Holt sued out a distress warrant for $300 against Seifert. It was levied upon certain property of Seifert. He filed his counter-affidavit, denying that any part of the sum claimed for rent was due, and averring that the contract upon which the rent was claimed was made and executed on the Sabbath day. He filed with the levying officer a bond for the condemnation money, with Freeman and Flanders Bros. as sureties thereon. At the August term, 1886, of said court, the plaintiff obtained the following verdict: "We, the jury, find the warrant proceed;" upon which verdict Holt entered judgment against Seifert and the sureties on his bond for $300, with interest. Execution was issued upon this judgment, which was levied upon certain property as the property of the defendant, and Flanders Bros. filed an affidavit of illegality, which was returned to the court for trial. During the August term, 1888, of the court, Seifert moved to reinstate the case made by the distress warrant and the counter-affidavit, and vacate the judgment rendered in said case, because it was, under the rules of said court, set down three days in advance of trial, contrary to the laws of the state regulating the call of the docket in the superior court, and no notice being given to counsel for the defendant, who was a non-resident of the county, as to the case having been called for trial and set for a hearing. He also alleged that he had a good defense, to-wit, that the contract upon which the rent claimed was predicated, was made and entered into on the Sabbath day, thereby rendering the contract null and void. Freeman came in, and was made a party to the motion, and asked to have the judgment vacated as to him, on the ground that he was not a surety, and not bound by the judgment or by the bond, in this: that when he signed the bond, and it was tendered to the sheriff, the sheriff refused it, on the ground that Freeman would not make oath that he was worth the amount of the bond over and above the homestead exemption; whereupon he said to the sheriff that he would not be further liable on the bond. Flanders Bros. were also made parties, and asked to have the judgment set aside as against them, for the reasons alleged by Seifert in his motion, and for the additional reason that they signed the bond believing Freeman to be a security on the bond, and on the further ground that, in the absence of all the defendants, the plaintiff not having a jury to pass upon said issue, the proceeding was illegal and void, for the reason that said case came into court as a suit for rent, and the only verdict which could be had was a money verdict, finding a stated sum for the plaintiff; also that the verdict was void for another reason, viz., that it was too uncertain and vague to base a judgment on, and that the judgment was void for the reason that there was no verdict to authorize it, the verdict not having found any sum of money for the plaintiff. The affidavit of illegality of Flanders Bros. contained the same grounds as the motion to set aside the judgment. The case was submitted to the court without the intervention of a jury. The affidavit of illegality and the motion to vacate the judgment were overruled and refused, and the execution was ordered to proceed. The defendants excepted to the judgment, and assigned the same as error.

The main points relied on by counsel for the plaintiff in error in the argument of the case before us were (1) that the case was not called in its order in the superior court, and the defendants being non-residents, and having no notice of the time the case was set for trial, the verdict should be set aside, in order to give them an opportunity to make their defenses before the jury. The judge who tried the case certifies that the rule agreed upon and adopted by him in the superior court of Monroe county requires the docket to be called in its order, and the cases thus called which are ready for trial are set down for a hearing three days thereafter, and that this case was called in its order, and thus set for trial. It appears that when the day for which it was set arrived the defendants and their counsel were not present, and the trial proceeded, and a verdict was had in their absence. (2) The defendants also relied upon the ground that the verdict was so uncertain and indefinite that no proper judgment could be entered thereon.

1. The court did not err in refusing to set aside the verdict on the first ground. It is no violation of the statute which requires

Digitized by Google

cases to be called in their order, for the court to call them in this manner, and set them down to be tried three days thereafter. Where there is such litigation in a court, it is a good rule to call the cases in their order on the docket, and set them down for trial on certain specified days. It saves witnesses in cases from constant attendance on the court every day for weeks at a time, and it also gives notice to the parties when to appear and when to summon their witnesses. It gives counsel time for preparation of the case set for trial, so that they can instruct the court upon the law, and the jury upon the merits, of the case. We see nothing in the practice to be condemned.

2. The next point is, was this verdict so uncertain as to render it void? It will be remembered that a distress warrant for $300 had been issued against Seifert, and that he had filed a counter-affidavit afterwards. When that affidavit was filed and returned to the court, the proceeding became a suit for rent; the distress warrant answering for the declaration, and the counter-affidavit for the plea in the case. On these pleadings, and in the absence of the defendants, the jury returned the verdict above set out. Code, § 3561, declares that "verdicts are to have a reasonable intendment, and are to receive a reasonable construction, and are not to be avoided unless from necessity." In the case of Rickerson v. Flowers, 50 Ga. 215, the jury, in a similar proceeding to this, upon a distress warrant, returned the following verdict: "We, the jury, find the issue for the plaintiff;" and this court held that the verdict was sufficiently certain, and covered the issue made by the pleadings. In the case of Williams v. Brown, 57 Ga. 304, this court held that "where a verdict may, by reasonable construction, be understood, and a legal judgment can be entered thereon, it is sufficient." In the case of Giles v. Spinks, 64 Ga. 205, JACKSON, J., says: "A verdict is certain which can be made certain by what itself contains or by the record." In the case of Harvey v. Head, 68 Ga. 247, it is held that "a verdict which is not explicit in its terms, but the intention of which is apparent from the pleadings and evidence, may be construed with reference thereto by the court." Applying these rules to this verdict, and construing it with the pleadings, we think it is sufficient upon which to enter a judgment. The distress warrant in the case, which, as we have seen, was converted into the declaration, alleged that Seifert was indebted to Holt $300. The jury found that it proceed. Giving the verdict a reasonable intendment, and construing it with the allegations in the distress warrant, we think the clear intention of the jury was to find in favor of the plaintiff, and to find that Seifert was indebted to Holt $300 with interest. And as we have seen, if we can arrive at the meaning of the jury construing the verdict and the pleadings, the verdict is sufficient, and will be allowed to stand. We therefore think the court did not err in refusing to set aside the judgment on this ground.

3. If the trial was properly had, and the verdict is right, then the affidavit of illegality of Flanders Bros. and Freeman's motion must fall. When parties have a case in court, it is their duty to attend the court, and look after their interests. They cannot remain away without sufficient cause, and have the verdict set aside because they were not present to insist upon their defense. This seems to have been called on Wednesday, and set for trial on Saturday. If they had been diligent, they certainly could have ascertained when their case was set for trial. Doubtless the place where the defendants resided and the place where the court was held were connected by railroad and telegraph, and they could easily have ascertained, by the exercise of the least diligence, the time for which their case was set. These remarks will also apply to the grounds in Seifert's motion to set aside the judgment. Upon a review of the whole case, we see no error committed by the trial court which would authorize us to reverse this judgment. Judgment affirmed.

(31 S. C. 218)

STATE v. JAMES.

(*Supreme Court of South Carolina.* July 5, 1889.)

CRIMINAL LAW—INSTRUCTIONS—OPINION EVIDENCE.

1. Where the judge in his charge on a trial for murder states that, if defendant hired another to kill his father, none of that father's blood should be on his (the judge's) hands, and that he did not suppose any of the jury would differ from him; comments on the conduct and motives of defendant; and states that the jury can draw no inference in favor of defendant from the fact that he was active in the prosecution of persons who had shot his father on a previous occasion,—he violates Const. S. C. art. 4, § 26, which provides that "judges shall not charge juries in respect to matters of fact, but may state the testimony and declare the law."

2. A witness who has had the opportunity of observing the intercourse between defendant and deceased, his alleged victim, may state his opinion as to whether or not they were friendly; but, where it appears on cross-examination that the opinion is based on merely the statements of either of the parties to the witness or to third persons, the evidence is hearsay, and should be rejected.

Appeal from general sessions circuit court of Darlington county; PRESSLEY, Judge.

Joseph W. James was convicted of murder, and appeals. The following is the charge referred to in the opinion:

"We have listened very patiently to the testimony and the argument in this case, and now comes the time when we are to do our duty. The main duty in this case is with you. There is very little law involved in it, and I have nothing to do with any implications or any opinion whatever on the facts. My duty ends when I shall call your attention to the law,—the settled legal principles by which you are to be governed in arriving at a correct conclusion in a trial of this sort. I shall do that to the best of my ability. If

Digitized by Google

this defendant hired another to kill his father, and his father was killed, one thing is certain: none of that father's blood shall rest on my hands when I get through; and I have no reason to suppose that any of you differ from me in your determination on that point. Now, let us see what are the principles upon which you are to start out in deciding a case of this sort. The law says, first, that you shall give the defendant the benefit of all reasonable doubts, and it is my duty to explain to you what is a reasonable doubt. That is very easy. It is when the testimony in the case, taken all together, with all its facts and circumstances, does not bring your mind to an unshaken conviction that the thing charged is true. Then, if that be not the case, it is a reasonable doubt; but, if that be the case, you are not at liberty to say, 'It may be this,' or 'It may be that,' or 'It may be something else.' You are to follow the convictions of your mind, as the testimony has brought your mind to. That is what you are bound to do—follow the convictions of your mind if they be of such a nature as, in the solemn affairs of your life, you would be willing to say: 'I am satisfied that such and such is true. I will act.' Well, what next? In investigating this case, you are not to take one circumstance by itself, or two circumstances by themselves, or three facts, or any number of facts, by themselves, and say, 'These are not enough, they don't satisfy us.' That won't do. You must take them all together,—you must take all the testimony and all the circumstances together, and say whether they all, united together into one strand, form a strand that cannot be broken. A single strand is easily broken, two or three may be easily broken, but you are to put them all together, and then say what is their effect. Do they produce conviction or not? If they do not, then say, 'Not guilty;' if they do, then say, 'Guilty.' The next thing is: You are to start out assuming that William Scott is not a credible witness. The law says so. You are to start out assuming that, taking his testimony by itself, neither reason, nor common sense, nor the law permits you to rely upon it in so serious a matter as this. If you take it by itself. I say that, not with regard to the testimony brought by the defense to contradict him and discredit him on various points. I say it in reference to the law that what he confesses of his own guilt in the matter renders him, in the eyes of every reasonable man, as a witness that is not credible; and, therefore, the law says it is very unsafe to convict a person for a murder, or any serious offense, on the testimony of one who acknowledges he has had such connection in the transaction, unless what? unless that testimony, in the number and the manner of the details, is such as that he could not have manufactured it, or unless it be stated in such manner, and be accompanied by such circumstances, that you are not able to discredit it, or unless it is corroborated by the circumstances which, taken with that testimony—those other circumstances not taken by themselves, nor that testimony taken by itself, but whether the two together,—the other circumstances and his statement taken together,—whether they produce conviction. The difference is this: That though the witness is not credible, yet he may tell the truth; and you are to judge, not whether you can rely on his testimony, but whether his testimony so tallies with all the other circumstances of the case as that you regard it corroborated, and, therefore, are brought to the conviction that whether he can be relied upon or not, yet, whether he is telling the truth in this case. That is the rule you are to follow. Next, it is indicated that the testimony of some of the witnesses for the state in this case is influenced by improper motives, and the expectant reward is mentioned as one of the improper motives that would influence their testimony. Well, gentlemen, if one is to be influenced by a motive of that sort, he would be influenced by the stronger motive, and you are to judge now whether this insinuation,—this hint,—be correct or incorrect, from the fact whether the stronger motive would be to go against Scott and get the thousand dollars that was offered, or whether it would be to go against the defendant and get only the reward which the governor has offered. That is a question for you. In weighing their testimony you are bound to consider that whether, if improper motives influenced them, on which side was the stronger motive, the motive to let James escape and get the thousand dollars he offers, or the motive to try him and lose the reward he offers, and only get that the governor offers. Next, some records have been introduced going to show that when Bell was tried for shooting the old man, that when Daniels was tried for shooting the old man, and when Fields was tried for shooting the old man, in each case his son, now the defendant, was a state's witness against them. It is introduced with the idea that the legal inference is to be drawn from that going to show that he has taken part in trying to prosecute and follow up those that were trying to kill his father. Well, now, gentlemen, I am bound to say to you that the bare proof of the fact, standing by itself, does not furnish ground for legal inference that he was so doing. It is not testified that he took part in getting up those prosecutions; it is not testified in any way whatever that he was active in the matter; the testimony that he gave against those parties is not before you, except in one case a witness was put on the stand by the defendant to say whether he testified in that case against Bell, and the witness replied: 'He testified against him and for him. And that Bell was acquitted.' In the case of Daniels he testified, but no witness says how he testified, and, therefore, no inference can be drawn. Nobody knows,—and you are to judge by the testimony,—nobody knows whether he was a willing witness,

Digitized by Google

or whether the state brought him up and compelled him to testify." *Mr. Dargan.* "May it please your honor, a witness testified that the defendant assisted in the arrest of John Daniels." *The Court, (to Mr. Dargan.)* "And I say no inference is to be drawn from that." *Mr. Dargan.* "I think your honor's language was that he took no part."

The Court, (to the jury.) "What I mean, gentlemen, is that there is no proof that he assisted in ferreting out the parties and bringing them to trial. The mere fact that he assisted in the arrest you can draw no legal inference from. Furthermore, let me call your attention to the fact that two of those parties escaped; one was convicted. Now, the law holds that the one who was convicted was guilty, and the law also holds that the two who were acquitted were not guilty. Then the guiltless parties escaped, and we do not know really who it was that directed attention towards the innocent parties who were acquitted. We don't know who directed attention towards the innocent parties. All I mean to say is, that no inference can be drawn from the fact that he was put up as a witness; because you are not to know whether he put the state's officers on the wrong track. You don't know that he did, and you don't know that he did not. There is no proof that he did, and there is no proof that he did not. All I mean to say, gentlemen, is that you are not to consider those matters as proving that he took an active part in trying to find out who was shooting his father from the mere fact that he was a witness on the record. Well, now, these are the general principles which will guide you in the investigation of this case. And now we will come down to that, and assuming that William Scott is not a credible witness, let us come down to the investigation of the fact of what he has said, and how far he is corroborated. And, first, gentlemen, your first inquiry should be, who killed the old man? Who killed him, or, in other words, did William Scott kill him or take part in it? Did he kill him, or was he present aiding and abetting? He says that he did. He says he was present acting as captain. I am not enough familiar with matters of this sort to know whether the captain should stand off and watch,—should stand off where he could see the parties that were to do the deed, and at the same time watch for anybody coming from the outside. I will not undertake to say. I will not indicate whether the proper place for the captain was where he said he was or whether he should have been in the face of danger, and had somebody else to watch. I don't know that you know. I don't know whether persons who go to do things of this sort always have somebody on the watch or not. But the first question now is, did he either do the thing himself, or place the parties that did it? Well, he says he placed the parties there, and for the purposes of this case, except as it affects his credibility, and that is gone already, for the purposes of this case it does not matter whether he did it himself, or put the parties there to do it. So, then, if you reach the conclusion that he did either do the thing himself or took part in doing it, your next inquiry will be, who assisted him? He names Lewis Williams and Bob Arthur as the parties who were his co-conspirators. Is that true? The witnesses say that when Lewis Williams was arrested he said not a word; he did not ask what he was arrested for; gave himself up, and went to jail quietly. That is what they say—the three who arrested him. Does that corroborate William Scott's story that Lewis Williams was one of the party? That is entirely for you. And you have heard the other testimony about the different houses at which he was seen, the time he left home that afternoon, the course that he went, and the time he came up the next morning, and his subsequent conduct. I need not repeat it to you. Are you satisfied that William Scott and Lewis Williams are the persons that took part in this most outrageous murder? And was Bob Arthur the other party? All that you know of him outside of what William Scott says was having been seen under certain circumstances after the killing. He has disappeared. There is no testimony whatever that will warrant you in holding any reasonable account for his disappearance. If he disappeared because he was fearful of being tried for a matter with which he was charged, how did he know that he was charged with a part of this matter? Who told him? If some person told him, who was that person? I don't know. All I know is that he has disappeared. So that you see, gentlemen, of the two persons who William Scott says took part in this murder one did not even ask why he was arrested, went to jail quietly, submitted, and the other has disappeared. Does that corroborate William Scott's testimony? Does it bring your mind to the unshaken conviction that William Scott has told the truth when he said that these two persons were those who took part in that murder? If you reach that conclusion, then, gentlemen, you will next inquire what motive had they to do it? What motive had they to commit that murder? Did you hear any evidence whatever of the hostility of those three men against the old man? Where is the proof? Murder is committed either from hatred and malice, or, it may be, perhaps, from fits of jealousy when a man actually discovers that another has been playing false with his wife, or from motives of robbery. Now, what one of these motives did these three persons have? If you see any evidence of hatred in the case, you will consider it; if you do not, you will not consider it. The second motive I have mentioned, what evidence is there of that? If you see no evidence of that, you will dismiss that.

"The third motive: robbery. Well, gentlemen, so far as I can construe the evidence that has been given, in the four times that

Digitized by Google

the old man has been shot not one of the persons attempted to rob him. There is no evidence whatever, in any case, that, at any time, any of the parties attempted to rob him. If that had been the object in a case of this sort, would a thief or a robber have been likely to go to a house where his son was, and where Mr. Harman Howell was, and close to the piazza, shoot him down, and then run off? If that had been the motive, would they? If there be no proof then that the motive was robbery, then what was the motive? Well, William Scott says the motive was this: that the defendant, James, told him, 'My father has a large amount of salaried property, and I want to get it into my hands.' I don't know what he meant by 'salaried property,' but that is the term he used. 'I want to get it in my hands.' That is the motive he assigns for the defendant's having hired them to kill his father. That is the motive he assigns. Well, gentlemen, go back now. He says this thing began two years before the old man was killed, while he was working with Mr. Chapman, and the father and son were living there. That the father wanted to sell him a suit of clothes, and the clothes had shot holes in them, and that he said he had been shot; that the holes were made by his having been shot; that he had not the money to buy them then; and the son afterwards approached him and asked him what his father had been doing, and what he said. He says that the son said, 'Well, John Daniels was charged with doing that; it was not Daniels, it was Prince Bradley' and another person he named. And from that time forth the planning, he says, continued. I will not go over the numbers of interviews and arrangements he described from that time forth. That while he was at Chapman's, and again while he was at Howell's, and subsequently while he was at Du Bose's, those plannings and arrangements continued. Well, now, is he corroborated? Is he corroborated in any of those matters in such a way as to bring conviction to your minds? He himself admits that he knew some time before this that Hooten had charged him with having tried to hire him to shoot his father, and that Hailey's name was mentioned at the same time with Hooten and in connection with Hooten. He admits that he knew that, that his father told him so. Hooten goes on the stand and testifies to it, and Hailey testifies he took the message. Hailey and Hooten have both been discredited by witnesses who say they would not believe them on oath. McKay, another witness, has not been discredited. Not a word has been said against his character, and he testifies that defendant applied to him to carry a message to Hooten, which he declined to do. So that McKay testifies that defendant at that time—bad as Hooten's character was—was at that time seeking communication with him. Furthermore, the fact that his father told him what Hooten said, brings home to him the knowledge that Hooten had charged it. What did he do to put that thing at rest while his father was alive? And, gentlemen, you must bear in mind that, whether he be a witness who can be believed on oath or not, this charge was made by him at a time when this defendant was not being tried, and was made by him when it ought to have put his father on the guard, and before the mischief was done. Now, the question is not whether he is a credible witness, the question rather for you is, will a person who wanted to hire another to do a thing like that be likely to go to one who would be a credible witness? Would he or not? Would he not try to seek out the worst man in the neighborhood to do it? A man ready to do desperate things, and whom nobody would believe if he peached afterwards? Well, gentlemen, you must judge of his conduct under that charge; you must decide for yourselves as to his conduct under that charge, and whether or not Hooten, though not a credible witness, told the truth, he having made the charge long before the old man was killed. Well, you must remember what Thompson says about what was said to him going to the party. You will remember that the defendant says that he does not know him, that he has never seen him. You saw the witness on the stand; I do not know him; you must judge for yourselves whether he tells the truth or not. If you don't know enough about him to know whether he can be relied upon, you will still say whether what he says is a circumstance to be added to the other circumstances of the case.

"Well, now, I will not go over the details of all the testimony, which has been twice gone over already, about these various interviews, and about where this man was and where that man was. The old man is killed; he is shot, and he cries out, 'Oh! Joe, I am shot and killed!' You have heard the testimony of the witnesses as to the conduct of Joe on that occasion, and you are to draw your own inferences from it. Was it that of an affectionate, dutiful son, or was it that of one different from an affectionate, dutiful son? Was his conduct such as to show any grief at all at the death of his father, any desire to bring the murderers to justice, or anything of the sort? What does he do? Where is the proof of anything he did to search out those murderers and bring them to justice? There was a reward offered by him subsequently, but the proof is that he did not offer that reward until he was advised to do it; and there is no proof that until that time he ever did anything whatever to assist in seaching out the murderers. Well, now, if you come to the conclusion that William Scott did that thing, or took part in it, then do the circumstances which are proved bear out the defendant in what he said to the sheriff,—that he had no suspicion of any person whatever? The proof is that he subsequently visited at William Scott's house; and the proof is further that at that time, and shortly before the old man

Digitized by Google

was killed, Scott was constantly firing his gun as if practicing shooting at a mark. That matter attracted the attention of others, and cast suspicion on Scott; yet he visited at Scott's house, and had no suspicions of anybody. Further, gentlemen, a piece of wadding was found on the body of the old man, and that piece of wadding was of a marked character, a piece of homespun with red check, and Howell—Ben Howell—noticed a piece of that homespun on the body of one of Scott's children when he went there, and that this thing was discussed. It may be very possible that the defendant visited there frequently in the night time, and noticed the same thing, but still it is a circumstance that you will consider when you come to consider the question whether he had any reason to suspect any one, whether he heard the firing, or knew anything about the check. Well, the inquest is held, and the night after the inquest, Wednesday night, the whole neighborhood was gathered there, the old man not being yet buried, but lying in his coffin; and William Scott goes there. He says he went after his money. It is for you to consider now whether, if he did the deed or took part in it, he would have gone there if he had not gone for something. You are to consider whether he would have gone to that place under those circumstances, if he did not go for something. He says that, sitting on the steps, the defendant came out, spoke to him there, and went to the well with him; that he asked him for the money, and defendant replied he could not pay him because the doctor had taken the numbers of the bills that were found on the old man's body, and he could not be passing off those bills to him without first changing them. That is what he said. He says further that defendant said: 'How came you to put that check wadding in your gun?' 'I said to him, "What will you do about it?" He replied, "I will make way with it." I said to him, "What have you done with it?" He replied, "I put it over the mantelpiece."' That is what William Scott said. 'I put it over the mantelpiece.' How did Scott know that? It is for you to say. He says the defendant told him. He says defendant told him he put that check wadding over the mantelpiece. He says he tried to put it in the clock, and, not opening it, he put it over the mantelpiece, behind it there, or somewhere there, and it got lost. Another witness says that he put it in the clock; but the third witness says he tried to open the clock, and put it up there on the mantelpiece. Well, Scott says the defendant told him he put it there. Now, gentlemen, you are to account in some way for Scott's knowing that, if the defendant did not tell him. That was Wednesday night. The check wadding is missing. Friday the defendant is going down the road; he passes the road where Scott is hoeing cotton. Scott says defendant called him, and he went to him. You heard and will remember what he says about the action of defendant about inquiring, before speaking, if there was anybody in the ditch. Thereupon, he says, at that time he got the first warning, that he had better be on the lookout, that Sheriff Cole was in the neighborhood ferreting out the matter. That is what he says. Is he corroborated? Ben Howell saw the defendant there on that day, at that place, talking to Scott. He says that he did pass there, that he did stop and tell him 'Good morning,' and that was all. Well, gentlemen, if the defendant merely told him 'Good morning,' how came Scott to leave his hoeing, as Howell says he did, and go to the fence to him? Now, gentlemen, you have got to consider all these matters. You have got to regard Scott as not a credible witness, and not to rely on his testimony, unless what he says carries conviction to your minds, if you consider it corroborated by circumstances which help to carry conviction to your minds. I have nothing to say about it. I have called to your attention all the matters that struck my mind, except some I intended to call your attention to, which counsel on either side have sufficiently discussed before you. I will not repeat to you any more of the testimony.

"Now, the solemn question is for you. Can you explain these circumstances consistent with the defendant's innocence? Do they satisfy you, bring your minds to the unshaken conviction that he is guilty? If all these circumstances can be explained away by you reasonably, as not corroborating Scott's testimony, then, as a matter of course, it is your duty to say, 'Not guilty;' but if you cannot reasonably explain away all these circumstances consistent with his innocence, the law says it is your duty to say 'Guilty.'"

The exceptions to the charge were as follows:

(1) Because his honor erred in admitting in evidence the declaration of Joseph James, deceased, to the witness, D. G. Du Bose, four weeks before his death. (2) Because his honor erred in indicating in his charge to the jury an opinion as to the influence which the rewards offered by the defendant and the governor would have on the witnesses for the state. (3) Because his honor erred in charging the jury that they could draw no inference from the fact that the defendant was a witness for the state on the trial of Bell, John Daniels, and Fields for shooting his father; and no inference from the fact that he assisted in the arrest of John Daniels when charged with the same offense. (4) Because his honor erred in that he misquoted the testimony in charging the jury in the following words: "It is not testified in any way whatever that he [the defendant] was active in the matter." Whereas, it is respectfully submitted, that it was in evidence and uncontradicted, that the defendant not only aided in the arrest of John Daniels when charged with shooting his father, but also testified against him. (5) Because his honor erred in that he plainly indicated to the jury that, in his opinion, the conduct of

Digitized by Google

Lewis Williams and Bob Arthur strongly corroborated the testimony of William Scott, the chief witness for the state, by charging the jury in the following words: "He names Lewis Williams and Bob Arthur as the parties who were his co-conspirators. Is that true? The witnesses say that when Lewis Williams was arrested, he said not a word; he did not ask what he was arrested for; gave himself up, and went to jail quietly. That is what they say—the three who arrested him. Does that corroborate William Scott's story that Lewis Williams was one of the party? That is entirely for you. And you heard the witnesses' testimony about the different houses at which he was seen, the time he left home that afternoon, the course that he went, and the time he came up the next morning, and his subsequent conduct. I need not repeat it to you. Are you satisfied that William Scott and Lewis Williams are the persons who took part in this most outrageous murder? And was Bob Arthur the other party? All that you know of him outside of what William Scott says was having been seen under certain circumstances after the killing. He has disappeared. There is no testimony whatever that will warrant you in holding any reasonable account for his disappearance. If he disappeared because he was fearful of being tried for a matter with which he is charged, how did he know that he was charged with a part of this matter? Who told him? If some person told him, who was that person? I don't know All I know is that he has disappeared. So you see, gentlemen, of the two persons who William Scott says took part in this murder, one did not even ask why he was arrested, went to jail quietly, submitted; and the other has disappeared. Does that corroborate William Scott's testimony? Does it bring your minds to the unshaken conviction that William Scott has told the truth when he says that these two persons were those who took part in that murder? If you reach that conclusion, then, gentlemen, you will next inquire, what motive had they to do it? What motive had they to commit that murder?" (6) Because his honor erred in charging the jury in that he presented in a forcible manner his own opinion as to the motive which actuated the persons who killed Joseph James. (7) Because his honor erred in charging the jury in respect to matters of fact, so as to influence their judgment in determining the degree of credibility which they should attach to the testimony of the defendant, and to that of McKay, Hooten, and Haley, witnesses for the state. (8) Because his honor erred in that he expressed to the jury his own views as to the deportment of the defendant after the murder, and suggested the conclusions to be drawn from his conduct by using the following words in his charge: "The old man is killed; he is shot, and he cried out, 'Oh! Joe, I am shot and killed!' You have heard the testimony of the witnesses as to the conduct of Joe on that occasion, and you are to draw your own inferences from it. Was it that of an affectionate, dutiful son, or was it that of one different from an affectionate, dutiful son? Was his conduct such as to show any grief at all at the death of his father, any desire to bring the murderers to justice, or anything of the sort? What does he do? Where is the proof of anything he did to search out these murderers and bring them to justice? There was a reward offered by him subsequently; but the proof is that he did not offer the reward until he was advised to do it; and there is no proof that until that time he ever did anything whatever to assist in searching out the murderers." (9) Because his honor erred in that he presented in his charge to the jury the strongest points in the testimony against the defendant, and omitted the facts and circumstances in his favor. (10) Because it is respectfully submitted that his honor erred in that his charge to the jury was an argument for the state, in violation of article 4, § 26, of the constitution, and had the effect to convince them that he had no confidence in the testimony of the defendant; that he was guilty of "hiring another to kill his father;" and that, unless he was convicted, "that father's blood would rest upon the hands of the jury."

E. Keith Dargan, for appellant. *J. M. Johnson*, for the State.

McIver, J. The appellant was indicted, jointly with William Scott, Lewis Williams, and Robert Arthur, for the murder of his father, Joseph James; and, a motion to sever in the trial having been granted at a previous term of the court, the solicitor elected to try appellant first; and at March term, 1888, the appellant was tried and found guilty. Sentence having been passed, defendant appeals upon the several grounds set out in the record. The theory upon which the case for the state rested was that the appellant had hired his three co-defendants to kill his father, by offering to pay each of them the sum of $200; and the testimony mainly, if not entirely, relied upon to support this theory was the testimony of an admitted accomplice, William Scott, together with various circumstances which it was claimed supported or corroborated his testimony. The testimony tended to show that the deceased was shot at night just as he stepped out upon the front piazza of the house where he and his son, the appellant, were then boarding; that the fatal shot was fired by Lewis Williams, the other two defendants, Scott and Arthur, being present, aiding and abetting, while the appellant was in the back part of the house taking a drink of water; that, when the gun was fired, appellant and Howell, with whom he was boarding, went out on the front piazza, when they heard the exclamation alluded to in the judge's charge, —"Joe! Oh, Joe! I am shot and killed!"—and, when asked by Howell what was the matter, deceased replied "I am shot; they have killed me;" that search was immediate-

Digitized by Google

ly made for the assassin by Howell and appellant, which proved to be ineffectual. They hurried back to the old man, who very soon afterwards died. Testimony was also adduced to show that deceased had been previously shot on three different occasions; that three persons—Bell, Daniels, and Fields—had been indicted and tried therefor; that on each of these trials appellant was a witness for the state; that he had assisted in the arrest of Daniels, who was convicted and sent to the penitentiary, and that the other two persons, Bell and Fields, had been acquitted. One James Hooten, whose character was attacked, was offered as a witness to show that appellant had attempted to hire him to kill his father; and one Hailey, whose character was likewise attacked, and one McKay, who was not attacked, were offered to corroborate Hooten's testimony, by showing that they were asked by appellant to carry messages to Hooten, though McKay does not say what was the purport of the message he was asked to carry, as he declined to bear any message at all. There was much other testimony, all of which is fully set out in the case, but the foregoing brief statement is sufficient to enable us to consider the several objections to the judge's charge.

The first ground of appeal is in the following words: "Because his honor erred in admitting in evidence the declarations of Joseph James, deceased, to the witness D. G. Du Bose four weeks before his death." On turning to the case we find that when the witness Du Bose was on the stand he was asked the following question: "Shortly before the old man was killed, do you know, from what you heard either of them say, whether the relations between the old man and his son were friendly or hostile?" Objected to. Objection overruled. Exception taken. *Answer.* "From what I heard Mr. Joe James, senior, say, they were not friendly. He said that to me about four weeks before he was killed." *Question.* "Could you state whether he had hostile feelings or friendly feelings?" *A.* "My opinion was—" (Interrupted.) Defendant's counsel objects to the opinions or impressions made on the mind of the witness by the declarations of deceased. Objection sustained. "*By the Court.* My ruling is that an expression of hostility is an act, not a declaration. I have not allowed declarations to be testified to. *By the Court,* (*to witness.*) If you heard him express hostile feelings towards his son, state it. *A.* I did, sir." Defendant's counsel asked that his exceptions be noted to all testimony as to expressions of hostility between the father and the son, and to all declarations of hostility. From this extract from the case, showing what occurred at the trial, in reference to the testimony objected to, it is very manifest that the circuit judge drew a distinction, whether well founded or not is not now the question, between expressions of hostility and declarations which the witness heard. This is clear from what occurred when Huggins, who was examined immediately before Du Bose, was on the stand, for when Huggins was asked as to the relations between the old man and his son, and he replied that he could not tell, except what the old man told him five days before he was killed, he was not allowed to say what the old man told him, the court ruling that, in reply to the evidence adduced on the other side to the effect that father and son were upon good terms, the witness might prove expressions of hostility, but could not be allowed to prove what words were used by the old man showing such hostility,—could not prove the old man's declarations. Now, while the exception noted at the trial does embrace both points,—expressions of hostility as well as declarations,—it will be observed that the first ground of appeal, which is all that we can properly consider, only imputes error to the circuit judge in excluding the declarations of the deceased, which, as we have seen, were expressly excluded; but, as this is merely technical, we would not be disposed, in a case of this gravity, to rest our decision upon it. Whether the relations between two persons are friendly or otherwise may be testified to by a witness who has had an opportunity of observing the intercourse between them; for although such testimony may, to a certain extent at least, be regarded merely as the opinion of the witness, yet it seems to fall under the exception to the general rule excluding opinions of witnesses, which exception, as is said in Com. v. Sturtivant, 117 Mass. 122, cited with approval in Jones v. Fuller, 19 S. C. 68, 69, "is not confined to the evidence of experts testifying on subjects requiring special knowledge, skill, or learning, but includes the evidence of common observers testifying to the results of their observation made at the time in regard to common appearances or facts, and a condition of things which cannot be reproduced and made palpable to a jury." Among the numerous illustrations given in that case and the note thereto may be found the following: "So, those who have observed the relations and conduct of two persons to each other may testify whether, in their opinion, one was attached to the other," (McKee v. Nelson, 4 Cow. 355,) or "as to the degree of affection entertained by a wife for her husband, in an action of *crim. con.*," (Trelawney v. Colman, 2 Starkie, 191.) It seems to us that the true rule is that a witness who has had an opportunity of observing the intercourse between two persons may be asked the general question whether the parties are friendly or otherwise, although his answer can be nothing more than an expression of his opinion, the correctness of which may be tested by a cross-examination as to the grounds upon which he bases his opinion; yet, when it appears that he speaks only from what he has heard one or the other say to himself or to third persons, it is nothing more than hearsay, and should be excluded upon that ground.

Digitized by Google

In all the other grounds of appeal exception is taken to various portions of the circuit judge's charge to the jury as being in violation of section 26, art. 4, of the constitution, which is in these words: "Judges shall not charge juries in respect to matters of fact, but may state the testimony and declare the law." For a proper understanding of the case it will be necessary that the charge of the circuit judge, together with the grounds of appeal, be fully set out by the reporter, although we do not deem it either necessary or desirable to consider specifically each of these grounds. This imperative mandate of the constitution it is our plain duty to enforce, without regard to the consequences which may ensue in any particular case. Whether this is a wise or an unwise provision we have neither the power nor the disposition to consider. It is enough for us to know that the people, in their sovereign capacity, have declared that judges "shall not charge juries in respect to matters of fact," and the only question which we have the power to consider is whether this imperative mandate has been violated in a given case. The first inquiry which naturally arises is, what is the meaning and extent of the prohibition, "Judges shall not charge juries in respect to matters of fact?" If that language stood alone, then the inference would be that a judge, in charging a jury, should not say anything about the facts, for the broad terms used—"in respect to matters of fact"—would certainly warrant, if they did not require, the inference that a judge was not at liberty even to speak of the facts,—not at liberty to speak in reference to or "in respect" to them; but, as that was not the intention, additional words are found in the clause which expressly permit the judge to state the testimony; so that the practical inquiry is, what is the extent of this permission, following as it does and qualifying the previous absolute prohibition, which, without such qualification, would forbid any allusion to the testimony? To state the testimony, certainly does not mean to discuss the testimony; for, to say nothing of the marked difference in the signification of these two words, such a construction would bring the latter part of the clause into direct conflict with the preceding imperative prohibition, for to discuss the testimony would certainly be charging in respect to matters of fact,—the very thing which is expressly forbidden. What, then, is the extent of the permission to state the testimony? Is it confined to a mere repetition of the testimony as it fell from the lips of the witnesses, or does it extend to an arrangement of the testimony in the order in which it applies to the several questions of fact arising in the case, and as thus arranged laid before the jury by the judge? Ever since the cases of State v. Green, 5 S. C. 65, and Redding v. Railroad Co., Id. 67, followed by State v. White, 15 S. C. 381, down to the very recent case of State v. Addy, 28 S. C. 4, 4 S. E. Rep. 814, the latter construction has been held the correct one; but it has been uniformly held that in thus laying the testimony before the jury, in its proper order, the judge must be careful to avoid expressing or even intimating any opinion as to the facts, and that if he does so, whether intentionally or unintentionally, a new trial must be granted. Under our constitution the jury are the exclusive judges of the facts; and the true meaning and real object of the section of the constitution above quoted is that they must be left to form their own judgment, unbiased by any expressions or even intimations of opinion from the judge.

Looking at the charge in this case under the light of these principles it is impossible for us to resist the conclusion that the jury could not fail to see that his honor had very decided convictions against the prisoner upon many, if not most, of the material questions of fact in the case. This impression was left upon our minds on the first reading of the charge, and a careful examination of it has only served to deepen that impression. Whether the charge be considered as a whole, or the several points specified in the exceptions be considered separately, we think the jury were bound to see the leaning of the judge's mind. The declaration in the outset that, if the prisoner hired another to kill his father, none of that father's blood should rest on his hands, and that he had no reason to suppose that any one of the jury was disposed to differ from him in that determination, was well calculated to convey the impression that the blood of the deceased rested upon the head of the prisoner. He was the only person then on trial; and, if the responsibility for that bloody deed rested neither upon the judge nor the jury, where else was it to rest except upon the prisoner. Then the manner in which the testimony adduced to corroborate the testimony of William Scott was presented to the jury, and the remarks made as to the motive for the killing, excluding all idea of the motive being robbery, and presenting in the strongest light the idea that it was for the bribe alleged to have been offered by the prisoner to any one who would take his father's life; the discussion of the testimony of Hooten, and the evidence relied on to corroborate him, especially in connection with the suggestion that he was just such a person to whom such an infamous offer would likely be made; the suggestion that the reward offered by the prisoner for the discovery of the murderer of his father might have been prompted by other than the ostensible motive; the intimation that the prisoner might have put the officers of the state upon the wrong track when they were trying to find out who had shot the deceased on previous occasions; the comments on the conduct of the prisoner after his father was killed,—these, and other portions of the charge which it is deemed unnecessary to consider specifically, could not fail to indicate to the jury the opinion of his honor. But,

Digitized by Google

in addition to this, when the judge, in commenting on the testimony adduced to show that the prisoner had been active in the prosecution of others who had previously shot his father, he explicitly instructed the jury that they could draw no inference favorable to the prisoner from such testimony,—that they could draw no inference from the fact that the prisoner had testified as a witness for the state on the trial of these parties, and had assisted in the arrest of Daniels, who was convicted,—it seems to us clear that he plainly invaded the province of the jury, and forbade them from doing what it was their exclusive province to do,—draw inferences from the testimony adduced. The jury being the sole judges of the facts, it is for them, and not for the judge, to say whether any inferences, and if so what, shall be drawn from the testimony; and it is a plain violation of the constitutional provision above referred to for the judge to instruct the jury that no inference can be drawn from any given portion of the testimony. If it were otherwise, then it would be practicable for a judge, in effect, to dictate the verdict. Without going into any further discussion of the charge it seems to us clear that, whether the charge be considered as a whole, or as to those portions of it specifically mentioned in the exceptions, it was in violation of the provision of the constitution; and for this reason we are compelled to grant a new trial. We desire to say, however, that we are not to be regarded as either expressing or even intimating any opinion as to the correctness or incorrectness of the verdict. That is a question which it is beyond our province to consider, and has, therefore, not been considered. Our action in granting a new trial for the errors of law indicated is not entitled to have, and should not have, the slightest influence, either one way or the other, upon the next jury called upon to pass on the facts of the case, as they may then be presented to them. The judgment of this court is that the judgment of the circuit court be reversed solely on the grounds indicated, and that the case be remanded to that court for a new trial.

SIMPSON, C. J., and MCGOWAN, J., concur.

(31 S. C. 262)

CARRIGAN *v.* EVANS *et al.*

(*Supreme Court of South Carolina.* July 6, 1889.)

PARTITION—JURY TRIAL.

On a foreclosure of a mortgage given on land by a *cestui que trust*, the trustee in possession and claiming title was not made a party. One of two purchasers at the foreclosure sale brought partition against his co-tenant and the trustee, alleging that the latter was in possession, claiming title. *Held*, that the purchasers had no right to partition until they established their title against the trustee, and the question of title was not one for an issue out of chancery, but was one of law for a jury.

Appeal from common pleas circuit court of Chesterfield county; PRESSLEY, Judge.

William A. Carrigan filed a bill in partition against Samuel W. Evans and others. From certain orders of the court Evans appeals.

R. T. Castin, for appellant. *Newton, McQueen & Hursey*, for respondent.

MCGOWAN, J. This case was submitted upon printed arguments, and, as well as we can gather them from the brief, the general facts are as follows: (1) It seems that Samuel W. Evans and his tenant, C. S. Brown, are in possession of a tract of land containing 500 acres; that Evans claims to be seised in fee of the same, under the will of one Eleanor Chapman, which conveyed the fee to him, upon the trusts to hold the same for the sole and separate use of Margaret Blue for and during her natural life, and, after her death, to convey the same to her children, share and share alike; that said Margaret Blue is still alive, and is one of the defendants in the case. (2) It further appeared that under some proceeding the aforesaid tract of land was offered for sale by the sheriff of Chesterfield county. The record of that proceeding is not in the case, and it does not appear what was the precise nature of the issues, or who were the parties thereto, except that it fell out incidentally from a previous order, made by Judge FRASER, that the proceeding was an action by William A. Carrigan, the plaintiff here, to foreclose a mortgage against Mrs. Blue, the principal *cestui que trust*, and that her trustee, Samuel W. Evans, was not a party to the proceeding. At the sale, however, Carrigan and A. A. Pollock bid off the land, and took sheriff's titles as tenants in common. Evans refused to yield possession, claiming that the legal title was in him; that he had never been made a party to any proceeding in which it was adjudged that he had not the title. The purchasers at the sheriff's sales made some efforts to dispossess him, which were not successful; but, from the view the court takes, it will not be necessary to refer to the subject of these proceedings again. (3) Thereupon the plaintiff, Carrigan, alleging that he and Pollock were "seised in fee-simple absolute" of the land, instituted this proceeding against his co-purchaser, Pollock, for partition, making at the same time Samuel W Evans, the trustee, and his tenant, Brown, as also the *cestui que trust* Mrs. Blue, parties defendant; the defendant Evans still objecting to surrender possession, but, on the contrary, claiming the land as his own as trustee, and traversing the allegation that Carrigan and Pollock, or either of them, had titles under the aforesaid sheriff's sale and conveyance. The case came up on calendar No. 2 as a case in chancery and Judge PRESSLEY, upon motion of the plaintiff, ordered that the following "issues from chancery" be submitted to a jury for trial: "(1) Is the defendant S. W. Evans the sole owner of the property described in the complaint as trustee? (2) Is the said defendant S. W. Evans, as trustee, owner of any part of said

Digitized by Google

property or land, and, if so, what part? It is further ordered that the said defendant S. W. Evans do hold the affirmative of said issues," etc. From this order the defendant Samuel W. Evans appeals to this court upon the following exceptions: "(1) Because his honor erred in granting said order. (2) Because said cause not being ready for trial, and no motion having been served on defendant's attorney, it was error to hear the motion of plaintiff's attorney, and grant order thereon without consent of defendant. (3) The complaint being for the recovery and partition of real estate, and the defendant, in his answer, having denied the allegations of complaint, and alleged adverse possession and title in himself, the plaintiff should have been required to establish the allegations of his complaint, and his honor erred in requiring the defendant to assume the affirmative of the issues, to be submitted to a jury. (4) The defendant, in his answer, having claimed absolute title to the land described in the complaint, the cause should have been submitted to a jury upon the issues made by the pleadings, and not upon 'issues out of chancery.' (5) The question of title to land being raised by the pleadings, the case should have been transferred from calendar No. 2 to calendar No. 1, to be tried before a jury upon the issues of title raised therein. (6) Because, the issues submitted under the order of Judge FRASER having been determined in favor of the defendant, the question of right to the possession of the land described in the complaint was thereby adjudicated. (7) Because the judgment and order of Judge WALLACE determined the right of possession of said premises to be in the defendant," etc.

Exceptions 6 and 7 relate to some previous proceedings by the purchasers to oust Evans from the premises, but we do not think it necessary to incumber the case with a statement of them. As we understand it, the doctrine of *res adjudicata* does not apply to the order of Judge WALLACE, confirming the finding under "issues" directed by Judge FRASER, that the defendant Evans was entitled to possession. While approving the finding, Judge WALLACE held that "no final judgment could be rendered in the case for the reason that title to land cannot be determined in this state under a rule." The merits had not been decided under proper issues. See Charles v. Charles, 13 S. C. 387. We regard every point in the case as conclusively settled by that of Reams v. Spann, 28 S. C. 530, 6 S. E. Rep. 325, where, in a simillar case, it was held that, "where plaintiff brings action for partition, alleging that two of the defendants are in possession, who answer claiming title, the rights of these defendants involve a legal issue, which must first be determined by trial by jury, before the matter of partition can be heard. Upon the question of title it is not a case for an issue out of chancery, but for a trial by jury at law." Here the pleadings admit that Evans is now, and for a long time has been, in possession of the premises, claiming title. It does not appear that he was made a party in the case of foreclosure of mortgage against Mrs. Blue, under which the claimants purchased. They may have no title; Mrs. Blue may not have had the right to bind the land by mortgage. At all events it is clear that the title has never been adjudged as against Evans, who claims title as trustee in himself. In this state of the case the claimants have no right to partition the land between themselves, until they have established their title as against Evans. That can only be done in the regular way,—by proving their title. Evans, being in possession, may remain entirely passive until they, the purchasers, prove their case upon the formal legal issue made by them. To assume that they have title, and to require him to prove his title, and to show cause why he should not be ousted of the possession, would be to reverse entirely the relations of the parties, and, by making Evans the actor instead of being the defendant, to deprive him of an important right involved in the maxim, "*melior est conditio possidentis, et rei quam actoris.*" As this court said in Reams v. Spann, supra: "The case embraced two causes of action,—one purely legal, for the recovery of the land, * * * and the other equitable, for partition after it was recovered. The legal issue should therefore have been first tried by a jury; and, if that resulted in favor of the plaintiffs, then, and not till then, could the court, on its equity side, decree partition,—as in Adickes v. Lowry, 12 S. C. 97. In the trial of the legal issue, the action being for the recovery of specific real property, the question of title should have been submitted to a jury upon the issues made by the pleadings. As we understand it, the right of a party to demand a trial by jury under section 274 of the Code * * * differs very materially from any right concerning 'issues from chancery,' [the findings upon which may be entirely disregarded by the judge acting as chancellor.] So far as the McReas [Evans] are concerned, this is simply an action at law for the recovery of a tract of land." And authorities. The judgment of this court is that the judgment of the circuit court be reversed, and the case remanded to that court for a new trial in conformity with the principles herein announced, or such other proceedings as the parties may be advised.

SIMPSON, C. J., and MCIVER, J., concur.

(31 S. C. 238)

STATE v. WILLIAMS.

(*Supreme Court of South Carolina.* July 6, 1889.)

COMPETENCY OF JURORS—INSTRUCTIONS.

1. Gen. St. S. C. § 2261, provides that the court shall, on motion, examine a person called as a juror, and if it shall appear to the court that he is not indifferent, he shall set him aside. Defendant in a murder trial challenged three jurors who had tried the case of one who had been jointly indicted with

Digitized by Google

defendant for the same offense and convicted. The court, after examination, held them competent. *Held*, that this was not error. McIVER, J., dissenting.

2. It is error for the court to excuse a juror on the ground of prejudice, without first making the examination called for by section 2261.

3. Where, on reading the charge given in a murder trial as a whole, it is apparent that the judge thought the prisoner guilty, and that he should be convicted, and the language used, and the questions propounded, naturally carried this thought to the jury, a new trial must be granted under Const. S. C. art. 4, § 26, providing that judges shall not charge as to questions of fact, but may state the testimony and declare the law.

Appeal from general sessions circuit court of Darlington county; PRESSLEY, Judge.

Lewis Williams was convicted of murder and appeals.

E. O. Woods, for appellant. *J. M. Johnson*, Sol. Gen., for respondent.

SIMPSON, C. J. For a full understanding of this case the opinion is preceded by a statement of the case, the indictment, the impaneling of the jury, the charge of his honor, Judge B. C. PRESSLEY, and the exceptions of appellant, as follows:

"STATEMENT OF CASE.

"The defendant Lewis Williams, and his co-defendants Joseph W. James, William Scott, and Robert Arthur, were jointly indicted for the murder of Joseph James, Sr., upon three counts, as the indictment will disclose. At the preceding term of the court for Darlington county, to-wit, at the June term, 1888, Judge FRASER presiding, the defendants Lewis Williams, Joseph W. James, and William Scott were arraigned, and each of them pleaded 'not guilty.' On the motion of the defense, Judge ALDRICH, at the October term, granted a severance, and subsequently, on the motion of the solicitor, continued the cases until the next term of the court. The case came on for trial at the March term of the court of sessions, when the defendants James and Williams were separately tried, and were both convicted, the defendant Scott, an alleged accomplice, in both cases testifying on behalf of the state, and in his testimony admitted his own guilt, and testified further to a conspiracy between himself and his co-defendants for the murder of the deceased. No disposition having been made of the case against Scott, upon a trial of the defendant Lewis Williams three of the jurors who composed the jury in the trial of Joseph W. James served upon the jury in the trial of Williams. The defendant having challenged for cause all the jurors who served in the trial of James, and being overruled, challenged them peremptorily, his peremptory challenges being exhausted when the said three jurors were called and sworn. The method of impaneling the jury is inserted in the case. The following constitute the indictment in the case, the testimony at the trial of Williams, the judge's charges, notice of appeal, and exceptions duly served upon the presiding judge, his honor B. C. PRESSLEY, and J. M. Johnson, solicitor; the time for serving the case having been extended by agreement with the solicitor: 'The State of South Carolina, County of Darlington.—At a court of general sessions begun and holden in and for the county of Darlington in the state of South Carolina, at Darlington, in the county and state aforesaid, on Monday, the ——— day of March, in the year of our Lord one thousand eight hundred and eighty-eight, the jurors of and for the said county of Darlington aforesaid, in the state of South Carolina aforesaid, that is to say, upon their oaths present that William Scott, Lewis Williams, Robert Arthur, and Joseph W. James, on the eighth day of May in the year of our Lord one thousand eight hundred and eighty-eight, with force and arms, at Darlington, in the county of Darlington, state aforesaid, in and upon one Joseph James, Sr., feloniously, willfully, and of their malice aforethought, did make an assault, and him, the said Joseph James, Sr., with a gun did shoot and wound, giving to him, the said Joseph James, Sr., then and there, by means of the said shooting in and upon the body of him, the said Joseph James, Sr., one mortal wound, of which said mortal wound the said Joseph James, Sr., then and there instantly died. And so the jurors aforesaid do say that the said Joseph W. James, the said Joseph James, Sr., in mannner and form aforesaid, feloniously, willfully, and of his malice aforethought, did kill and murder, against the form of the statute in such case made and provided, and against the peace and dignity of the state. And the jurors aforesaid, upon their oaths aforesaid, do further present that the said Lewis Williams, on the eighth day of May in the year of our Lord one thousand eight hundred and eighty-eight, with force and arms at Darlington, in the county of Darlington, state aforesaid, in and upon one Joseph James, Sr., feloniously, willfully, and of their malice aforethought, did make an assault, and him, the said Joseph James, Sr., with a gun did shoot and wound, giving to him, the said Joseph James, Sr., then and there, by means of said shooting in and upon the body of him, the said Joseph James, Sr., one mortal wound, of which said mortal wound the said Joseph James, Sr., then and there instantly died; and so the jurors aforesaid do say the said Lewis Williams, the said Joseph James, Sr., in manner and form aforesaid feloniously, willfully, and of his malice aforethought did kill and murder; and the jurors aforesaid, upon their oaths aforesaid, do further present that Joseph W. James, William Scott, and Robert Arthur, late of the county aforesaid, before the said felony and murder was committed in form aforesaid, to-wit, on the second day of May in the year aforesaid, at Darlington, in the county aforesaid, did feloniously and maliciously incite, move, procure, aid, counsel, hire, and command the said Lewis Williams the said felony and murder, in manner and form aforesaid, to do and commit, against the form of the statute in such case made and provided, and against the

Digitized by Google

peace and dignity of the same state aforesaid.'

"When the jury was being impaneled the juror T. P. King was called to the book, whereupon the defendant's counsel challenged the juror, upon the ground that this juror had served upon the panel which tried the case against Joseph W. James, and that the defendant Lewis Williams was charged in the indictment as a co-conspirator with James. The presiding judge ordered the juror to be sworn upon his *voir dire*. This was done, and the juror, having answered satisfactorily the questions propounded to him, was declared by the presiding judge to be a competent juror, and ordered to be presented to the defendant. (The defendant excepts.) When the juror E. R. Moore was called the defendant's counsel challenged the juror for the same cause. He was sworn upon his *voir dire*, and, having answered satisfactorily to the court the questions propounded to him, he was declared by the presiding judge to be a competent juror, and was ordered to be presented to the defendant. (Defendant excepts.) When the juror S. E. Moore was called the defendant's counsel challenged the juror for the same cause. He was ordered by the presiding judge to be sworn upon his *voir dire*. This was done, and, the juror having answered satisfactorily to the court the questions propounded to him, he was declared by the presiding judge to be a competent juror, and ordered to be presented to the defendant. (Defendant excepts.) When the juror J. M. King was called the defendant's counsel challenged the juror for the same cause. The juror was ordered to be sworn upon his *voir dire*. This being done, and the juror failing to answer satisfactorily to the presiding judge the questions propounded to him, he was declared to be not a competent juror, and ordered not to be presented to the defendant. When the juror A. M. Lee was called the defendant's counsel challenged the juror for the same cause. The juror was ordered to be sworn upon his *voir dire*. This being done, and the juror having answered satisfactorily to the court the questions propounded to him, he was declared by the court to be a competent juror, and ordered to be presented to the defendant. The solicitor challenged this juror. When the juror P. A. Parnell was called the defendant's counsel challenged the juror for the same cause. The juror was sworn upon his *voir dire*, and, having answered satisfactorily the questions propounded to him, was declared by the presiding judge to be a competent juror, and ordered to be presented. (Defendant excepts.) When the juror W. C. Ervin was called defendant's counsel challenged the juror for the same cause. The juror was sworn upon his *voir dire*, and, having satisfactorily answered the questions propounded, was ordered to be presented. (Defendant excepts.) When the juror ——— Polson was called the defendant's counsel challenged the juror for the same cause. The juror was sworn upon his *voir dire*, and, failing to satisfactorily answer the questions propounded, he was declared by the presiding judge to be not a competent juror. When the juror J. A. Huggins was called the presiding judge said: 'I heard his testimony in the other case, and I do not regard him as a person without prejudice. I was not at all satisfied with his talking with the witnesses at the hotel door.' The juror was ordered not to be presented to the defendant. (The defendant excepts.) When the jurors John T. Rogers, W. S. McIntosh, and ——— Barrington were each called the defendant's counsel challenged each for the same cause. Each juror was sworn upon his *voir dire*, and each juror, having answered satisfactorily the questions propounded, was declared by the presiding judge to be a competent juror, and presented to the defendant. (Defendant excepts.) The defendant's peremptory challenges having been exhausted before the last-named three jurors were called, they were sworn upon the jury."

"JUDGE'S CHARGE.

"Mr. Foreman and Gentlemen: There have been so many details in this case that I do not consider necessary to call your attention to, and which may have tended to divert your attention from the true issues of the case, that I will endeavor precisely to call your attention to the true issues which you are to try. Well, first, you are not to try whether Lewis Williams shot that gun, or who shot it. That is not a material issue in the case in so far as his legal guilt is concerned. It is a question when you come to consider the truth of William Scott's testimony, but it is not one of the legal issues in the case, because the law is this: that whether he shot the gun, or whether he was on the watch,—present on the watch,—it is just the same. The law is this: that the man who kills, and the man who stands on the watch to keep him from being surprised when he is going to kill,—the offense is the same in law. If two or more persons go together to kill a man, the finger of the man that is on the trigger is the finger of all. So you will not try that issue at all. You are to try whether he took part in that killing, either by shooting the gun, or by being on the watch,—being there to encourage, aid, and abet. But, as a matter of course, it does bear upon the question of Scott's telling the truth. Your view on that matter does bear on that question. And, first, let me say to you on that question what I said to the other jury, that you start out assuming that Scott is a discredited witness. The law considers, when he testifies to the part he took in the transaction, he thereby discredits himself, and you are not to believe him unless you consider, either from his manner of testifying, and from the number of details,—the number of particulars,—which he mentions of which you are to judge, that he could not have manufactured them, and from the circumstances which you regard as corroborating him. You are to judge from all these whether he has told the truth or not.

Digitized by Google

If he be a lying witness, one that cannot be relied on under any circumstances, still, if all these things taken together,—that is, his manner, the number of details and other circumstances that point to the defendant corroborating him,—if all these circumstances bring conviction to your minds that, whether liar or not, he tells the truth in this case in so far as the guilt of the defendant is concerned, the law says you can act on it. The law says, if it be not corroborated in the important material matters, you should be very cautious about trusting his testimony. The law says it is unsafe to trust his testimony unless, from all the circumstances of the case, you are reasonably satisfied that he has told the truth. Well, now, bear in mind that the question of who shot makes no legal difference in the case. Then the question for you to decide is, was this defendant present there, either doing the shooting, or on the watch helping or encouraging the others? Well, you recollect Scott's story. He says he was employed by James to get the other men to come into this matter; that he got defendant, and defendant got Bob Arthur, and that they three contrived the matter under the management of Mr. James. Now, first, Scott admits that he was there; but he does not admit that he did the shooting. It is said that you are not to believe that he tells the truth on that account. You are not to believe he tells the truth, because it is more likely he did the shooting. You are to be the judges of that. If he was the person who arranged the whole matter, and if he got Lewis Williams, and Lewis Williams got Bob Arthur to join in this matter, it is for you to say for yourselves, according to your own common sense and knowledge of such things, what is the position he would be likely to take if he was the captain. He says that he stood about half-way between the gate and the parties who were to do the shooting. Well, I don't know whether he would consider that the safer position for himself or not, —I don't know; you are to judge whether he thought, as he was the manager, he would not be the best man to watch. Did he or not stay in such position as that he could see anybody coming from the big gate, and at the same time give the alarm to those that were at the house? You must weigh that matter for yourselves. I cannot give you any opinion on it. If, from what he says as to his position, you come to the conclusion that he was in a position to see anybody coming, and at the same time in a position to give the alarm to the others, you will then say, was not that the best position for the captain? He may or he may not be unwilling to trust one of the others to an important position like that. I don't know; it is for you to say. Well, it is said he is not to be believed because there was but one track there, and therefore it is to be inferred that he had no accomplices. There was but one track. You have heard the testimony of Mr. Harman Howell on that subject. He says all the ground around the steps was perfectly hard, and that it was not at all probable that a person in his socks could have made a track there; that on the left hand as you go in, where the person is said to have stood that shot the old man, you could see that the ground looked like it had been scraped; not a track, but the surface stirred. Whether that would be likely to occur from the manner in which one would move about when firing a gun, I do not know: it is for you to judge. But he said he found no mark of the foot or track anywhere else within the inclosure, but going on there was a place where he did see tracks of a stocking foot—of one person in stockings—crossing a sandy place. Can you or not infer from that that there was but one person going that way? That would depend upon whether they would all run together, or whether they would scatter. It would depend upon that. If they scattered immediately after leaving that place, then would more than one person cross that narrow sandy place he described? That is a matter entirely for your own judgment. As far as his testimony is concerned, he does not say they went together. He says they came back to the gate. Lewis came back and Bob Arthur came back, and there got their shoes, and then they each went their way. So much as to there being but one track found.

"Now, gentlemen, what is his story? His story is that James first approached him, and it was at James' request that he approached Lewis Williams to go there that night; that there was a hitch about the matter, and that subsequently he and James saw Lewis Williams again, and then Lewis Williams agreed to join in the matter, and get Bob Arthur. That is his story. Is it corroborated? Mr. Harris says that defendant told him, in the presence of Mr. Truett, that Scott had tried to get him to do the matter, and he refused, and that Scott and James together subsequently tried him, and he still refused. Well, if he told Mr. Harris and Mr. Truett that,— if you believe them,—their story tallies with what Scott said, excepting the last, namely, that he then refused. Scott says he saw him first; that James saw him next; that when he saw him there was a hitch about it; that when James saw him it was agreed. The witness Harris says that the defendant said Scott saw him first, and that he would not have anything to do with it, and that Scott and James saw him again, and he refused, and would not have anything to do with it. Barney Howell says the same thing,—that he told him so. Is that corroboration or not? The question is, do you believe those witnesses? Are they credible witnesses? Did he tell them so? What next? It gets out that he had been talking about this thing, and the old man and Joe James came to him to ask him about it. Well, that is certainly proof that before the old man was killed things got out; whether true or not true, that he had been talking about it. It does not prove that he had been talking about it, but

Digitized by Google

it proves that this thing had got out that he had been talking about it, and that the old man heard it, and that he had connected Joe James with it. Joe James came along with the old man. I don't know whether to convince his father that he was innocent, or for what purpose he came along. The defendant then denied it. Did he do it or not because Joe James was present? That is a question for you. But he admits on the stand that when he denied it that it was true that Scott, in the name of Joe James, had approached him on the subject, and he did not tell the old man that. That is what he said on the stand. Scott had approached him in the matter, and he did not tell the old man; allowed him to go without warning,—without telling him to take care of Scott, or telling him to watch Scott, or anything of the sort,—although he says now on the stand,—he admits that much,—that Scott had approached him in the name of Joe James, and said Joe James would pay him if he would take the old man off. Now, what comes next as to corroboration? If this be corroboration of Scott's testimony on a material point, what comes next? Mr. Truett says that on the afternoon of the night when the old man was killed the defendant asked him to take the plow before it was time to knock off; that he told him, no, it was not time to knock off, to go on plowing. He then said he wanted to go, and asked him to take a turn; that he wanted to go off early, and asked him to take the plow. He says: 'I told him I would take the plow, but he must not go; he must go to the crib, and go to shucking corn.' He says: 'I continued to plow until time to knock off, and when it was time to knock off I came in and put up the animal, and when I finished putting up the animal supper was called; that the defendant went in and got his supper, took it in his hand and went off.' What time was that? He said between sundown and dark; that is what Mr. Truett says. Does Mr. Harris corroborate that? Mr. Harris says that it was light enough for him to see; that he went out to the big road, and when he got to the big road he turned to the right. That is what Mr. Harris says. It was light enough for him to see then. That is his description of the time. Now he attempts to prove an *alibi*. What is the law of *alibi*? If an *alibi* be proved perfectly, it is considered a perfect defense, because a man cannot take part in doing a crime if he proves to the satisfaction of the jury that he could not have been there, for he was somewhere else. But what else? Well, the law says it is a dangerous defense, because if he fails to prove it he comes in danger of proving something else,—that he was somewhere else at the time than the place where he tries to prove he was. What is your impression from the testimony of the proof of the *alibi* in this case? You will remember what the witnesses say. Mr. Truett says he wanted to go early,—much earlier than he went. He and Mr. Harris both say he didn't wait to eat his supper, but went off with it in his hand, and at the time they mentioned. Now he says he went straight to his wife's house. What proof is there as to the time he got to his wife's house? His wife says she had about finished supper when he came. She asked him if he would have supper. He said, no, he had taken some already. When cross-examined she refused to say what time it was. She said she don't know what time it was; she would not undertake to say what time it was; it was early in the night, but she had no time-piece, and she would not undertake to say what time it was. What time does Henry Joe say it was? He says he went fishing, and came home and got his supper, smoked his pipe, then went to defendant's wife's house, and defendant had not got there yet, and that it was late, and that he came a few minutes afterwards. It is for you to say now is that consistent with his being in a hurry to go in the afternoon, with his starting off with his supper in his hand, and his going straight to his wife's house? If it is not, then the question is, what effect does his attempt to prove an *alibi* for that intervening time have on his defense? That is a question for you. You must decide that; I simply bring your attention to the testimony. He attempts to prove an *alibi*. If he fails to do it, what account does he give of the intermediate time? Where was he? You have heard the evidence of the witness who gave an account of how he behaved afterwards; of his leaving his plow. What impression does that make on your mind? You are to decide that. He comes to Darlington on Saturday, and when he went home on Saturday what does he do? He goes to his wife's house, and, his wife not being there, he goes over to the house of William Scott on Saturday night. Now that is the house of the person he was not on good terms with. He finds there another person that he says was the brother of Bill Scott's wife. He asks about his wife, and is told that she left some clean clothes for him. But what more? Then he and Bill Scott, according to his own story, leave the house together. They leave the presence of the person in the house, and go to the gate. At the gate he says Bill Scott told him 'Joe James says you are talking about him. Joe James says you are telling about his wanting to hire you to kill his father, and he says he will see you about it.' He says: 'That is a man I hardly ever see. [Joe James.] That is a man I hardly ever see.' Scott says he said: 'You have been telling Barney Howell and Dr. Wallace.' Scott says: 'My wife says that Isabella McPherson says that Joe James says that you have been telling Barney Howell and Dr. Wallace that he has been trying to hire you to kill his father, and you had better see about it.' That is what Scott, as he says, told him at the gate Saturday night. That is his story. Now, mind you, you have heard that Isabella McPherson is the woman that Joe James kept at Scott's

Digitized by Google

house, she having moved from that place to another house. He goes back to Harris', and Sunday morning Mr. Harris says that after coming in he left soon without his breakfast. He says he went to see one John Hines; that is what he was absent for on Sunday morning. He tells his testimony on the stand in chief, and nothing is said, he never says one word, about going to Harman Howell's that morning. He gives his testimony in chief, accounts for where he had been, and never says a word about being at Harman Howell's. He is cross-examined by the solicitor, and is questioned about his whereabouts on Sunday morning, and in that examination not a word is got from him about his being at Harman Howell's that morning,—not until the court interposed and asked him the question did he then tell the story about seeing Joe James at Harman Howell's on Sunday morning. When the court interposed, questioning him about that, he said that he had gone there; that he called Harman Howell to the gate, and told him his business; that Harman Howell called Joe James, and after a while Joe James came, and he says there, in the presence of all of them: 'I told him that I had heard that he had heard that I had been telling Barney Howell and Dr. Wallace about his wanting to hire me to kill his father, and I had told them no such thing, and that I wanted him to go with me and clear it up. Joe James said: "No, never mind; if I hear any more about it then I will go."' He says: 'I said to him, "No, get in your buggy, and let us go and let us clear it up." Joe James said: "No, let it alone; but if I hear any more of it then I will clear it up. Then I will see you about it."' That occurred on Sunday morning, after defendant came here on Saturday, and after he heard the talk on the road in which Joe James said something about his being in the shade. That occurred on Sunday morning. I ask you to account to yourselves why he, after telling Bill Scott on Saturday night that Joe James was a man he hardly ever saw, why he should have been so anxious on Sunday morning to go over there and clear that matter up with Joe James? What motive had he? Why did he wish to put an end to the story against Joe James,—that Joe James had hired him? Why did he desire to kill that rumor against Joe James about his hiring him to kill his father? Was it because—you are to say—was it because of any connection he had with Joe James that was important to him? Was it because of any particular interest in Joe James, a man he hardly ever saw, to take him there that morning? Well, if Scott tells the truth that he was to get two hundred dollars,—if that was the case,—then you may know what took him there; but you are not to assume that to be true until you find Scott corroborated in other matters. If Scott tells the truth, you can well suppose why he was anxious to clear up that in order to get his money. If Scott does not tell the truth, then why was he anxious to clear up that matter next morning with Joe James? Those are questions for you. You must account for them. You are bound to weigh them. You are bound to weigh all, and account for them, and in weighing them all your inquiry is, do they or do they not corroborate Scott? Because the law is that if you can reasonably account for these circumstances consistent with his innocence, then it is not corroboration; but if you cannot reasonably account for them, then they do corroborate his evidence.

"Well, the Sunday morning passes. He is at the prayer-meeting that night; sees Scott. Monday morning he goes back, and you have heard the account of how he left the plow; how he persuaded Truett to take a turn in the field for him, and to plow a round for him; and then of his disappearance; and you have heard what the witnesses say about his being tracked down behind the kitchen. One of the witnesses says that the tracks looked as though he was running, but he disappears and never came back. He disappeared where? Well, it is claimed for him that he disappeared, and went to a place on the public road where he would be more likely to be discovered than at Harris'. That is the claim. Well, that is a matter for you to consider, and you are to consider whether that fair inference can be drawn from it. You are to remember that the place on the public road was not very far from Scott, and where he could have subsequent communications with Scott, so that they might communicate to each other whether there was danger ahead or not; whether there was danger brewing. You will also consider whether that place on the public road was or was not the best place to be on the watch; whether there were any officers about the country. From my view you are not, in trying a case of this sort, to assume that a party that is charged is playing the fool; that he is doing things for nothing, without a motive. What motive did he have for leaving Mr. Harris'? Has he assigned any motive for leaving Mr. Harris'? If he has assigned no motive, then you will say what was his motive. You must judge of the whole matter. It was not far from the public road and Scott's, and would he, in that position, be in the safest place? that is, could they not have quicker telegraphic communication with each other as to danger brewing, and could he watch for Scott and could Scott watch for him? I don't know that that was his motive,—I do not say. Furthermore about that *alibi:* If he went to his wife's house that night, did he get there at an hour which would have allowed him time to have done the deed, and then get there, and get there very soon after? You are to consider the question whether he was then laying the foundation to prove an *alibi*. If you think he has failed to prove it, you are to consider whether he was laying the foundation for an *alibi*. You are to judge of these according to your common sense, and according to all

Digitized by Google

the circumstances of the case. Now, gentlemen, I know of nothing more that I need call your attention to. Mr. Northcut, who arrested him, says that he submitted quietly, and did not ask what they arrested him for. He says he thought they were arresting him about something he did over at Mr. Harris'. What had he done at Mr. Harris' to be arrested for? That is his account. He was arrested, and taken where Scott was, and there they were both tied, and never once did he ask, 'What am I arrested for?' 'Who charges me with anything?' 'What have I done?' Weigh all these circumstances, and having weighed them all, then say is Scott's story so corroborated as that we are satisfied, and that without reasonable doubt, that defendant either shot that gun, or was there aiding and abetting; that he took part in this matter. If you are so convinced of that as that your minds are made up on the subject to a reasonable certainty, then it is your duty to say 'Guilty,' and if your minds are not made up to a reasonable certainty it is your duty to say 'Not guilty.' I certify that the foregoing is a true copy of the testimony and charge of the presiding judge in above case. F. F. COVINGTON, Official Stenographer, Fourth circuit. April 25, 1889."

"DEFENDANT'S EXCEPTIONS.

"To Honorable B. C. PRESSLEY, Presiding Judge, and J. M. Johnson, Solicitor of the Fourth Circuit: Please take notice that the defendant above named appeals from the sentence in the above case, on the following grounds:

"(1) Because the presiding judge erred in overruling the said defendant's challenge for cause of all the jurors who had served upon the jury in the case against Joseph W. James, who was charged as a co-conspirator with defendant, and who was convicted; and in allowing three of said jurors to be sworn when the defendant had been forced by his honor's ruling to challenge said jurors peremptorily, his peremptory challenges being then exhausted.

"(2) Because his honor erred in charging the jury as follows: 'Well, first, you are not to try whether Lewis Williams shot that gun, or who shot it. That is not a material issue in the case in so far as his legal guilt is concerned. It is a question when you come to consider William Scott's testimony, but it is not one of the legal issues in the case, because the law is this: that whether he shot the gun or whether he was on the watch,—present on the watch,—it is just the same.' And in further charging: 'So you will not try that issue at all. You are to try whether he took part in that killing, either by shooting the gun, or by being on the watch,—being there to encourage, aid, and abet;' his honor thus excluding from the jury's consideration material facts and circumstances negativing the whole contention on the part of the state that the defendant himself did the killing, and showing that Scott fired the gun, and suggesting to the jury something which the testimony did not even hint at, viz., that the defendant was on the watch.

"(3) Because his honor erred in that, after charging the jury that 'you start out assuming that Scott is a discredited witness. The law considers when he testifies to the part he took in the transaction he thereby discredits himself, and you are not to believe him, unless you consider either from his manner of testifying, and from the number of details —the number of particulars—which he mentions of which you are to judge, that he could not have manufactured them, and from the circumstances which you regard as corroborating him,' among other instructions, and after rehearsing Scott's testimony, and asking the question, 'Is it corroborated?' he proceeds to rehearse and detail the testimony in a style at once argumentative and convincing, leaving no room for doubt that his honor regarded his testimony corroborated in material particulars; his honor thus intimating, most transparently, to the jury his opinion upon a very vital question of the testimony.

"(4) Because his honor prejudiced the defense of *alibi* set up by the defendant, and discredited his testimony in that, after charging as follows: 'Now he attempts to prove an *alibi*. What is the law of *alibi*? If an *alibi* be proved perfectly, it is considered a perfect defense; because a man cannot take part in doing a crime, if he proves to the satisfaction of the jury that he could not have been there, for he was somewhere else. But what else? Well, the law says it is a dangerous defense, because, if he fails to prove it, he comes in danger of proving something else; that he was somewhere else at the time than the place where he tries to prove he was. What is your impression, from the testimony, of the proof of the *alibi* in this case? You will remember what the witnesses say;' his honor proceeds in an attempt to show the uncertainty of the testimony as to when defendant arrived at his wife's house, and then charges as follows: 'It is for you to say now, is that consistent with his being in a hurry to go in the afternoon; with his starting off with his supper in his hand, and his going straight to his wife's house? If it is not, then the question is, what effect does his attempt to prove an *alibi* for that intervening time have on his defense? That is a question for you. You must decide that. I simply bring your attention to the testimony. He attempts to prove an *alibi;* if he fails to do it, what account does he give of the intermediate time? Where was he?'

"(5) Because his honor throughout his charge manifested that he had no confidence in any of the defenses of which the defendant was seeking to avail himself, and that he had failed to establish them.

"(6) Because his honor intimated his opinion of the defendant's conduct in that, after charging the jury as follows: 'You have heard the evidence of the witness, who gave

Digitized by Google

an account of how he behaved afterwards,—of his leaving his place. What impression does that make on your mind? You are to decide that. He comes to Darlington on Saturday, and when he went home on Saturday what does he do? He goes to his wife's house, and, his wife not being there, he goes over to the house of William Scott on Saturday night. Now, that is the house of the person he was not on good terms with;' and, after rehearsing a conversation between Scott and defendant, charges the jury as follows: 'He gives his testimony in chief, accounts for where he had been, and never says a word about being at Harman Howell's. He is cross-examined by the solicitor, and is questioned about his whereabouts on Sunday morning, and in that examination not a word is got from him about his being at Harman Howell's that morning; not until the court interposed and asked him the question did he then tell the story about seeing Joe James at Harman Howell's that morning;' his honor thus, in this and other portions of his charge, throwing discredit upon defendant's testimony.

"(7) Because his honor erred in charging further upon defendant's conduct, as follows: 'I ask you to account to yourselves why he, after telling Bill Scott on Saturday night that Joe James was a man he hardly ever saw,—why he should have been so anxious on Sunday morning to go over there and clear that matter up with Joe James? What motive had he? Why did he wish to put an end to the story against Joe James,—that Joe James had hired him? Why did he desire to kill that rumor against Joe James about his hiring him to kill his father? Was it because—you are to say—was it because of any connection he had with Joe James that was important to him? Was it because of any particular interest in Joe James, a man he hardly ever saw, to take him there that morning? Well, if Scott tells the truth that he was to get two hundred dollars,—if that was the case,—then you may know what took him there. But you are not to assume that to be true until you find Scott corroborated in other matters. If Scott tells the truth, you can well suppose why he was anxious to clear that up to get his money. If Scott does not tell the truth, then why was he anxious to clear up that matter next morning with Joe James?'

"(8) Because his honor erred after stating to the jury the defendant's claim that, inasmuch as he was on the public road after he left Harris', where he was more likely to be discovered, an inference was to be drawn in his favor in suggesting that 'the place on the public road was not very far from Scott's, and where he could have subsequent communication with Scott, so they might communicate to each other whether there was danger ahead or not,—whether there was danger brewing,' in suggesting to the jury that Scott and defendant could have quicker telegraphic communications with each other, and in charging the jury: 'From my view you are not, in trying a case of this sort, to assume that a party that is charged is playing the fool; that he is doing things for nothing,—without a motive;' his honor thus, in most unequivocal terms, intimating his opinion to the jury that defendant's conduct indicated guilty knowledge, and that he was seeking to avoid arrest.

"(9) Because his honor erred in charging the jury in relation to the defendant's conduct as follows: 'Mr. Northcut, who arrested him, says that he submitted quietly, and did not ask what they arrested him for. He says he thought they were arresting him about something he did over at Mr. Harris' What had he done at Mr. Harris' to be arrested for? That is his account. He was arrested, and taken where Scott was, and there they were both tied, and never once did he ask, "What am I arrested for?" "Who charges me with anything?" "What have I done?"'

"(10) That his honor, in his charge, gave undue prominence to those facts which tended to establish defendant's guilt and threw discredit upon the testimony of defendant, and used the testimony which came from the mouths of his own witnesses, in his charge, in such manner as had a tendency to condemn him.

"(11) Because his honor, throughout his charge, clearly intimated that he had no confidence in defendant's testimony; that his conduct was suspicious; that he was guilty, and should be convicted.

"(12) Because the charge of his honor, when read as a whole, was repugnant to article 4, § 26, of the constitution of South Carolina.

"(13) Because of error in his honor in ordering J. A. Huggins, a juror, to stand aside, without challenge or objection by the defendant or the state, and before said juror was presented to the defendant."

The questions involved are: *First.* Did his honor err in his rulings on the matter of impaneling the jury, to-wit, in not sustaining defendant's challenges to the jurors who had tried the case of State v. James, with whom the defendant had been jointly indicted for the same offense for which he was about being put upon his trial, and for which James had just been convicted, and also for allowing three of said jurors to be impaneled, the others having been excluded by the peremptory challenges of the defendant, which right he had exhausted, when the three mentioned were presented? *Second.* Did his honor err in directing, on his own motion, without challenge or examination, J. A. Huggins to stand aside, and before he was presented as a juror to the defendant? *Third.* Did his honor charge upon the facts, in violation of the constitutional inhibition upon that subject, in one or more of the particulars indicated in the exceptions?

We have found no direct authority in conflict with his honor's ruling in the matter of the jurors who were of the jury which tried

Digitized by Google

the Case of James. True, it is laid down in Bish. Crim. Proc. §§ 773, 774, where he discusses the case of jurors who had passed upon the same question while serving in some other capacity, that a grand jury man, who had served on the jury which indicted the prisoner, could not afterwards serve on the petit jury which tries him. This, says Mr. Bishop, was not only so at common law, but was also the rule by statute in England; which statute, as said by Mr. Hawkins, was "in affirmance of the common law." And Mr. Hawkins adds that "this exception against a juror, that he hath found an indictment against a party for the same cause, hath been adjudged good, not only upon the trial of such indictment, but upon the trial of another indictment or action wherein the same matter is either in question or happens to be material, though not directly in issue," etc. See Bish. Crim. Proc. § 774. The principle under which a grand jury man should be excluded, as above, comes very near being applicable here, and, but for our act of assembly on this subject, (section 2261, Gen. St.,) I would be disposed to extend it, or rather to apply it, to facts like these in the case before us. Every man before conviction is presumed to be innocent, and he has a constitutional right to an impartial trial before and by an impartial jury. The general assembly, however, of this state has passed an act looking to this very matter of an impartial jury. Section 2261, Gen. St., supra. That act provides "that the court shall, on motion of either party in suit, examine on oath any person who is called as a juror therein to know whether he is related to either party, or has any interest in the cause, or has expressed or formed any opinion, or is sensible of any bias or prejudice therein, and the party objecting to the juror may introduce any other competent evidence in support of the objection. If it appears to the court that the juror is not indifferent in the cause, he shall be placed aside at the trial of that cause, and another shall be called." There are certain legal, and therefore necessary, qualifications which attach to every juror, and of course when one or more of these are absent, the accused has the legal right to have the juror excluded; and in addition, the act of assembly, supra, furnishes other reasons to the end of securing impartiality, and why a juror may be placed aside and another called. The matter of determining, however, whether a party presented as a juror is obnoxious to the provisions of this act is left to the court, after motion from either side that an examination be had. See State v. Nance, 25 S. C. 163; State v. Coleman, 20 S. C. 450; State v. Dodson, 16 S. C. 460. The required examination took place below, and his honor held that the jurors were not incompetent. We cannot say, under the light of the cases supra, that this was legal error.

When J. A. Huggins was called his honor ordered that he should not be presented to the defendant, stating that he heard his testimony in the other case, and that he did not regard him as a person without prejudice, and that he was not at all satisfied with his talking with the witnesses at the hotel door. We do not know upon what legal principle this was done. It is true, as we have said, that an impartial jury should be had. This is essential both for the state and for the prisoner, and the general assembly has enacted a law to that end. Section 2261, Gen. St., supra. That act provides the mode and manner by which the question of prejudice shall be determined, with the right to either side, upon motion, to have it applied. We think it was error for his honor to act without applying this legal test. If one juror could be thus ruled out, why not the whole panel? No doubt there was sufficient cause for the exclusion, and no doubt, had the legal test been applied, Huggins would have been ordered out; but the act provides the mode and manner, and it should have been adopted.

The other exceptions raise questions upon the charge of his honor, alleging violations of article 4, § 26 of the constitution, which provides "that judges shall not charge juries in respect to matters of fact, but may state the testimony and declare the law." This court has, in several cases, announced its understanding of the meaning and intent of this section, which, in brief, is as follows, to-wit: "While the judges may state the testimony, they cannot legally indicate their opinion, either expressly or impliedly, intentionally or otherwise, as to the credibility of the witnesses, or as to the truth of any fact in issue, and the subject of the evidence. They may declare the law fully and freely, but whether a certain contested fact has been proved is entirely for the jury, which involves both the credibility of the witness and the existence of the fact, whether said fact depends upon direct and positive testimony or upon inferences to be drawn from other proved facts. In fine, the whole matter of finding the facts of the case must be left entirely to the jury, without suggestions or leadings by the court." Now a copy of the charge is appended hereto, and, without going into the consideration of all the exceptions seriately, it is sufficient to say that we are constrained to hold that in our judgment his honor went beyond the constitutional limit, supra, as appears both upon reading the charge as a whole and upon an analysis of several of the exceptions, in which the language and arguments of his honor are given, and especially in what he said as to the corroboration of the witness Scott; as to the *alibi;* as to the conduct of the prisoner in failing to state that he had been at Harman Howell's until the court interposed and asked him the question directly; in calling upon the jury to account to themselves why the prisoner, after telling Bill Scott on Saturday that Joe James was a man he hardly ever saw, why he should have been so anxious on Sunday morning to go over there and clear that matter up with Joe James,—what motive had he? thus assuming certain facts

Digitized by Google

as proved, and suggesting damaging questions thereon in a way which indicated that they could not be accounted for consistently with the prisoner's defense.

But it is needless to incumber this opinion with any further particulars. Upon reading the charge as a whole we have been impressed with the idea that his honor thought the prisoner guilty, and that he should be convicted, and that the language used, and the questions propounded for the consideration of the jury, necessarily carried this thought to them, and therefore a new trial must be ordered. In reaching this conclusion we desire it to be distinctly understood that it is not significant of any opinion by this court upon the guilt or innocence of the accused, and that our judgment granting the new trial should have no influence whatever upon said trial. It is the judgment of this court that the judgment of the circuit court be reversed, and that the case be remanded for a new trial.

MCGOWAN, J., concurs in the result.

MCIVER, J., (*dissenting.*) I concur fully except as to the first question considered. As to that I think the circuit judge erred in disallowing the prisoner's challenge to the three jurors who had served on the trial of State v. James. I do not think the section of the General Statutes referred to applies, and, on the contrary, am of opinion that the conceded fact that these jurors had just rendered a verdict in a case depending to a great extent upon the same testimony was a sufficient cause of challenge, without regard to their testimony when examined on their *voir dire.*

(31 S. C. 259)

LINDSAY *v.* GARVIN.

(*Supreme Court of South Carolina.* July 6, 1889.)

PAROL EVIDENCE.

Where a mortgage was given to secure a debt contracted in the purchase of a mule, and the trade was afterwards rescinded, and the mule returned, parol evidence is inadmissible to show that it was afterwards agreed that the mortgagee should retain the mortgage as security for money loaned and further advances to be made.

Appeal from common pleas circuit court, York county; HUDSON, Judge.

D. E. Finley, for appellant. *C. E. Spencer*, for respondent.

SIMPSON, C. J. This was an action to foreclose a mortgage upon certain real estate, executed by the defendant (appellant) to the plaintiff (respondent) to secure the payment of a note for $100 given in the purchase of a mule by appellant from respondent. The mule was afterwards traded back to the respondent for a mare, the appellant agreeing to give $64 as boot, to secure which he executed a mortgage upon said mare. Afterwards, appellant becoming dissatisfied because of the unsoundness of the mare, she was returned, and the chattel mortgage given up, the respondent keeping both the mule and the mare, which substantially broke up the entire trade, and therefore canceled the mortgage given to secure the $100 for the purchase of the mule. In the mean time the appellant had become indebted to the respondent in the sum of $63.12 on open account, and desired to contract at a future time some $11.68 additional, and at the time of the return of the mare it was understood between the parties that appellant should pay $25 for the use of the mule while he had him in possession, before the trade was broken up. On account of these items of indebtedness, and to secure the payment of the same, when the mare was returned the parties verbally agreed with each other that the mortgage upon the real estate, *supra*, should stand as security therefor, and the proceeding below was instituted to foreclose said mortgage in payment of said items of indebtedness.

Upon the report of a referee, with exceptions, who had disallowed the mortgage except as to the $25, which sum he held might be regarded as a part of the purchase money of the mule, and therefore embraced in the mortgage as it originally stood, his honor, Judge HUDSON, ruled that the mortgage should stand as security for the entire indebtedness of appellant to respondent, including the items other than the $25 as well as said $25, and he decreed judgment of foreclosure for plaintiff's whole account, amounting to $97.17 From this judgment the defendant has appealed, contesting his honor's ruling that the original mortgage could be extended to cover other debts than the debt to secure which it was given, under the circumstances of this case, and upon oral testimony. No doubt oral testimony is competent to prove that a deed absolute on its face was intended as a mortgage; no doubt oral testimony may be admitted to apply a written contract to its proper subject-matter, as, per example, a mortgage to the debt really intended to be secured thereby; no doubt, though the mortgage may be for a definite sum, it is competent to prove that it was intended to secure an open account continually varying; and no doubt oral testimony will be received to prove that the mortgage was to secure future advances. It is also competent to show the true character of the mortgage, and for what purpose, and upon what consideration, it was given. See, for these positions, 1 Jones, Mortg. §§ 351, 374, 784, and also our cases of McCaughrin v. Williams, 15 S. C. 505; Kaphan v. Ryan, 16 S. C. 352; Walker v. Walker, 17 S. C. 329; Moffatt v. Hardin, 22 S. C. 9; and Moses v. Hatfield, 27 S. C. 328, 3 S. E. Rep. 538. But this case does not fall under either of these principles. Here a mortgage was given to secure a certain debt, to-wit, the $100 debt contracted in the purchase of the mule. It had no other purpose at its inception. No other debt was contemplated or intended to be secured. This mortgage fell through and became extinct, because the trade was after-

Digitized by Google

wards rescinded; and the effort below was not to prove that the mortgage was intended at the time of its execution to secure other debts, either future advances or otherwise, or to apply it to its proper subject-matter, because that was doubtful, or to do any one of those things which, according to Jones on Mortgages, cited supra, and the cases above referred to, might be legitimately done; but it was an effort by parol to add to a mortgage given for a distinct and definite purpose, and for no other,—an additional purpose conceived some time after the mortgage was given, and after in fact it had been substantially canceled and was dead. It was in fact an effort to resuscitate a dead instrument, and to give it a feature by a parol agreement which it did not possess before said parol agreement was made, and this, too, entirely by parol testimony.

It seems to us that this was in conflict with the well-settled doctrine that parol testimony is inadmissible to alter, vary, or to add to a written instrument. If the purpose here was not to add the verbal agreement suggested to the original mortgage, and then enforce it as a part of the mortgage, which would be in violation of the doctrine mentioned above, then there could have been no other purpose but to set up a verbal mortgage, as independent of the written one. For such a proceeding we know of no principle or decided case as authority.

The judgment below must be reversed, and it is the judgment of this court that the judgment of the circuit court be reversed in so far as said judgment sustains the mortgage in question, and orders a foreclosure thereof in payment of the debt established, and that the case be remanded so that plaintiff may obtain and enter judgment on the amount of said debt, if so advised.

McIver and McGowan, JJ., concur.

(32 W. Va. 454)

ALDERSON v. COMMISSIONERS.

(*Supreme Court of Appeals of West Virginia.* June 24, 1889.)

ELECTIONS—POWERS OF COMMISSIONERS—CERTIORARI.

1. Upon a writ of *certiorari* used as an appellate proceeding to bring to the circuit court for review a judgment or order of an inferior tribunal, the circuit court should decide all matters of law and fact, including those on the merits fairly arising on the record, either affirming such judgment or order, or reversing or modifying it, and render such judgment as the inferior tribunal should have rendered, or remand it to that tribunal where further proceedings are necessary, with distinct decision on the points involved in the latter event.

2. The circuit court, where such further proceedings outside the record before it are necessary, cannot retain and try the cause, but must remand to the inferior tribunal for such proceedings.

3. County commissioners, in canvassing returns of an election for congress on a recount, sign various exceptions for alleged errors taken by one of the candidates voted for, and the count is completed, and result declared. The party excepting obtains a *certiorari* to review the action of commissioners, and the circuit court reverses it, and remands the matter to them, with directions to again perform the work of canvassing the returns. *Held*, that commissioners are not *functus officio*, but are yet competent to canvass the returns in compliance with the order of the circuit court.

(*Syllabus by the Court.*)

Error to circuit court, Kanawha county; F. A. GUTHRIE, Judge.

Petition of John D. Alderson for a writ of *certiorari* to review the action of J. S. Cunningham, W. B. Calderwood, and S. S. Staunton, commissioners of the county court of Kanawha county, upon a recounting of votes polled in the general election for representatives in United States congress. The writ was awarded, and the cause remanded to the county court. From that part of the order remanding the cause petitioner brings error.

J. W. St. Clair, Brown & Jackson, and *Okey Johnson*, for plaintiff in error. *A. Burlew* and *J. A. Hutchinson*, for defendants in error.

BRANNON, J. John D. Alderson presented his petition to the circuit court of Kanawha county, representing that at the election on the 6th of November, 1888, he had received a large number of votes in all the counties of the Third district of this state for representative in the congress of the United States, and that James H. MacGinnis also received a large number of votes for the same position; that on the 12th of November, 1888, the commissioners of the county court of Kanawha county met to ascertain the result of said election in that county; that the certificates from the precincts showed that Alderson received 3,329 votes, and MacGinnis 4,658 votes; that he, Alderson, demanded a recount of the ballots cast, and that said commissioners made such recount, and the result of the recount was for Alderson 3,341 votes, for MacGinnis 4,638 votes, and that such recount would elect Alderson; that said commissioners refused to accept the result as shown by their recount, and decided that they would accept the result of the recount of all the precincts except Alum Creek, St. Albans, Charleston, Coalburg, and Lewiston, and as to them they would accept the returns as originally certified as to Alum Creek, St. Albans, and Charleston, and would reject all the ballots cast at Coalburg and Lewiston, and declared that in said county Alderson received 3,122 votes, and MacGinnis 4,468 votes; that said commissioners examined witnesses as to the conduct of the election, and the swearing in of the officers of election, and refused him leave to cross-examine them, or introduce other evidence on the subject, and that witnesses were examined tending to show that ballots had been tampered with and altered at Charleston and St. Albans, and he was refused leave to introduce evidence to the contrary; that he moved the commissioners to declare the result as shown by the recount, except Lewiston, Alum Creek, and Fields Creek precincts, and exclude them for certain causes in the record

Digitized by Google

stated, and his motion was overruled; that he moved to declare, if Alum Creek should be counted, to take the result on the recount of it, and also the recount of Charleston, which motion the court overruled; that he moved the court to include the result on the recount at Coalburg and St. Albans, which motion the court overruled; that he moved the court to exclude all ballots at West End and Fields Creek precincts, which motion the court overruled. Said petition gives the number of votes at the various precincts for each candidate on the original returns and on the recount. It is not necessary here to give more of the contents of said petition or record, as this statement will show their nature. The writ of *certiorari* was awarded, and a judgment was rendered by the circuit court reversing the action of the county commissioners, and remanding the cause to them, with instructions that they meet in special session "for the purpose of doing and performing the business for which the commissioners of the said county court were convened at the court-house of said county of Kanawha, on the 12th day of November, 1888, in relation to the election of representative in the congress of the United States for the Third congressional district of this state, among other things." Alderson moved the court to retain and try the cause, and not remand it to the county court, but his motion was overruled. He obtained a writ of error, and complains that the court remanded, instead of retaining and trying, the cause.

The first question is, did the circuit court err in failing, as plaintiff contends in argument, to decide all the points of error arising on the record, and in sending the case back to the county commissioners without giving specific rulings or instructions to them on the points, so that the parties and commissioners might have the benefit of the decision of the circuit court as to them. There has been much difference of opinion as to the scope of the hearing of a writ of *certiorari*, as will be seen in the opinion in Dryden v. Swinburn, 15 W. Va. 234, and Dryden v. Swinburne, 20 W. Va. 89; some courts holding that the writ touched only questions of jurisdiction, power, or authority of inferior courts, or the regularity of its proceedings; others holding that all questions of law arising on the record could be passed on. The evident leaning of the courts of late has been to widen the field of this valuable remedial writ. I do not elaborate this matter, as I regard it settled by former decisions of this court. In Dryden v. Swinburn, Judge GREEN, speaking for the court, says: "The cases above cited, while they all agree that a trial *de novo* cannot be had in a superior court in a case brought before it by *certiorari*, yet they by no means agree as to the judgment which may be rendered. They agree that, if no error is found in the proceedings in the inferior court, its judgment should be affirmed; but they differ on the judgment to be rendered, if the judgment of the inferior court is found erroneous, —some holding in such a case all that the superior court can do is to render a judgment reversing the judgment of the inferior court; and others holding it may go further, and render such judgment as the inferior court ought to have done; * * * that is, they may modify the judgment of the inferior court, or reverse it *in toto*, and enter up a new judgment, or remand it to the inferior court for trial. This latter practice would certainly seem to be far the most convenient, especially where the inferior court is a court of record, but there are highly respectable authorities which deny the superior court the right, unless so authorized by statute, to do more than simply to reverse or annul the judgment of the inferior court; but the weight of authority is in favor of the power of the superior court, in a case brought before it by *certiorari*, to do more than simply to affirm or reverse the judgment of the inferior tribunal, and is in favor of the authority of the superior court to affirm the judgment below, or to reverse it, and remand it to the inferior court, or to modify its judgment, and, in short, to enter up such judgment as the court below ought to have done, as in cases brought up by writ of error." Judge GREEN then expresses it as his opinion that the court may, if it reverse, remand the cause to be further proceeded in, or enter such judgment as the court below ought to have entered, and that the record alone is to be the basis of judgment in either case. Point 7 of the syllabus in that case is: "In all cases of *certiorari*, when used as an appellate proceeding, the superior court has a right to affirm the judgment of the inferior court, or to set aside and annul it, and enter up such judgment as the inferior court ought to have done, or remand the cause to it, as in a case brought up on writ of error." In Dryden v. Swinburne, 20 W. Va. 89, it was decided that, "a case being brought before a circuit court by a writ of *certiorari* for review, it should review, not only jurisdictional questions and questions of irregularity in the proceedings of the inferior tribunal also, but all questions of law, and all actions alleged to be based on erroneous principles, or taken in the absence of all evidence to justify such action."

It is therefore the duty of the inferior tribunal to make a part of its record, if asked, all the facts necessary to enable the court to see upon what principles of law it has based its action, or whether there was any evidence to justify its action, and all the rulings and decisions of all law questions in the case, and all facts necessary to the proper understanding of all such rulings and decisions of such inferior tribunal. I do not think, from the language of the syllabus in that case, that it was meant that under *certiorari* the superior court could weigh all the evidence on the merits, and find all the facts involved in the evidence as a jury, and reverse on that ground; and I am confirmed in this by a clause in the opinion in that case where, after saying that

Digitized by Google

the practice on *certiorari* and writs of error should be similar, the court seems to qualify that expression by saying: "The errors which, in this state, are corrected on a writ of error are generally errors of law; and the juries and inferior tribunals are, as a general rule, held to be the sole judges of the weight of evidence, and their decisions on an issue of fact is rarely reversed or interfered with by the appellate court on a writ of error. It is true that the power in this state exists to grant a new trial on a writ of error, because the verdict is so contrary to the weight of evidence as to shock the conscience; and the appellate court in this state probably exercises this power thus, as it were, in a qualified manner, to review what seems to be a question of fact to an extent to which it would not be exercised in some states, these states, or some at least of them, never reviewing a question of fact on a writ of error." In Poe v. Machine-Works, 24 W. Va. 517, the syllabus says: "The general rule is that upon *certiorari* to an inferior court the court awarding the writ will only inquire into errors and defects which go to the jurisdiction of the court below. But in this state, if the inferior tribunal proceeds in a summary manner, and not according to the course of the common law, and there is no remedy by appeal or writ of error, then the courts will consider other than jurisdictional questions." This case does not decide how far beyond jurisdictional questions the court will go. By these decisions it has been held that on *certiorari* all questions of jurisdiction or regularity of proceeding in the inferior court could be decided, and also all questions of law arising on the record. But it has not been held that all the facts of the case involved in the evidence could be decided; that the superior court could take the place of a jury or the inferior tribunal, and weigh the evidence, and find and determine from it whether a proper finding of the facts had been made in the court below on the merits. Certainly it may be said to be doubtful whether our courts have gone so far. So much for the decisions in this state.

As expressing the law elsewhere, and I think in this state, too, I quote section 4, tit. "Certiorari," 3 Amer. and Eng. Cyclop. Law, 62, sustained by authorities of many states: "When its scope is not enlarged by statute, *certiorari* lies only to correct errors in law, and not to review the evidence. According to the better view, however, it is proper to inquire whether there was any evidence to establish some essential fact, and also as to the rulings below upon the admission of alleged incompetent evidence, where no other and competent evidence was introduced tending to prove a necessary finding. But the record of an inferior court or other tribunal of matters in its jurisdiction cannot be disputed by other evidence, nor its finding of facts, when supported by any competent evidence." Thus stood the law up to the passage of chapter 153, Acts 1882; Code 1887, p. 742.

Certiorari was not wide enough in its efficacy as a remedial writ; certainly, at least, it can be said there was doubt as to its scope. It was to cover a field for the correction of errors not covered by the writ of error or appeal. Why should it not afford, in its field of operation, the same relief against erroneous finding on the evidence as would be afforded by a writ of error on a motion for a new trial, on the ground that the finding was without sufficient evidence or contrary to the evidence? To give it such efficiency, to remove all doubt as to its reach, that act was passed. It gives the writ in every case, matter, or proceeding in which a *certiorari* might be issued as the law heretofore has been, and in every case, matter, or proceeding before a county court, council of a city, town, or village, justice, or other inferior tribunal. It provides that, "upon the hearing, the circuit court shall, in addition to determining such questions as might have been determined upon a *certiorari* as the law heretofore was, review such judgment, order, or proceedings of the county court, council, justice, or other inferior tribunal upon the merits, determine all questions arising on the law and evidence, and render such judgment or make such order upon the whole matter as law and justice may require." Therefore, under the decisions of this court, and the additional scope given the writ of *certiorari* by said act of 1882, a circuit court should decide every point on the law and evidence, law or fact, arising on the record before it, and render such judgment as the inferior tribunal should have rendered, or remand the case to it, where further proceedings before it are necessary. It should in its judgment particularly and specifically decide on every point involved in the record, and make distinct for the guidance and direction of the inferior tribunal its decision on the several points by way of instructions or directions to it, so that the inferior tribunal may understand just what the law of those points is, and be able to conform in its further proceedings to such decision. This is important in practice, to avoid the same errors, and prevent further litigation, as without such guidance the inferior tribunal might simply repeat the same errors. It is admitted by counsel for plaintiff that a portion of the errors suggested were decided in his favor,—those in refusing him right to cross-examine witnesses introduced by the commissioners touching the administration or non-administration of the oath to officers of election, and refusing him right to introduce evidence; for the circuit court reversed the action of the commissioners, and pointedly instructed them to allow either of the parties to cross-examine any witness, and to introduce witnesses, and to appear by counsel or in person.

As to other questions, they were involved in or dependent on evidence,—as, for instance, whether the officers of election were sworn; whether the ballots had been tampered with and altered,—on which evidence offered by Alderson had been excluded.

Digitized by Google

What that evidence would have shown, if it had been admitted, the circuit court could not see. Without it a full decision of the case could not be had. The circuit court held that its refusal was error, against Alderson's right, sufficient to reverse the judgment of the county court, and call for a new trial. As to the question of the constitutionality of the act excluding precincts where officers are not sworn, which, it is claimed, the court should have decided: If it had decided it constitutional as, under the then state of the case, the circuit court might have decided, it would have excluded certain precincts,—Coalburg, for instance,—and included others,—Fields Creek, for instance,—but Alderson had offered evidence to show that the officers at Coalburg were in fact sworn, and that at Fields Creek they were not. If decided invalid, it would be deciding a moot question, for perhaps the evidence would show no such question existed. But, as to this constitutional question, it is settled law that, out of respect to that high department of the government,—the law-making power so directly representing the popular will,—the courts will not even approach the question whether its acts are valid under the constitution, unless there is no escape from it. The state of the case must command the decision. The courts will not decide it when it is a moot question, when, at last, when the evidence is finally in, the question may not arise. Cooley, Const. Lim. 163.

We do not see that the circuit court has omitted to decide any question which it was proper to decide in the state of the case as it was before it. It went as far as it was called on to go in the condition of the record. If the circuit court could not decide these matters, this court cannot. Even if there had been questions in the record which the court ought to have decided, but did not, this court would likely not do so; as it decides only after that court has performed its functions, and does not act until it has completed its function. Armstrong v. Grafton, 23 W. Va. 50.

Another question is, should the circuit court have retained the case, and itself tried it, and declared the result of the election, after reversing the action of the commissioners? We think not. As above stated, until the act of 1882 there was no law to authorize a circuit court under *certiorari* to weigh evidence and pass on the merits, though the evidence may have been incorporated into the record, and it was only to give *certiorari* the additional scope, so as to allow the court to pass on the merits under the whole evidence, that this act was passed. That was the evil to be remedied in the writ of *certiorari* by that act. It was to give *certiorari* in its field the same efficiency as a writ of error possessed in its appropriate field; to let the court "review" the case on the law and evidence as it was before the lower tribunal, in order to determine whether that tribunal had done injustice. It was not the purpose of the act to give a trial *de novo* in the circuit court. The act does not contain words to plainly convey that meaning. It says the circuit court shall "review" the judgment, not retry the case; the word "review" seeming to mean that the circuit court should go over again just what the lower court had considered. It does not say that new evidence may be heard. To give the construction to the statute, that in every case where a judgment or order of an inferior tribunal is reversed the circuit court must retain and try the case *de novo*, would be productive of great inconvenience. In Dryden v. Swinburn, 15 W. Va. 235, it was held that the circuit court could not retain for trial any case brought before it by *certiorari* to the judgment of the county court; the twenty-second section of chapter 17, Acts 1872–73, directing the retention of cases in the circuit court, applying only to cases brought before it by appeal, writ of error, or *supersedeas*, Judge GREEN saying that was the only law allowing a retention. It seems to me that decides this matter, for no statute has been cited—none is known to me—to call for such retention, but the act of 1882, and we hold that it does not. The contention that the circuit court had no jurisdiction to review by *certiorari* the action of the commissioners, as canvassers of the returns of elections, is met by the decisions in Chenowith v. Commissioners, 26 W. Va. 280, and Alderson v. Commissioners, 32 W. Va. ——, 8 S. E. Rep. 274, (decided Dec. 5, 1888.)

It is argued that the commissioners, having once performed the duty assigned to them by law, and declared the result, have no power to correct their errors, and that the circuit court could not remand the matter to them. The commissioners are public officers of fixed term, who act ministerially as such in performance of a duty cast upon them by law,—the canvass of election returns. They begin the canvass, and complete it; but they perform this duty erroneously, as is held by a court exercising a lawful jurisdiction to review their proceeding, and it sets their action aside, and remands it back to them, with the mandate to perform again the work, for the correction of defects in their former action, and it is said they are *functus officio*, and cannot obey this lawful mandate. They have begun this legal transaction, but have not completed it, and cannot, though ordered by a legal tribunal to do so. The very statement of the proposition is, to me, its own refutation. I regard the body continuous, and its work an entire thing, and that it is bound to complete its work, and the function is never performed until the act is completed. The judgment is affirmed.

SNYDER, P., and ENGLISH, J., concur. GREEN, J., absent.

Digitized by Google

(32 W. Va. 637)

FLEMING v. COMMISSIONERS.

(*Supreme Court of Appeals of West Virginia.* June 28, 1889.)

ELECTIONS—CONTEST—CERTIORARI—PETITION.

A petition for a writ of *certiorari* to bring to the circuit court, for review, proceedings of the commissioners of a county court in the canvass of the returns of an election, filed by a candidate, which fails to show that he was prejudiced by the errors complained of, is not sufficient to justify the award of such writ, and will be *held* bad without demurrer at the hearing; and a judgment of a circuit court reversing the action of the commissioners upon a *certiorari* based on such petition will be reversed here, with costs in this court against the party who filed such petition.

(*Syllabus by the Court.*)

Error to circuit court, Kanawha county; F. A. GUTHRIE, Judge.

J. W. St. Clair, Brown & Jackson, and *Okey Johnson*, for plaintiff in error. *A. Burlew, J. A. Hutchinson*, and *W. P. Hubbard*, for defendants in error.

BRANNON, J. A. B. Fleming filed a petition in the circuit court of Kanawha county, alleging that at the election, November 6, 1888, he was a candidate for governor, and received a large number of votes in every county in the state, and that Nathan Goff was a candidate also, and received a large number of votes in every county of the state; that it appeared from the returns of the election, as certified by the commissioners of the county courts of the several counties, that for said office said Fleming received ——— votes, and said Goff ——— votes, and that the total number received by all other candidates did not exceed 10,000 for said office; that the vote of said Fleming and Goff respectively, as shown on the poll-books of the different precincts in Kanawha county, was as follows: For said Fleming ——— votes, and for said Goff ——— votes; that when the commissioners met on the 12th of November, 1888, to ascertain the result in the county of Kanawha, said Fleming demanded a recount of the ballots, which was made, and its result was as follows: For said Fleming ——— votes, for said Goff ——— votes; that the commissioners refused to accept the result of the recount, but declared and decided that, in ascertaining the result, they would accept the result of the recount of all the precincts except five, which were named, and, as to three of those, they would accept the returns as originally certified, and reject all the ballots cast at two of them, and they ascertained the result accordingly,—that is, for said Fleming ——— votes, for said Goff ——— votes. It alleged that, at each of the five precincts where the result on the recount was rejected, the vote on the original return was for Fleming ——— votes, for Goff ——— votes, and on the recount for Fleming ——— votes, for Goff ——— votes, not giving the vote at any precinct either on the original return or on the recount. It alleged divers errors on the part of the commissioners in refusing Fleming leave to cross-examine witnesses, or introduce witnesses, as to the conduct of the election. It alleges that said Fleming moved the commissioners to ascertain the result by the recount, except at two of those five precincts, and to reject them entirely, which they refused to do; and that he moved that, if those two precincts be counted, they be counted according to the recount, but they refused to do so; that he moved then to adopt the recount at three of these precincts, which they refused; that said Fleming excepted to these rulings and actions, and that the commissioners made a record of their proceedings, and signed a bill of exceptions. The petition alleged that said Fleming was aggrieved by the errors and arbitrary and erroneous rulings of said commissioners, and prayed a writ of *certiorari* to correct such errors and do justice to him in the matter. A writ of *certiorari* was awarded, and on the 8th of April, 1889, the court entered a judgment reversing the decisions and determinations complained of in said petition. The said Fleming moved the court to retain the cause for further proceedings, but the court refused to do so. The judgment further directed the commissioners to again meet and perform the duty of canvassing the returns for governor, and directing them to allow cross-examination of witnesses, and to introduce evidence. The said Fleming took this writ of error, and assigns as error that the circuit court of Kanawha did not retain and hear and determine the cause, and in remanding the cause to an inferior tribunal that was *functus officio*. The record as before us contains no such bill of exceptions, or commissioners' record, as the petition asserts to have been made.

The matters sought to be presented in this case are similar in nature to those involved in the case of Alderson v. Commissioners, ante, 863, (decided this term;) and, if the petition and record were not so defective, the principles announced in the opinion, and the judgment rendered in that case, would apply in this cause. The petition on which the *certiorari* was awarded is so defective that no writ of *certiorari* or judgment thereon could properly have been awarded or rendered. A pleading must show that the party has a right, and that such right has been violated so as to call for redress. It must show a cause of action. It must show just what right the plaintiff has, and just how and wherein it has been violated. A petition for a writ of *certiorari* must show a right in the petitioner, and that he is injured by the action complained of, and wherein the inferior tribunal has erred to the prejudice of that right. It will not be enough to say generally a party has been aggrieved. It must state how, wherein. This petition does not state that petitioner received any particular number of votes, or that Goff received any particular number of votes, in state, county of Kanawha, or any precinct therein, or that petitioner's election was defeated or prejudiced by the erroneous action; nor does it state how many votes the petitioner or other candidates re-

Digitized by Google

ceived by the original returns, or the recount, in Kanawha county, or any single precinct in it, nor whether he was injured by the adoption of the result on the recount at those precincts where that result was adopted, or by the adoption of the original returns from those precincts where such returns were adopted, or by rejecting or excluding precincts the vote of which was rejected or excluded. Probably no attention was called to this defect in the circuit court, but it is here cross-assigned as error by the defense. We must, for this cause, reverse and remand the case to the circuit court, with leave to plaintiff to amend his petition within a reasonable time, and, if not so amended, the circuit court must dismiss it; and as the cause of reversal is the defect of the petition, and is for the fault of plaintiff in error, he must be subjected to the costs in this court. Gaylords v. Kelshaw, 1 Wall. 81.

SNYDER, P., and ENGLISH, J., concurred. GREEN, J., absent.

(32 W. Va. 640)

ALDERSON *v.* COMMISSIONERS.

(*Supreme Court of Appeals of West Virginia.* June 28, 1889.)

EQUITY—APPEAL—ELECTIONS.

1. Equity has no jurisdiction to enjoin commissioners of a county court from certifying to the governor the result of their canvass of the vote in their county for a representative in the congress of the United States.

2. An appeal from a decree in a suit in equity will not bring up for review an order discharging a rule to show cause why the party shall not be punished for contempt in disobeying an order of injunction made in such suit.

(*Syllabus by the Court.*)

Appeal from circuit court, Kanawha county; F. A. GUTHRIE, Judge.

Petition by J. D. Alderson for injunction against John S. Cunningham, W. B. Calderwood, and S. S. Staunton, commissioners of the county court of Kanawha county, to restrain them from certifying to the governor of West Virginia the result of the vote cast at the general election for congressman in the Third congressional district of West Virginia. From an order dissolving the injunction and dismissing the bill for lack of jurisdiction, petitioner appeals.

J. W. St. Clair, Brown & Jackson, and *Okey Johnson,* for appellant. *A. Burlew* and *J. A. Hutchinson,* for appellees.

BRANNON, J. John D. Alderson presented to the judge of the Eighth circuit a bill in equity stating to the effect that at the election in this state on November 6, 1888, he received a large number of votes for representative in the congress of the United States for the Third district of this state; that the opposing candidate was James H. MacGinnis, who received a large number of votes for the same position; that the result of the election in each county of said district, except Kanawha, had been certified to the governor; that either he or MacGinnis had been elected; that the result depended on the ascertainment of the result in Kanawha county; that the defendant commissioners, on November 12th, met to ascertain the result in said county; that returns, as certified from the precincts, showed that said Alderson had received 3,329 and said MacGinnis 4,658 votes; that said Alderson demanded a recount, which recount was made, whereby the result was for said Alderson 3,341 and for said MacGinnis 4,638 votes; that said commissioners refused to accept such recount, except as to certain precincts, and as to others adopted the original returns, rejecting the result of the recount there, and entirely rejected the votes cast at two precincts, whereby the result was for said Alderson 3,325 and for said MacGinnis 4,660 votes, which would elect said MacGinnis. The bill states that the said Alderson excepted to this action of the commissioners, and during the progress of the canvass excepted to various rulings and decisions of the commissioners which are detailed in the bill. The bill also states that the commissioners refused to settle and sign bills of exceptions touching these rulings, and that said Alderson, by a proceeding in *mandamus* in this court, obtained a mandate from this court requiring them to do so; and that they were bound to make a record of all poll-books, ballots, packages, boxes, and tally-sheets, on the recount and evidence, and their rulings and actions, and that he had tendered them a bill of exceptions representing the same, but they had not yet settled and signed it; and that, as soon as settled and signed, he would apply to the circuit court of Kanawha for a writ of *certiorari* to correct such erroneous proceedings of said commissioners; that, in order that justice might be done, it was important to him that said commissioners should not send to the governor certificates of the result of said election in said county according to their said decision; that it was the intention of the commissioners, as soon as they should sign said exception, and before he could have time to apply to said circuit court and obtain a *certiorari* and give bond, to certify said result to the governor, according to their erroneous decision, and that they intended so doing for the very purpose of defeating said Alderson's right to review said proceedings; that he had asked said commissioners to consent not to certify said result until he could apply for the *certiorari*, but they declined to say what their intention was; that though they had announced their decision they were keeping it off the record until the bill of exceptions should be signed, and he charged that they had already made out a certificate ready to file with the governor as soon as the exception should be signed and their decision entered of record, and that they had prepared it, that there might be as little delay as possible in filing it with the governor, and that thereby the said Alderson would be defeated in reviewing said proceedings. He prayed an injunction to restrain the commissioners

Digitized by Google

from certifying to the governor the result of said election. On December 15, 1888, such injunction was awarded. Said Alderson, on January 4, 1889, filed in court his affidavit stating that process upon the injunction bill was served on two of the commissioners December 15th, but does not give date of service on the other; that on December 15, 1888, he presented his petition for a *certiorari* to review such proceedings, and it appears it was allowed 17th December, 1888, with an order restraining them from certifying said result, and that he believes the said commissioners had full notice thereof; and that, notwithstanding such notice and service of process on said injunction, said commissioners did certify such result to the governor; and on said Alderson's motion a rule was awarded against them to show cause why they should not be punished for their contempt in so violating the injunction. Afterwards the defendants moved the court to quash the said rule for contempt, as improvidently awarded, and for want of jurisdiction, and the rule was quashed, and defendants discharged therefrom. Afterwards the defendants moved the court to dissolve the injunction, and the same was dissolved for want of jurisdiction, and the bill dismissed. Said Alderson appealed to this court. He assigns that the court erred in dissolving the injunction and dismissing the bill, and in discharging the rule for contempt.

The defendants contend there was no jurisdiction in the circuit court to entertain the injunction, and that it properly dissolved it and dismissed the bill. No principle of the law of injunction is better settled than that injunction does not lie to determine questions of appointment to public office, and the title thereto, as they are of purely legal nature and cognizable only in courts of law. 2 High, Inj. § 1312; High, Extr. Rem. § 619; Kilpatrick v. Smith, 77 Va. 347; Judge GREEN'S remarks, and authorities cited, in Dryden v. Swinburn, 15 W. Va. 234. This is not, however, a proceeding to try title to an office, but to restrain county commissioners from sending to the governor the result of their count of the votes for a representative in the United States congress. Does an injunction lie in such case? Our statute provides that the commissioners shall ascertain the result of the election in their county, and certify it to the governor, who is to ascertain who is elected, and make proclamation thereof. In Dickey v. Reed, 78 Ill. 261, it was held that a court of chancery has no power to restrain by injunction a board of canvassers from canvassing the returns of an election, where the law under which the election was held neither in terms nor by implication confers such power, and where there are no facts before the court which require it to take judicial cognizance and hear and adjudicate and decree; and that, valuable as is the remedy in its proper sphere, it must not be extended to doubtful cases, or to accomplish ends, where there are other adequate remedies. The opinion in that case is elaborate and well sustained. I quote some of its passages: "If the court may exercise this jurisdiction in cases of doubt, or even where there is no doubt, of the result, a few * * * persons might, and probably would, be induced, from the heat and strife always engendered in such elections, to resort to a bill and injunction, and thus for years thwart the will of the people. * * * Public policy does not require such a jurisdiction, even if it could sanction it. If the power were admitted, where would its jurisdiction end? * * * Sanction the power in this case as inherent in the court of chancery, could any ingenuity suggest reasons which should forbid the application of the same rule to every case we have above supposed, or any election case where fraud is alleged? In this case alleged fraud is the ground on which the power is urged. So would it be in those cases, and the fraud would be precisely the same in each." In Peck v. Weddell, 17 Ohio St., 271, it was held that fraud in election could not justify injunction. In Thompson v. Ewing, 1 Brewst. 67, it is held that equity cannot restrain a prothonotary from certifying election returns to the board of return judges, though they are admitted to be forgeries. 6 Amer. & Eng. Cyclop. Law, tit. "Elections," p. 392, states the law thus: "A court of equity will not interfere by an injunction to prevent the election officers or canvassing officers from doing their duty as required by the law, nor prevent them from canvassing votes in a certain way."

I think the case of Fleming v. Guthrie, 32 W. Va. ——, ante, 23, contains principles of law kindred to, if not binding as authority in, this cause. Judge Flemming, who was a candidate for governor at the same election, obtained an injunction restraining the secretary of state from laying before the legislature the certificate of the commissioners of the county court of Kanawha county of the result of the election as to governor, and afterwards Gen. Goff, who was also a candidate for governor, obtained from the circuit court of Kanawha a *mandamus* to compel the secretary of state to do what he had been so enjoined from doing. The circuit court announced that it would disregard and ignore such injunction. The bill of injunction alleged that Flemming had before that obtained from said circuit court a *certiorari* to correct the action of the commissioners in canvassing the vote for governor, and that said *certiorari* was yet pending, but that said commissioners had transmitted said certificate of returns to the secretary of state before said *certiorari* issued. Flemming asked a writ of prohibition from this court to prohibit the circuit court from ignoring said injunction and proceeding with said *mandamus*, which was refused by this court. Here was an injunction to restrain the sending to the legislature, that it might declare the result as to governor, the returns of Kanawha county until the pending writ of

Digitized by Google

certiorari should accomplish correction of alleged errors, and procure correct returns. That injunction might be said to be merely auxiliary, and necessary to keep back the returns, so that they could not be made the basis of a declaration of election until correct returns should be had, just as much as in this case; but the court did not think the injunction could be sustained for want of jurisdiction. In delivering the opinion of the court, SNYDER, president of the court, said: "In Walton v. Develing, 61 Ill. 201, it was held that 'where the law plainly requires an officer to perform a duty, and he is not exceeding or abusing his powers, but fairly acting within the same, and a court issues a writ to restrain him from its performance, he must discharge his duty as prescribed by the law.' That case was a proceeding for contempt against election officers for holding an election in disobedience to an order of injunction, and in which the court held that the injunction, having been issued without authority, was void, and that there was no contempt in disobeying it. The court, in its opinion, says: 'In such case what must control the officer,—the mandate of the court or the plain behests of the law? The court, as well as the inferior officer, must be governed by the law. When the law imposes a positive duty upon a public functionary, and a court commands him not to perform it, he must obey the law, and disobey the writ of the court.' In Moulton v. Reid, 54 Ala. 320, it was decided that a court of equity has no jurisdiction to enjoin the person declared elected to a municipal office from using his certificate of election where the law provides for a contest." This court then held that "a court of equity has no jurisdiction to enjoin the secretary of state from delivering to the speaker of the house of delegates the sealed returns of an election for governor properly transmitted to him, and such injunction, if granted, will be treated as a nullity." This court, citing in its opinion with approbation the case of Smith v. Myers, 109 Ind. 1, 9 N. E. Rep. 692, quoted from it the language: "It is a principle of constitutional law, declared in our constitution, and enforced by many decisions of our own and other courts, that the departments of government are separate and distinct, and that the officers of one department shall not invade any other. To interfere by injunction in this case would involve a violation of this fundamental principle, as a conflict between two great departments of the government would result from an exercise of the jurisdiction invoked by the appellant." Why do not these principles substantially apply to the case in hand? The injunction here involved was an act of the judicial department, tending in its consequences to prevent the governor, the chief of the executive department, from performing an important function assigned to him by law,—that of declaring an election of a member of congress. Through these commissioners, popular will in elections for all offices, national and state, from president and governor down, as expressed in the several counties, is ascertained and certified to the power which declares the election result. For representative in congress the vote is certified by them to the highest state officer, the governor, in order that he may ascertain and declare the result. This duty is of the most vital importance, and should be performed without delay. Is it possible that injunction lies to tie up, even temporarily, the performance of these functions, so necessary to reach the popular verdict, when any candidate may think himself aggrieved, and make it dependent on private litigation? Do not the evils of the exercise of such a jurisdiction at once suggest themselves without specification? Once the courts allow it, where will it end? How often and where will it be exercised? It may be rather asked, when and where will it not be exercised? It would prove a Pandora's box, the evils and ultimate effects of which cannot be readily foreseen. Through the exercise of such a power in the courts by injunction, that which is most sacred in free government—the will of the voters—may be indefinitely delayed in its expression or practically defeated. These matters are in their nature political, and their decision rests with the political power of the government, and the processes which it has designated for the purpose, not with the judiciary; and the courts should be on their guard lest they overgo the legitimate boundary of their jurisdiction. This court has, under the clause of the constitution giving circuit courts power to supervise and control all proceedings before justices and other inferior tribunals by *mandamus*, prohibition, and *certiorari*, sustained a jurisdiction by those processes, and in so doing has gone as far as there is warrant, and does not desire to extend the scope of the process of injunction in this field.

There is no provision in the constitution expressly authorizing it as to injunction. But it is argued that this case is an exception to the general rule, and that the injunction in this instance is only auxiliary or ancillary to the proceeding at law by *certiorari;* that but for it the commissioners could and would certify the returns to the governor before the plaintiff could obtain that writ, and give bond to consummate it, and thus render the *certiorari* abortive. I do not see that the mere fact that a party has taken exceptions in a law proceeding, with intention to appeal to a higher court, will warrant an injunction to restrain the judgment. Here the exception was not yet settled or signed: no *certiorari* was pending. Perhaps the intention to obtain it might not be carried out, or the writ might not be obtained. But the position that there was no other remedy does not seem sound. If upon the *certiorari* when obtained the action of the commissioners should be reversed, the judgment might be such as to need no further proceedings before them; or, if such further proceedings

Digitized by Google

would be required, they could be required to review their work, and properly certify the result of the election, as this court has at this term decided in Alderson v. Commissioners, ante, 863, and beyond this the law affords ample and adequate remedy in the process of a contested election. Equity disavows jurisdiction by the stringent process of injunction where other adequate remedy exists. High, Inj. § 28. Equity especially disavows a jurisdiction in matters pertaining to elections. We fail to see in the circumstances of this case that stress of necessity which would make this case an exception to a general rule, which the able and distinguished counsel for the plaintiff frankly admits to exist. If it be argued that the contemplated hasty action by the commissioners was with fraudulent intent to defeat the purpose of the *certiorari*, the answer is, first, that the law does not impute fraud to public functionaries in the exercise of their lawful jurisdiction, (Bridge Co. v. Town of Point Pleasant, 32 W. Va. ——, ante, 231;) and, further, that we do not see how fraud could be imputed to them in doing an act which the law made it their duty to do.

As to the error alleged in discharging the rule for contempt. Does this appeal bring up the judgment in this proceeding to this court for review? The proceeding for a contempt is a criminal proceeding in its nature, separate and distinct, upon the return of the rule or appearance thereto by the defendant, from the cause, in a violation of orders in which the contempt consists. Railroad Co. v. Wheeling, 13 Grat. 40; State v. Irwin, 30 W. Va. 404, 4 S. E. Rep. 413; Mason v. Bridge Co., 16 W. Va. 864. It is to be then entitled in the name of the state at the relation of the party complaining against the offender. It was so entitled in this case. It must be entered in the law order-book, though the contempt was in disobedience of process or orders in chancery, and it is error to fail to enter it in the law order-book. Ruhl v. Ruhl, 24 W. Va. 279. It does not appear in what book the order of discharge was entered in this instance. The petition in this case asked an appeal from and *supersedeas* to the two orders in it specified, made 9th January, 1889; one being the order discharging the rule, the other dissolving the injunction and dismissing the bill.

What are we to call this proceeding, or what are we to consider it? It cannot be both an appeal and writ of error. I think it is what the record calls it, an appeal in said chancery cause, and that, so far as applying to the order discharging the rule for contempt, it was improvidently allowed, and that it does not bring up for review the order discharging said rule, because that is separate and distinct from the chancery proceeding, criminal in its nature, and cannot be brought here by appeal, but only by writ of error. As that order is not, therefore, reviewable or cognizable in this appeal, we do not consider any questions involved in it, whether the said Alderson has such relation as to warrant proceedings in his individual name for its review, or whether any contempt was committed. The decree of the circuit court dissolving the injunction and dismissing the bill is to be affirmed, with costs and $30 damages to appellees.

SNYDER, P., and ENGLISH, J., concurred. GREEN, J., absent.

(32 W. Va. 447)

ZINN v. LAW *et ux.*

(*Supreme Court of Appeals of West Virginia. June 24, 1889.*)

HUSBAND AND WIFE—GIFTS.

1. Where a wife delivers money or property of her own to her husband, which he uses in his business, the presumption is that such delivery was intended as a gift; and in order to constitute such delivery a loan, as against the creditors of the husband, the wife must prove an express promise of the husband to repay, or establish by the circumstances that it was a loan, and not a gift.

2. When the facts and circumstances tend to show that a gift was intended, and that the husband used and dealt with the property as his own, the mere parol testimony of the husband and wife of a private understanding between themselves that the transaction should be considered or was intended as a loan to the husband by the wife, and not a gift, will not, as against the creditors of an insolvent husband, rebut the presumption of a gift.

(*Syllabus by the Court.*)

Appeal from circuit court, Calhoun county; ROBERT F. FLEMING, Judge.

Thomas E. Davis, for appellant. *Schilling & Pendleton*, for appellee.

SNYDER, P. Suit in equity brought in September, 1886, in the circuit court of Calhoun county, by Thomas G. Zinn against L. F. Law and Nancy E. Law, his wife, to subject a tract of 148 acres of land in said county to the payment of a judgment for $252.68, recovered by him in said court at its June term, 1886, against the defendant L. F. Law. The bill avers that the debt upon which said judgment was recovered was contracted by said Law in March, 1882, and that at that time said Law was the owner of a steam saw-mill, engine, and fixtures, and that he continued to own and operate said saw-mill until about the time the plaintiff instituted his action at law on said debt; and that the said Law, for the purpose of hindering and defrauding the plaintiff, entered into a written agreement with one Mary Hays, dated November 23, 1885, by which he traded said saw-mill to said Hays for the said 148 acres of land, and $600 in lumber and money, binding said Hays therein to convey said land to his wife, the defendant, Nancy E. Law; that subsequently, by deed dated December, 1885, said land was conveyed to said Nancy. The bill then avers that said conveyance was voluntary as to the said Nancy, and made for the purpose of hindering, delaying, and defrauding the plaintiff and other creditors of the said Law, and prays that said land may be held liable for and sold to pay the plaintiff's said judgment, etc. The defendant

Digitized by Google

Nancy E. Law by her answer denies that said conveyance to her was either fraudulent or voluntary, but, on the contrary, avers that she is the *bona fide* owner thereof, and paid a valuable consideration therefor; and then proceeding to state the consideration, and the manner in which she acquired the land, says that she became the wife of L. F. Law in the year 1868, and that they have lived together as man and wife ever since; that in the year 1879 she received from her father, Henry Steinbeck, $500; that in 1881 she received from her father-in-law, Andrew Law, $100; and that prior to that time she received from her uncle, Christian Steinbeck, $400; that about the year 1880 her husband, under an agreement with her, purchased of one Rollins a steam saw-mill, engine, etc., at the price of $1,100, upon which Thomas E. Davis had a lien for about $800, which her husband agreed to pay, and the other $300 of the purchase money was furnished by her upon an agreement with her husband that the said saw-mill should be her property; that soon after the purchase of the said saw-mill she furnished to her husband the further sum of $200, which was the residue of the money she had gotten from her father in 1879, to be used in making repairs on said mill; that in the year 1879 her husband bought on credit from one Ireland an interest in a grist-mill, which he traded to one Leggett for a tract of land; that, with her consent, her husband traded said land to Thomas E. Davis in payment of the lien held by him on the said saw-mill, and the money due to Ireland for said land was paid in sawing and work done at the saw-mill for Ireland and others; that said saw-mill, engine, etc., were entirely paid for with her separate means and the increase from its investment, and no part of the purchase money was paid with the money or means of her husband; that after this saw-mill had been thus paid for by her it was traded for another saw-mill, and $200 boot paid by her means; that in 1882 this last-named saw-mill was removed from Ritchie to Calhoun county, where in November, 1885, it was traded by her husband as her agent for the tract of 148 acres of land in controversy, and said land was conveyed to her as her separate estate; that by an oral agreement she made her husband her agent to handle and invest her money in all the aforesaid trades; and that he did not, either directly or indirectly, furnish any part of the means which was paid for said land, save his own services in making said trades and operating said saw-mills, but that the same was paid for by her own separate means, derived, as aforesaid, from her father, uncle, and father-in-law, and the proceeds of its investment. She further avers that the said 148 acres of land have been sold for taxes, and that the title is vested in the state. The answer of the husband adopts, and virtually reiterates, the answer of his wife. The cause was on June 16, 1887, heard upon the pleadings, exhibits, and depositions, and a decree was then pronounced by the court, dismissing the bill, and from that decree the plaintiff has appealed.

The only testimony filed by the defendants is their own depositions, in which they substantially testify to the facts set forth in their answer as above given. All the depositions are in a narrative form, and none of the witnesses were interrogated or cross-examined, but each was left free to frame his or her own statement, without interference. The plaintiff, besides his own, filed the depositions of two witnesses, viz., Thomas E. Davis and George M. Ireland. The plaintiff testifies that he knows that L. F. Law, the husband, bought the saw-mill, and did a good deal of sawing, and did the business in his own name, and never mentioned his wife's name in any of his business transactions; that he claimed the mill as his own; and also that Law told witness that he had traded the mill for the land, and had the deed made to his wife, and thus got his business in such a shape that witness could not make anything off him. Davis testifies that in the year 1880 he sold to L. F. Law a saw-mill, engine, etc., in this way: One Rollins was indebted to witness for said mill, and Law purchased it from Rollins, and witness took Law's notes for what was due on the mill; that Law had purchased an interest in a grist-mill, which he traded to Leggett for about 40 acres of land, and Law arranged with Leggett to have said land conveyed to witness to pay off Law's notes for said saw-mill; that in this way Law paid for said saw-mill, and the wife of Law was not mentioned in the transaction. Ireland testifies that he sold to L. F. Law an interest in a grist-mill, for which he made Law a deed, retaining a lien on the property for the purchase money; that some time thereafter Law informed witness that he had traded this interest in the grist-mill to Leggett for a small tract of land, and desired him to release the lien on the grist-mill, and take a lien on the saw-mill, which Law had bought from Davis, and that witness did release said lien, and in lieu thereof Law gave him a lien on the saw-mill; that Law afterwards paid off the lien on the saw-mill, in money and sawing, and a note on one Atha for $91, except $200, which is still unpaid; and this witness also testifies that the wife of Law had nothing to do with any of these transactions.

The foregoing is substantially all the testimony in this cause. In addition to this evidence, the plaintiff relies upon the following facts to show that the conveyance of the 148 acres of land to the wife of Law was intended to defraud the plaintiff and other creditors of L. F. Law: *First*, in the deed for the land to the wife a lien is retained to secure "the peaceable and undisturbed possession of said mill property against any incumbrances of any kind by judgment liens or otherwise;" *second*, the written agreement for the exchange of the saw-mill for the land shows that, as it was originally prepared, the wife

Digitized by Google

of Law was not named as one of the contracting parties, but that afterwards her name was interlined; and, *third*, the claim of the wife in her answer that the land had been sold for taxes. These facts, it is claimed, show the conduct of the parties to be so unusual and precautionary as to indicate a fraudulent purpose. But, without giving any undue importance to these matters, it seems to me that the circuit court erred in dismissing the plaintiff's bill. It is not denied, as a general proposition, that, if a clearly valid, subsisting debt is established by a wife against her husband, he may pay it or prefer it in the conveyance of his property. But, where a husband becomes insolvent, the wife cannot convert into debts, as against his creditors, former deliveries of her money or other property to him, or permitted receipts by him of her income or proceeds of her separate estate, which at the time of such delivery or receipt were simply gifts intended by the wife to assist her husband in his business, or to pay their common expenses of living; and considering the relation between them the law does not, merely from such delivery or receipt, imply a promise on the part of the husband to repay or replace the same, as it would between parties not so related; but it requires more,—there must be either an express promise, or circumstances attending the transaction to establish the fact that they dealt with each other as debtor and creditor. It would be exceedingly dangerous to permit the wife, after she has allowed her husband to use and expend her means for the common benefit of themselves and their children, without any expectation of any return, or the creation of a debt, when by mismanagement or misfortune of the husband he becomes unable to pay his debts, to raise up these gifts, and convert them into loans to the prejudice of creditors, and support them by her own evidence, after they had trusted the husband in total ignorance of any such liability. In transactions between husband and wife, which are impeached as fraudulent, it requires less proof to sustain the impeachment, and more and stricter proof to repel it, than would be required if the transaction were between strangers. A transfer of property, either directly or indirectly, by an insolvent husband to his wife, is justly regarded with suspicion; and unless it is clearly shown to be entirely free from an intent to withdraw the property from the husband's creditors, or the presumption of fraud be overcome by satisfactory affirmative proof, it will not be sustained. The foregoing principles are fully sustained by many decisions of this court in cases in which they were rigidly enforced. McGinnis v. Curry, 13 W. Va. 29; Herzog v. Weiler, 24 W. Va. 199; Maxwell v. Hanshaw, Id. 405; Burt v. Timmons, 29 W. Va. 441, 2 S. E. Rep. 780; Bank v. Atkinson, 32 W. Va. ——, ante, 175.

Assuming that the wife, Mrs. Law, acquired from her father, uncle, and father-in-law the money she claims in her answer and deposition, and that it was delivered to her husband, and used by him in such manner that the proceeds, or a part thereof, entered into the purchase of the land in controversy, the proof wholly fails to prove that the money was hers after it passed into the hands of her husband. In the absence of an express contract or circumstances, the legal presumption is that the delivery of the money to her husband was a gift, and, as she has entirely failed to rebut this presumption, we must hold that such delivery was a gift. There is no pretense of any express promise by the husband to repay the money. It is true the wife says that by an oral agreement she made her husband her agent, and that the money was furnished to him with the understanding that the mill was to be her property when purchased. But all the circumstances repel this claim. The husband purchased the first mill before she furnished him any money. He made all the subsequent trades, and did all the business in his own name. He claimed the mill as his own; gave a lien upon it to secure his own debt; paid that debt from his own labor and the profits of the mill. In none of these transactions was his wife mentioned, nor did she in any respect make her claim known to any one dealing with her husband. It is entirely fair to conclude, from all the facts and circumstances, that the suggestion of a loan or investment of the wife's money for her separate use never occurred to either the wife or the husband until insolvency overtook the husband, and some plausible device became necessary to shield the property from the pursuit of creditors. I am therefore of opinion that the said 148 acres of land is liable for the plaintiff's judgment, and that the decree of the circuit court must be reversed, and the cause remanded for further proceedings in accordance with the principles announced in this opinion.

ENGLISH and BRANNON, JJ., concurred. GREEN, J., absent.

(32 W. Va. 444)

JONES v. BROWSE.

(*Supreme Court of Appeals of West Virginia.* June 24, 1889.)

PLEADING—APPEAL FROM JUSTICE—ACTION AGAINST RECEIVER.

1. In an action commenced before a justice, and taken by appeal to the circuit court, if the defendant files an informal plea which sets up a valid defense to the action, the circuit court should not deny him the benefit of his defense when the plea is such that a person of common understanding may know what is intended by it.

2. An action against a receiver as such cannot be maintained without the leave of the court by which he was appointed.

(*Syllabus by the Court.*)

Error to circuit court, Pleasants county; JAMES M. JACKSON, Judge.

H. M. Russell and *W. P. Hubbard*, for plaintiff in error.

Digitized by Google

SNYDER, P. This action was commenced before a justice of Pleasants county in the name of Simpson Jones, for the use of T. W. Haines, against R. H. Browse, special receiver for Jones & Haines, to recover $300, money due by contract evidenced by an account in writing. The account filed is for $386, to which is attached the affidavit of said Jones, stating that the account is just, and that no part of it has been paid. Judgment was rendered by default by the justice against the defendant for $300 and costs. Upon the petition of the defendant an appeal was allowed, and the case was duly docketed in the circuit court of Pleasants county. In said circuit court the defendant tendered an answer or plea, in which he averred that he did not assume to pay the demand set forth in the summons; and further, that he is an officer of the circuit court of Wood county, and as such cannot be sued in another court without the leave of said court; that the possession of the defendant of the trust property of Jones & Haines is the possession of said circuit court of Wood county, and that therefore the plaintiff ought not to have his action aforesaid against him, etc. Upon objection by the plaintiff, the court rejected said plea, and, the defendant declining to further prosecute his appeal, the court dismissed the same, and in the same order it affirmed the judgment of the justice, and ordered that the plaintiff recover from the defendant $300, with interest thereon from June 12, 1886, and his costs, and gave leave to the plaintiff to file his petition to the court in the chancery suits of A. P. Riggs v. J. A. Armstrong et al., and Jones & Haines v. R. H. Gillespie et al., pending in the circuit court of Wood county, in which suits the defendant had been appointed special receiver, to obtain payment of said judgment, but that no execution should issue thereon. From this judgment the defendant obtained this writ of error.

The action and proceedings in this case, both before the justice, and in the circuit court, appear to be anomalous, irregular, and erroneous in almost every particular. The claim upon which the action is founded seems to be for a sum in excess of the jurisdiction of the justice. The account filed is against and for services rendered to "J. A. Armstrong and the Monitor Tow-Boat & Lumber Company," and in which the name of the defendant nowhere appears; and, while the defendant is sued as special receiver for Jones & Haines, the judgments rendered by both the justice and the circuit court seem to be against the defendant personally. The circuit court, after dismissing the defendant's appeal, proceeded, not only to affirm the judgment of the justice, but to render its own judgment against the defendant, and then inhibits the plaintiff from suing out execution on either judgment. But, aside from all these errors and irregularities, the judgment of the circuit court must be reversed, because it rejected the answer or plea of the defendant. This plea, if it may be regarded as such, is certainly not in good form; but good form or technical accuracy is not required in cases originating in a justice's court. The statute designates the defendant's pleading in such cases an answer, which may be simply a denial or a statement of facts constituting a defense. No particular form is required, and it will be sufficient if it so states the defense relied upon as to enable a person of common understanding to know what is intended. Poole v. Dilworth, 26 W. Va. 583; Todd v. Gates, 20 W. Va. 464.

The defenses set up by the defendant in this plea or answer are two: *First, non-assumpsit*, and, *second*, that the defendant could not be sued as special receiver without leave of the court by which he was appointed. The circuit court denied the right of the defendant to make either of these defenses, when, as a matter of law, either of them, if proved, was a complete answer to the action. If the defendant never assumed the liability for which he is sued, then certainly there could be no recovery against him, either as receiver or personally. The second defense is that the defendant, being a special receiver, and as such the mere agent or hand of the circuit court of Wood county in respect to the liability for which he is sued, the action against him is virtually an action against said court; and therefore he is not suable in any other court without the leave of the court which he represents. It is broadly laid down by High on Receivers, § 254, that it is in all cases necessary that a person desiring to bring suit against a receiver should first obtain leave of the court appointing him. In Barton v. Barbour, 104 U. S. 126, it was held that "no suit can be maintained against a receiver of a railroad company who is, by order of court, conducting the business of a common carrier thereon, for injury to persons or property, caused by his negligence or that of his servants, without leave of the court by which he was appointed." This decision was affirmed in Melendy v. Barbour, 78 Va. 544. Every suit against a receiver as such is a proceeding set on foot to reach the assets in his hands, and hence in the hands of the court that appointed him, for the judgment to be entered against him can only be payable out of the trust funds in his hands. Com. v. Runk, 26 Pa. St. 235; Peale v. Phipps, 14 How. 368. If this action were allowed, we would have the anomaly of a justice attempting to adjust rights and enforce the payment of claims out of trust property held by a circuit court, and which was being administered by it, without leave of that court, and without regard to the rights and equities of other claimants to the fund. It would be an usurpation of the powers and duties belonging exclusively to the court, and render it impossible for the court to distribute the fund according to the rights and priorities of the trust creditors. It is no sufficient an-

Digitized by Google

swer to say that in the case at bar no such attempt was made, but that instead thereof leave was given to petition the court holding the fund for payment of the judgment, because this simply proves that the court which rendered the judgment appreciated the difficulties by which it was surrounded, and therefore refused to render an unconditional or enforceable judgment. For these reasons the judgment of the circuit court must be reversed, and the case remanded for further proceedings.

ENGLISH and BRANNON, JJ., concurred. GREEN, J., absent.

(32 W. Va. 433)

LYON v. HORNER *et al.*

(Supreme Court of Appeals of West Virginia. June 24, 1889.)

SHERIFFS—FAILURE TO TAKE BOND—NOTICE OF MOTION.

1. A notice to a sheriff, under section 35, c. 41, Code 1887, may be in the name of the plaintiff in the motion, and need not be in the name of the state for the use of such plaintiff.

2. A sheriff levies a writ of *fieri facias* upon property. A claimant of the property gives a suspending bond. The sheriff returns the writ and said bond to the clerk's office, and leaves the property in the possession of the debtor without security, and it is consumed by him. It is subsequently decided that the property was liable for the writ. Upon a motion by the creditor against the sheriff and his sureties, they will be held liable to the creditor for the value of said property.

(Syllabus by the Court.)

Error to circuit court, Harrison county; A. B. FLEMING, Judge.

J. J. Davis and *J. Philip Clifford*, for plaintiffs in error. *John Bassel*, for defendant in error.

SNYDER, P. In February, 1884, a writ of *fieri facias* was issued from the clerk's office of the circuit court of Harrison county upon a judgment in favor of James M. Lyon, executor, etc., against Franklin C. Stewart, W. J. Kester, and Dexter Lowther, the two latter being the sureties of Stewart, returnable to April rules, 1884. The said writ came into the hands of T. M. Horner, deputy for James D. Horner, who was then the sheriff of said county. The said deputy-sheriff, on February 15, 1884, levied the said writ upon certain personal property of Franklin C. Stewart, the principal debtor, among which was 13 stacks of hay, which was claimed by Joanna M. Stewart. An indemnifying bond was required by the deputy-sheriff, and given, and thereupon the said Joanna M. Stewart gave a suspending bond. The return on the writ shows these facts, and also that the officer returned the indemnifying and suspending bonds aforesaid to the said clerk's office, with the writ of *fieri facias*. The right of property to said 13 stacks of hay was tried according to the statute, (section 5, c. 107, Code,) and a judgment rendered on June 1, 1885, that said hay was not the property of the claimant, Joanna M. Stewart, but that it was liable under said writ of *fieri facias*. No further action was taken by the sheriff to execute said writ, and on January 15, 1887, James M. Lyon, executor, etc., the plaintiff in said *fieri facias*, gave notice in writing to James D. Horner, as sheriff, and to Thomas M. Horner and others, his sureties, as such sheriff, in which, after setting forth the issuance and return upon the said writ above mentioned, he stated that he would, on January 26, 1887, move the circuit court of Harrison county to render judgment in his favor against said sheriff and his sureties for the sum of $195, the value of said 13 hay-stacks. The defendants appeared to said notice, and moved the court to quash the same, which motion the court overruled; and on May 24, 1887, by consent of the parties, the court, in lieu of a jury, tried the case, and rendered judgment in favor of the plaintiff against the defendants, James D. and Thomas M. Horner, for $130, and his costs, and the said defendants thereupon obtained this writ of error. During the trial the defendants saved a bill of exceptions, in which all the facts proved are certified, from which, in addition to the facts hereinbefore stated, it appears that the plaintiff, among other matters, proved that the said *fieri facias* had not been satisfied; that no forthcoming bond had been taken; and that said 13 stacks of hay had been left by the sheriff in the possession of the debtor, Franklin C. Stewart, who had used and consumed the same prior to June 1, 1885, the time the right of property therein was determined; and that said hay, if it had not been so consumed, would have been worth on the said 1st day of June, 1885, $10 per stack, aggregating $130.

The first error assigned by the plaintiffs in error is that the court improperly overruled their motion to quash the notice. In support of this assignment it is claimed that the notice should have been in the name of the state for the use of the plaintiff, because it is provided in chapter 10 of the Code that in all bonds payable to the state "suits may be prosecuted in the name of the state," etc. It is true that this proceeding is, in effect, a suit on the sheriff's official bond, which is payable to the state, but the statute is merely permissive, and not mandatory. This proceeding is taken under section 35, c. 41, Code 1887, which declares that the court may, on the motion of the person entitled to recover, give judgment, etc. The form of the notice is not given, but the universal practice, so far as I know or can discover, both in this state and Virginia, ever since said statute was enacted, has been for the notice to be in the name of the plaintiff in the *fieri facias*. Chapman v. Chevis, 9 Leigh, 297; Stone v. Wilson, 10 Grat. 529; Bank v. Horner, 26 W. Va. 442. No other objection is pointed out to the notice, and, according to the decisions of this court, it seems to me to be sufficient, and that there was consequently no error in overruling the motion to quash it. Bank v. Horner, supra; Board, etc., v. Parsons, 22 W. Va. 308.

Digitized by Google

It is further contended for the plaintiffs in error that the trial court erred in rendering judgment against them on the facts proved. It is insisted that the *fieri facias* was properly returned when the suspending bond was given, and that, as the plaintiff failed to have a *venditioni exponas* issued as soon as the right to subject the hay to his debt was determined, the sheriff had no power or authority to sell it, and that consequently there was no default on the part of the sheriff in not making the sale. This position, it seems to me, involves an assumption that is not law. It is well settled that, if a writ of *fieri facias* has been levied by the officer upon the property of the debtor before the return-day, he may sell the property so levied upon by virtue of said writ after the return-day thereof. Cockerell v. Nichols, 8 W. Va. 159. It is also well settled that, where an officer makes a levy, the property levied upon is legally in his custody and at his risk. Unless he takes a forthcoming bond, he must keep the property in his possession until it is sold or the debt satisfied. If he leaves it in the possession of the debtor, and it is thereby lost or consumed, he will be liable for its value. The giving of a suspending bond does not affect the liability of the officer for the property. Such bond merely suspends the sale, and leaves the property in the custody of the officer. After the levy is made it is the duty of the officer, and not the plaintiff, to see that the property levied upon is legally kept and sold. Therefore, if the officer returns the writ by virtue of which he made the levy, it is his duty to take out a *venditioni exponas* to sell the property. But a *venditioni* in the case at bar, if issued after the right to the property had been determined, would have availed nothing, because long before that time, according to the proof, the property had been consumed by the debtor. The default was wholly on the part of the sheriff. Instead of keeping the property safely, he left it in the possession of the debtor without any security. He left it there at his risk, and, it having been lost to the creditor, the officer is liable. This case, it seems to me, is too plain to justify any further discussion. The judgment of the circuit court is affirmed.

ENGLISH and BRANNON, JJ., concurred. GREEN, J., absent.

(32 W. Va. 136)

BULLINGTON v. NEWPORT NEWS & M. V. CO.

(*Supreme Court of Appeals of West Virginia.* June 24, 1889.)

STOCK-KILLING CASES—INSTRUCTIONS—OPINION EVIDENCE.

1. In an action for damages against a railroad company for killing stock upon their track, the following instructions, asked for and given at the instance of the plaintiff, are not erroneous, evidence having been introduced before the jury tending to prove the hypothetical statements therein contained: "(1) If the jury believe from the evidence that the defendant's engine and caboose killed the plaintiff's horses, and that the said caboose had upon it two brakemen and a conductor, and that the engine had the engineer and fireman aboard, and that while the alarm whistle was blowing no brake was applied upon said caboose, but that said engine and caboose chased said horses, and knocked them off without any apparent slowing of the train, then the said defendant is guilty of negligence, and the jury will find for the plaintiff. (2) If the jury believe from the evidence that defendant's engine chased plaintiff's horses 600 or 800 feet, and that where said horses were struck said engine had not slacked its speed, then there was negligence on the part of the employés of the defendant to check or stop said train, and in that case they are instructed to find for the plaintiff. (3) If the jury believe from the evidence that the defendant's train killed plaintiff's horses, and that said train was a light train; that it had upon it two brakemen, a fireman, and engineer; and if they further believe from the evidence that the alarm whistle sounded 200 feet away from the horses, and that said brakemen and conductor took no steps to prevent the destruction of plaintiff's horses,—then, and in that case, there is not only a want of care, but negligence on the part of the defendant, and the jury will find for the plaintiff."

2. The jury in this case having fixed the damages at $200, the value of the horses ascertained by the witnesses other than the plaintiff, without reference to any peculiar or particular value, it was not error in the court to reject the following instruction asked for by the defendant, as the defendant was not prejudiced thereby: "The court instructs the jury that while the measure of damages is the value of the stock when killed, that value is the market value of such stock, and not some peculiar or particular value attached to it by plaintiff."

3. A question propounded to a witness who is not an expert, calling for his opinion, which is not responded to by said witness, expressing his opinion, is not such an error as would prejudice the party excepting to said question.

4. Under the circumstances of this case it was not proper to ask the engineer if he did all in his power to prevent striking the horses of the plaintiff, and the court did not err in rejecting said question.

(*Syllabus by the Court.*)

Error to circuit court, Kanawha county; F. A. GUTHRIE, Judge.

L. A. Martin and *Brown & Jackson*, for plaintiff in error. *Ferguson & Chilton*, for defendant in error.

ENGLISH, J. This was a suit brought by D. H. Bullington before L. S. Lee, a justice of the peace of Kanawha county, on the 28th day of April, 1887, against the Newport News & Mississippi Valley Company, a corporation, for the recovery of damages for a wrong in which damages were claimed amounting to $250. It seems that said corporation was operating a railroad through said county, and on the 24th day of April, 1887, a locomotive of defendant, with tender and caboose attached, under the control and management of the agents of said corporation, killed two horses belonging to the plaintiff which were grazing upon the commons near said railroad track, at Brownstown, thereby damaging the plaintiff, as he claimed, to the amount of $250. Said company appeared before said justice, and denied the allegations of the plaintiff's complaint which in any way charged the killing of said horses to the negligence of defendant or any of its agents or employés, and pleaded not guilty to said complaint. The case was tried before

Digitized by Google

a jury of six, who found for the plaintiff, and assessed his damages at $200. The defendant, by its attorney, moved said justice to set aside the said verdict, (1) because the same was contrary to law and the evidence, and without sufficient evidence; (2) because the same was contrary to the instructions of the court; (3) because of erroneous rulings in giving and refusing instructions to the jury; (4) because of erroneous evidence allowed to go to the jury,—which motion was overruled, and the defendant then and there excepted, and took a bill of exceptions setting forth all the evidence given and all the proceedings had before said justice, which was signed and sealed by said justice; and on the 11th day of July, 1887, the defendant sued out a writ of *certiorari*, directed to said justice, reciting the fact of the rendition of said verdict in favor of the plaintiff for $200, and judgment on the same, requiring him to bring before the said circuit court of Kanawha county the record and proceedings had before him in the said action, including said judgment, in order that the same might be reviewed in and by said court, and, if error be found therein, be reversed; and on the 6th day of January, 1888, the circuit court of Kanawha county proceeded to hear said cause upon said writ of *certiorari*, and, upon the examination of said transcript, held that there was error in the judgment complained of in the petition for said writ, (1) in giving the several instructions to the jury asked for by the plaintiff; (2) in refusing to give the instructions asked for by the defendant; (3) in allowing improper evidence to go to the jury; (4) in refusing to set aside the verdict of the jury, and grant the defendant a new trial; and not only reversed the judgment, but dismissed the plaintiff's action. Did the court below commit an error in reversing the judgment of said justice and dismissing the plaintiff's action?

Said court seems to have based its opinion, first, upon erroneous instructions given to the jury at the instance of the plaintiff. These instructions were three in number, and read as follows: "No. 1. If the jury believe from the evidence that the defendant's engine and caboose killed the plaintiff's horses, and the said caboose had upon it two brakemen and a conductor, and the engine had the engineer and fireman aboard, and that while the alarm whistle was blowing no brake was applied upon said caboose, but that said engine and caboose chased said horses, and knocked them off, without any apparent slowing of the train, then the said defendant is guilty of negligence, and the jury will find for the plaintiff. No. 2. If the jury believe from the evidence that defendant's engine chased plaintiff's horses 600 or 800 feet, and that where said horses were struck said engine had not slacked its speed, then there was negligence on the part of the employés of the defendant to check or stop said train, and in that case they are instructed to find for the plaintiff. No. 3. If the jury believe from the evidence that defendant's train killed plaintiff's horses, and that said train was a light train; that it had upon it two brakemen, a fireman, and engineer; and if they further believe from the evidence that the alarm whistle sounded 200 feet away from the horses, and that said brakemen and conductor took no steps to prevent the destruction of plaintiff's horses,—then, and in that case, there is not only a want of care, but negligence, on the part of the defendant, and the jury will find for the plaintiff."

Now, while it has been held that it is error to instruct a jury hypothetically upon a state of facts when there is no evidence tending to prove such facts, and that it is error to instruct upon a conjectural state of facts unless there is evidence tending to prove the same, (see Winkler v. Railroad Co., 12 W. Va. 699; Vinal v. Core, 18 W. Va. 1,) yet, if the instruction propounds the law, and does not mislead the jury, it should be given, (see McClintic v. Ocheltree, 4 W. Va. 249;) and in the case of Railroad Co. v. Skeels, 3 W. Va. 556, it was held "competent to instruct the jury that if from the evidence they believe so and so, that then certain consequences will follow." The proper determination of the question as to the correctness of these three instructions requires us to look to the evidence which was introduced before the jury, and see what it discloses in regard to the conduct of the defendant's employés in the management of their train about the time the horses were killed. Was there any evidence tending to show that the ordinary precautions were not used, by those in charge of the train, that should be used when horses or stock of any character are discovered upon the track in front of a locomotive and train moving at the speed of 20 miles an hour? Barney Haynes, the engineer on the locomotive, testified that he saw one horse, the light one, a dun, coming up the bank, above the culvert, on the path. It started to run on the side of the track when he blew the whistle. It then jumped on the track. "I was about one telegraph pole or 200 feet away, as near as I can come at it, when I blew the whistle. The horse jumped on the track. I reversed my engine and opened the lever, and the tank-brake was set by the fireman, and the throttle was pulled open. The horse ran between 200 and 300 feet, and stepped on the track," etc. And on cross-examination he stated: "When I saw the horse I was running about 20 miles an hour, and when I struck the horse I was running about 10 or 12 miles an hour." But, on the other hand, Mrs. Snodgrass, Charles Workman, and C. A. Harrold, who were looking on at the time said horses were killed from points near the railroad, all state that the train seemed to them to increase its speed after the alarm whistle was first sounded until it struck the horses. Here there was evidence tending to prove that the speed of the train was increased instead of being slackened. The court cannot pass upon the weight

Digitized by Google

of the testimony without invading the province of the jury. These questions of fact must be left to the jury, and, as there appears to be evidence tending to prove the hypothetic statement contained in all three of the instructions given by the justice at the instance of the plaintiff to the jury, we can see no error in said instructions.

Now, as to instruction No. 9, which was asked for by the defendant, and was refused by the court, which is in these words: "The court instructs the jury that while the measure of damages is the value of the stock when killed, that such value is the market value of such stock, and not some peculiar or particular value attached to it by the plaintiff." While we are of opinion that said instruction properly propounds the law in regard to the measure of damages in cases of this character, (see Sedg. Dam. 559, and note, and Edwards v. Beebe, 48 Barb. 106,) and it was error in the justice to reject such instruction, yet the error is not such a one as operated to the prejudice of the defendant in error, because, on looking to the record, we find that the jury found the damages to be $200, which was the value placed upon the horses by disinterested witnesses, while the plaintiff claimed that they were worth to him $250.

The next question to consider is whether upon the trial of said action the justice ruled properly upon the admission and rejection of the testimony offered. Now, the witness Charles Workman, introduced by the plaintiff, was asked: "If there had been an effort on the part of the persons in charge of the train, with appliances ordinarily used, could the train have been stopped or slowed up in the distance you have stated (meaning 450 feet) so as to have prevented the accident and injury to the horses of the plaintiff?" which question was objected to by defendant as leading and improper, which objection the court overruled. Now this witness had stated he lived in Brownstown, where it appears there was a station, and, although the question calls for his opinion, it seems to me it was a question upon which he might well express an opinion from every-day observation, although he was not an expert, and the defendant might easily have shown on cross-examination the weight and value of his opinion.

The next question objected to was one asked the witness Barney MacKinsbridge, who was introduced by the plaintiff, and was asked: "Did you see or observe any effort on the part of those in charge of the train to slow up or prevent the accident and injury to plaintiff's horse?" I cannot see that any rule of evidence was violated or injustice done the defendant in allowing that question to be asked. When the plaintiff had concluded his examination of witnesses in chief, the defendant by its counsel moved to strike out all the evidence given on behalf of the plaintiff, upon the ground that the same was insufficient in law to entitle the plaintiff to a verdict and judgment, which motion was overruled, and the defendant excepted.

The defendant, in introducing its testimony, asked the witness Barney Haynes, (the engineer:) "Did you, as engineer of that train, do all in your power to prevent striking the horses of the plaintiff?" to which question the plaintiff objected, which objection the justice sustained. The witness was then asked: "Could you, after seeing the horse, have prevented striking it?" and the plaintiff objected, which objection was sustained,—both of which rulings I regard as correct, the question being improper because it would have been in accordance with the rules of evidence to let the witness state what he did, and allow the jury to judge as to whether he could have done more. The witness had already stated the distance of the horses from the train, and their position with reference to the track when he first discovered them; the movements made by the horses; and what was done by him with reference to the machinery of the train before the engine struck the horses. If anything was left undone by him which he ought to have done, he could easily have stated it. It seems to me the jury were entitled to know what he did do, and that it was not proper to ask him if he did all in his power, as the jury might not know what was in his power, and the expression is very indefinite; and the other question asked is merely putting the first in different language.

The next question asked this witness by plaintiff, and objected to by defendant, was as follows: "Do you say that the four or five witnesses who have testified here that the horse was standing on the track before you whistled are all mistaken as to the horse's position, and that you alone knew its exact position?" Now, while this question may assume some things that did not exist, I do not think that the defendant was prejudiced by allowing it to be answered, and the witness to again explain what he had said in reference to the position of the horses.

C. W. Matthews was asked by plaintiff: "Did you not consider the killing of these horses a great piece of carelessness on the part of the railroad employés, and did you not so state to the plaintiff and his attorney and witnesses on the day first set for trial in this case?" The defendant objected, and the objection, as we think, was properly overruled, as the question was proper in laying the foundation for an impeachment of the witness. The plaintiff then asked one Allison Myers this question: "Do you have any knowledge of how long it takes to stop an engine and tender running at the rate of 20 miles an hour, or in what distance it could be stopped in from any experience of yours, from observation or otherwise?" which was objected to by defendant, and the objection overruled. The witness had already stated that he was 41 years of age, never worked on a train or engine, had lived on the railroad ever since it was built, but had no experience

Digitized by Google

in running a train or engine. As a matter of course, he could only speak from observation, but it does not seem to me that the justice erred in allowing him to state whether he had any knowledge in regard to said matters or not, nor do I see any good reason why the next question asked the witness, and objected to by the defendant, should not have been answered by him as it was.

D. P. Kegley, the next witness, who stated that he had had some experience as a brakeman on the C. & O. R. R., was asked by plaintiff to state in what distance such a train could be stopped from the west end of Lens Creek culvert going east,—how many feet,—if he knew the ground; and the defendant objected, and the objection was overruled, and he answered: "Well, I can't hardly tell. It looks to me like they ought to stop in 300 or 400 feet. It is a guess. I don't know; it is my opinion." The question was objectionable, yet the answer seems so indefinite and uncertain that I do not think the defendant was prejudiced materially by it. Now, these are all the points raised by objections to the testimony in the case before the justice, and by looking at the conclusion of the bill of exceptions it will be seen that the evidence was certified, and not the facts proved; and under the rulings in the case of Black's Adm'rs v. Thomas, 21 W. Va. 709, "the appellate court should not reverse the judgment unless, after rejecting all the conflicting parol evidence of the exceptor, and giving full faith and credit to that of the adverse party, the decision of the trial court still appears to be wrong." Applying these principles to this case, I am of opinion that the judgment of the circuit court of Kanawha county should be reversed, and, this court proceeding to render such judgment as should have been rendered by said circuit court, the judgment of said justice is affirmed, and the defendant in error must pay the costs of this writ of error.

SNYDER, P., and BRANNON, J., concurred. GREEN, J., absent.

(32 W. Va. 559)

OGDEN v. CHALFANT *et al.*

(*Supreme Court of Appeals of West Virginia.* June 26, 1889.)

RECEIVERS—APPOINTMENT—NOTICE OF MOTION.

1. In a suit pending to subject lands to the payment of liens thereon, the court, in a proper case, may appoint a receiver to take charge of the lands and rent the same until a sale can be made.
2. A receiver may be appointed in such case whenever it is shown, in any proper manner, that the debtor is insolvent, or that the lands are likely to prove insufficient to satisfy the undisputed or ascertained liens thereon.
3. Where the motion is made in term-time in a pending suit, no notice to the debtor is necessary.

(*Syllabus by the Court.*)

Appeal from circuit court, Harrison county; A. B. FLEMING, Judge.

J. Philip Clifford, for appellants. *John Bassel*, for appellee.

SNYDER, P. Suit brought by Selden M. Ogden against John Chalfant and others, in the circuit court of Harrison county. The suit was originally to enforce the lien of the plaintiff's judgment against the real estate of the defendant John Chalfant, but, it appearing from the bill that there were other liens upon said real estate, an order was made referring the cause to a commissioner, with directions to convene all the lien creditors by publication, and to ascertain and report all the liens on said real estate, together with their amounts and priorities, and thus the suit was converted into a general creditors' suit and thereafter prosecuted as such. The bill alleges that the said Chalfant has no personal estate, and the commissioner convened all the lien creditors, and reported a large number of debts, amounting to over $20,000, as liens upon said real estate. This report was recommitted, and a second report made by the commissioner, showing an increased amount of liens; and by an order made May 30, 1887, the court again recommitted the report. A. P. Sturm, a judgment creditor of said Chalfant, whose debt appears in said report, gave written notice to Chalfant that he would move the court on May 25, 1887, to appoint a receiver to rent a part of the lands mentioned in the bill and proceedings, and filed in the cause an affidavit of the insolvency of said Chalfant. Two affidavits were filed by said Chalfant, in one of which it is stated that he had leased 86 acres of said land to Solomon H. Chalfant for the season of 1887, and in the other it was stated that lands in the hands of tenants generally deteriorate and become less salable. On June 2, 1887, the court made an order in the cause, appointing the sheriff of the county a special receiver to take charge of a part of said lands, and rent the same until March 1, 1888, but ordered the receiver not to take possession of the 86 acres of land, which had been rented, until the term of the tenant expired. It is from this order that the defendant John Chalfant and the said Solomon H. Chalfant have obtained this appeal.

It is assigned as error that the court had not sufficient *data* upon which to base an order appointing a receiver. Pending a suit to subject a debtor's real estate to the payment of liens upon it, the court may sequester the rents and profits of such real estate, and appoint a receiver for that purpose, whenever it appears that the debtor is insolvent. Grantham v. Lucas, 15 W. Va. 425; Beard v. Arbuckle, 19 W. Va. 145. In this case the bill alleged that the debtor had no personal estate, and there was an affidavit that he was insolvent. These facts are not only not contradicted, but they are virtually admitted; and besides, the whole proceedings in the cause show that this was a cause in which it was eminently proper for the court to take charge of the lands, and rent them until a sale could be had. There seemed to have been much delay and difficulty in ascertaining and adjusting the numerous liens upon the lands. Two re-

Digitized by Google

ports had been made, and the court found it necessary to order a third report. It is not essential that there should be a report of the value of the lands, or the amount of all the liens, in order to warrant the court in sequestering the property. Whenever it is shown in any proper manner, whether by the report of a commissioner or other sufficient proofs, that the debtor is insolvent, or that the lands are likely to prove insufficient to pay off the undisputed or ascertained liens thereon, any lien creditor who is a party to the proceeding is entitled to have the lands sequestered until a sale thereof can be made. In this case all these requisites appeared, and therefore there were sufficient *data* for the appointment of a receiver. It is further claimed that A. P. Sturm, on whose motion the receiver was appointed, was not a party to the suit; and that therefore he was not entitled to make said motion. While Sturm was not made a formal party to the bill, he was in fact a party to the suit. He was one of the creditors convened, and the report of the commissioner showed that he filed in the cause a large judgment in his favor against the debtor John Chalfant. This, under the repeated decisions of this court, made him a party to the suit. Neely v. Jones, 16 W. Va. 625; Arnold v. Casner, 22 W. Va. 444.

It is also insisted for the appellants that the notice was irregular and insufficient. The order appointing the receiver was made in a pending suit, fully matured for hearing; and, as the parties were already in court, no notice was necessary. In Grantham v. Lucas, and Beard v. Arbuckle, supra, there was no notice of the motion, and I have been unable to find any case in which notice of the motion was required. It therefore follows that no injury could have resulted to the appellants from the defects in the notice, because no notice was required. I have now considered all the errors assigned, and for the reasons stated none of them are tenable. The decree of the circuit court is affirmed.

ENGLISH and BRANNON, JJ., concurred. GREEN, J., absent.

(32 W. Va. 487)

GWYNN *v.* SCHWARTZ.

(*Supreme Court of Appeals of West Virginia.* June 26, 1889.)

BOUNDARIES—ACQUIESCENCE—NEW TRIAL—WRIT OF ERROR.

1. When in any civil suit there is an order made granting a new trial, a writ of error will lie from such order, either before or after the new trial has been had, and without regard to the finding on such new trial.

2. The verdict of a jury ought not to be interfered with, and a new trial awarded by the court, when the evidence is contradictory, if, when most favorably considered in support of the verdict, it does not still appear that the verdict was plainly not warranted by the evidence.

3. In the description of lands, as to questions of boundaries the rule is settled in Virginia and West Virginia that natural landmarks, marked lines, and reputed boundaries will control mere courses and distances, or mistaken descriptions in surveys and conveyances.

4. The statement of the quantity of land supposed to be conveyed, and inserted in deeds by way of description, must not only yield to natural landmarks and marked lines, but also to descriptions in deeds by courses and distances.

5. Disputed boundaries between two adjoining lands may be settled by express oral agreement, executed immediately, and accompanied by possession according thereto.

6. Long acquiescence by one adjoining proprietor in a boundary established by the other is evidence of such agreement so fixing the division line between them.

7. Such acquiescence may be shown by the adjoining land-owners having actual possession and cultivating to such line; or, if it run through woods, by the proprietor who established such division line with the knowledge of the adjoining land proprietor, always clearing up to this line and, with his like knowledge, cutting timber and peeling bark up to this division without the other making any objection to such claim or such acts of ownership, though he was present when such acts were being done.

8. Such acquiescence, in this state, for a period of over 10 years will justify a jury in inferring that such parol agreement establishing such division line existed; and a verdict based on such inference ought not to be set aside as plainly contrary to the evidence.

(*Syllabus by the Court.*)

Error to circuit court, Mason county; F. A. GUTHRIE, Judge.

This is an action of ejectment, brought August, 1884, in the circuit court of Mason. The declaration was in proper form, and to it the defendant pleaded not guilty, on which issue was joined. There was no controversy in the court below, nor is there in this court any controversy about the pleadings. When the case was tried first, the jury, on February 10, 1886, found, "We, the jury, find the defendant not guilty," and thereupon the plaintiff, Amos Gwynn, moved the court to set aside the verdict, and award him a new trial, because the same is contrary to the law and the evidence, which motion the court sustained on condition the plaintiff pay unto the defendant his costs expended in the trial of the cause at that term of the court; and the defendant took a bill of exceptions to this action of the court, in which all the evidence before the jury, and all the proceedings had in the trial of the case, are set out. No instructions were asked by either party. The whole controversy was as to the proper location of the division line separating the farms of the plaintiff and the defendant. The evidence shows that one D. C. Sayre owned a tract of land of 7,000 acres on Little Mill creek, in Mason county. On August 8, 1856, he gave to his two grandchildren, Daniel W. Vanmetre and Miriam McCullough, the wife of Joshua McCullough, about 400 acres, as he supposed, of this land, dividing it into two nearly equal parts. He conveyed one of these to Daniel W. Vanmetre, and on the same day he conveyed the other part to Joshua McCullough. Daniel W. Vanmetre and wife conveyed the land so conveyed to him, on March 3, 1880, to the plaintiff, Amos Gwynn, by a deed which was duly admitted to record. Joshua S. McCullough conveyed the land so conveyed to him to Henry J. Sine by a deed dated December 12, 1866, duly recorded; and

Digitized by Google

Henry J. Sine and wife, by deed duly recorded, conveyed said land to the defendant, Levi Schwartz. The whole controversy in this case is in reference to the true division line between these two tracts of land.

On reading these two deeds one is struck with some peculiarities about them. Though they were both deeds of gift, yet on the face of the deeds they appear to be sales, for the consideration named in each of them is $300 cash, and both of them contain general warranties of title. In the next place, while each deed states that the land conveyed is "about 200 acres," yet it is perfectly obvious, according to the metes and bounds, that the land conveyed to Joshua S. McCullough, now owned by the defendant, Schwartz, contained 10 or 12 acres more than the land conveyed to Vanmetre, now owned by the plaintiff. The two tracts are of the same shape, (parallelogram,) 310 poles long, but differing in width, one being 106 poles wide, and the other 100 poles wide. Again, it would seem from these deeds that the division line between the two tracts—the subject of dispute now—was not actually run when these were made. The deed to McCullough gives its length as 310 poles, while the deed to Vanmetre gives its length as 300 poles. In fact, the inference to be drawn from the reading of these deeds is that very few, if any, of the metes and bounds of these two parcels of land were then actually run, as no corners are stated to have been made or marked. The courses of the tract in the deed to McCullough are as follows: "Beginning at the lower corner of a tract sold to Miriam Sayre, in Little Mill creek bottom, and running with sd line west three hundred and ten poles to the closing line of the 7,000-acre tract, and with said line north, 18 degrees west, one hundred and six poles; thence east three hundred and ten poles to the center of Little Mill creek; thence up the same with its meanders to the beginning." While the courses of the Vanmetre tract, now owned by the plaintiff, are thus given in his deed: "Beginning at the lower corner of a tract sold Joshua McCullough in Little Mill creek, and running with said McCullough's line west three hundred poles to the closing line of the 7,000-acre tract; thence with said line north, 18 degrees west, one hundred poles; thence east three hundred poles to the middle of Little Mill creek; thence up the same with its meanders to the beginning." The surveyor, in his report made to the court in this case, states that the parties to this suit—plaintiff and defendant—point out to him a birch on Little Mill creek, which they agreed was the lower corner of the tract sold to Miriam Sayre, in "Little Mill creek bottom," and therefore the beginning corner of the defendant's (Schwartz's) tract of land. The surveyor then ran a line nearly north—that is, N. 88 deg. 40 min. W.—along what was said by the parties to this suit to be a line of the Miriam Sayre tract till it intersects the closing line of the 7,000-acre tract of Daniel C. Sayre at a hickory marked as a corner, which it was agreed by the parties to this suit was the second corner of the defendant's (Schwartz's) tract of land.

If there had been no parol evidence in this case, as neither of the deeds giving the boundaries of the tract of land owned by the defendant, Schwartz, or by the plaintiff, Gwynn, give any marked corners, but only the metes and distances of each tract, all that could be done to ascertain the boundaries of these tracts of land, and the true division line between them, would have been to run out these two tracts of land according to the courses and distances contained in these deeds. The true course of the division line between these tracts would then have been S. 88 deg., 40 min. E., so as to be parallel with the first line of the tract conveyed to McCullough, for though this line was said in the deed to run west, yet it did not run quite west, but N. 88 deg., 40 min. W., and it is therefore to be supposed that the division line between these two tracts, stated in the deeds to run east, really ran S. 88 deg., 40 min. E., or parallel with the first line. The division line described in one of these deeds as 300 poles, and the other 310, would, according to both deeds, terminate at Little Mill creek.

The plaintiff, Amos Gwynn, insists that the division line between the tracts of the plaintiff and defendant must be found in this manner, by running out the courses and distances of the deed under which he and defendant claim. This, if done, would show the verdict of the jury in favor of the plaintiff to be correct, and the judgment of the court below, of September 15, 1886, would be affirmed. The defendant, however, insists that there was before the jury an abundance of evidence to justify the verdict of the jury, on the first trial, for the defendant, and that the court ought then to have entered up a judgment for the defendant, instead of granting, on the motion of the plaintiff, a new trial, as it did on February 20, 1886. All the evidence given at this trial is certified by the court; and, in deciding whether the circuit court erred in awarding such new trial, we are bound to give full weight to the defendant's evidence; and, when the evidence in favor of the plaintiff conflicts with that of the defendant, we must reject the plaintiff's evidence.

When the evidence is thus viewed, we may regard this as the case as proven by the evidence in the estimation of the jury; that D. C. Sayre, before he executed to his grandchildren said two deeds dated August 8, 1856, under which the plaintiff and defendant respectively claim, marked as a corner of the division line between the said two tracts of land a hickory on the closing line of the 7,000-acre tract, and that the hickory is on the di-

Digitized by Google

vision line between these two tracts of land as it is claimed by the defendant; that D. C. Sayre, before he made these two deeds of August 8, 1856, also marked trees on each side of a road, where it crossed this division line between these two tracts; that these trees were marked there as a corner and as line trees on this division line between these two tracts as afterwards deeded by Sayre, when a survey of this 7,000-acre tract was being made. When the distance was run, showing the width of the tract according to the deeds he intended making, he made the surveyor stop, set his compass on this division line as he intended it should be, and mark these trees as upon it. These trees are on the division line of these tracts as claimed by the defendant. That D. W. Vanmetre, under whom the plaintiff claims, went with a certain person to look at this land which had been deeded to him by D. C. Sayre, Rollins having an idea of purchasing it; that one Shirley pointed out to them one of these marked trees on this road as the division line between the tracts of the plaintiff and defendant, and from this tree they had traced this division line its whole length by well-marked trees. The line thus recognized by the vendor of the plaintiff as the division line is the line now claimed by the defendant as the true division line. It had been run and marked by a surveyor named Rollins, and he was employed by A. R. Sayre, who was a son of D. C. Sayre, under whose two deeds of August 8, 1856, both the plaintiff and defendant in this suit claim. That in running this division line he was guided by a plat furnished by D. C. Sayre, who was a surveyor; and these trees which I have spoken of are marked by him as on the intended division between these two tracts, which he had marked before he made these deeds of August 8, 1856, were noted in this plat as on this division line; and this surveyor, Rollins, so ran this division line as to make these trees lie upon it, though, in so doing, the line was not straight. This division line as so run by Rollins is still found distinctly marked. It is far from being a straight line. There are now found still standing and well marked no less than 38 trees along this division line so run and marked by Rollins in 1870. The line as shown by these marked trees is so crooked that it would be difficult to suppose that it was ever run by a surveyor for a straight line. Some of these trees are north of where they should be, if the line was straight, and others are south. They are distant from the straight line from 4 links to as much as 90 links. The defendant always claimed this line, as run and marked by Rollins in 1870, as the division line between him and the tract owned by the plaintiff. He and those under whom he claimed always cut wood and lumber up to this line. Vanmetre, the plaintiff's vendor, knew of this line. He made no objection to his so doing. Vanmetre was frequently there when the defendant's vendor was cutting timber and hauling tan-bark up to these trees as marked by Rollins as on this division line between them. Vanmetre knew that those under whom the defendant claimed held that this line as run by Rollins was the division line, for they had warned Vanmetre not to cut beyond this line; and they had cut up to it without any objection. The land lying between this crooked division line run by Rollins in 1870 and the line run by courses and distances in the two deeds from D. C. Sayre of August 8, 1856, under which the plaintiff and defendant claim, is the land in controversy in this suit. It contains 20 acres, and is in woods; while the defendant, and those under whom he claims, by cutting timber and peeling bark up to this Rollins line, ever since it was run, up to the institution of this suit, was getting the use of this land in controversy; and yet the defendant and those under whom he claims never did have actual possession of the land in controversy for a longer period than eight years. If the views of the plaintiff are followed, his tract would contain 272½ acres instead of about 200 acres, as called for by his deed; but, if the views of the defendant are followed, and this Rollins line is held to be the division line, the tract of the plaintiff will contain 250 acres, and the tract of the defendant 229¾ acres.

J. B. Menager and *Simpson & Howard*, for plaintiff in error. *Gunn & Gibbons*, for defendant in error.

GREEN, J., (*after stating the facts as above.*) The only question in this case is whether the court below, in its judgment rendered on February 20, 1886, erred in setting aside the verdict of the jury in favor of the defendant, as contrary to the law and the evidence, and awarding a new trial. A writ of error may be granted to such judgment, without reference to the final judgment in the case, and even without waiting for the new trial to be had. See Code W. Va. 1887, c. 135, § 1, par. 9, pp. 828, 829. A bill of exception was taken by the defendant to this action of the court, and in it the court certified all the evidence which was before the jury in this trial. The only question in controversy before the jury was the true location of the division line between a tract of land owned by the plaintiff and a tract owned by the defendant, the plaintiff complaining that the defendant had encroached on his tract of land by taking possession of about 20 acres of land, which he insisted, if the division line between them was correctly located, was a part of the plaintiff's tract. The question in controversy was therefore much more a question of fact than of law. It has always been regarded in Virginia, and in this state, as a delicate matter for a court to interfere with,—the verdict of the jury on a question of fact. The jury is the judge of the weight and credit to be attached to the evidence; and it is only in cases of manifest

Digitized by Google

abuse, or plain departure from right and justice, that the court can interfere with the finding of a jury in such matters by granting a new trial. See Ross v. Gill, 1 Wash. (Va.) 88; McDowell's Ex'r v. Crawford, 11 Grat. 377; State v. Hurst, 11 W. Va. 75; State v. Thompson, 21 W. Va. 756; Black v. Thomas, Id. 712; Blosser v. Harshbarger, 21 Grat. 216; Grayson's Case, 6 Grat. 712; Sheff v. City of Huntington, 16 W. Va. 307. These cases show that the verdict of the jury ought not to be interfered with, and a new trial awarded, when the evidence is contradictory, and when most favorably considered in support of the verdict of the jury it does not still appear that the verdict was plainly not warranted by the facts proven. I have stated, however, the facts in this case, as shown by the record. Does it plainly appear from these facts proven that the verdict of the jury in favor of the defendant was unwarranted by these facts? The jury in finding a verdict for the defendant must have regarded it as a fair inference from the facts proven that the line run and marked by Rollins in 1870 was the division line between the tracts of the plaintiff and the defendant.

If this were an inference which can be drawn from the facts proven, then the verdict of the jury could not be properly set aside by this court. The counsel for the plaintiff claims that it is clear that this Rollins line, run and marked as the division line between these two tracts, could not have been the true division line between these two tracts of the plaintiff and defendant, because the true division line according to the deeds was a line running east and west, and parallel with this base line, but this line run by Rollins in 1870 varied from a parallel with this base line by 2 deg., 15 min., which in the length of this division line would make a variation of 14 poles. Then, again, this division line as run by Rollins would make the width of the defendant's tract 109 poles instead of 106 poles, as called for by the deeds. The land contained in the defendant's tract, if this Rollins division line be regarded as the division line, would be 250 acres instead of about 200 called for in the deeds, and lost by this Rollins line, which, though well marked, is far from a straight line, as called for by the deeds; on the contrary, some of the marked trees along this Rollins line are nearly 20 yards from where they would be if the line had been run straight; and, lastly, this Rollins division line was not run by Daniel C. Sayre when, on August 8, 1856, he conveyed to his grandchildren (under whom the parties to this suit claim) these two tracts of land, but some 14 years after these two deeds were made, and it was then a line run at the instance of a party under whom defendant claims. This is true, but it was proven that before these two deeds under which the plaintiff and defendant respectively claim, made August 8, 1856, the common grantor, Daniel C. Sayre, had actually marked several trees on this division line, as afterwards run by Rollins, as trees which should be on the division line between the two tracts he was going to convey to his grandchildren; and, when Rollins years afterwards ran this division line, he was guided in running it by a plat of these two tracts furnished by Daniel C. Sayre, the common grantor of each of them originally, and on which plat these trees were marked along the division line between the two tracts; and, this being the case, the jury might have regarded the division line as in part run prior to the making of the two deeds by Daniel C. Sayre in 1856, and not altogether by Rollins in 1870 for the first time.

We will now consider the objections which are urged by the plaintiff's counsel against this line as run by Rollins being regarded as the division line between the tracts of the plaintiff and of the defendant; and first as to the departure of this line in course and distance from the division line as called for by the deeds. The variation in course is 2 deg., 15 min., and the Rollins line exceeds in length the division called for in the deeds not less than 53 poles. But in the description of lands, or question of boundaries, the rule is settled in Virginia, and in this state, that natural lines and reputed boundaries will control mere courses, and mere courses and distances, or mistaken description in surveys and conveyances. See Dogan v. Seekright, 4 Hen. & M. 125; Coles v. Wooding, 2 Pat. & H. 189; Baker v. Seekright, 1 Hen. & M. 177; Smith v. Davis, 4 Grat. 50; Adams v. Alkire, 20 W. Va. 486. See, also, Cherry v. Slade's Adm'r, 3 Murph. 82. If, then, this Rollins division be proven to be the marked division line between the tracts of the plaintiff and defendant, it must be held to be the true line though it thus differs in its courses and distances from the division line as called for in the deeds. It is a crooked line, portions of it being nearly 20 yards from where it would be if it were a straight line between its extremities. See Cowan v. Fauntleroy, 2 Bibb, 261. We have less difficulty in disregarding to a considerable extent the courses and distances of this division line as named in the deed, because it is apparent that, as stated in the deed, the distance as well as the course was to a considerable extent a surmise, and cannot be relied upon. Thus in the deed from Daniel C. Sayre to Daniel Vanmetre, dated August 8, 1856, the length of this division line is stated to be 300 poles; but, in a deed of the same date from Daniel C. Sayre to Joshua McCullough, under which the defendant claims, this division, by all the deeds, is the middle of Little Mill creek, and the other terminus is the closing line of the 7,000-acre tract. Now the survey made in this case under the order of the court shows that the shortest line which could be run between these two termini would exceed 350 poles in length, or exceed the distance called for in the deeds from 40 to 50 poles; nor can the course of this division line as called for in the deeds be regarded as correct, for it is called an east and west line in all these deeds,

Digitized by Google

and yet they speak of it as parallel to the division line between this tract of the defendant and another tract of McCullough. Its true location was admitted by both the plaintiff and defendant in this suit; but, instead of being an east and west line as called for in the deeds, it varied 1 deg., 19 min., its real course being N. 88 deg., 40 min. W. The fact that, if this Rollins division line is adopted, it would make the defendant's tract contain 250 acres, and the plaintiff's tract only 239½ acres, while the deeds call for each of them as containing 200 acres more or less, is entitled to very little consideration in determining the location of this division line, for the general rule is that a statement of the quantity of land supposed to be conveyed, when inserted by way of description only, must yield to description by metes and marked boundaries. See Bradford v. Hill, 1 Hayw. (N. C.) 22, and note; Drew v. Swift, 46 N. Y. 204; Powell v. Clark, 5 Mass. 355.

In the case before us this variation in the quantity of the land from that called for in the deeds is entitled to much less consideration than it would ordinarily be entitled to in fixing the division line between the two tracts, for, though both of these tracts of the plaintiff and of the defendant are said in the deeds to contain about 200 acres, yet it is obvious from the face of the deeds that the tract of the defendant was the larger of the two, for it is of the same shape with that of the plaintiff,—oblique parallelograms, of the same length east and west,—while the defendant's tract was in width north and south 106 poles, while the plaintiff's tract was only 100 poles wide; and, as the two tracts contained together 479½ acres instead of 400 acres, as called for by the deeds, we would naturally expect the defendant's tract to exceed 200 acres considerably. If the boundary between the two tracts was fixed as claimed by the plaintiff, the defendant's tract would contain only 207½ acres, while the plaintiff's would contain 272 acres, a result obviously much more in conflict with the face of the deeds than is caused by taking the Rollins line as the division line between the tracts. It only remains to inquire whether there was, before the jury, evidence from which they could draw the inference that the line as run by Rollins was the true division line between the two tracts. These two tracts, one claimed by the plaintiff, and the other by the defendant, had their origin in two deeds made by Daniel C. Sayre to his grandchildren on August 8, 1856. The plaintiff claims under one of these grantees, D. W. Vanmetre, and the defendant under the other, Joshua McCullough. There is evidence from which the jury might conclude that one of the termini of this division was fixed by Daniel C. Sayre, and a tree marked as such, before he made these deeds, and also two trees where this division line crossed a certain road were also marked as trees on this division line before Daniel C. Sayre made these deeds. But this division line was not actually run, and marked as such, before or when these deeds of August 8, 1856, were made, further than the marking of these three trees on them. Some 14 years after these deeds were made, at the instance of one under whom the defendant claims, Rollins, a surveyor, ran and marked this division line. In so doing he was guided by a plat of these tracts of land purchased by Daniel C. Sayre, the common grantor of them, who was a surveyor, and who had on this plat marked those which, before he made said deeds, he had marked as on this division line. The surveyor, Rollins, so ran the division line as to make all these marked trees upon the division line. In so doing he departed considerably from the courses and distances named in the deeds. He marked 40 or 50 trees upon the division line thus run, most of which are still standing. Those under whom the defendant claims, and the defendant, have ever since, for a period not less than 14 years before the institution of this suit, claimed this as the division line between these tracts, and this claim is set up by the defendant, and those under whom he claims. The defendant's claim was shown by his cutting timber and stripping bark off of trees up to this division line as run by Rollins, the person owning the other tract being frequently present when this was being done, and making no objections thereto, though he well knew the location of this division line as claimed by those under whom the defendant claimed. It had been pointed out to him, and he had been warned not to cut timber beyond this division line as run by Rollins; and on one occasion the party under whom the plaintiff claims went over the Rollins division line, and pointed it out to a person, who was thinking of purchasing his land, as the boundary of it; and, some seven years after this line was run by Rollins, the defendant moved on his tract of land, and cleared a part of it up to this Rollins line, and the plaintiff and those under whom he claimed made no objection to his clearing up to this Rollins division line, or to his cutting timber up to it; that, before the plaintiff purchased his tract of land of Vanmetre, he was shown one of the marked trees on this Rollins division line, and he was told that it was on the division line between the two tracts; and that, ever since the plaintiff bought in 1880 of Vanmetre this tract, the defendant had claimed this Rollins line as the division line between the tracts, and had continued to cut timber off of it, and to grub up to it, without objection on the part of the defendant. Can we, on this character of evidence, say that the jury, inferring from it, and deciding, as they did at the first trial, that this Rollins line was the division line between the tracts of the plaintiff and the defendant, so plainly erred that the court ought to have set aside their verdict, and awarded a new trial, as it did? It seems to me that the inference to be drawn from such evidence was an inference of fact, and not a conclusion of law. It was,

Digitized by Google

therefore, peculiarly the duty of the jury to draw the inference, and not that of the court; and the inference drawn by the jury was not so clearly erroneous as to justify the court in interfering with this verdict.

Whatever doubt may exist as to whether this Rollins division was originally the division line between these two tracts, as established by Daniel C. Sayre in 1856, when he formed and conveyed these two tracts, we think the evidence justifies the conclusion that, not less than 14 years before the institution of this suit, this Rollins division line was run by a surveyor at the instance of one under whom the defendant claims; that Vanmetre, under whom the plaintiff claims, knew that this division line had been so run; and, though he had nothing to do with the running of the line, he was cognizant of its having been so run, and that the defendant, and those under whom he claimed, regarded it as establishing the boundary between the two tracts, and the said Vanmetre and the plaintiff acquiesced in this Rollins line, as the established division line between the two tracts, for some 14 years before the institution of this suit, permitting the defendant, and those under whom he claimed, to clear up to this line in places, and, in other places, to cut timber up to the line, without objection.

It may be regarded as settled that a disputed boundary between two adjoining proprietors may be settled by parol agreement when the agreement is accompanied by possession according thereto. See Jackson v. Dysling, 2 Caines, 198; Kip v. Norton, 12 Wend. 127; Terry v. Chandler, 16 N. Y. 354; Vosburgh v. Teator, 32 N. Y. 568; Smith v. Hamilton, 20 Mich. 433; McNamara v. Seaton, 82 Ill. 498–500. Such parol agreement is not regarded as passing any real estate from one proprietor to the other, but as simply ascertaining the line to which their respective deeds extended; and hence it would follow that long acquiescence by one of adjoining proprietors in a boundary as established by the other is evidence of an agreement that such is the boundary. Kip v. Norton, 12 Wend. 127. What is meant by long acquiescence in this proposition is not definitely settled by the decisions. Thus in Sneed v. Osborn, 25 Cal. 626, Judge RHODES, delivering the opinion of the court, says: "The authorities are abundant to the point that, when the owners of adjoining lands have acquiesced for a considerable time in the location of a division line between their lands, although it may not be the true line according to the calls of their deeds, they are thereafter precluded from saying it is not the true line. The better opinion is that the considerable time mentioned in the cases must, at least, equal the length of time prescribed by the statute of limitations to bar a right of entry." See Jackson v. Ogden, 7 Johns. 238; Jackson v. Freer, 17 Johns. 29; McCormick v. Barnum, 10 Wend. 104; Dibble v. Rogers, 13 Wend. 536; Adams v. Rockwell, 16 Wend. 285; Van Wyck v. Wright, 18 Wend. 157; Boyd's Lessee v. Graves, 4 Wheat. 513. But, in Kellogg v. Smith, 7 Cush. 375, the court admits the difficulty of reducing the cases to system and consistency, and limited itself to deciding that long acquiescence may give validity to such transactions, even if they do not possess it in the first instance. FLETCHER, J., in delivering the opinion of the court, says, (page 379:) "It seems to be settled by a course of decisions of the supreme court of New York that, where the owners of adjoining lots of land settle and establish a division line between them by express parol agreement, and their agreement is immediately executed, and is accompanied and followed by actual possession according to such line, the agreement is binding and conclusive, and such division line shall not be disturbed, though it may afterwards appear that it is not the true line according to the paper title; so, when no express agreement is shown, long acquiescence by one proprietor in the line assumed by the other is evidence from which such agreement may be inferred. Jackson v. Bowen, 1 Caines, 358–362; Jackson v. Dysling, 2 Caines, 198, 201; Jackson v. Vedder, 3 Johns. 8, 12; Jackson v. Dieffendorf, Id. 269; Jackson v. Ogden, 7 Johns. 238–242; Jackson v. Douglas, 8 Johns. 286; Jackson v. Gardner, Id. 308; Jackson v. Smith, 9 Johns. 100; Jackson v. McCall, 10 Johns. 377, 380; Jackson v. Van Corlaer, 11 Johns. 123; Jackson v. Freer, 17 Johns. 29; Rockwell v. Adams, 7 Cow. 761, 6 Wend. 467; McCormick v. Barnum, 10 Wend. 104; Dibble v. Rogers, 13 Wend. 536. In most of these cases there had been a possession of more than 20 years according to the line, but in several of them the possession had been for a less time than 20 years, there being no sufficient adverse possession to make a title, the decision depending on the force of the parol agreement, and the occupancy according to such agreement. No particular time appears to have been settled as necessary, during which such occupancy should have continued, and the length of the time of the occupancy was different in the different cases. The decisions in the cases referred to above were not overruled by the court of errors in Adams v. Rockwell, 16 Wend. 286."

Since this decision, rendered in 1851, the decisions have not reached any clear or distinct conclusion with reference to the controverted point as to the length of time which must elapse before an agreement fixing a division line can be inferred from an acquiescence therein. Thus, in McNamara v. Seaton, 82 Ill. 500, (decided by the supreme court of Illinois in 1876,) the court say: "It has been held, and the rule may be regarded as well settled, not only here, but in other states, that where adjoining land-owners agree upon a boundary line, and enter into possession, and improve the land, according to the line thus agreed upon, the parties will be precluded from afterwards disputing that the line then agreed upon is the true one, even

Digitized by Google

where the statute of limitations has not run. Crowell v. Maughs, 2 Gilman, 419; Bauer v. Gottmanhausen, 65 Ill. 499; Yates v. Shaw, 24 Ill. 367." But, as not according with these views, see Carleton v. Redington, 1 Fost. N. H. 291; Tolman v. Sparhawk, 5 Metc. 469; Brewer v. Railroad Corp., Id. 478. Nor do the decisions indicate in what way acquiescence by one adjoining proprietor in a division line fixed by another adjoining proprietor is to be proven. It is clear that one mode of proving this acquiescence is by the actual occupation and cultivation up to such line so fixed, without objection by the other adjoining proprietor. But this is not the only mode in which this acquiescence can be shown. If it was, all these decisions, in which it has been held that the acquiescence, to avail a party, must be for a period at least as long as that which bars a right of entry, would be idle, for, if this were so, the party cultivating up to the division line so fixed would acquire this land up to such a division line, being presumed to be made by the parties by adversary possession. This acquiescence in a division which has been fixed and marked can be proven by any evidence that would satisfy a person that, in point of fact, such division had been accepted by both of the adjoining land-owners as the division line between them; for instance, if such division line run through a wood, by one party cutting timber up to such division line habitually with the knowledge of the other, who, knowing that he claims this marked line as a division line, still makes no objection to such cutting. Applying this law to the facts in the case, the jury, from the evidence, had a right to infer that the defendant and those under whom he claimed had, from the time that Rollins run the division line between the tract of the defendant and plaintiff, which was not later than 1870, up to the institution of this suit, claimed this Rollins line as the true division line, and that he had shown by cutting timber and peeling bark up to this Rollins line for some seven years, and then by clearing the land up to this Rollins line along a part of it, and continuing to cut timber up to this line along the residue of this tract, the plaintiff and Vanmetre, under whom he claimed, acquiesced in this Rollins line as the true division line between the two tracts; for, knowing that the defendant, and those under whom he claimed title, claimed this land up to the Rollins line, and cut timber up to this line for some 14 years, and cultivated, for some 7 or 8 years, portions of the land up to the Rollins line, yet neither Vanmetre, under whom the plaintiff claimed, nor the plaintiff himself, objected to this occupancy and use of the land in controversy, and thus treated this Rollins line as the true division line between the tracts; but, on the contrary, said Vanmetre had been over the whole of this Rollins line, and pointed it out to a person to whom he wished to sell, as the true division line between the two tracts. In this state 10 years by the statute bars a right of entry on land; so the jury, from the evidence, might well have found in this case that the acquiescence of the plaintiff and Vanmetre, under whom he claimed, in this Rollins line as the division line continued for 14 years before the institution of this suit, or, at least, for more than 10 years, and therefore, by all the decisions, this acquiescence in this Rollins line as the division line between the two tracts had been sufficiently long to justify the conclusion that it had been agreed upon by the parties as the true division line between them. The jury, therefore, did not plainly err in the first trial in regarding this Rollins line as the division line between the tracts of the plaintiff and defendant, and in finding a verdict for the defendant.

The court below, therefore, erred in its judgment rendered February 20, 1886, in setting aside this verdict, and awarding him a new trial. It should have overruled the motion of the plaintiff to set aside this verdict and award him a new trial, and have entered up a judgment in favor of the defendant, in accordance with the verdict. Of course it follows that the judgment of the court below in favor of the plaintiff, rendered afterwards, September 15, 1888, is erroneous, and both these judgments must be set aside, reversed, and annulled; and the plaintiff in error, Louis Schwartz, (the defendant below,) must recover of the plaintiff below, (the defendant in error,) Amos Gwynn, his costs in this court expended; and this court must enter up such judgment for the defendant below, Louis Schwartz, as the court below should have entered.

SNYDER, P., and BRANNON, J., concurred. ENGLISH, J., absent.

(32 W. Va. [illegible])

LORENTZ *v.* LORENTZ *et al.*

(*Supreme Court of Appeals of West Virginia.* June 26, 1889.)

BILL OF REVIEW.

1. Where a bill of review is filed to review and reverse a decree on the ground of newly-discovered evidence, and the bill on its face shows that the facts stated as relied upon are immaterial and irrelevant, the bill should be dismissed on demurrer.

2. Where errors apparent on the face of the decree are relied on in the bill of review to reverse the same, it is not allowable to look into the evidence in the case to show that the decree is not supported by the facts proven.

(*Syllabus by the Court.*)

Appeal from circuit court, Upshur county; HENRY BRANNON, Judge.

Lewis Bennett, for appellant. *C. C. Higginbotham*, for appellees.

ENGLISH, J. On the 4th day of December, 1882, Jacob Lorentz applied to the circuit court of Braxton county for leave to file a bill of review, and reverse two decrees pronounced in this cause,—one on the 21st day of December, 1879, and the other on the 23d

Digitized by Google

day of March, 1880, by said circuit court, in which bill certain errors of law were relied upon as existing in the decrees complained of; and the plaintiff also alleged that since the decree complained of was rendered he has discovered testimony unknown to him before that time, which would establish beyond dispute the fact that he, plaintiff, was to have all the unsold land on Bridge run for a certain consideration therein set forth; that the discovery of the witness was accidental, and that by all the diligence in his power he could not have discovered the testimony to be used in said cause before the decree; that the witness was Perry C. Lorentz, whose affidavit was filed as part of said bill of review; in consideration whereof the said circuit court of Braxton county granted leave to file said bill as a bill to review said decree pronounced on the 23d day of March, 1880, and refused leave, as to said decree of the 21st day of August, 1879; and said bill was accordingly filed as a bill to review said decree of the 23d day of March, 1880, and said bill was sent to rules with leave to sue out process thereon, and to mature the same for hearing, and afterwards the original cause and the bill of review thereto were transferred to the circuit court of Upshur county, there to be docketed in said court, and to be determined and tried in the circuit court of Upshur county. The defendant Mifflin Lorentz appeared and demurred to the plaintiff's bill of review, and also filed an answer thereto, and some depositions were taken for both plaintiff and defendants upon the questions of fact raised by said bill, and on the 11th day of February, 1885, a decree was rendered by the said circuit court of Upshur county dismissing the plaintiff's bill; and, although the decree does not in express terms pass upon the demurrer, the effect thereof would be to sustain the same, the decree having been in favor of defendants.

Now, in the case of Nichols v. Heirs of Nichols, 8 W. Va. 175, we find that this court has held in the seventh point of syllabus that when a bill of review is brought upon new matter or evidence, and the defendant thinks it is not relevant, he may demur; and in section 8 of the syllabus that, upon a bill of review for errors apparent upon the face of the decree it is not allowable to look into the evidence in the case in order to show the decree to be erroneous in its statement of the facts; and, if the decree does not contain a statement of the facts on which it is based, there can be no relief by bill of review. Looking to the bill of review under consideration we find that the errors complained of in the decrees sought to be reviewed are not errors of law, but depend upon the facts sought to be proved in the original cause, and it would be necessary to look into the evidence taken in said original cause before we could determine whether error existed or not. The plaintiff also seeks to review said decrees on the ground of the newly-discovered evidence, which is set forth in the affidavit of Perry C. Lorentz, which is filed with and made part of said bill; but on looking at said affidavit of said Perry C. Lorentz in connection with the allegations of the bill we find that the newly-discovered evidence consists of declarations made by Jacob Lorentz, Sr., before and after the execution of the deed for the Bridge Run property in the bill mentioned, and, in order to admit such testimony, the instrument must be attacked on the ground of undue influence in obtaining the same, or incapacity in the grantor. In the case of Dinges v. Branson, 14 W. Va 100, we find that this court has held "that the declarations of a testator or grantor, made either before or after the execution of the instrument, are admissible evidence where the issue involves the mental capacity of the testator or grantor at the time the instrument was executed, or that undue influence was exercised over him at that time;" and these, it is believed, are the only instances in which such declarations can be proven, unless made at the time the instrument is executed. The evidence, then, which the plaintiff claims he had discovered is immaterial, and the bill could not be sustained on that ground; and, even if there were any errors in law set forth in the bill, which would ordinarily entitle the plaintiff to review said decree, it having been brought to the attention of the court below that the plaintiff had applied to this court for an appeal from the decree complained of, which appeal had been refused because this court was of opinion that the decree complained of was plainly right, the court below acted rightly in dismissing said bill. See the case of Moore v. Johnson, 24 W. Va. 549, where it is held that "where the supreme court of appeals rejects an application for an appeal to a decree of the circuit court on the ground that the decree complained of is plainly right, no other petition therein can be afterwards entertained; and if an appeal from the same decree or from one based solely upon it, and which simply carries it into execution, should afterwards by inadvertence be granted by said court on the hearing of the case, the appeal so inadvertently granted will be dismissed as improvidently awarded." It seems to me that the demurrer to said bill of review should have been sustained, and the bill dismissed; but, the same conclusion having been reached by the court below upon the hearing, the decree will be affirmed, with costs to the appellant.

SNYDER, P., and GREEN, J., concurred BRANNON, J., absent.

(32 W. Va. 552)

JOHNSON v. MacCOY.

(Supreme Court of Appeals of West Virginia. June 26, 1889.)

WRITS—SERVICE—ACTION FOR CLERK'S FEES.

1. A summons issued by a justice in a civil suit is served by delivery of a copy to the defendant by a private individual, as shown by his affidavit.

Digitized by Google

Defendant does not appear, and judgment is given against him. He then takes an appeal to the circuit court. In that court he moves to quash this return on the ground that the person so serving had not been appointed a special constable, and the court overrules the motion to quash. Defendant then makes full defense before a jury, and there is judgment upon the verdict against him for $107.85. Under the facts of this case this court will not reverse the judgment for the overruling of the motion to quash the return.

2. *Quære*, can a summons issued by a justice be served by a credible person, though not an officer, he verifying his return by an affidavit?

3. A clerk of a circuit court may maintain an action for his fees without first having placed them in an officer's hands and had them returned, "No property found."

(*Syllabus by the Court.*)

Error to circuit court, Barbour county; WILLIAM T. ICE, Judge.

T. P. R. Brown, for plaintiff in error. *John Bassel*, for defendant in error.

BRANNON, J. Isaac V. Johnson brought an action before a justice in Barbour county against Benjamin MacCoy to recover money due by note and fee-bills in favor of Johnson, as clerk of the circuit court of Barbour. MacCoy did not appear, and, judgment having been rendered against him, he took an appeal to the circuit court, where judgment was rendered against him, and he obtained this writ of error. He assigns two errors only. The first is that the court overruled his motion to quash the return of the service of the summons upon him. This service is shown by an affidavit made by W. T. Robinson "that he executed the within summons on the defendant, Benj. MacCoy, by delivering to him in person a true copy thereof on the 10th day of December, 1885." The assignment of errors argues that there was no evidence that Robinson had been appointed a special constable. I do not see that this argument has any force. He does not return it as special constable, but makes affidavit of service. The Code, § 17, c. 50, provides that process may be directed to a constable, and section 30 provides that a special constable may be appointed to serve process, and the process be directed to him; and section 32 provides that process may be served on the defendant by delivering him a copy. Section 2, c. 124, provides that process from any court may be served by any credible person, and his return verified by affidavit; and section 1, c. 121, provides that any notice may be served by any credible person. It might with force be argued that justice's process can be served not only by a constable or special constable, but also by a credible person, though not an officer; that the provision in the chapter relating to justices contemplating service of process by constables is only one method, and that the service by a credible person under said chapter 124 may also be resorted to; that these provisions, all in the one Code, are in furtherance of the remedy, and ought to be liberally applied as a means to bring suits to hearing. A judgment may be had in the circuit court for any amount, however large, upon a service by any credible person, verified by his affidavit; yet, as appellant contends, a judgment for a cent could not be rendered by a justice on a precisely similar service. This would be a singular anomaly, if true. The justice's statute does not, in terms, limit the service to constables. But we do not think it necessary to place our ruling on that ground. The object of service of process is to give a defendant notice of the suit. In this cause, if we may read the return, the defendant had the benefit of the best mode of service,—a delivery into his own hands of a copy of the summons. He next appears after judgment, and takes an appeal; and thus it appears he had notice of the suit. He then comes into court, appears in the suit, and moves the court to quash the return. Had the court quashed it, it would not have dismissed the suit, but simply awarded an *alias* summons to be the next moment served, for it would have been sent to rules and served for what purpose? Simply to give him notice of the suit, which notice he already had. Upon the overruling of his motion to quash he asked no continuance, and a jury is sworn in the case, and the defendant avails himself of the proceeding to make a defense, has had a fair trial, and now asks this court to reverse all these proceedings, not on a ground going to the merits, but on a dilatory, technical ground, and only to give him what he has already had,—another trial before a jury. This would seem to be sacrificing substance to a dry technicality. What injustice had been done the defendant by reason of this return? No injustice has been done the defendant, but substantial justice promoted by our ruling on this point. This doctrine may be too liberal for a formal suit in a circuit court, where, upon a return quashed, the cause is sent to rules for proceedings there, but this case was a case before a justice, and to it liberal rules, both before the justice and court, should be applied in a line to attain justice.

The second error assigned is that the circuit court allowed the plaintiff to introduce and prove fee-bills due from the defendant to the plaintiff as clerk of the circuit court of Barbour county. The appellant bases his objection to the introduction and proof of these fee-bills on the ground that they had never been placed in the hands of an officer for collection, and had no return on them by an officer showing his inability to collect them; and he cites to support this position the case of Craigen's Ex'x v. Lobb, 12 Leigh, 627, in which the syllabus is: "Though no action lies for clerk's fees till they shall be put into an officer's hands for collection, and he has returned that they cannot be levied by distress, yet the clerk may set them off against an action on his bond to the party from whom they are due." That decision was based on a statute in the Code of 1819 expressly providing that no action shall be had or maintained for clerk's fees unless the sheriff should return that the person owing such fees had not sufficient property within his bailiwick.

Digitized by Google

That statute has long since been repealed. No provision prohibiting action for clerk's fees until a return by an officer is now in our statute law. Under the common law he may sue for his fees as any one else performing work and labor, and recover what the law prescribes for the particular services. The statute which allows a clerk to issue and levy fee-bills is only a cumulative remedy for speedy collection, and does not take away the right to the common law suit. The Code, c. 137, § 31, as found in Acts 1882, c. 129, in force when this suit was brought, expressly recognizes the existence of, if it does not impliedly give, both remedies by suit and action, by the language: "No fee shall be collected by distress or suit after two years from the end of the year in which the service was performed that is charged therein, unless within two years before the institution of such proceeding it was returned by an officer, with such indorsement thereon (properly dated) as is mentioned in the preceding section." The function of the latter clause is not to prohibit suit or distress in all cases until there shall be a return of "No property found," but to save the right of collection, notwithstanding the lapse of two years, in cases where, within two years before the suit or distress, the fee-bill had been so returned. The second assignment of error is not tenable. The judgment is to be affirmed, with damages and costs to appellee.

SNYDER, P., and GREEN and ENGLISH, JJ., concurred.

(32 W. Va. 562)

CORROTHERS v. JOLLIFFE *et al.*

(*Supreme Court of Appeals of West Virginia.* June 27, 1889.)

PARTITION—SALE.

In a suit for the partition of a mill property, which is not susceptible of partition in kind, the plaintiff, who is the owner of one-sixth of the property, offers for the whole $5,000, and claims that it is worth more than that sum, and the court at the instance of the defendant, who owns the other five-sixths, and states that he does not wish to sell, and offers to pay the fair value of the plaintiff's interest, refers the cause to a commissioner, who reports the value of the plaintiff's interest at $550. *Held*, it was error for the court to decree that upon the payment of said $550 the plaintiff should convey his interest to the defendant. Instead of such decree the court should have ordered the whole property to be sold at auction.

(*Syllabus by the Court.*)

Appeal from circuit court, Taylor county; A. B. FLEMING, Judge.

John W. Mason and *A. F. Haymond*, for appellant.

SNYDER, P. Suit in equity commenced in December, 1882, in the circuit court of Monongalia county, by John W. Corrothers against Thomas M. Jolliffe and others, and subsequently removed to the circuit court of Taylor county, where it was finally heard and decided. The facts as they appear in the record, so far as it is necessary to state them for the purposes of this appeal, are as follows: Prior to July, 1882, six of the children of Joseph Jolliffe, deceased, were the joint owners of certain real estate in Monongalia county, consisting of about 21 acres of land on which there were a mill and other buildings, with certain water-rights appurtenant thereto. One of these six children was the defendant, Thomas M. Jolliffe, and another was his sister, Catherine A. Hutchinson, who in July, 1882, sold and conveyed her undivided one-sixth interest in said property to the plaintiff, John W. Corrothers. In December, 1882, the defendant Thomas M. Jolliffe purchased and had conveyed to him the interests of four of said children, whereby he became the owner of the five-sixths, and the plaintiff the owner of the other one-sixth, of said property. The bill alleges and the answer admits that the property is not susceptible of partition in kind. The bill prayed for a sale of the property, and a division of the proceeds according to the respective interests of the parties. The defendant Thomas M. Jolliffe states in his answer that he does not wish to sell his five-sixths interest in the property, and avers and offers to pay the plaintiff for his one-sixth interest whatever sum three disinterested men will say it is worth, or whatever the court, by reference to a commissioner, may ascertain to be the value of the plaintiff's one-sixth interest. In reply to this claim and offer of the said defendant the plaintiff stated that he also wished to buy the property, and was willing to pay the said defendant the fair value of his five-sixths, to be ascertained as suggested by the defendant; and denies that because the defendant is the owner of the larger interest he has the right to purchase the property to the exclusion of the right of the plaintiff to purchase. Upon this state of facts the court made an order in which it decided that the defendant was entitled to purchase the one-sixth interest of the plaintiff, and referred the cause to a commissioner to ascertain the value of said one-sixth interest. The commissioner took depositions as to the condition and value of the property and reported that the value of the plaintiff's one-sixth was $583 and he also returned with his report the offers of two responsible persons to pay $1,100 and $1,150 respectively for said one-sixth interest. On exceptions by the plaintiff the cause was referred to another commissioner, and he reported that the said one-sixth interest was worth $550. Upon the final hearing of the cause the plaintiff repeated an offer previously made by him to pay the defendant $4,166.69 for his five-sixths interest in the property, and brought said sum into court, and tendered it for such payment; but the court refused to consider said offer, and decreed that the defendant pay to the plaintiff $550, in full satisfaction of his one-sixth interest, and in consideration thereof ordered the plaintiff to convey said interest in the property to the said defendant. From this decree, which was entered

Digitized by Google

on August 11, 1886, the plaintiff has appealed.

Our statute declares: "When partition cannot be conveniently made, the entire subject may be allotted to any party who will accept it, and pay therefor to the other parties such sums of money as their interests therein may entitle them to; or, in any case in which partition cannot be conveniently made, * * * the court may order a sale of the entire subject, and make distribution of the proceeds of sale according to the respective rights of those entitled," etc. Section 3, c. 79, Code 1887. Under this provision of the statute, when partition in kind cannot be conveniently made, the court may do either of two things: *First*, it may allot the entire subject to a party who will accept it; or, *second*, it may order the whole subject to be sold; but whether the court should in any particular case adopt one or the other of these modes of proceeding must depend upon the circumstances of the case. In a case such as the one now before us, where there are but two parties, and each of them desire to have allotted to him the whole subject, the court cannot arbitrarily decide that one shall have the subject to the exclusion of the other. Because one has a greater interest than the other is surely no just reason why he should be given a right of election which is denied to the other. In principle the owner of the small interest has as much right to control and protect his interest as the owner of the large interest has to control and protect his interest. The difference between the two interests is merely one of degree, and not of principle. The small interest of the one may be a much larger proportion of his whole estate than the large interest is to the whole estate of the owner of that interest. A man who owns one acre of land is in law and justice entitled to the same rights in respect to it that a man who owns 100 acres is in respect to his 100 acres. The language of the statute is not that the owner of the larger interest may elect to have allotted to him the whole subject upon the payment to the owner of the smaller interest, the value of the latter, but that the entire subject may be allotted to any party, regardless of his interest, who will accept it. In a case where more than one party, as in the case at bar, asks the court to allot the whole subject to him, and is able and willing to pay for the other interests, both reason and justice would require the court, in the exercise of its powers, to allot the whole to the party who offered the largest proportional sum for the whole or the interests of other parties. It would be unjust in such cases to allot the whole to the party who was unwilling to pay to the other party or parties as much or more proportionally for their interests as they were willing and able to pay him for his interest, and it would be equally unjust for the court to compel a party to accept for his interest less than he was ready and willing to pay for the like interests of the other parties. In such case the only proper mode of proceeding is for the court either to allot the entire subject to the party who offers the largest proportional price for it, or to order the sale of the whole. If, however, only one of the parties is willing to have the whole allotted to him, and the other parties are unwilling to take for their interests what such party is willing to pay therefor, then the court may either refer the matter to a commissioner to ascertain the fair value to be paid for said interests, or order the whole subject to be sold, as the one or the other course may seem to the court to be the most advisable, and promotive of the interests of all the parties in interest. In the case at bar the plaintiff offered to pay the defendant $4,166.67 for his five-sixths of the property. This was equivalent to an offer of $833.33 for a one-sixth interest, and in the face of this offer the court decreed that the plaintiff should have only $550 for his one-sixth interest. The effect of this decree was to confiscate at least $283.33 of the plaintiff's property, or to transfer it to the defendant arbitrarily and without compensation. But this was not all. The plaintiff was offered a much larger sum than $833.33 for his interest, and stated that he expected to pay the defendant more than that sum for each of the defendant's sixth interests, in the event the entire property should be sold at public auction. In view of these and other facts appearing in the record, it was the plain duty of the court to order the entire subject to be sold at auction. For these reasons I am of opinion that all the decrees of the circuit court should be reversed, and the cause remanded to said court, to be there proceeded in according to the principles announced in this opinion.

GREEN, ENGLISH, and BRANNON, JJ., concurred.

(32 W. Va. 504)

LEWIS *et al.* *v.* ALKIRE *et al.*

(*Supreme Court of Appeals of West Virginia. June 27, 1889.*)

TRIAL BY COURT—APPEAL.

1. Where a case is tried by the court in lieu of a jury, the appellate court must regard the case as upon a demurrer to the evidence; and it will not reverse the judgment of the trial court upon the ground that it is contrary to the evidence, unless, after disregarding all the conflicting evidence of the defendant in error, there is not sufficient legal evidence in the case to warrant the judgment.

2. The matter of the introduction of evidence as to the order and time thereof is largely in the discretion of the trial court, and will not be interfered with by the appellate court, where no injustice has been done.

(*Syllabus by the Court.*)

Error to circuit court, Lewis county; HENRY BRANNON, Judge.

William E. Lively and *Louis Bennett*, for plaintiffs in error. *Thomas Huntor*, for defendant in error.

SNYDER, P. Action commenced before a justice of Lewis county by J. S. Lewis & Co.

Digitized by Google

against John W. Alkire, J. G. Sims, E. M. Gibson, W. A. Sims, and G. W. Allman, on a negotiable note dated April 13, 1886, for $150, purporting to be signed by John W. Alkire and J. G. Sims, payable 90 days after date, to the order of E. M. Gibson, at the National Exchange Bank of Weston, and indorsed successively by the said E. M. Gibson, G. W. Sims, and G. W. Allman. All the defendants appeared to the action except E. M. Gibson, who was not served with process, and on the hearing of the case the justice dismissed it as to the defendants J. G. Sims and W. A. Sims, and gave judgment for the plaintiffs against the defendants Alkire and Allman for the amount of said note and costs. From this judgment the said Alkire and Allman appealed to the circuit court of Lewis county, where the case was tried by the court in lieu of a jury, and judgment rendered by it for the plaintiffs, affirming the judgment of the justice, and from this latter judgment the said defendants Alkire and Allman have obtained this writ of error. Neither the transcript from the justice nor the record of the circuit court show the ground on which the action was dismissed by the justice as to the defendants J. G. and W. A. Sims; nor does it appear from the pleadings that any plea or answer was filed by any of the defendants to the action, as is required by section 50, c. 50, of the Code of 1887. The bill of exceptions, which certifies all the evidence heard on the trial, shows that the defendants offered evidence tending to prove that the names of the maker and all the indorsers of the note sued on, except E. M. Gibson, had been forged. The proof shows pretty clearly that the signatures of J. G. and W. A. Sims had been forged, or that they were not genuine; while the evidence as to the signatures of Alkire and Allman was conflicting, and, although each of these latter defendants testified on the trial, neither of them was willing to swear, and did not swear, that their respective signatures were not genuine. Upon this state of the evidence this court cannot reverse the finding of the circuit court upon the ground that it was contrary to the evidence; because the rule is settled in this state, where the case is tried by a jury, or by the court in lieu of a jury, that the appellate court must regard the case as upon a demurrer to the evidence. Board v. Parsons, 24 W. Va. 553; Black v. Thomas, 21 W. Va. 713. The evidence proves that the note was passed by Gibson to the plaintiffs, John S. Lewis & Co., and therefore the plaintiffs in error claim that because the note was a forgery as to J. G. & W. A. Sims, whose liability was primary as to the said Allman, there could be no liability against Allman. There is nothing in this claim, for the proof shows that the plaintiffs are *bona fide* holders of the note for value, and that they acquired the note before its maturity. The legal presumption, therefore, is that Allman, the subsequent indorser, was an accommodation indorser, either for the makers or Gibson; and our statute provides that upon any protested negotiable note the holder may maintain an action thereon, and recover judgment jointly against all the drawers and indorsers, or any one or any intermediate number of them. Section 11, c. 99, Code 1887. The plaintiffs could therefore have sued Allman alone, and obtained judgment against him; and he is not prejudiced because the judgment is against him and another. After the evidence had been closed, and the court had taken the papers to decide it, including the certificate of protest of the note, on a subsequent day of the term, and before the judgment was entered, a question arose as to whether the certificate of protest had been offered in evidence; the defendants claiming that it had not, and the plaintiffs that it had, been offered in evidence. Thereupon the court stated that it would consider the certificate in evidence, and gave the defendants leave to offer any evidence to rebut the certificate; but no further evidence was offered by the defendants. The defendants in error claim that the court erred in treating this certificate as a part of the evidence in the case. The matter of the introduction of evidence as to the order and time thereof is largely in the discretion of the trial court, and will not be interfered with in the appellate court when no injustice is done. When justice requires it, courts are permitted to relax rules relating to the mode and manner of the procedure. Howel's Case, 5 Grat. 664; Bowyer v. Knapp, 15 W. Va. 278. In this case it would have been error for the court to have refused to consider the certificate of protest, and consequently it did not err in doing so after giving the defendants an opportunity to rebut it. The other errors assigned are too untenable to need notice. The judgment of the circuit court is affirmed.

GREEN and ENGLISH, JJ., concurred. BRANNON, J., absent.

(32 W. Va. 566)

BOGGS v. BODKIN *et al.*

(*Supreme Court of Appeals of West Virginia.* June 27, 1889.)

SPECIFIC PERFORMANCE—AGREEMENT TO RESCIND—APPEAL.

1. A written contract is entered into for the exchange of lands, and it is so far executed that each party puts the other in possession of the lands exchanged, but deeds are not executed to complete the exchange. The parties then enter into an executory parol contract, whereby they annul the first contract of exchange, and it is put into effect partially by one of the parties restoring to the other the possession of his land. The court will enforce such contract of rescission thus partially executed.

2. A court of equity will not enforce a parol contract for the sale or exchange of land, unless the terms of the contract are admitted or clearly proven.

3. Such parol contract will not be specifically enforced unless it be proven that the parties have good titles to their respective lands; and, if the validity of the plaintiff's title is dependent on the question whether he had 10 years' adversary possession of the land, he must, before he can enforce such contract, specifically establish by clear evidence that he had such adversary possession for 10

Digitized by Google

years; and, if he has declined to defend an action of ejectment brought by a stranger to test his title, this will be regarded as showing that his title is so doubtful that the court ought not to require it to be received as a good title by the other party to such contract for the exchange of land: and, being unable to make the other party a good title, the contract for the exchange of lands ought to be rescinded.

4. Orders made pending a cause suppressing portions of the evidence offered, allowing the retaking of depositions, and other orders regulating the preparation of the cause for a hearing in the court below, in order to be good grounds for an appeal, must appear, not only to be erroneous, but the appellant must show by this record that he was prejudiced by the entries of such orders.

(*Syllabus by the Court.*)

Appeal from circuit court, Braxton county; HENRY BRANNON, Judge.

On September 8, 1824, Daniel Stringer obtained a patent from the commonwealth of Virginia for 2,000 acres of land at the forks of the Little Kanawha river, in what was then Lewis county. On September 25, 1828, he conveyed this and other land to Gideon D. Camden and James W. Porter, trustees, to secure the payment of several debts due to one Daniel Mason of Culpeper county, Va. By this deed of trust, upon default in the prompt payment of any said debts, either of said trustees were authorized to sell said lands, or so much thereof as may be necessary, for cash, before the front door of Thomas Bland's tavern in Weston, in said county of Lewis, and pay the proceeds on said debts secured by said deed of trust; and, in accordance with its terms, Gideon D. Camden, one of said trustees, did on December 1, 1834, at the request of Daniel Mason, sell at public auction, for cash, after having advertised the time and place of sale, as required by said deed of trust, said tract of 2,000 acres of land at the forks of the Little Kanawha river. This tract of land was purchased by said Mason for $300, and by his direction the trustee Gideon D. Camden, on November 9, 1839, conveyed said tract of land to Samuel Merchant, of the city of Baltimore, by a deed duly recorded in the clerk's office of the county of Lewis, on December 9, 1839. Merchant appointed said Camden his agent, and his attorney in fact, to control, lease, or otherwise dispose of said tract of 2,000 acres of land; and on April 13, 1843, said Camden, as such attorney in fact, did lease in the name of his principal, Samuel Merchant, to Andrew Boggs, Sr., said tract of 2,000 acres of land for three years from and after April 1, 1843, the said Boggs by said lease, which he also executed, agreeing to pay to said Merchant the annual rent of 100 bushels of Indian corn, to be delivered on the land; and he also agreed to pay the taxes on said tract of land, and at the end of said term, April 1, 1846, to deliver peaceable possession of said land to the said Merchant or his agent. Said Boggs, under this lease, took possession of and occupied the said tract of 2,000 acres of land at once. It further appears that one David Alkire, in 1834, took possession of a portion of this 2,000-acre tract, and on July 2, 1854, he entered 786 acres,—a part of this 2,000 acres,—by metes and bounds, as vacant land. He surveyed this tract of 786 acres, October 11, 1855, and on July 1, 1856, he obtained a patent for this 786 acres of land. This patent, it is claimed by George Bodkin and other appellants, never conferred any title to this 786 acres on David Alkire, because it appears that, when said entry, survey, and patent were made in favor of David Alkire, he was then in possession of said 786 acres of land as tenant under said Merchant, the owner of the Stringer patent. He had taken possession of some land within what was afterwards made the metes and bounds of this 786 acres of land about the year 1834. This land was, about the year 1837, taken possession of by Andrew Boggs, Sr., under a purchase from McComas and Keneen, but he soon found that the McComas and Keneen tract did not include this land, and thereupon he abandoned his possession under them, and leased, as before stated, this 2,000 acres under the Stringer patent of Samuel Merchant, its then owner, for three years from April 1, 1843. After the expiration of this lease David Alkire took possession of this land. He occupied it for several years, but whether as a mere squatter, or under any claim of title, does not appear. Afterwards, one John Cunningham lived on this land a short time, but the record fails to show whether he had any claim of title to it or not. He abandoned the possession of this land, and William B. Alkire and John V. Alkire each afterwards lived on this land for short periods of time, whether under any claim of title, or what claim of title, does not appear; but, from 1859 to 1865, Andrew Boggs, Jr., who took possession of this land under a lease from Merchant, occupied this land. On July 22, 1854, David Alkire entered this 786 acres as vacant land. He had it surveyed on October 11, 1855, and on July 1, 1856, he obtained a patent therefor from the commonwealth of Virginia. On December 5, 1859, he conveyed said 786 acres to Andrew Boggs, Jr., but, not being satisfied with such a title, Andrew Boggs, Jr., did not have this deed recorded, and in the fall of 1860 leased this 2,000-acre tract, under the Stringer patent, which covered this 786 acres of land of Camden, the attorney in fact of Merchant, for two years.

On September 6, 1865, Andrew Boggs, Jr., conveyed this 786-acre tract of land patented to David Alkire July 1, 1856, to George Bodkin and Nimrod G. Mundy, in exchange for a tract of 725 acres which they by a written contract had agreed to convey to him, and George Bodkin was put in possession of said 786 acres of land. Shortly thereafter a demand was made of the defendant George Bodkin by G. D. Camden, as agent and attorney in fact of said Samuel Merchant, to quit the possession of said land, or become the tenant of said Merchant, or else a suit would be instituted to obtain the possession of said land. Bodkin refused to surrender the possession of said land, and thereupon said Merchant, who was a non-resident of this state, instituted,

Digitized by Google

in the United States district court at Clarksburg, an action of ejectment to recover this tract of 786 acres. On March 26, 1869, a notice of the filing of this declaration was served on George Bodkin, the defendant in possession of said land. Said Bodkin, and his co-defendant Nimrod G. Mundy, about one year afterwards, in the spring of 1878, met said Andrew Boggs, Jr., on the land in controversy, and said Andrew Boggs deliberately waived and relinquished all his previous claims of right and title to this 786 acres of land in favor of Samuel Merchant, and admitted that his title to said tract of land was good. He refused to make any contest in this ejectment suit, and advised the defendant in this suit to make the best compromise he could with said Merchant; and at the same time Andrew Boggs, Jr., then and there agreed that the contract by which said Andrew Boggs, Jr., agreed to exchange this 786 acres of land for the 725 acres owned by said Bodkin and Mundy should be mutually abandoned, the said Andrew Boggs, Jr., to be refunded the costs which he had incurred in moving onto this 725-acre tract, or which he might incur in moving off of it. He did move off of this tract, and said Bodkin did give him a horse, valued at $105, for and as the estimated cost he had incurred in such removal, and the defense of this ejectment suit was abandoned, and the controversy settled by the purchase of this land of said Merchant, who on October 20, 1870, conveyed said tract of 786 acres of land to said Mundy. In the deed from Andrew Boggs, Jr., to said Bodkin and Mundy for this 786 acres of land, Andrew Boggs reserved a lien upon the land conveyed, to indemnify him against any liens, liabilities, or defects of title that might exist against this 725-acre tract which was to be conveyed by said Bodkin and Mundy to said Boggs in exchange for the 786-acre tract. In the spring of 1876 William H. Boggs, by a parol contract, purchased from Andrew Boggs, Jr., who was his father, this vendor's lien, giving him therefor an undivided moiety of 145 acres, of which he put his father in possession at the time of said contract. In February, 1881, William H. Boggs, brought his suit in chancery, in the circuit court of Braxton county, against said George Bodkin and N. G. Mundy, the administrator of Andrew Boggs, Jr., and his widow and heirs, to compel said Bodkin and Mundy to elect promptly to have said contract of exchange of lands between them and his father rescinded or specifically performed on their part. In his bill, and three amended bills, he set out substantially the facts above stated. The original bill omits any statement of the compromise, or attempted compromise, made in the spring of 1870, whereby it was agreed to rescind the contract for the exchange of land by Andrew Boggs, Jr., and Bodkin and Mundy. The bill gives the contents of this contract and refers to a copy of it as filed therewith as an exhibit, though in fact no such copy was filed. The bill says that Bodkin and Mundy in this exchange of lands were to pay Andrew Boggs, Jr., $——— boot, which sum the bill alleges has never been paid.

This bill further alleges that at the same time, on September 6, 1865, the said Andrew Boggs, Jr., made a deed to the defendants, said Bodkin and Mundy, for this tract of 786 acres of land, worth $6,288, and put George Bodkin in possession thereof, who has held it ever since under said deed, and the said Bodkin and Mundy have disposed of a large amount of timber off the said land, and taken the rents and profits thereof. The bill further states that Bodkin and Mundy have not conveyed to the said Boggs, Jr., the 725 acres of land in Upshur and Webster counties, according to their contract. It further alleges that said Andrew Boggs, Jr., in said deed to Bodkin and Mundy, retained a lien on the 786 acres of land to indemnify him against any liens, liabilities, or defects of title on the said 725-acre tract, which by terms of said contract was to be conveyed by Bodkin and Mundy to the said Andrew Boggs, Jr. The bill also alleges that on September 28, 1878, for a valuable consideration, said Andrew Boggs, Jr., father of the plaintiff, transferred to him all his right, title, and interest in this said 725-acre tract, and in the said purchase money amounting to $———, still unpaid, also the said lien which he retained in the deed of this 786 acres. The bill states that Andrew Boggs has since died intestate, and one P. F. Duffy has qualified as his administrator. The prayer of this bill is as follows: "Therefore plaintiff prays that the parties mentioned in the caption may be made parties defendants, and full, true, and perfect answer make to all and singular the matter herein stated and charged, and that the defendants, George Bodkin and N. G. Mundy, may be compelled to elect, within a short day given for the purpose, either to have said contract rescinded, and the deed for the 786 acres decreed void, or specifically performed on their part by the payment of $———, the unpaid purchase money, and the conveyance to the plaintiff of the 725 acres of land; and such other and general relief as the court may see fit to grant." Bodkin and Mundy appeared and demurred to this bill, but withdrew their demurrer at the August term, 1881, and took a rule against the plaintiff to require him to produce and file the original contract between Andrew Boggs, Jr., and Bodkin and Mundy. On the 4th of October, 1881, the plaintiff, William H. Boggs, filed his answer in writing to this rule, in which he alleges his inability to produce this contract, because it had been left by his father, Andrew Boggs, Jr., in his life-time with one Jonathan Bennett, to bring a suit upon, and he asked the judge in the vacation to award a subpœna *duces tecum* to compel the production of said paper by said Bennett. This subpœna was awarded by the judge, and on motion of Bodkin and Mundy the rule against the plaintiff

Digitized by Google

was discharged. By an order made on November 29, 1881, and a rule issued against Jonathan M. Bennett to appear and show cause why he should not be fined for his contempt in failing to file this contract, alleged to be in his possession, and in April, 1882, on motion of Bodkin and Mundy, the plaintiff was required to speed his cause, on pain of the dismissal of the bill, and in August, 1882, the court in vacation enlarged the rule against J. M. Bennett till the next term of court, when Bennett filed his answer, in writing, to this rule, but no entry of filing, it appears, was made by the court. At December term, 1882, said Bodkin and Mundy filed their joint answer to this bill, to which he replied generally, and asked leave of the court to amend this bill, in which he alleged that the said contract between Andrew Boggs, Jr., and Bodkin and Mundy was in the possession of Jonathan Bennett, who, although called upon to produce it, had heretofore failed and refused to do so. This amended bill alleged that Bennett had an interest in this contract, and it prayed that he might be made a party defendant in this cause, and be required and compelled to produce and file this contract.

On April 28, 1883, Jonathan M. Bennett filed his separate answer to this amended bill, but this answer has been taken out of the papers of the court, and cannot now be found. At the December term of 1883, said Bodkin and Mundy filed their amended and supplemental joint answer, in which they set out as defense the facts hereinbefore stated. They denied the waste charged by the plaintiff. They relied upon the statute of limitations. This answer was replied to generally, and the defendants subsequently demurred to the plaintiff's amended bill. The plaintiff filed a second amended bill, in which he states that Homer A. Holt claimed to be the owner of the 725 acres of land which said Bodkin and Mundy contracted, as before stated, to convey to Andrew Boggs, Jr., in exchange for this 786 acres of land, and there is filed, as exhibits, deeds which purport to convey to Holt this land, but it is alleged that Holt agreed to let said Bodkin and Mundy have this 725 acres of land, and they moved upon it, and took actual possession thereof, and made valuable improvements thereon, and were so in possession thereof when they made the contract on September 6, 1865, to exchange it with Andrew Boggs, Jr., for the 786-acre tract aforesaid. In this second amended bill it is alleged that this contract of exchange has been lost, and cannot be found after diligent search. The bill states that Homer A. Holt, on July 24, 1882, sold and conveyed this 786-acre tract to B. C. Conrad. The bill further states that said Bodkin and Mundy sold most of the timber off of 786 acres to Burns & Bros., and with the proceeds purchased the said land of the agent of said Merchant, who had only a pretense of title. Mundy has since sold this land to the son of said Bodkin, who is his brother-in-law. This deed, it is claimed, is fraudulent, as it was made for the purpose of defrauding the plaintiff, and the grantee, John P. Bodkin, it is alleged, knew all the facts. He lived with his father, George Bodkin, on this land. This amended bill asks to set aside the deed from Andrew Boggs, Jr., to said Bodkin and Mundy, and also the deed from Mundy to John P. Bodkin, and restore the plaintiff to the possession of this 786 acres, and for general relief. This second amended bill was demurred to by John Bodkin and Mundy, and also answered by them jointly, in which they adopt the separate answer of George Bodkin, previously filed. This answer states at some length the facts hereinbefore stated, and especially the rescission of the contract of exchange, which it is insisted was consummated in 1870, as heretofore stated. He does not even assert that the defandants George Bodkin and N. G. Mundy had a valid title to the 725-acre tract in Braxton county, which was to have been conveyed to the said Andrew Boggs, Jr. All that he says on the subject is that, "as to what title they had to the tract of 725 acres which Homer A. Holt agreed to convey to them, is a matter of no consequence in this suit, because this agreement by the plaintiff rescinded the contract sued upon in this cause." A third amended bill similar to this second amended bill, but more argumentative and more detailed in its statements, was filed.

The defendants said George Bodkin and said Mundy demurred to this third amended bill, and also answered it substantially as they had answered the second amended bill. These answers were replied to generally. It was proven that this 725 acres, known as the "Bodkin Place," was sold by Homer A. Holt to said George Bodkin and N. G. Mundy about 1855, and he gave them a title-bond therefor, and put them in actual possession, and took their bonds for the purchase money. In 1870, shortly after Andrew Boggs, Jr., and said Bodkin and Mundy had agreed to cancel their contract, whereby these 725 acres were to be exchanged for the 786 acres at the forks of the Kanawha, said Bodkin and Mundy agreed with Holt to cancel the contract, whereby they were to purchase from him this 725 acres, and it was accordingly canceled, the title-bond being surrendered to Holt by them, and their purchase-money bond surrendered by Holt to them. They gave up the possession of the land to Holt, and he agreed to pay them from $80 to $150 for improvements they had put upon the land, and he executed his bond to them therefor. Holt afterwards sold the land to B. C. Conrad, but that contract has also been rescinded by mutual consent. There were numerous orders made suppressing depositions or portions of depositions, giving leave to retake depositions, and other orders relating to details in the conducting of the cause in the circuit court. These, so far as it is deemed necessary, will be noticed in the opinion. It is not deemed necessary to notice

Digitized by Google

them further now. On May 3, 1887, this decree was entered. "Upon consideration whereof it is adjudged, ordered, and decreed that the demurrers aforesaid be severally overruled; and the court being of opinion that the plaintiff is entitled to a rescission of the contract of exchange of lands made by Andrew Boggs with George Bodkin and N. G. Mundy, whereby the said Andrew Boggs exchanged 786 acres of land in the bill mentioned for 725 acres of land in the bill mentioned, and to a cancellation of the deed made by the said Andrew Boggs to the defendants George Bodkin and Nimrod G. Mundy, dated the 6th day of September, 1865, a copy of which is filed as 'Exhibit B' with the plaintiff's bill, it is therefore adjudged, ordered, and decreed that the contract of exchange and deed aforesaid be, and are hereby, rescinded, canceled, and annulled, and that the defendants George Bodkin and John P. Bodkin do surrender to the plaintiff the possession of the 786 acres of land, described in the said deed, and a writ of possession is awarded the plaintiff to cause him to have the possession thereof. It is further adjudged, ordered, and decreed that N. G. Mundy, George Bodkin, and John P. Bodkin do pay to the plaintiff his costs by him herein expended; but it is provided that this decree shall not prejudice the right of the said defendants Bodkin to assert or maintain their right and title, if any they have, to the 786 acres of land aforesaid, derived by them, or either of them, from or under Samuel Merchant, in any suit or proceeding in which it may be involved. At the instance of the defendants George Bodkin and John P. Bodkin it is ordered that the execution of this decree be suspended for the period of 80 days, upon the said defendants, or either of them, giving bond before the clerk of this court, with good security, to be approved by him, in the penalty of $400, conditioned for the payment of all such damages as any person may sustain by reason of such suspension in case a *supersedeas* to this decree shall not be allowed, and be effectual, within the time aforesaid." To which decree an appeal and *supersedeas* has been awarded to George Bodkin and N. G. Mundy, on July 11, 1887.

J. J. Davis and *Dayton & Dayton*, for appellants. *C. P. Dorr* and *G. J. Arnold*, for appellee.

GREEN, J., (*after stating the facts as above.*) The prayer of the original bill in this cause was "that the defendants George Bodkin and N. G. Mundy may be compelled to elect, within a short day given for the purpose, either to have said contract rescinded, and the deed for the 786 acres decreed void, or specifically performed on their part by the payment of $———. the unpaid purchase money, and the conveyance to the plaintiff of the 725 acres of land; and for general relief."

The evidence shows that in 1876, the plaintiff, finding that he could not make good his warranty of title for the 786 acres of land contained in his deed to said Bodkin and Mundy, and they, having been sued by one Merchant for the tract of land which they had been put in possession of, would lose the same, proposed to rescind this contract of exchange of this 786-acre tract for said tract of 725 acres, and the proposition was accepted by the defendants said Bodkin and Mundy, and completely consummated by them; they, on the plaintiff's advice, abandoning all defense of the ejectment suit brought to recover this 786 acres of land of them, and Andrew Boggs, Jr., the father of the plaintiff, abandoning his possession of the 725-acre tract. So that, in point of fact, the parties to this contract had, so far back as 1870, mutually agreed that what was asked by the plaintiff's original bill was right and proper. This being the case, it is difficult to see how the court could do otherwise than rescind this contract for the exchange of these two tracts of land.

It was agreed, in 1870, that this should be done because the father of the plaintiff, Andrew Boggs, Jr., did not, as he then admitted, have a good title to the 786-acre tract. But, if proper then, it was much more proper and necessary in 1881, when this suit was instituted, for it was proven in the case that the defendants Bodkin and Mundy did not then have a pretense of title to the 725-acre tract. They never did have any title, but they did have, when this contract of exchange was made, a right to demand a conveyance of this land, upon their paying the purchase money to Holt, of whom they bought it. But this right to demand a conveyance of this land was lost by them in 1870, they having rescinded their contract for the purchase of this land, given up the possession of it to Holt, and annulled the contract of sale, and Holt, the vendor, having surrendered to them their purchase-money bonds, and paid them for their improvements on the land. It would, therefore, obviously have been improper for the circuit court in this cause to specifically enforce this contract, as neither party had title to the tracts of land they undertook to exchange. It was of course proper, if the contract was to be rescinded, to restore each party to the situation he was in when this contract was entered into. The defendants said Bodkin and Mundy had been thus restored to the situation in which they were when the parties had themselves agreed on a rescission of the contract in 1870; that is to say, Andrew Boggs had surrendered to them the possession of the 725-acre tract which they had put in his possession. To restore the other side to the position in which they were before this contract was made it was necessary, not only to require Bodkin and Mundy to surrender to the plaintiff, as the representative of Andrew Boggs, Jr., the 786-acre tract, the possession of which was obtained from said Boggs, but it was also necessary to set aside and annul the deed

Digitized by Google

from said Andrew Boggs to them, dated September 6, 1865; and this was properly done by the decree appealed from, rendered May 3, 1887.

The counsel for the appellants insist that this agreement made 1870 by said Andrew Boggs, Jr., and said Bodkin and Mundy, to cancel this contract for the exchange of lands, being but an executory parol agreement, was a mere nullity, as the agreement to exchange these lands, being in writing, could only be set aside by an agreement in writing signed by the grantees. But this arrangement in 1870 was not simply an executory agreement in writing signed by the grantees, but it was executed by said Andrew Boggs, Jr., surrendering to Bodkin and Mundy the possession of their 725 acres of land, and disposed of it by restoring to Holt, from whom they had agreed to purchase it, taking back their purchase money bonds, and canceling and surrendering the contract whereby they became the purchasers of this land from Holt. After this, said Bodkin and Mundy could not equitably refuse to surrender to said Andrew Boggs his 786 acres got from him in exchange for this 725 acres, and to cancel the contract for the exchange of these lands, even were the position of the appellants' counsel —that a mere executory parol contract would be insufficient to cancel a written contract for the exchange of lands—tenable. But the court would have to set aside this contract of exchange, even though the partnership had not made a valid agreement to do so in 1870, for the parties to this contract for the exchange of lands, or their representatives, are unable to specifically execute the same. Said Andrew Boggs, Jr., and representatives have not, and never did have, such good title to the 786 acres of land that a court of equity would be justified in holding that their deed to said Bodkin and Mundy conveyed to them such title to his 786 acres of land that would compel them to receive, in compliance with his obligation to give them, this tract of land, and a clear and valid title thereto. The appellants admit that on the face of the deeds the title of said Andrew Boggs was not good. He traced his title back to a patent July 1, 1856, by the state. But it appears in proof that one Daniel Stringer had a patent issued to him by the state on September 8, 1824, for a 2,000-acre tract, which covered the whole of this 786 acres as entered, surveyed, and patented to David Alkire more than 30 years afterwards. It is claimed, however, that David Alkire, and those claiming under him, acquired a valid title to this 786 acres of land by their holding in adversary possession against Daniel Stringer, and those claiming under him, for more than 10 years prior to September 6, 1865, when this tract of land was conveyed by said Andrew Boggs and wife to said George Bodkin and Nimrod G. Mundy, in accordance with said contract for the exchange of this land for the 725-acre tract. To constitute adversary possession, such as will bar the legal owner, five elements must exist. It must be (1) hostile; (2) actual; (3) visible, notorious, and exclusive; (4) continuous; (5) under claim of title. See Core v. Faupel, 24 W. Va. 238, point 1 of syllabus.

The appellants' counsel insist that neither David Alkire nor any one claiming under him ever held adverse or hostile possession of the 786 acres of land as against Daniel Stringer or those claiming under him. Stringer obtained a patent for 2,000 acres of land covering that located and surveyed by David Alkire some 30 years afterwards. It is true that, as early as 1834, David Alkire settled on this land, and actually built a house thereon, and cleared up and inclosed a few acres of ground. The simple proving that a party was in the actual possession of a tract of land is not sufficient, for the burden of proving that it was adverse and hostile, and not under the legal owner of the land, is on the person who asserts that such possession was adverse. See Jones v. Porter, 2 Pen. & W. 132. There is proof that David Alkire took possession as before stated, he inclosing a few acres of land in 1834. There was then, so far as the record shows, no claimant of this 786 acres of land, or any part of it, except Daniel Stringer, who had had a patent for a tract of land covering it for some 10 years.

The appellants insist that the presumption of fact is that David Alkire entered on this land under the title of Daniel Stringer, and that this presumption is much strengthened by the fact that the record shows no other claim of title to this land till July 22, 1854, when he entered this 786 acres of land, as vacant land. In the meantime he had abandoned or surrendered the possession of this land for many years, for, in 1843, Samuel Merchant, who claimed the land under the patent of Daniel Stringer, leased this land to Andrew Boggs, Sr., for three years from April 1, 1843, and put said lessee in the possession of said land, it being then unoccupied by any one. Before this lease expired Andrew Boggs, Jr., the plaintiff's father, the son of the lessee Andrew Boggs, Sr., married, and thereupon he moved into said house on this 786-acre tract, and he occupied it for some three years under his father, who was holding it under the Stringer title as tenant, when he gave it up. The agent of Samuel Merchant leased the lower part of this survey to Thomas Roby, who, with his son, as tenant under those claiming under the Stringer survey, occupied a portion of this 2,000-acre tract by living upon it and cultivating a portion of it from 1854 till 1863.

It is insisted by the counsel for the appellee that the possession of David Alkire, and those claiming under him, was not exclusive during these nine years, and also that it was not continuous, as the law requires. David Alkire obtained his patent for this 786 acres of land in July 1, 1856. He had it entered on July 22, 1854, and made a deed of it to said Andrew Boggs, Jr., on December 5, 1854, which was not recorded till December 10,

Digitized by Google

1866. Yet, in 1860, said Andrew Boggs took a lease of the whole 2,000-acre tract, including this 786 acres which had been patented to David Alkire from Samuel Merchant, claiming under the Stringer title; and if he had any adverse possession under the Alkire title, which commenced in 1854, this hostile possession was broken up by his claiming as lessee under the Stringer title, in 1860, and afterwards. There is certainly much force in these views of counsel of George Bodkin and N. G. Mundy. They at least show that the title of Andrew Boggs, Jr., to this 786 acres of land was very far from being clearly good; and when it is remembered that, in 1870, Andrew Boggs, Jr., had an opportunity of establishing his title to this land, if he had good title, in the action of ejectment brought against his vendees, said Bodkin and Mundy, by said Merchant, claiming under this Stringer title, but he did not avail himself of this opportunity, but then admitted the superiority of the Stringer title, and advised his said vendees not to defend said suit, but either to surrender the land to the claimant under this Stringer title, or compromise the suit on the best terms they could make, under such circumstances it would not be right for a court of equity to compel the defendants George Bodkin and N. G. Mundy to accept, as a fulfillment of their part of the contract to convey this 786 acres, with a good title to them, this deed from him to them. This title, if not actually worthless, was at least so regarded by himself, and they ought not to be compelled to run the risk of losing this 786-acre tract when it appears that said Andrew Boggs, who ought to know the character of his title, obviously regarded this risk as so great that he thought their loss of it by them as almost a certainty.

But there is still another reason, not noticed in the argument of this cause, which would, of itself, require the abandonment of this contract of exchange of lands of September 6, 1865; *i. e.*, the entire failure of the record to show what were the terms of this contract. The bill alleges that the defendants George Bodkin and N. G. Mundy were by said agreement in exchange for said 786 acres, not only to convey the said 725 acres, but also to pay to the said Andrew Boggs $———. They neither conveyed said 725 acres of land to him, nor paid him said money. That these were the terms of this contract is denied by the answers of these defendants, which were replied to generally; and there is an entire failure of proof as to the terms of this contract of exchange. There is proof that an exchange of these two tracts was agreed upon, but no one proves whether there was to be any boot paid in the exchange by either party. The contract was reduced to writing, and this writing was in the possession of Jonathan M. Bennett when this suit was instituted. He refused, however, to produce this written contract, though required so to do by the court; and, in one of the latter amended bills, it is alleged by the plaintiff to have been lost. It never was produced, nor has its contents ever been proven. This of course would effectually prevent the court from specifically enforcing this contract.

There were certain orders made during the progress of this cause, which have not been noticed. The first of these, made August 29, 1884, granted the defendant George Bodkin, for reasons set forth in the affidavit of his counsel, leave to retake the depositions of G. D. Camden, upon giving notice to the plaintiff of the time and place of such examination. It will suffice to say, in reference to this, that it is unnecessary to consider the merits of this order, as it was made at the instance of the appellants in this cause, and they cannot therefore complain.

The reading of the deposition was excepted to by the plaintiff, and two exceptions indorsed on the back thereof. One of those exceptions was because "the notary continued the taking of depositions, without commencing the examination of a witness, and without notice or presence of the plaintiff first from December 11, 1883, until December 20, 1883, and from December 20, 1883, until December 25, 1883, and the plaintiff would have been subjected to unlawful expense and trouble to have attended on all of said days." This exception was overruled by an order made September 8, 1885, and portions of these depositions were read by the court at the final hearing of the cause. It appears, when these several continuances were made, a formal order was made by the notary, stating that no witness had appeared, and the "taking of these depositions is continued to the specific day, at the same place, and between the same hours." This memorandum was dated and signed by the notary public, officially. The taking of these depositions was perfectly regular, and this exception to them was properly overruled by the court. The plaintiff, by the manner in which these depositions were taken, was not compelled to attend, at the place named for taking these depositions, five different times, as the exception seems to assume. In point of fact, he did not attend a single time; and, if he had attended when first notified, he could have asked that the witness which did not attend be summoned to attend by subpœna issued by the notary at the time fixed at the first continuance; and the presumption is that the witness would have done so, and his deposition been taken, at the second continuance instead of the fifth. The plaintiff had no right to object to this deposition being taken on the 28th. He utterly neglected to pay any attention to the notice he received to take this deposition, and he can properly attribute his absence when the deposition was taken to his own neglect, and not to the action of the notary in regularly continuing the taking of depositions from time to time.

The plaintiff also excepted to so much of the deposition of N. G. Mundy taken then as

Digitized by Google

detailed any conversation or declaration made by Andrew Boggs, deceased, to him, and a like exception was taken to the deposition of John P. Bodkin, taken on November 28, 1885, and December 3, 1885. The court sustained these exceptions, and ordered that so much of these depositions as gives any personal transactions or communications between the witnesses, as respective parties to this suit, and Andrew Boggs, Jr., be suppressed. This suppression of this portion of these depositions was obviously right.

These orders should have designated the answers to specified questions which were thus suppressed, but the plaintiff cannot complain in this court that the answers were not so designated, as the record does not show that he asked the court below to be thus specific in making these orders, and it does not appear from the whole record that he was injured by the manner in which these orders were made, for it does not appear that the court below, at the hearing of this cause, read or considered any of the answers of these witnesses which ought to have been suppressed as incompetent evidence; and, omitting all such evidence, there was ample testimony in the cause to justify the court below in reaching the conclusion which it did.

One of the errors assigned in the petition for the appeal of George Bodkin and N. G. Mundy and John P. Bodkin is the court erred in sustaining the exception of the plaintiff to the deposition of G. D. Camden, taken on the 19th of October, 1883, and filed in the cause. There is nothing of which they can complain alleged in this ground of error, for, on motion of the said defendants Bodkin and Mundy, on August 25, 1884, they were given leave to retake the deposition of Gideon D. Camden, and on August 23, 1886, they did retake his deposition, and it was again taken on August 12, 1887. These depositions were read by the court, and the appellants could have sustained no injury from the first deposition of G. D. Camden not having been read by the court, as the depositions that were read contain all and more than what was contained in his first deposition. The appellant must show, not only that such orders made pending a cause were erroneous, but that he sustained injury thereby.

The depositions of Washington Boggs and V. M. Roby, taken before Lewis Kelly, as notary public, on November 21, 1884, were improperly suppressed by an order made December 3, 1885, on exception of plaintiff to the reading of these depositions. These depositions should have been read by the court; and, in stating and deciding this case, I have considered them as in the cause. They rather strengthen the position of the appellees, and, it seems to me, were not very prejudicial to the plaintiff in the case, but really strengthened it, though the depositions were taken by the defendants.

The court, by its order on December 2, 1886, sustained the exception of the plaintiff to the reading of an attested copy to the deed of trust from Daniel Stringer to Camden and Porter, trustees, filed with the defendants' answer, in tracing the title of Merchant to Daniel Stringer's patent, and in order to show that Andrew Boggs did not have a good title to the 786-acre tract claimed under a patent subsequent in date to Stringer's. This deed of trust is signed "D. STRINGER," and was recorded on its acknowledgment by D. Stringer before the clerk of the county court of Lewis, who was D. Stringer. This acknowledgment was, as held by the court below, fatally defective if the Daniel Stringer who executed the deed was the same person as D. Stringer, the clerk, as a person cannot acknowledge a deed before himself. There is no proof on the question that arises whether they were the same person, though it is very obvious it could have been proved by G. D. Camden whether they were the same person or not. It seems to me, in the absence of all proof on this point, the presumption on the face of the deed is that they were the same person, for it appears that the grantor was a resident of Lewis county, and that he signed his name "D. STRINGER," just as the clerk signs his name. If so, the court did not err in excluding this copy of this deed as evidence. This, however, does not materially alter the case as presented to the court. In my statement and consideration of the case I have regarded Merchant's title as properly traced back and connected with D. Stringer's patent; that is, I have regarded the existence of this deed of trust as established. It is really immaterial whether the valid title to this tract of land was in Merchant or D. Stringer, except as it might affect the question of adversary title claimed by David Alkire under his patent in 1856, and it could have no effect on this question as to whether he had this deed of trust or not, as it is still abundantly proven that Merchant claimed title under the Stringer patent; and whether he actually had a good title would, of course, depend on whether this copy of this deed of trust was or was not evidence. But that question is not involved in this cause, but simply whether he claimed title under the Stringer patent, and this is abundantly proven. I am unable to find any errors in this record prejudicial to the appellants. The decree of the circuit court of May 3, 1881, must therefore be affirmed, and the appellee must recover of the appellants his costs in this court expended, and $30 damages.

SNYDER, P., and ENGLISH, J., concurred. BRANNON, J., absent.

(32 W. Va. 519)

NEELY *v.* BEE *et al.*

(*Supreme Court of Appeals of West Virginia.* June 27, 1889.)

SURETY—CONTRIBUTION—SET-OFF.

1. Where a joint and several promissory note was executed by D., as principal, and B. N. & P.,

Digitized by Google

as sureties, payable to G., and N. pays a portion of said note after judgment has been rendered against him alone thereon, if such payment was made by N. when he was indebted to D., the principal, in an amount sufficient to pay the judgment so obtained against him, or if, after the maturity of said note, said N. had in his possession, or under his control, money belonging to said D., sufficient to pay off said note or judgment, and did not so apply it, but paid it back to said D., said N. is not entitled to contribution from his co-sureties, even if he afterwards paid said note or judgment out of his own money.

2. A surety is entitled to the benefit of any indemnity or security held by his co-surety; and if the co-surety has it in his power to pay off and discharge the indebtedness for which they are jointly liable out of money or other thing belonging to the principal, and fails to do so, he cannot call upon his co-surety for contribution.

(*Syllabus by the Court.*)

Appeal from circuit court, Doddridge county; THOMAS I. STEALEY, Judge.

Stuart & Farr, for appellants. *J. V. Blair*, for appellee.

ENGLISH, J. This was a suit in equity, brought by one Floyd Neely, in the circuit court of Doddridge county, against John Donahue, Ephraim Bee, L. W. Pearcy, administrator of the estate of Joshua Pearcy, deceased, M. Donahue, and the Grafton Bank. It seems that John Donahue, Ephraim Bee, Floyd Neely, and Joshua Pearcy, on the 24th day of August, 1878, executed their joint and several promissory note, payable to the Grafton Bank, at Grafton, West Virginia, or order, 120 days after date, for the sum of $400. Upon this note an action of debt was brought, in the county court of Taylor county, against the parties who executed said note, but process was only executed upon said Floyd Neely, and judgment was rendered by said court on the 20th day of May, 1879, against said Floyd Neely alone for the sum of $410, with interest from that date, and costs. An execution was issued on said judgment, directed to the sheriff of Doddridge county, which appears to have been levied upon four head of horses, the property of said Floyd Neely, and a forth-coming bond was executed by Neely with M. Donahue, John Donahue, and Joshua Pearcy as his sureties. On the 4th day of March, 1879, a credit of $100 was indorsed upon said execution, and on the 25th day of April, 1881, a judgment was rendered upon said forth-coming bond against the obligors therein for the sum of $369.14, with interest thereon from the 5th day of March, 1881, and on the 9th day of July, 1883, said Floyd Neely paid upon said judgment the sum of $383.45, and said action of debt seems to have been dismissed on the first Monday in December, 1884, by plaintiff's attorney, as to the defendants J. Donahue, Bee, and Pearcy, who were never served with process therein. The plaintiff, in his said bill, alleges that by reason of his having been the surety of said John Donahue, and the co-surety of Ephraim Bee and Joshua Pearcy, he has been forced and compelled by due process of law to pay said sum of $383.45 to the sheriff on said debt; that neither said Bee nor Pearcy paid any portion of said debt, and he never has been reimbursed in whole or in part for the money paid by him as aforesaid; that the residue of said debt was collected off of said Donahue, that being all that could be made or collected off of him; that said principal was then, and has been ever since, totally insolvent, and that said Bee and Pearcy are the only persons to whom he can look for contribution; and he prays that they be compelled to contribute their just and equal proportion of said money so paid by plaintiff Neely. The defendant Bee answered said bill, admitting the execution of said note, but says he signed it at the special instance and request of said Neely, who agreed to hold and save said Bee harmless therefrom; and said Bee claimed that the said Neely, having executed said forth-coming bond, and allowing the same to be forfeited, and permitting the judgment thereon, released and exempted him from any liability on the original note for the amount of the same or any part thereof. Said Bee also alleged in his answer that at the date of said note, and after the same became due, and until suit was brought thereon, and till and at the time of the payment of the debt and judgment by said Floyd Neely, the said Neely had moneys and property and funds in his hands, possession, and under his control, belonging to the defendant John Donahue, and could have paid said note; which money, funds, and property he paid over to said John Donahue in person instead of applying the same to the payment of said note and the judgment thereon, which he could and should have discharged and paid with said money, funds, and property of said Donahue; and that the money, funds, and property with which said Neely paid said judgment was the property of the said John Donahue, who was principal in said note. The administrator and heirs also answered said bill, claiming that said Floyd Neely did not pay said debt with funds of his own, but with money belonging to said J. Donahue, and that, after said note fell due, said Neely had in his possession money and property of said John Donahue with which he might and could have paid said debt, and that said Neely and John Donahue colluded together to defraud the other sureties on said note out of the money now sought to be obtained by way of contribution from the other sureties; that said administrator settled the estate of his intestate, and in doing so published notice for creditors to bring forward their claims, of which said Neely had notice, but failed to bring forward any claim or make any demand for payment. Several depositions were taken in the cause, bearing upon the time and manner of the execution of said promissory note, and the *status* of accounts between the plaintiff, Floyd Neely, and John Donahue, the principal in said note, at the time the same was executed; and on the 2d day of August, 1886, a decree was entered therein, ascertain-

Digitized by Google

ing that the plaintiff had been compelled by due process of law to pay $383.45 to the Grafton Bank on said promissory note, and that he was entitled to call upon the defendant Ephraim Bee and the estate of Joshua Pearcy, deceased, to contribute the one-third part thereof, and directing a commissioner of the court to calculate and state the proportionate share which the said Bee and Pearcy estate should pay, and such other matters as he might deem pertinent, or might be required of him by said parties.

Upon the question raised by the answer of the appellant, Ephraim Bee, as to inducements held out to him by said Floyd Neely to become a party to said note, and representations and promises that he should lose nothing by so doing, and that, if said Donahue failed to pay said note when due, that he (Neely) would hold said Bee harmless, this was an affirmative allegation made by said Bee by way of defense, and the burden of proof was upon him; but upon examining the testimony it is found that, while said Bee swears positively that these promises and representations were made to him by said Neely to induce him to sign said note, the said Neely in his deposition is just as positive that no such promises ever were made; and, as a matter of course, said Bee fails in proving said allegation if the parties are to be regarded equal in point of credibility.

As to the allegation in the appellant Bee's answer that the plaintiff, Floyd Neely, had moneys and property and funds in his hands, possession, and under his control, belonging to the defendant John Donahue, out of which he might and ought and could have paid said note, which money, funds, and property he paid over to said Donahue instead of applying it to the payment of said note and the judgment thereon, the questions of fact raised by said allegation were referred to a commissioner, and a large number of witnesses have been examined as to the *status* of accounts between the plaintiff, Floyd Neely, and the defendant John Donahue subsequent to the execution of said promissory note, which bears date August 24, 1878, and and was made payable 120 days after date, with interest; and the effort seems to have been made by said Floyd Neely to show a balance in his favor at the time he paid the sum of $383.45 on said judgment, which was the balance remaining unpaid thereon, after crediting about $100 realized out of the sale of some property belonging to the defendant Donahue, and which amount was paid by said Neely on the 9th day of July, 1883. Said commissioner seems to have returned several reports and supplemental reports. In his supplemental report, dated December 4, 1886, he finds a balance due said Neely from said Donahue of $793.07. In his report, dated July 18, 1887, he finds the balance in favor of said Neely due from said Donahue to have been, on the 9th of July, 1883, $476.05. To these reports exceptions have been filed by the appellant, and also by the personal representative of his co-surety Joshua Pearcy. In regard to the items of account presented by said parties before said commissioner, it is very difficult to ascertain what portion of them ought to have been allowed or rejected by said commissioner; and in his report, dated July, 1887, he says: "It is very hard for your commissioner to pass upon them, [meaning these items] as to the preponderance of testimony," etc. It however appears that said John Donahue was sheriff of the county of Doddridge from January 1, 1877, to December 31, 1880; that this note was executed on the 24th day of August, 1878, payable 120 days after date; that very intimate relations existed between said Donahue and Neely during that period and afterwards; and when said Donahue, in giving his deposition, is asked the question, "Did you, during the time beginning January 1, 1877, and ending December 31, 1880, while you were sheriff of Doddridge county, furnish to Floyd Neely personally, or to Floyd Neely and Luther Martin, under the firm name of Neely & Martin, or to Floyd Neely, for the use of the boom company at Grafton, any sum or sums of money or other securities?" he answered, "The firm of Neely & Martin didn't get any from me. I loaned Col. Neely some. I didn't furnish any to the boom company;" and he files with his deposition a statement marked "X," showing the amounts he let Neely have during that time; and, by reference to said exhibit, that said Donahue, during the time he was sheriff, loaned said Neely, at different times, $1,424.86, and from that time until March, 1883, he loaned him $342.14 more; but taking the statement X, filed by said Donahue, of his account against said Neely, and the statement A, filed by said Neely, of his account against Donahue, we find that between January, 1877, and January, 1883, there was a balance in favor of said Donahue of $481.26, and the greater part of said balance accrued after the maturity of said note. Again said Donahue, in giving his testimony, is asked, "During the time you were sheriff of Doddridge county, after the date of that note, and since you were sheriff, up to the present time, has Floyd Neely been indebted to you in any sum?" and he answered, "I couldn't tell how it would be, because we have had no settlement. He got some money from me, but we have had no settlement. He gave me a good deal of orders. He asked me if they were not as good as the money to me, and I told him they were." "*Question.* Did he give you that good deal of orders since the execution of that note? *Answer.* I could not tell whether it was before or since. He was giving them to me along, I suppose,—some before and some after."

Now, although there were other accounts existing between said Donahue and Neely both before and subsequent to the time he was sheriff of said county, yet the state of accounts during that period is most material,

Digitized by Google

for said note was executed August 24, 1878, and fell due in December, 1878, and said Neely allowed suit to be brought against him on said note, and process according to the statement of his bill was served upon him on the 13th day of February, 1879, and judgment to be rendered against him on the same on the 20th day of May, 1879, for $410; and, according to said Donahue's statement, he loaned said Neely in cash subsequent to that time over $500. This money the plaintiff, Neely, claims that he paid back to said Donahue in county orders, state claims, etc., and if he did so, it was with full knowledge of the claim on which suit had been instituted against him and his co-sureties, part of which he claims was paid after said judgment was rendered. But, with money in his own hands sufficient to have paid off and discharged said note before it was sued upon, he allows costs to be added, and a judgment to be rendered, and the expense of a forth-coming bond to be added, and invests the money he has received from said Donahue in county orders and state claims, and turns them over to him, instead of discharging this note for which he and his co-sureties were liable as the security of said Donahue. Would it be equitable, under the circumstances developed by the evidence in this cause, to allow said Neely to compel his co-sureties to contribute any portion of the amount so paid by said Neely on said judgment?

Something has been said about the question of jurisdiction in cases of this character, but upon that question we regard it as well settled that equity will take jurisdiction in a suit brought by one surety against his co-sureties to compel contribution. In Barton's Chancery Practice (volume 1, p. 216, § 72) we find it said: "To avoid multiplicity of suits, and in order that in one proceeding there may be contribution among the parties, the sureties, as well as the principal debtors, should be made parties," etc., to a suit in equity of this character. Returning then to the question as to whether equity would allow said Neely, under the circumstances of this case, to compel contribution from his co-sureties. In the case of Currier v. Fellows, 27 N. H. 366, we find the court holds that a surety is entitled to the benefit of any security held by his co-surety; and in Brandt, Sur. § 238, p. 334, we find that "it has also been held that the surety who has partial indemnity in his hands, in the shape of property of the principal, can only recover from a co-surety one-half the amount paid by him after deducting therefrom the value of the property;" and as a matter of course, if said co-surety has in his hands sufficient property or money to wholly indemnify him, he can recover nothing from his co-sureties.

The view that I take of this case renders it unnecessary to pass upon the questions raised in argument as to the effect of the execution of the forth-coming bond by said Neely; but I will say that such a bond executed by a surety, in which the principal debtor does not join, would not have the effect of releasing a co-surety who was no party to said bond. I am, however, of opinion that the facts disclosed in this case, as to the intimate business relations existing between said Donahue and the plaintiff Neely, and as to the large amounts of money passing between them at or near the very time suit upon said note was being pressed, show conclusively that said Neely had it in his power to pay off and discharge said note, on more than one occasion, with money in his hands belonging to said Donahue, and that it would be inequitable under the circumstances to allow said Neely to enforce his claim for contribution against his co-sureties. The decree rendered in said cause on the 6th day of September, 1887, must be reversed, and the plaintiff's bill dismissed, with costs to the appellant, Ephraim Bee.

SNYDER, P., and GREEN and BRANNON, JJ., concurred.

(32 W. Va. 463)

FRAME v. FRAME *et al.*

(Supreme Court of Appeals of West Virginia. June 26, 1889.)

SPECIFIC PERFORMANCE—REQUISITES OF CONTRACT—LACHES.

1. A court of equity will enforce a verbal promise made by a father to a son, in consideration of love and affection, to give him land, and make him a deed therefor, if the son, induced by such promise has taken possession of the land and expended on it labor and money in improvements.[1]

2. But if, when such gift was made, the father required the son, in a given time, to put specified improvements on the land, such requirements would be regarded as a condition precedent to the right of the son to demand a deed; and the son, before he could acquire such deed, would have to prove that he put on the land, in the time specified, the specified improvements.

3. When the donor (the father) has put the donee (the son) in possession of the land, and the donee has fulfilled the conditions precedent attached to his gift, and by improvements on the land, acquired the equitable title to the land, a court of equity will regard the donor as trustee for the donee, and the possession of the donee, of itself, conveys notice to the world of his equitable title, and of his right to the legal title.

4. But if the donor sells this land, and the legal title passes into the hands of persons who are purchasers for valuable consideration, without any actual notice of the donee's equity, and knowing that the donor has parted with the legal title,—if the donee, instead of promptly asserting his right to demand the legal title to the land, delays the assertion of such demand for 19 years, and until after the death of the donor and of all others present when the verbal gift was made,—a court of equity will not enforce the making of the legal title to such land to such donee, because of his laches.

5. In such case, even if the rights of a third person had not intervened, a court of equity, if a suit to compel the donor to convey the legal title to the donee was not instituted for 31 years, would not grant relief in such a case, if there was any trouble about the terms of the agreement or the conditions

[1] A parol gift of land, of which the donee takes possession, and on which he makes improvements, is enforceable in equity. Young v. Young, (N. J.) 16 Atl. Rep. 921, and note. See, also, Wallace v. Scoggin, (Or.) 21 Pac. Rep. 558, and note.

Digitized by Google

on which the deed was to be made by the father to the son.

(*Syllabus by the Court.*)

Appeal from circuit court, Braxton county; HENRY BRANNON, Judge.

This was a chancery suit, brought September 12, 1887, in the circuit court of Braxton county. The bill was filed at October rules, 1887, and it alleged that the plaintiff, L. M. Frame, was the son of William B. Frame, deceased, who was a former resident in said county. That the plaintiff lived with his father, and worked, aided, and assisted him on his farm till the plaintiff married, on May 1, 1855. That the said father owned seven or eight different tracts of lands in said county, and, being desirous of compensating the plaintiff for his services and of starting him in life, proposed to him, if he would go upon a certain tract of land, situated on the south side of Elk river, about one mile from Frame's mill, in said county, — containing 100 acres, — and cultivate and improve the same, that he would give him said land, and make him a deed therefor. This tract was granted to said William B. Frame by the commonwealth of Virginia, by patent dated September 30, 1846, a copy of which is filed with the bill, and shows the metes and bounds of this tract. That the plaintiff accepted the proposition, and, on or about May 12, 1855, moved upon said tract of land, and has ever since lived upon said land, claiming, as the bill says, and holding, the same adversely to all the world,—and further alleged that the plaintiff's possession has been open, notorious, and exclusive from that day to this,—a period over 32 years, — and he still owns, possesses, and claims the same. Some years after the plaintiff moved upon said tract of land, his father became the surety of one A. W. Wilson, on a constable's bond, in the month of May, 1868. Being apprehensive that he might be made liable, by reason of such suretyship, for the default of said Wilson, he determined to convey all of his lands to his two sons, John W. Frame and Thomas J. Frame; and accordingly, by deed bearing date the 26th of May, 1868,—a copy of which was filed with the bill,—he conveyed to his said two sons seven different tracts of land, one of the said tracts being the same tract which 18 years previously he had granted to the plaintiff, and placed him in possession of. Why his father, William B. Frame, included the plaintiff's tract of land in said conveyance, the plaintiff is not advised. "Certain it is that it was never intended by his father or by his brothers to deprive him of the ownership or possession of said tract of land, even if they could legally have done so. His said brothers well knew all the facts in relation to the agreement under which he went into possession of said land; well knew his long possession, improvement, and cultivation of the same, and well knew he was entitled to a deed therefor. In fact, they never disputed the plaintiff's right to said land, never attempted to oust him from the possession thereof, never set up any claim thereto, nor did any act in the least tending to assert a claim thereto, except as hereinafter stated. The character of said conveyance was well understood by the said William B. Frame and his said two sons, the said William B. Frame remaining in possession of said lands, except the tract sold to the plaintiff, until his death, and paying taxes therein, except the tract owned by the plaintiff, the taxes upon which were paid by the said plaintiff. It was not until July, 1886, that either of said brothers did any act which in the slightest asserted any claim to the plaintiff's land. On the 1st day of July, 1886, John H. Frame, by deed of that date, conveyed an undivided half of five of said tracts of land, including the tract owned by the plaintiff, to George Goad, trustee, to secure to Jelenko & Bro. the sum of $482.54, evidenced by a negotiable note of that date and payable six months after date, also to secure to Jelenko & Loeb the sum of $536.54, evidenced by note of that date, payable six months after date, with provision that upon default of payment of said notes, or either of them, said trustee should, upon request of the holder of said notes or either of them, sell the said undivided half of said land according to law, for cash. A copy of said deed is here filed as part hereof, marked 'Exhibit No. 3.' The firm of Jelenko & Bro. is composed of the defendants Jacob Jelenko and Gustavus Jelenko, and the firm of Jelenko & Loeb is composed of the defendants William Jelenko and Charles Loeb. At the time of the conveyance by John H. Frame to said George Goad, trustee, the plaintiff was still in the open, notorious, and exclusive possession of said 100 acres of land, and by law the said George Goad and Jacob Jelenko and Gustavus Jelenko and William Jelenko and Charles Loeb had constructive notice of the rights of the plaintiff to said 100 acres of land, and his ownership thereof, and, in addition thereto, had actual notice of such right and ownership. That on the 22d day of August, 1877, the said John H. Frame having made default in the payment of said notes, the said George Goad, as trustee, sold the said undivided one-half of said five tracts of land, including the plaintiff's tract of 100 acres, at public auction, to the highest bidder, at which sale the said defendant Charles Loeb became the purchaser of said undivided one-half of said five tracts of land, including the land of plaintiff, at the price of $700. That the said George Goad is about to convey the same to the said Loeb by a deed as such trustee. The plaintiff says that the said deed from William B. Frame to his sons Thomas J. and John H. Frame, and the trust-deed from the said John H. Frame to the said Goad, constitute a cloud upon the title of the plaintiff to said 100 acres of land; and the deed from Goad to Loeb, when made, will still further cloud his title. He is advised that he has a right to have said clouds removed, and to have specific execution of

Digitized by Google

his said contract, made with his said father, and the legal title to said land conveyed to him. He therefore asks that said contract be specifically executed; that the said George Goad be restrained and enjoined from conveying the undivided one-half of said 100 acres to the said Charles Loeb; that the said John H. Frame, Thomas J. Frame, George Goad, and the parties secured by said deed of trust, be held to have no interest in said 100 acres of land; that the clouds arising from the conveyance hereinbefore set out be removed by this honorable court; that the said John H. Frame, Thomas J. Frame, and George Goad be required to unite in a deed conveying said 100 acres of land to the plaintiff, and that he have such other, further, and general relief as the court may see fit to grant."

The parties defendant to this bill were the plaintiff's said two brothers, and the trustee George Goad, and said two firms secured by said deed of trust, and Charles Loeb, the purchaser of this tract of land at the public sale under the deed of trust. The exhibits referred to in the bill were all filed with it. The following is the answer of Thomas J. Frame, filed December 5, 1887: "To the Hon. Henry Brannon, etc.—Defendant, for answer to said bill, says that he does not desire to controvert the right of the said L. M. Frame to have specific execution of his contract, as set out in said bill, and he here tenders a deed for all his right, title, and interest in the said 100-acre tract of land, and, having answered, asks to be hence dismissed, with his costs. THOMAS J. FRAME." The deed referred to in this answer was filed with this answer, and thereupon this order was made: "Thomas J. Frame this day filed his answer to plaintiff's bill, to which the plaintiff replies generally, and the said Thomas J. Frame, having by his answer tendered a deed for all his right, title, and interest in the tract of 100 acres of land in the bill mentioned, which deed is accepted by the plaintiff, it is ordered that this cause be dismissed as to the said Thomas J. Frame, but be retained for further proceedings against the other defendants; and said L. M. Frame hath leave to withdraw said deed from the papers of this cause."

At the October rules, 1887, all the other defendants other than John W. Frame filed their joint and several answers, which were as follows: "These defendants, for answer to said bill, say that it is true, as alleged in the plaintiff's said bill, that defendants Jelenko & Bro. and Jelenko & Loeb were creditors of John H. Frame in the sums and at the times set out in the plaintiff's bill, respectively, and for which the said John H. Frame, in order to secure them in their respective sums on the ——— day of ———, 188–, conveyed to the defendant George Goad, trustee, his undivided half interest in the five tracts of land in the plaintiff's bill mentioned, situated on Elk river, near Frame's Mill, in Braxton county, among which was a tract containing 100 acres, claimed by plaintiff in his bill filed in this cause. It is also true that the said undivided half interests in the said five tracts of land conveyed to the said George Goad, trustee, as aforesaid, were on the 22d day of August, 1887, by order of the defendants Jelenko & Bro. and Jelenko & Loeb, sold by the said George Goad, trustee, after giving notice as required by law, at public auction, at the front door of the court-house of Braxton county, for cash, to Charles Loeb, at the price of $700.00, he being the highest bidder therefor, which amount was paid on day of said sale by said Loeb. A deed was obtained by said Loeb from said trustee, on 1st day of October, 1887, which is here filed, marked 'Exhibit No. 1,' and made part of this answer. These respondents deny that the plaintiff ever had any title, or semblance of title, to the said 100 acres of land claimed by him in his said bill, or that his possession thereof was adverse and exclusive for the period of time alleged in his bill, or it ever was so held by him for any period of time from the time his said father obtained his grant from the commonwealth of Virginia therefor to the present time. These respondents here expressly deny ever having had any notice, either actual or constructive, of any claim of title by plaintiff to said tract of land, or of any right thereto by him whatever. These defendants, for further answer, say that they are advised and believe and charge that plaintiff never had any contract of purchase with his said father for said 100 acres of land, but that, if he had any such contract, it was without consideration, and cannot affect the title of either George Goad, trustee, or defendant Charles Loeb, to said land; that if the plaintiff ever occupied, resided on, or controlled in any manner said tract of land in the life-time of his said father, it was a mere tenancy at will, and not under a contract of purchase. These defendants also deny that William B. Frame, in his life-time, ever made plaintiff any proposition to the effect that if he (plaintiff) would move upon said 100 acres of land, and improve it, that he would give said land to him. These defendants, having answered fully all material allegations in the plaintiff's bill charged, pray hence to be dismissed, with their costs in this behalf expended, and they will ever pray," etc.

The exhibits referred to in this answer were filed as exhibits with it. Depositions were taken both by the plaintiff and by the defendants. The plaintiff proved by one witness, a nephew of William B. Frame, that the plaintiff, L. M. Frame, had had possession of and lived upon the 100-acre farm named and described in the bill for 31 years, —ever since 1856. That he, the witness, went to the residence of plaintiff's father one morning in 1856, and William B. Frame told him he had given theplaintiff, "Lemuel, a farm yesterday morning," and he pointed out this 100-acre tract, which was in sight,

Digitized by Google

"across the river," as the farm he had given him; and he said he had given his other lands to John and Thomas, his sons. He said that "Lemuel could go to work, or starve." He said they would have to give a woman who was in the house on this farm two bushels of corn in order to get her to leave and give up the house to Lemuel, so he could move in. Lemuel Frame, the plaintiff, moved on the place a week or 10 days afterwards, and has been in the occupation of it ever since. The witness proved, also, that he had since then gotten timber trees off this tract of land. He got the timber trees of the plaintiff, L. M. Frame, who always claimed this as his farm. These trees were sawed for the witness at the mill of the plaintiff's father, William B. Frame, who knew where these trees came from, but set up no claim to them. He never disputed about them, and never claimed that the plaintiff, L. M. Frame, did not own this tract of land, as he claimed. The members of William B. Frame's family,—his wife, sons, and daughter, and a son of the plaintiff's family,—who were all examined, all testified they had never heard of William B. Frame's giving his sons John H. Frame and Thomas J. Frame any lands in 1856, as had been testified to by their cousin. But the daughter testified that she had lived with her father in 1856, up to 1864, and at that time she heard him say frequently he had given L. M. Frame the farm he claimed in this suit; that he moved on the land within a month after it was given to him, and has lived on it ever since. Her father always called it "Lemuel's place." The widow of William B. Frame, whom he married in 1864, proves the same statement that she heard made by William B. Frame frequently. She never heard him say he had given any other lands to his other children in 1856. The plaintiff himself testified that he had lived on the 100-acre farm in controversy since the 18th or 20th of May, 1856; that his father gave it to him, and he moved on it and occupied it as his own, and he did not occupy it as a tenant of his father. His occupancy of it has been open, notorious, and visible. He has cultivated the land, cleared it, fenced it, and cut saw-logs from it. He cleared and fenced on it some 72 acres. The whole of this was fenced prior to 1871. He has planted on it 800 apple-trees, and some 50 peach-trees, and, while the house he lived in was on the land when he went there, he had put up another house on the land; also, a log stable. John H. Frame and Thomas J. Frame, his brothers, to whom he had conveyed this and other tracts of land in 1868, frequently got timber trees off of the land, buying them from him and not disputing his ownership of the land. John H. Frame had in this way bought timber from him off of this land in 1868 and 1869. The plaintiff's son proved that about 18 months ago his father, Lemuel M. Frame, had offered to sell this farm of 100 acres to one T. A. Reip at $50 for the house and garden, and $1 apiece for the bearing apple-trees and walnut-trees. Witness told John H. Frame of this offer, which he had declined. John H. Frame said witness' father had better have reduced the price of the trees to 50 cents, rather than miss the sale. He knew of John H. Frame on several occasions buying a stick of timber off of this tract of land and paying witness' father for it. He proved his father had lived on this land from his earliest remembrance, and he was now 30 years old. He always claimed the farm as his own, and every one spoke of it as his father's farm. He had cleared and inclosed about three-fourths of it. On the other fourth was a maple-sugar orchard of 15 or 16 acres, from which his father made sugar every year. He knew of his father more than once selling a stick of timber off of this land to his grandfather, William B. Frame. He bought one of these sticks of wood about 1866. William B. Frame died in 1876.

It was also proved by other witnesses that the plaintiff, L. M. Frame, had lived on this tract of land some 30 years; that during all that time he claimed it as his own farm; that, although it was taxed to his father, William B. Frame, till 1868, and after that to John H. Frame, and Thomas J. Frame, yet the taxes were always paid by plaintiff, L. M. Frame. He testified that about 1882 he refused to pay the taxes on this tract of land, unless the sheriff made out a separate receipt for this tract, and did not have it as it had been on the receipt for the taxes of all the lands owned by John H. Frame and Thomas J. Frame, and after that a separate receipt was made out by the sheriff for this tract of land. The defendants Jelenko & Bro. and Jelenko & Loeb were wholesale merchants, doing business in Charleston, Kanawha county, W. Va. John H. Frame was a retail merchant at Frametown, Braxton county, W. Va. He purchased goods of these two wholesale firms in 1882, and continued thereafter to do so. When he commenced doing business with these firms they made inquiry of the clerk of the county court of Braxton with reference to his financial condition, and what real estate he owned, and with what personal property he was taxed, and whether there were any liens on his property. They were informed that he owned a moiety of the seven tracts of land conveyed to him and his brother Thomas J. Frame. They included the 100-acre tract now claimed by the plaintiff, L. M. Frame. At the foot of a copy of this deed for these seven tracts of land from William B. Frame to Thomas J. Frame and John H. Frame was this memorandum, sent to a member of the firm by said county clerk: "The only lien on record against the above, so far as I have been able to find, is a judgment lien against John H. Frame, in favor of Philip Frankenberger, for $143.90, with interest from the 13th day of June, 1885, and $1.90 costs. I find that John H. Frame is assessed on the personal property book of this county with the aggre-

Digitized by Google

gate sum of $96, consisting of 3 head of cattle, at $40; 2 hogs, $4; 1 watch or clock, at $2; farming implements, $5; household, etc., $45; I have given the boundary to each tract as it is in the deed above mentioned."

A member of one of the firms, Charles Loeb, went up to Braxton county, to try and collect the amount due them for boots and shoes they had sold to John H. Frame, which amounted to $536.54. He said he could not pay it, but was willing to secure them on his real estate, if they would give him six months' longer credit. To this Charles Loeb, one of the members of said firm, agreed; whereupon John H. Frame gave his note for the balance due the firm, payable in six months, and a deed of trust dated July 1, 1886, on an undivided moiety of five tracts of land, including the 100-acre tract claimed by the plaintiff. "When I made this arrangement for my firm, Jelenko & Loeb, I also, as the agent of the firm of Jelenko & Bro., wholesale dry-goods merchants in Charleston, settled the balance due them from him to Jelenko & Bro., bought of them by John H. Frame. This balance was $482.54, for which he executed his note to Jelenko & Bro., dated July 1, 1886, payable in six months, which was secured by said deed of trust on said five tracts of land, including the 100-acre tract claimed by the plaintiff." This deed was executed, and duly acknowledged and recorded in the county court clerk's office of Braxton county, on July 2, 1886, both by John H. Frame and his wife, Amanda Frame. The trustee in this deed of trust, George Goad, pursuant to the provisions in this deed of trust, sold the said one undivided moiety of these five several tracts of land, and Charles Loeb became the purchaser thereof for $700, which being paid in cash, said trustee executed and delivered to him a deed for one undivided moiety of these five tracts of land, including this 100-acre tract claimed by the plaintiff. This deed is filed with the answer of the defendants, it having been recorded. A lawyer, on behalf of Lemuel M. Frame, when these lands were being offered for sale and before they were sold, publicly announced that the party purchasing this 100-acre tract claimed by Lemuel M. Frame could not get any title thereto, as he had claimed the land for 30 years, and lived upon it, and the trustee, Goad, said: "Certainly, you can only get such title as is in me."

J. F. Brown, for appellants. *W. E. R. Byrne*, for appellee.

GREEN, J., (*after stating the facts as above.*) The first question presented by this record is, will a court of equity specifically enforce in any case, or against any one, a verbal gift of land from a father to a child, as in some cases it is difficult, if not impossible, in principle, to distinguish gifts and sales? I will, before considering directly this question, state briefly the law in reference to the specific enforcement of verbal sales of land, and the principles on which it is based. By the statute of frauds, passed in 1677, and a similar statute to be found wherever the common law prevails, "No action shall be brought upon any contract or sale of land, tenements or hereditaments, or interest in or concerning them, unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing and signed by the party to be charged therewith, or by some person thereunto by him lawfully authorized." See Code W. Va. 1887, c. 98. The English courts, very soon after the passage of their statute of frauds, took the view that, while the chancery courts were as much bound by this statute as the common-law courts, yet, as it was the peculiar province of a chancery court to relieve against fraud, a court of chancery, despite this statute, would specifically enforce a verbal contract for the sale of land when the refusal to execute the contract would itself amount to the practicing of fraud by the defendant on the plaintiff. In so doing, they said, they were engrafting no exception on this statute, but simply proceeding to prevent fraud upon general principles which prevailed universally in courts of equity, and it would never do to so construe the statute of frauds, as to promote instead of suppressing fraud, as it was intended to do. See Browne, St. Frauds, § 457. If the defendant has partly performed his part of such contract, and his act of part performance is incapable of compensation in damages, it would obviously be fraud on the plaintiff to permit the defendant to refuse to execute such contract because it was verbal; and in such case a court of equity will compel the specific performance of such verbal contract. If, for example, the vendor of real estate, by a verbal contract, has delivered possession of the land to the vendee, this will entitle the vendee who is in possession of the land to compel a specific performance of the contract by making a deed therefor on the payment of the purchase money; for otherwise the vendor might sue the vendee as a trespasser, and to permit him to do so after he has put the vendee in possession under the verbal contract would be to permit him to take advantage of his own wrong, in repudiating his obligation, and it would be punishing the vendee, who has complied with his own obligation. If the vendee has taken possession of the land, the courts regard that the wrong done by compelling him to surrender the possession of it as a trespasser is such an injury as could not be compensated in damages, and hence there is no other way of punishing the recalcitrant vendor for committing a fraud on the vendee, who has complied with his contract, by treating him as a trespasser. The authorities supporting these views are numerous, both in England and America. See 2 Lomax, Dig. p. (40,) 55; 1 Story, Eq. Jur. § 761; Wat. Spec. Perf. § 270. It is also settled, both in England and America, that, if the vendee under a verbal agreement for the purchase of real estate expends labor or

Digitized by Google

money in improving the same, the contract is thereby partly performed, and the statute of frauds has no application to it. In such a case the improvements by the vendee in possession constitute valuable and equitable consideration, and entitle him to specific execution of the contract which he complies with fully on his part. There is, then, *First*, the verbal agreement; *second*, the delivery and taking possession of the estate in accordance with the agreement; and, *third*, the expenditure of money in consequence and in faith of the agreement; and, *fourth*, a complete compliance with the agreement by the vendee, by the payment of the entire purchase money. If the first of these circumstances alone exists, the statute of frauds denies all remedy. When the second ensues, the vendee has partly performed his contract, and has taken a step which would render it a fraud on the part of the vendor to divest him of his possession and refuse him a deed. When the third circumstance follows, in expenditures to improve the land, all the powers of equity are summoned into action to protect the vendee on several grounds, each sufficient and each distinct in its nature. It will then, when the vendee fully complies with his contract, compel specific execution by the vendor —*First*, because it would be a fraud in him to refuse it; *secondly*, he would profit by his own fraud, in acquiring the improvements with the land he sold; and, *thirdly*, because the vendee has introduced a valuable consideration, which, if he lost it, could not be restored to him, and is not ordinarily of a nature to be compensatory in damages. These views are well sustained by both English and American authorities. See 1 Sugd. Vend. (8th Amer. Ed.) p. (151,) 226; 1 Story, Eq. Jur. § 761; Browne, St. Frauds, § 487*a*; Wat. Spec. Perf. § 280; Rhea v. Jordan, 28 Grat. 683; Tracy v. Tracy, 14 W. Va. 243. If a donee, being a child, under a parol gift of real estate by a father, take possession and expend money or labor to improve it as against the donor, he stands upon the same footing as a purchaser for a valuable consideration. The statute of frauds has no application to the transaction, and equity will compel its specific performance by requiring him to execute his deed to consummate his gift. We will now consider parol gift specially. If A. points to a house and lot, and says to his child, B., "I give you this house and lot," and B. says, "I accept the gift," and nothing more passes in reference to the matter, a court of equity will take no cognizance of it. B., if he had paid A. for the house and lot, without taking possession, could not compel him to execute a deed, because he could have his remedy in recovering the money he had paid, with interest, in a court of law. *A fortiori*, a court of equity will not entertain B. when he has paid nothing; and, if B. should sue at law, he can recover nothing, because A.'s promise or gift was without consideration,— a *nudum pactum*,—and B. has suffered no damages. The donee has not changed his situation, and there is no basis for an appeal to a court of equity to interpose. But suppose B. enters the house and makes it his home, and goes on to act as owner, and improves the premises by the expenditure of money or labor. He digs ditches and enriches the land. He builds fences for its permanent protection. He plants out trees, clears the land and lives in the house. These acts change the situation and fix the gift. Why? Because valuable consideration has now entered into the transaction. The agreement of gift has been partly performed, by acts which cannot be undone. A valuable consideration may be a detriment to the promisee or a benefit to the promisor. What was in its inception? A promise sustained only by a good consideration—the love and affection of a father to a child—has by such acts become in effect a promise sustained by a valuable consideration.

It may be regarded as settled law in this state and in Virginia that a verbal donee of land—a child, who, under the verbal gift, has taken possession of the land and improved it —has a right to demand in a court of equity a specific performance of the contract by the execution of a deed by the father, thereby consummating his verbal gift. This was so held in Shobe's Ex'rs v. Carr, 3 Munf. 10, decided as long ago as 1811, and this case has been repeatedly followed or recognized as law by numerous Virginia decisions ever since. See Darlington v. McCoole, 1 Leigh, 36; Reed's Heirs v. Vannorsdale, 2 Leigh, 569; Pigg v. Corder, 12 Leigh, 69; Cox v. Cox, 26 Grat. 305. There are also numerous authorities in other states to the like effect. Freeman v. Freeman, 43 N. Y. 34; Lobdell v. Lobdell, 33 How. Pr. 347; Shepherd v. Bevin, 9 Gill, 32; Young v. Glendenning, 6 Watts, 510; Galbraith v. Galbraith, 5 Kan. 409; Kurtz v. Hibner, 55 Ill. 521; McLain v. School-Directors, 51 Pa. St. 196; Neale v. Neales, 9 Wall. 1; Hardesty v. Richardson, 44 Md. 617. If, however, a father give his child verbally a farm, and put him in possession thereof, but he neither spends money nor labor in improving the land, it is very questionable in Virginia and in West Virginia whether the child, in a court of equity, could compel the father to make him a deed. It was so decided in the cases of Stokes v. Oliver, 76 Va. 72, and Keffer v. Grayson, Id. 517. In these cases it was held that the love and affection of a father to a child is not enough, of itself, to warrant a decree for a specific performance, even when the agreement to make the gift is in writing, and the child in possession of the farm. But the contrary was held by this court in Marling v. Marling, 9 W. Va. 79. But, in delivering the opinion of the court, in that case, on page 95, I express my own opinion, that, while such agreement need not be under seal, it must be a formal agreement, in writing, duly delivered as such, and while in such case, the consideration being good, though not valuable, a court of equity could properly dis-

Digitized by Google

pense with the seal to it, yet it could not dispense with its being a formal agreement in writing, and a verbal agreement to give a farm to a child could not be enforced specifically, even when the child had been put in possession of the farm, but such agreements of gift, when performed in part by putting the donee in possession, have been enforced in some states. See TILGHMAN, C. J., in Lessee of Syler v. Eckhart, 1 Bin. 380; Big. Fraud, 386; Smith, Eq. 254, 255; Mahon v. Baker, 26 Pa. St. 519. And it must be admitted that the reasoning which supports the enforcement of a verbal contract of sale partly performed by the simple delivery of possession appears equally applicable when there is a verbal gift of land by a father to a child, accompanied by the delivering of the possession of the land. See 1 Story, Eq. Jur. § 761, and articles of John W. Daniel in the April, 1883, number of Virginia Law Journal, where the question we are considering is elaborately discussed in an able article. Many of the views taken in said article I have adopted in this opinion.

I have thus far been discussing the right of a donee or vendee of real estate by a verbal agreement to enforce specifically such verbal agreement when the donor has put the donee in possession of the land. We will now consider whether the law is modified when the vendee or donee in possession of the land seeks to have his contract specifically enforced against a subsequent purchaser for valuable consideration of the donor, or against a judgment creditor of the vendor or donor. In the first place, it must be observed that when the vendee or donee is in possession of the land, openly and notoriously living upon it, for instance, there cannot be a purchaser of the land for valuable consideration without notice from the vendor or donor, because such possession by the vendee or donee of itself conveys notice to the whole world of the equitable title of the vendee or donee, and of his right to the legal title; the possession of realty being the fact of most comprehensive and far-reaching consequences that bears upon its title. The perfect legal title was originally conferred by this delivery of possession or livery of seisin. A fee was not perfect without this delivery of possession, but, if accompanied by such delivery of possession, it was perfect, even though it was a mere verbal transfer. The earth has been described as that universal manuscript, open to the eyes of all. When, therefore, a man proposes to buy or deal with realty, his first duty is to read this public manuscript; that is, to look and see who is there upon it and what are his rights there. And, if the person in possession has an equitable title to it, he is as much bound to respect it as if it was a perfect legal title, evidenced by a deed duly recorded. See 2 Sugd. Vend. 866; Sedg. & W. Tr. Title Land, § 717; 1 Story, Eq. Jur. § 400; Big. Fraud, 293, 294; Floyd v. Harding, 28 Grat. 410; Merithew v. Andrews, 44 Barb. 207; Grimstone v. Carter, 3 Paige, 421; Haddock v. Wilmarth, 5 N. H. 181; Knox v. Thompson, 1 Litt. (Ky.) 350; Tuttle v. Jackson, 6 Wend. 213; Parks v. Jackson, 11 Wend. 442; Morgan v. Morgan, 3 Stew. (Ala.) 383. When the sale or gift of the land is by a verbal agreement, the terms of such agreement must be definite and made out with reasonable certainty. See Wright v. Pucket, 22 Grat. 370. By reasonable certainty is not meant a mathematical certainty; but what is meant is that the evidence adduced must leave the court satisfied and convinced as to the terms of the agreement, and it must be so definite as to guide the court safely into carrying it into execution. The plaintiff who seeks a specific performance of a verbal contract or gift of land, or, indeed, who seeks the aid of a court of equity to enforce any equitable right, must show that he has used reasonable diligence, and that his claim is not a stale claim. See 1 Bart. Ch. Pr. § 23. As there stated, it is a familiar doctrine of the courts of equity that nothing can call them into activity but conscience, good faith, and reasonable diligence. Where these are wanting, the court is passive, and does nothing.

We will assume, first, that a verbal gift of this 100 acres of land, patented to William B. Frame September 30, 1846, was by him, about May 12, 1856, made to his son Lemuel M. Frame, and the donee then took possession of this 100 acres, exercising an undisputed ownership over it from that time, selling timber off it to his father and others, and had lived upon it and cleared it up and cultivated it ever since, and that considerable time and money had been spent by him in improving this tract of land. These facts the counsel of the plaintiff, L. M. Frame, regard as clearly proven. If they are really proven, with the requisite degree of distinctness and certainty, then, on the authorities we have cited, it would seem clear that the son of L. M. Frame had a right to specifically enforce this agreement against his father, William B. Frame, provided he used reasonable diligence in instituting his suit, and did not permit his claim to become too stale before he brought his suit. It is claimed by the plaintiff, L. M. Frame, that he was in the exclusive and uninterrupted possession of this farm, claiming against all the world, and especially against his father, the donor,—actually selling him timber off this land. It was unnecessary for him to institute this suit while this state of things existed. The donee, L. M. Frame, was not called upon to act, no one disputing his right to the same, and he having held possession and use of it. There is much strength in this view; and, so long as this state of things existed, the court might be disposed to excuse the plaintiff, L. M. Frame, for not instituting this suit for a specific performance. How long did this state of things exist? The record shows until May 26, 1868. But not thereafter, for William B. Frame, the father, exercised the most decisive act of ownership over this 100-acre tract; for on that day, for a consideration stated on

Digitized by Google

the face of the deed to have been $500, he and his wife conveyed to their sons Thomas J. and John W. Frame seven different tracts of land, including the tract of 100 acres claimed to have been given verbally to said L. M. Frame 13 years before. This put it entirely out of his power to make a deed of this land to L. M. Frame, knowing that he could not acquire a valid title for this tract of land, on which he was living, except by instituting in a court of equity a suit for the specific performance of the verbal agreement to give it to him, made by his father some 13 years before. He never could have acquired a good title to this tract of land by living upon it, claiming it as his own, and exercising rights of ownership over it, no matter how notorious, undisputed, and exclusive such possession was. For, as he entered upon the land by permission of his father, who had the legal title, his possession was admitted in subordination to his father's title, and was not, therefore, and could not become, adversary to his father's title, or the title of those claiming by deed under his father. See Hudson v. Putney, 14 W. Va. 561. He knew, therefore, as early as June, 1868, that if he wanted a title to this 100-acre tract, on which he lived, he would have to get it by asking a court of equity to compel the legal owners to convey the land to him, as the true equitable owner. It was his duty, therefore, if he did not mean to abandon his equitable title, to have instituted this suit in a reasonable time after January 1, 1868. It may be said that he did not know that his father then conveyed this tract of land to his two brothers. But though, perhaps, we cannot assume that he knew this deed was made to his brothers by his father simply because it was promptly put on record, yet there is his own statement in his deposition of facts, which shows that he did know of the making of this deed to his brothers, for he says he always paid the taxes on this land, though it was taxed in his father's name until 1868, and then in the name of his brothers; that the tax-bill was thus made out, and he paid the taxes on this tract, though the tax-bills were made out against his brothers, and that he refused to pay them after a while, if not differently made out. He was thus reminded each year by these tax-bills, that the legal title of this land was in his father till 1868; after that, in his brothers. It was clearly his duty, when it was thus made known to him that he could not acquire legal title to this land except by suit, for him to have brought such suit with reasonable promptness, especially as 13 years had already expired since he claimed the equitable right to this land. But he did not institute such suit for more than 19 years, and some 32 years after the alleged verbal promise of his father to give him this land. In the mean time his father had died, and one of his brothers, to whom, in 1868, his father had conveyed this land, and the records of the clerk of the county court showed that, upon the fact that he owns this land, this brother had acquired a credit, and been trusted, and, on his giving security to pay debts so owed, in the shape of a deed of trust on his interest in this and other lands, the trustee had sold said interest in said land at public auction for cash. There is a strong contrast between the care and diligence of the plaintiff in protecting his rights and that of the defendants. Before they extended credit to the plaintiff's brother, and took this deed of trust of him, they had the clerk's records in the county court of Braxton, where his brother lived, examined, to ascertain what lands he owned, and whose liens were upon them, and all they now ask is that, as they have used every precaution in conducting their business, the court will not deprive them of the security they took by setting up an equitable title of the plaintiff, of which they had no actual notice and of which the plaintiff must have, in the nature of things, known that they could take no notice. They were wholesale merchants, living remote from Braxton county, in Charleston. The defendant John H. Frame was engaged in the mercantile business in the county of Braxton, and his brother, (the plaintiff,) who lived near him, must have known that in conducting such business he would buy his goods of wholesale merchants, at a distance, and thus incur debts, and such creditors would have no means of knowing his pecuniary condition, except as it was shown by the records in the clerk's office of the county court. So, by his neglect in bringing the suit the plaintiff must have known he was furnishing his brother John H. Frame the means of imposing on the wholesale merchants, of whom he was buying his goods on credit, as to his pecuniary condition. Just what might have been expected did occur, and loss must now be sustained. Should this loss be sustained by the plaintiff, who was so grossly careless, or by the defendants, who acted with caution and diligence? *Vigilantibus non dormientibus jura subveniunt.* But the staleness of the plaintiff's claim is not the only difficulty in making out this case, as presented by this record. I have heretofore assumed that he proved the verbal gift of this 100 acres of land from his father in 1856. But has he proven the agreement to make this gift with the requisite degree of certainty and distinctness, such as a court of equity should require, especially when it is borne in mind that the plaintiff, who alleges this verbal agreement, asks to have it specifically enforced, to the obvious loss of purchasers from his brother for valuable consideration, without any actual notice of such verbal gift? The bill alleges that the plaintiff lived with his father, and worked and assisted him on his farm, until his marriage, which occurred on May 1, 1855; that his father at that time was the owner of seven or eight different tracts of land in Braxton county, W. Va., and being desirous of compensating the plaintiff for his services, and starting him in life, proposed to him that if

Digitized by Google

he would go upon a certain tract of land, situated on the south side of Elk river, about one mile above Frame's mill, in said county, containing 100 acres, and cultivate and improve the same, he would give said land to him, and make him a deed therefor. The plaintiff accepted this proposition of his father and on or about May 12, 1855, moved upon said land, and has since held and claimed the same adversely to all the world. This possession has been open, notorious, and exclusive from that day to this,—a period of over 32 years. "Some years after the plaintiff moved on this land,—in the month of May, 1868,—being apprehensive that he might be made liable by reason of his suretyship of a constable named Wilson, because of his default, he determined to convey all of his said land to his two sons, the defendants Thomas J. and John H. Frame. He made them a deed, duly recorded, a copy of which is filed with the bill. On the face of the deed the consideration purports to be $500 cash." This verbal agreement by the plaintiff's father to give him this tract of land was not an absolute promise to give him the land, and make him a deed therefor, but was only a conditional promise that he would do so if the plaintiff (his son) would cultivate and improve the same. In what way he was required to improve the same is not stated in the bill, if it were specified by the father at the time. But, as the bill states that "the plaintiff [the son] accepted the proposition, moved upon the land, erected a house thereon, and commenced to cultivate and improve the same," it is very probable that the building of a dwelling-house on this farm, as a residence for his son and his family, (he having married,) was an improvement required of the son by the father. This is the more probable as we may infer from the proof in the case that the house then on the land was a very indifferent one,—in fact, one not fit to be occupied by his son's family as their dwelling. But even this very indifferent house was then occupied by a woman, who might not surrender the possession of it. There is no direct proof as to the character of this house that was on the land, but the plaintiff's son proves that about a year before this suit was brought his father (the plaintiff) offered to sell to T. A. Reip the house and garden at $50, and his brother John said his father should have taken less than he asked for it. We may, I think, fairly infer from this that the house was hardly fit for a man and his family to occupy. The plaintiff testified he built a house on this land. But I assume it was a very poor house, as he continued to live in a house worth less than $50. When he built this house does not appear. It only appears that the son (the plaintiff) moved into the house on the place when the gift was made by the father. This, the proof shows, was not at the time he was married, on May 1, 1855. There is nothing said about his marriage in the evidence. If the agreement was that the father would make the deed to the plaintiff, (the son,) if he would build a residence on the farm and improve it, as the bill says, such an agreement was a conditional agreement.

The building of the residence and improving the farm being a condition precedent to the son's acquiring a right to demand a deed of the father, and if a time was named when the house was to be built, if the son failed to build the house in the specified time, or of the character named, he lost forever a right to demand a deed of the father. Keffer v. Grayson, 76 Va. 517. Some 12 years after this parol agreement to make a gift on certain conditions to his son, (the plaintiff,) the father actually conveyed this land to two other sons. "Why he did so," the bill says, "the plaintiff is not advised. Certain it is that it was never intended by his father or his brothers to deprive him of the ownership or possession of this tract of land." It seems to me, a probable explanation of the conduct of the father and brothers to the plaintiff is that, he having failed to comply with the condition on which only the father was to convey him the land,—that is, as I surmise, to build in a certain specified time a house of a particular character,—he had no right to demand a deed of his father, and his father was at liberty to convey it to his other sons; and this he did because of the failure of the plaintiff to comply with the condition imposed on him by his father, the plaintiff, and his family, after 12 years, still living in a house worth less than $50. The answer of the defendants to the appellee's bill denied this verbal gift by the father to his son (the plaintiff) of this land. This put on him the burden of proving this parol agreement of his father to give him this land; and the law, we have seen, required him to prove the agreement with definiteness and accuracy. Has this been done? It seems to me, it has not. No one who was present when the alleged verbal agreement was entered into by the father and son for the gift of this tract of land testifies in the case to what then transpired, or as to the terms of, or conditions attached to, the gift. That it was a conditional agreement we only learn from the allegations in the bill. There is not one particle of evidence showing what the terms or conditions of this gift were. The whole proof consists of subsequent admission by the father that he had given this land to his son (the plaintiff) or admission by conduct or by acts that he regarded this farm as belonging to his son (the plaintiff.) But such statements and conduct are what would naturally have occurred had the verbal gift of this farm to his son (the plaintiff) been a conditional one, such as is set out in the bill, or such as I have above suggested. Naturally, the father would have expected the condition precedent attached to the gift would in good time have been complied with by the son, and the gift thus perfected; and, anticipating that this would be the case, the father would naturally speak and act as if this farm belonged to his son,

Digitized by Google

and though he had no right to demand a deed for this farm unless he complied strictly with the conditions precedent to the gift, whatever they were. The most direct and satisfactory evidence of this verbal agreement was deposition of a nephew of the father, giving what was said casually by the father to the witness the day after this verbal gift of this farm to his son, (the plaintiff.) This we will analyze. He says in his deposition taken October 17, 1887: "L. M. Frame, the plaintiff, has resided on this farm of 100 acres about 31 years. I went to his father's, William B. Frame's, one morning, and he said to me: 'I have made way with my land.' I said, 'Have you?' and he said, 'Yes. I gave Lemuel a farm yesterday,'—and he pointed to the 100-acre farm across the river as the one he had given him. He said he let John and Tom have the balance. He had owned six or seven tracts of land. He said: 'Now Lemuel can go to work, or starve.' He said too, they would have to give Nancy Jones, to get her out of the house, two bushels of corn, before Lem could move in." Though this witness is so definite as to what was said then, still it is obvious that his testimony is far from being satisfactory. It gives the details of a casual conversation in which the witness had had no interest and which occurred some 31 years before. We know there must have been very substantial errors in it. For instance, the bill does not pretend that William B. Frame gave all his land to his three sons at that time, in 1856; but it says he gave this one farm of 100 acres to his son (the plaintiff) then, and the balance of his land to his two other sons, John and Tom, some 12 years afterwards, and not one member of the family, or a single other witness, ever heard of any gift at that time of any of his lands by William B. Frame to any of his children except this 100 acres to his son, (the plaintiff.) This, I suppose, was a mistake made by the nephew as to what his uncle, William B. Frame, then said to him. He heard this many years afterwards. This witness said the father said, "Now Lemuel," (the plaintiff,) "must go to work." This does not look as if the gift was made, as stated in the bill, "to compensate the plaintiff for his past services, and to start him in life." He had lived with his father, but we may infer from what his father said that he did not think his past services deserved compensation, but rather considered that he had heretofore supported him in idleness, and he proposed to do so no longer, but he must "go to work or starve." There is in this conversation corroborative evidence of the small value of the house on this 100 acres of land, for it was supposed Nancy Jones would let the son move into this house, and she would give it up, for the trifling compensation of two bushels of corn. She could not have regarded the house at all desirable to live in, if she could surrender it so easily. This conversation took place before the son (the plaintiff) had taken possession of this farm, and when, of course, the conditional gift named in the bill was imperfect, and when, of course, the son had no right to demand a deed of the father; and, though the statements and acts of the father subsequently show simply that he had given his son (the plaintiff) this farm, and were made after he had taken possession, yet none of them are inconsistent with the gift being conditional and the condition not complied with, and this, one suspects, was the case, from his father having some 12 years afterwards made to two other sons a deed for this farm. It seems to me, therefore, that the plaintiff has failed to show with the requisite degree of distinctness and accuracy the terms of the verbal agreement made by his father, giving him this land, because of the great lapse of time (31 years) before the institution of this suit.

The court below ought to have dismissed his bill at his costs. The court below, obviously, by its order made December 5, 1887, properly dismissed the bill as to the defendant Thomas J. Frame, he tendering with his answer a deed to the plaintiff for his moiety of the land, which the plaintiff was willing to accept, but the court below erred in its decree of May 2, 1888, specifically enforcing said alleged verbal contract against the other defendants. This decree must be set aside, annulled, and reversed, and the appellants must recover of the appellee, L. M. Frame, their costs in this court expended, and this court, entering such order as the court below should have done, must dismiss the bill of the plaintiff, and the defendants below, other than Thomas J. Frame, must recover of the plaintiff below their costs expended in the court below.

SNYDER, P., and ENGLISH, J., concurred. BRANNON, J., absent.

(32 W. Va. 628)

CHENOWITH *et al.* *v.* RITCHIE COUNTY COURT.

(*Supreme Court of Appeals of West Virginia.* June 28, 1889.)

COUNTIES—CONTRACTS—ACTIONS—EVIDENCE—APPEAL.

1. Where a county court made a contract for the construction of a bridge in accordance with certain specifications attached to and made part of the contract, in a suit by the contractors to recover a balance claimed to be due them on said contract, after the work was completed and received by the county, as they claim, the plaintiff must show affirmatively that they have complied with said contract and specifications, or that said work has been received, before they will be entitled to recover.

2. If the plaintiffs themselves offer in evidence an order of the county court, which shows that the county court acted upon the report of the committee appointed to superintend the building of said bridge, which stated that it would take all that remained unpaid to make good certain deficiencies in said work, and shows on its face that said court declines to receive and pay for said work, said order is competent evidence upon the question as to whether said work had been received by the county or not. Following Kinsley v. Monongalia Co., 7 S. E. Rep. 445.

Digitized by Google

3. When a bill of exceptions contains a certificate of all the testimony offered, instead of all the facts proved, the court cannot reverse the judgment of the court below for refusal to set the verdict aside as contrary to evidence, unless by rejecting all the conflicting evidence of the exceptor, and giving full force and credit to that of the adverse party, the decision of the court below is plainly wrong.

(*Syllabus by the Court.*)

Error to circuit court, Doddridge county; JOHNSON, Judge.

Okey Johnson and *H. Peck*, for plaintiff in error. *R. S. Blair* and *H. C. Showalter*, for defendants in error.

ENGLISH, J. This was an action of *assumpsit* brought in the circuit court of Ritchie county by Eli Chenowith and O. S. Fought, who sued for the use and benefit of W. H. Thomas and O. S. Fought, against the county of Ritchie, to recover a balance of $798.15 alleged to have been due on the 29th day of August, 1884, upon a contract entered into between A. C. Barnard, as president of the county court of Ritchie county, and said Eli Chenowith and O. S. Fought, for the construction of a bridge across the North Fork of Hughes river, near the house of E. R. Taylor, to be completed on the 1st of October, 1884, in accordance with specifications accompanying and referred to in said agreement. This case seems to have been twice before a jury in the county of Ritchie, and, they failing to agree for cause shown to the court, it was transferred to the county of Doddridge, in which county a trial was had, which terminated on the 1st day of December, 1888, in a verdict for the plaintiffs for the sum of $1,002.30, with interest thereon from that date, and judgment was rendered against the defendant for that amount in said court. The defendant by its counsel moved to set aside the verdict of the jury, and grant it a new trial, which motion was overruled; to which action of the court the defendant excepted, and prayed that the evidence given in the cause might be certified and saved to it as a part of the record, and that certain exceptions taken by the defendant to rulings of the court might be saved to it as part of the record in the cause, which was accordingly done, and from said judgment and rulings of said court the defendant applied for and obtained a writ of error to this court.

The first exception relied upon by the defendant, as constituting error in the ruling of the court upon said trial, was in allowing copies of said contract and specifications to be given in evidence to the jury, and, although we find in the second volume of Greenleaf on Evidence, p. 9, § 11, the author says, "A further preliminary observation may here be made applicable to every action founded on a written document, namely, that the first step in the evidence on the side of the plaintiff is the production of the document itself," yet our statute (chapter 130, Code, § 5) seems to have changed the common law by providing that "a copy of any record or paper in the clerk's office of any court, * * * attested by the officer in whose office the same is, may be admitted as evidence in lieu of the original," etc. I think, therefore, the court committed no error in admitting copies of said contract and specifications to be read as evidence before the jury, especially when the order of the county court awarding the contract to construct said bridge to Chenowith and Fought, and accepting their bond for the performance of the same, directed that said bond and contract be filed in the office of the clerk of said county court, and being so filed the clerk was authorized to make a certified copy of the same, and said certified copy was doubtless the best evidence the plaintiff could produce of said contract.

The second error relied upon by the plaintiff in error is that the court erred in admitting an order of the county court of Ritchie county appointing E. J. Taylor, E. R. Taylor, and James M. Wilson a committee to advertise for sealed bids for an iron bridge or wooden arch bridge to be erected across the North Fork of Hughes river, near the residence of E. R. Taylor, prescribing the time that notice should be given, and requiring said committee to report their proceedings to the court, when the court would decide the character of the bridge to be built. We find, however, by reference to the case of Kinsley v. Monongalia Co., 31 W. Va. —, 7 S. E. Rep. 445,—which was a similar case to the one under consideration, Kinsley having brought an action of *assumpsit* against said county to recover for his services rendered in constructing a bridge,—this court, in delivering its opinion in that case, says: "It is also insisted that the court erred in refusing to admit in evidence an order of the county court. A number of orders were properly admitted, such as the order appointing viewers; the order appointing commissioners to contract for the work; the order requiring certain money to be paid to the contractor," etc. Now, it will be perceived that the order to which said second exception refers was an order appointing a committee to advertise for sealed proposals, and we think it is almost identical with the order which was held to be properly admitted in said last-named case, that it is a link in the plaintiff's evidence which is necessary to make out his case, and cannot be regarded as irrelevant, and that said objection was properly overruled.

The next point relied on by the plaintiff in error is that the court erred in sustaining the objection made by plaintiff's counsel to the question asked the witness A. C. Barnard, who appears to have been a member of the county court of Ritchie county when said bridge was being constructed. The question objected to was as follows: "Did the county court at any time accept that bridge, or any part of it, and take it off the contractor's hands?" We think the court erred in sus-

Digitized by Google

taining said objection. It is true, to some extent, that a court can only speak by its record, but A. C. Barnard, although one of the members of the court, and a component part of the court when sitting as a court, was not the court, nor any part of it, when said court was not in session, and acting as a court; and when he was asked to state a fact which might well be supposed to be within his knowledge, to-wit, whether the county court did at any time accept said bridge, or any part of it, it seems to us that he might state the fact affirmatively or negatively, without going to the order-book, and reading the orders made indicating the acceptance or rejection of said bridge. It does not seem to us that the question is objectionable on the ground that it is leading or irrelevant; it does not suggest the answer expected, and leaves him free to answer it as he chooses. The witness should have been allowed to answer the question.

The fourth assignment of error is as to the action of the court in refusing to allow the witness E. R. Taylor to answer the following questions, to-wit: "Was it or not this digging that caused the wing walls to fall down?" and, "What caused the wing wall to fall?" Also: "Were the committee and the contractor upon the bridge-site, about the time the contract was entered into, for the purpose of ascertaining upon what the abutment would rest?" And when the witness answered, "Yes, sir; they ascertained upon what it should rest;" then he was asked upon what, and the court refused to allow him to answer. Now, it will be remembered that the plaintiff had already introduced and read in evidence the contract and specifications for the erection and construction of said bridge. These papers clearly show that said abutments were to rest upon the solid rock, and the relevancy of the questions is apparent when it is considered that the committee and contractors went upon the site to ascertain whether it was possible or practicable to place the said abutments upon a solid foundation, and after making the examination the contract was drawn, providing that said abutments should set on solid rock base. This evidence tends to show that the contractors did not enter into said agreement unadvisedly, but after examining the location with the committee, and it is not to be presumed that they would have contracted to place the abutments on a solid rock base if they had not ascertained that the rock was there; and, as to the other questions, he should have been permitted to answer the question, "What caused that wing wall to fall?" because his answer to that question may have disclosed the character of the foundation upon which said wing wall rested, and have shown that its fall was not occasioned by digging the dirt away from it.

The next exception relied on by the plaintiff in error is to the action of the court in overruling its objection to a question asked the witness O. S. Fought, "as to the present condition of the abutment." It seems to us that this question was relevant, and the witness should have been allowed to answer the same, for the reason that its answer would be calculated to throw light upon the original character of the work, demonstrate its weak points, or show whether it was in conformity with the contract in such respects as would insure its durability.

The sixth assignment of error claims that the court erred in refusing to allow the witness John P. Wildman to testify in rebuttal. This witness was introduced as an expert stone-mason, who stated that he had worked at the business since 1857 or 1858, and was introduced by way of rebuttal to the evidence of O'Kelly, Hart, and Hibbs, who, after the plaintiffs had rested, were allowed to speak of the present condition of the abutment, after the court had stated that either party might introduce such evidence; and when said witness had stated that he had worked on pitch and range work, and all kinds of work, arching tunnels, building abutments for bridges, and on house-work, and that he saw this abutment in February, 1885, and was asked to state what character of work that was,—which question was objected to by plaintiffs' counsel, and the court sustained the objection, which ruling of the court, it seems to us, was erroneous, as other witnesses had been allowed to testify as experts for plaintiffs in regard to the character of the work,—the witness Wildman should also have been allowed to testify in regard to the same matter, by way of rebuttal.

Coming, then, to the seventh and last assignment of error by the plaintiff in error, to-wit, "in refusing to set aside the verdict of the jury, and grant the defendant a new trial because the same was contrary to the law and the evidence," we first look to the bill of exceptions, which was made a part of the record at the time of the trial, and find that in the conclusion the court certified that the foregoing was all the testimony offered in the cause, instead of certifying the facts proved. When a certificate of this character is made, this court has repeatedly held "that it cannot reverse the judgment of the court below for refusal to set aside the verdict as contrary to evidence, unless, by rejecting all the parol evidence for the exceptor, and giving full force and credit to that of the adverse party, the decision of the court below still appears to be wrong." See Sanaker v. Cushwa's Adm'r, 3 W. Va. 29; Sheff v. City of Huntington, 16 W. Va. 308; Black v. Thomas, 21 W. Va. 709. Acting, then, upon this well-settled practice, and rejecting the parol evidence offered by the defendant, the question presented for consideration is whether the plaintiffs have shown themselves entitled to recover in said action.

It is incumbent on them to show affirmatively, not only what the contract was, but that they have complied with it. By reference to the bill of exceptions, it will be perceived that they offered in evidence the con-

Digitized by Google

tract, including the specifications thereto attached, and which were part thereof; and in that contract they agreed "to build said bridge and abutments in accordance with the plans and specifications thereto attached, and at the price therein named;" and it was further agreed "that all of the above-named work should be done in a neat, substantial, and workman-like manner, said abutments to be 19 ft. high, set on solid rock base." It seems that Eli Chenowith, one of the contractors, assigned his portion of the contract to one W. H. Thomas, who is one of the plaintiffs in said action. O. S. Fought, one of the contractors, had himself sworn as a witness, and stated that he built the bridge just as he understood the contract and specifications, and he states twice that when they finished the stone-work the committee, composed of Taylor, Brown, and Gray, received it, and paid them for it; but he nowhere states that said abutments were constructed so as to be 19 feet high; that the work was done in a neat, substantial, and workman-like manner; or that said abutments were set on solid rock base. It will be seen that the plaintiffs in said suit contracted for said stone-work and wood-work as an entirety, and not separately. Their contract was to build the bridge in accordance with the specifications, and, although they were to be paid as the work progressed, the work was not to be received until the bridge was finished. The contract for the stone-work was not a separate contract from the wood-work, and the order of the county court of Ritchie, dated the 17th of July, 1884, which was given in evidence by said Fought, shows that said county court, upon the report of Brown and Taylor, two of said committee, declined to pay the balance of $798.65, which plaintiffs claimed was yet due on said bridge; their report setting forth that it would probably take said balance to make good certain deficiencies herein mentioned, showing that said committee were clearly of opinion that plaintiffs had failed to comply with their contract in constructing said bridge. W H. Thomas, one of the plaintiffs, was also sworn as a witness, and said he saw Gray, Fought, and E. R. Taylor measuring the abutment; that he bought Chenowith's interest in the bridge, and completed the wood-work according to the contract; that the committee saw it, and made no objection to it; that Brown, one of the committee, said it was a very good job if they would tighten up some of the bolts and washers; that Taylor told the court it was a good job of work, and ought to be protected; that he (witness) requested the court to make an order for shingles to cover the bridge, or finish covering it, which the court declined to do, and he afterwards bought shingles himself to finish covering it, and then sent for the committee to come and receive it, and after they came he told them if they had any suggestions to make about anything he was ready to do it, and they made no suggestions about anything but the bolts, and he went home, and paid no more attention to it; that he became a contractor after the stone-work was completed, etc. It will be seen that his testimony has reference mainly to the wood-work. He further says that E. J. Taylor said to him, when he was beginning the bridge, (evidently meaning the wood-work,) "Hadn't you better wait until we investigate this thing a little?" (meaning the abutment.) That was all the notice he ever had. He saw some places in the abutment under the ground, that might have been better. That the committee called him to see the abutment about the time they were beginning to raise the bridge. That he jobbed a crowbar down, and felt something,—a log or a rock. That he at last became alarmed at the reports about the deficiencies in the abutment, and went to E. J. Taylor, and told him about these reports that were being circulated, and that Taylor said these were all lies, started by old Chenowith and Granville Cotrill, and that nobody would believe them on oath, and for witness to go back and finish the work, learn all he could about bridge-building, and that he (Taylor) and witness would take the job of building another bridge across South Fork. "That neither Taylor nor Chenowith told him the abutment was defective. That there were no cracks in the face of the abutment. Some of the joints did not fit up. That he could slip his fingers in where the mortar had fallen out. That he saw solid rock under the abutment three feet. That he saw Mr. Porter digging a hole under the abutment. That he and Mr. Britton leveled from the rock in the bed of the river, and it was only three inches lower than the bottom of the abutment. That he does not know whether the abutment is in solid base rock or not. That he would not state anything more about it. That it could not stand there in the condition it is in if it were not on the solid rock base; too much weight there. A. B. Wilson, a witness called by plaintiff, stated that he was employed by the county court to build an approach to said bridge in the fall of 1884, and received $240 for it in orders, which he filed with his deposition. That he was employed by Mr. Barnard, president of the county court, and J. M. Wilson, to make the approach, and he believes he saw two men ride over it,—a Mr. Taylor and Mr. Wilson. This was all the evidence offered by the plaintiffs in chief. They (the plaintiffs) called several witnesses by way of rebuttal, one of whom, an expert by the name of Jacob Hibbs, stated, on cross-examination, that he did not consider the work done in a workman-like manner. That 10 or 12 feet of the wing wall fell down. It would be hard for him to tell whether it would have fallen anyhow, or the excavation caused it to fall, etc. He had before stated that he had been a stone-mason for 45 years, etc.

This is the case presented by the plaintiffs' evidence, and, excluding all evidence offered by the defendant, whether contradicted or not, it does not seem to me that it would

Digitized by Google

entitle the plaintiffs to the verdict rendered. It nowhere appears that the abutment was built upon the solid rock foundation that the contract requires. On the contrary, the plaintiff Thomas says he does not know whether the abutment is on solid base rock or not. He saw Mr. Porter digging a hole under the abutment, which he could not have done if it stood upon a solid rock foundation; and Mr. Hibbs states that it was a rough job, and not done in a workman-like manner; and the orders of the county court offered in evidence by the plaintiffs show clearly that the committee's report was adverse to the reception of the bridge, and for that reason the court declined to pay for the same. Without, then, invading the province of the jury in weighing the testimony *pro* and *con*, but considering only the evidence offered by the plaintiffs in connection with the errors we have hereinbefore indicated in the rulings of the court, I am of opinion that the judgment of the court must be reversed, a new trial awarded, and the cause is remanded to the circuit court of Doddridge county for that purpose, and the plaintiff in error must recover the costs of this writ of error.

SNYDER, P., and GREEN and BRANNON, JJ., concurred.

(32 W. Va. 614)

NORMAN *et al.* *v.* BENNETT *et al.*

(*Supreme Court of Appeals of West Virginia.* June 28, 1889.)

SPECIFIC PERFORMANCE—LIMITATIONS.

J. M. B., by his attorney in fact, T. M., executed a title-bond to J. J. N., dated September 18, 1848, in which bond is recited the fact that J. M. B., by his attorney, T. M., had bargained and sold unto the said J. J. N. 150 acres of land, more or less, lying in a certain boundary situate on the right-hand fork of Steer run, for the consideration of one dollar per acre, and said B. binds himself upon the payment of the purchase money to make unto said J. J. N. a good and sufficient title to the said 150 acres of land upon an oblong square, and shortly afterwards said attorney in fact surveyed and marked said 150-acre tract, and J. J. N. took possession and lived upon the same, and cultivated and improved it until his death, which occurred in 1865, and on the 17th day of August, 1852, said J. M. B. receipted to said J. J. N., for two notes on J. L., aggregating $120, which, when collected, were to be applied on said purchase money, which notes the evidence shows were collected by said J. M. B., who admits, in his answer to a bill filed to specifically enforce said contract, that said title-bond dated September, 1848, was treated as ratified. *Held*, that in a suit brought in June, 1875, by the heirs at law of said J. J. N., to enforce specific performance of said contract, the plaintiffs were entitled to specific performance of said contract, under the circumstances proven in the case, and said claim is not barred by the lapse of time or the statute of limitations.

(*Syllabus by the Court.*)

Appeal from circuit court, Gilmer county; ROBERT F. FLEMING, Judge.

Kidd & Johnson, for appellants. *Lewis Bennett*, for appellees.

ENGLISH, J. This was a suit in equity, brought by Jasper Norman and others against Jonathan M. Bennett and others in the circuit court of Gilmer county, to enforce the specific execution of a contract alleged to have been made in writing between James J. Norman and said J. M. Bennett, acting by Tom Marshall, his attorney in fact, on the 18th day of September, 1848, for the purchase of a tract of land containing 150 acres, situated on the right-hand fork of Steer run for the consideration of one dollar per acre. It is alleged that the contract for said land was made with one Tom Marshall, acting as attorney in fact for said J. M. Bennett; that on the 17th day of August, 1852, the said James J. Norman assigned and transferred to the defendant J. M. Bennett two bonds or notes on one James Long,—one for $45, due 1st of September, 1852, and the other for $75, due the 1st day of September, 1853,—which bonds bore date September 1, 1849, and were to be applied as a credit on bonds executed by said James J. Norman to said Bennett for the purchase of 150 acres of land on Steer run, a branch of the left-hand fork of Steer creek, which bonds have long since been paid; that said tract of land was to be laid off in an oblong square, and was part of a 766-acre tract granted to said Bennett by the commonwealth of Virginia; that soon after the said purchase the said James J. Norman moved upon and took possession of said tract of land, and lived upon the same, and made valuable improvements thereon, and continued to reside thereon until his death in 1864 or 1865; that on the 17th day of September, 1866, the said J. M. Bennett, in consideration of $150, conveyed to the defendant Elijah G. Norman 187 acres of land, which includes said 150-acre tract; that the said E. G. Norman had full notice and knowledge of the sale of said tract of land by said Bennett to James J. Norman before he purchased the same, and the plaintiffs charge that there was a written agreement between said Bennett and E. G. Norman to the effect that, if the heirs of James J. Norman ever sought and recovered said land, the defendant Bennett was to pay back to said E. G. Norman a stipulated sum; that before any purchase money was paid the said Tom Marshall, as agent of said Bennett, and a surveyor went upon said land so purchased by said J. J. Norman, and surveyed and laid off the same by metes and bounds, and marked the corners and lines thereof, and the plat of said land made by said Marshall was delivered to said J. J. Norman, and remained in his possession until his death, since which time it has been lost or mislaid, and from that time until his death said J. J. Norman enjoyed peaceable possession thereof by actual residence and cultivation, and by clearing out, and making large and valuable permament improvements thereon, and that at the time of his death said land was worth $1,500 or $2,000.

Calhoun Norman, one of the heirs of Elijah G. Norman, deceased, filed an answer to the original and amended bills of plaintiffs, denying the allegations therein contained, and J. M. Bennett filed his answer to the

Digitized by Google

amended bill filed by plaintiffs, in which he denied that Thomas Marshall was ever his attorney in fact with power to sell his lands, except that any sale made by him was subject to his approval and ratification, and unless so ratified such sale was not to be obligatory upon him. He admits in his answer that the title-bond bearing date on the 18th of September, 1848, as he believes, was treated as ratified, but alleges that the 150 acres therein described was part of the tract of 300 acres acquired by said James J. Norman, and which was sold for the purchase money under a decree of said court. He also admits that he received on the 17th of August, 1852, two notes of James Long,—one for $45, due September 1, 1852, and the other for $75, due September 1, 1853,—which, when collected, he was to apply as a credit on the bonds of said Norman for a piece of land on Steer run, for which notes he gave a memorandum in writing as a private individual, and not as an attorney, it being understood at the time that he did not practice law in Randolph county, where the debtor resided, and he did not therefore undertake to collect the same; that it was agreed that the notes should be placed in the hands of Caleb Boggess, who practiced law in Randolph county; that said notes were placed in said Boggess' hands, but whether he collected them defendant does not know, but he denied having collected any part of said money for said notes; that said Boggess shortly after moved to the city of Richmond, and did not return until after the war, and he does not know what disposition said Boggess made of said notes. He, however, denies that said notes were assigned to him, and says he was only acting in the capacity of a friend to carry the notes to said Boggess, and was to credit the said Norman when he received the money. He further alleged that if this claim was legitimate against him it should have been presented before a commissioner having the accounts between Camden, Despard & Bennett against James J. Norman before him for adjudication; and, having failed to present the claim, or having presented it, as the case may be, it is too late now to do so, and he relies upon the statute of limitations, and claims that the plaintiffs' demand is a stale one, and that it has been adjudicated between the parties. He admits that said Norman moved on the land, but insists that the land was sold for the purchase money, and that the tract sold to Elijah G. Norman was a tract altogether different from any tract or tracts sold to James J. Norman. These answers were replied to generally, and on looking to the proofs in the cause we find that the plaintiffs filed with their amended bill, as Exhibit 1, a title-bond which appears to have been signed by J. M. Bennett and by Tom Marshall, attorney in fact, bearing date the 18th day of September, 1848, reciting that said Bennett by his said attorney had sold to J. J. Norman 150 acres of land on the right-hand fork of Steer run for the consideration of one dollar per acre, payable in three equal annual installments from the 18th day of September, 1849, to the 1st day of October, 1851, binding said Bennett on the payment of said purchase money to make unto said James J. Norman a good and sufficient title to the said 150 acres of land upon an oblong square, situated as above described. The plaintiffs also exhibit with said bill, as Exhibit No. 2, the receipt of said Bennett for said notes, describing them, and stating therein that when collected they were to be applied as a credit on a bond executed to him by said James J. Norman for a piece of land on Steer run, a branch of the left-hand fork of Steer creek.

The plaintiffs also file with their amended bill a deed made by said J. M. Bennett and wife to Elijah Norman for a tract of land containing 187 acres, 1 rood, and 25 poles, as a part of a tract of 766 acres patented to said Bennett, described as located on the waters of Steer creek, which deed bears date September 17, 1866, and which plaintiffs allege included the 150 acres sold by said title-bond to J. J. Norman by said Bennett, acting by Tom Marshall, his attorney in fact. The plaintiffs also file, as Exhibits 4 and 5, with their amended bill, a copy of the decree in the suit of G. D. Camden and J. M. Bennett v. James J. Norman, Administrator, and Others, directing a sale of a 300-acre tract of land on Steer creek, which appears to have been sold for purchase money amounting to $529.89 due the plaintiffs, Camden & Bennett, also a copy of the report of sale; and the commissioner's deed was also filed therewith, showing that E. G. Norman became the purchaser for $700, and the same was conveyed to him by special commissioner, from which it will be perceived that the 150-acre tract contracted to J. J. Norman by said Bennett, acting by Marshall, his attorney in fact, was a different tract belonging to said Bennett, and patented to him individually, as is shown by the face of the deed from said Bennett and wife to E. G. Norman for the 180-acre tract, which includes said 150-acre tract, and was not the joint property of Bennett and Camden. In support of the allegation in plaintiffs' amended bill that E. G. Norman had notice of the title and claim of said James J. Norman before said conveyance was made to him by said J. M. Bennett and wife, Jasper Norman, a witness for plaintiffs, was asked: "Do you know whether or not the defendant E. G. Norman knew your father resided on the land in controversy before his death, and before the purchase of the said E. G. Norman from the defendant J. M. Bennett?" and answered: "He was at my father's residence several times during his life-time, and had dealings with him up to the time of his death." He was also asked: "Do you know whether or not the said E. G. Norman knew of your father's purchase and claim of the land in controversy?" and answered: "I have heard him say quite recently that he knew my father had bought and claimed the land before he (E. G. Norman) purchased it of de-

Digitized by Google

tendant Bennett." He also states that his father resided on the land in controversy for about 14 years. He also proves who were the heirs at law of said J. J. Norman, who appeared as plaintiffs in this suit. It is also shown by the evidence of Milton Norris, a witness introduced by plaintiffs, that J. J. Norman resided on Steer run, a branch of Steer creek, near its head, on a tract of land that is now occupied by E. G. Norman: that he understood him to occupy the same as owner; that he lived there some 12 years, claiming the land as his own; that E. G. Norman is now in possession of the land, and claims it under a purchase from said Bennett; that he had in his possession the agreement between Bennett and E. G. Norman for the land in controversy, and read it several times, but does not recollect the date: that he does not know what became of said agreement; that he gave it to a gentleman who came around as the agent of Despard, and he was to give it to J. M. Bennett; that in that agreement E. G. Norman purchased two tracts of land,—one containing 300 acres; also a tract of 150, 160, or 170 acres, known as the "Jim Norman Tract." The 300-acre tract he sold as the land of Bennett, Despard & Camden, and the other tract he sold in his own right; the tract sold in his own name or right being the Jim Norman tract. He reserved in his agreement time to consider whether he would consummate the sale or not. The bond went on to show what sum said Bennett was to pay back to said Norman if he did not choose to consummate the sale of the land. Several of the questions asked these witnesses were excepted to by the defendant Calhoun Norman because of their leading character, and several of the answers were objected to because they gave the witness understanding of the matters inquired about.

I have examined the questions objected to as leading, and do not think they suggest the answer desired, or that the defendant was prejudiced by allowing them to be answered; and I think the witnesses could properly give their understanding of the matters in response to the questions asked them, as by giving their answers in that way they were not expressing an opinion. Said defendant also excepts to the questions 17 and 19, asked Milton Norris, because they refer to a written agreement, which was not produced. It will, however, be seen that said agreement had been sent to the defendant Bennett, and has since been produced, and is an exhibit in the cause; so that the defendants were not prejudiced by said answer. It is also shown by the evidence of John E. Hays that he not only had in his possession a receipt for a title-bond executed by Thomas Marshall, as agent for J. M. Bennett, to James J. Norman, for 150 acres of land on the head-waters of the left-hand fork of Steer run, a branch of the left-hand fork of Steer creek, for which the said James J. Norman was to pay one dollar per acre; also the said Norman at the same time produced a receipt in the handwriting of J. M. Bennett, and signed by said Bennett, for two bonds executed by said James Long to said James J. Norman, the amount of which he did not remember, but his recollection was that said bonds, if solvent, would pay off and discharge the land debt all but about $30; that it would lack about $30 of paying for the land named in said title-bond, and these bonds were to be applied, according to Bennett's receipt, when collected, as payments on the land,—the said 150-acre purchase; that in a subsequent conversation with said Bennett he said he had never got any of said money; that he had put said bonds, or one of them,—did not then remember which,—in Count Stover's hands for collection, and Count had collected one of the bonds, and had used the money, and had never paid him. James Long states in his deposition that the $45 bond was paid about the year 1852, and the $75 bond was paid the next year, which made $120, which went to the use of Bennett; and his wife, Barbara Long, stated the same thing.

Now, from this evidence it is apparent that said J. M. Bennett, on the 18th day of September, 1848, contracted in writing to sell J. J. Norman a tract of land on the right-hand fork of Steer run for the consideration of one dollar per acre, said land to be laid off "in an oblong square;" and agreed to make him a good and sufficient title to the same upon the payment of the purchase money. It is true that said Bennett denies in his answer to the amended bill that Tom Marshall, who signed said Bennett's name, and affixed his seal to said agreement, was ever his attorney in fact, with power to sell his lands, except that any sale made by him was subject to the approval and ratification of said Bennett, and, unless so ratified, was not to be absolutely obligatory upon him, but said Bennett admits in his answer to the plaintiffs' amended bill that he believes the title-bond bearing date on the 18th day of September, 1848, was treated as ratified, but claims the 150 acres therein mentioned was part of the 300-acre tract. Yet in Bennett's answer to the original bill he admits that he did sell two tracts of land on Steer run of Steer creek, in Gilmer county, to James J. Norman; that he does not remember the quantity in either tract, and calls for the production of the title papers, not to furnish evidence of the sale, but the conditions of the sale; that he is quite sure that he received no part of the purchase money on either tract, and that he filed his bill to enforce the payment of the purchase money in said circuit court, and a decree was rendered for the sale of both of said tracts, and they were sold, and the sale confirmed by said court, and that upon a balance struck the plaintiffs would be found to be in his debt; but on examining the decree, which is filed as Exhibit No. 4 with plaintiff's amended bill, we find that G. D. Camden and J. M. Bennett were plaintiffs in the suit against J. J. Norman's administrator and others, and that a 300-acre tract of land on Steer creek was directed to

Digitized by Google

be sold for the purchase money thereof, amounting to $529.89, instead of the 150-acre tract; and by the report of the special commissioner appointed to sell the same it appears to have brought $700, and Elijah G. Norman became the purchaser. It is also clear that said J. M. Bennett approved and ratified the action of said Tom Marshall in making the sale of said 150-acre tract of land to J. J. Norman, by receiving the notes of said James Long, amounting to $120, as part of the purchase money, to be credited on the bond executed to him by said Norman when collected, as shown by his receipt filed with plaintiff's amended bill. And it appears by the evidence of Isaac Norman that J. M. Bennett stated to him that he had got part of the money and part he had not got; and, it appearing from the evidence in the cause that said J. M. Bennett intrusted the collection of said Long notes to an attorney, who collected and used part of the money and never accounted to him for it, yet it is clear that when the money was collected by said attorney he received it as the agent of said Bennett, and so far as said J. J. Norman was concerned, when the money went into the hands of said Bennett's attorney said Norman was entitled to credit for it on his indebtedness for the purchase money of said land, because if said Bennett selected agents who were not trustworthy to transact his business, who collected and spent the money, the loss ought not to fall on said Norman. It also appears that in pursuance of said sale said James J. Norman took possession of said 150-acre tract of land, as it was surveyed by some surveyor to him in the shape of a parallelogram; and Levi Boggs, a witness who testified in the case, states that the widow of said J J. Norman placed in his hands a plat of said land, which, upon calculation, he found to contain 149 acres.

The report of O. H. P. Lewis, surveyor, who surveyed said tract under an order of court in said suit, states that on the 11th of May, 1886, he found an old marked line, and ascertained that the rectangle claimed by plaintiff contained 169 acres; and the witness Milton Norris states that in the year 1855 he ran a part of the lower line, and since the war he ran around the entire tract for E. G. Norman, and in his last survey found the original lines, but found them longer than the calls, and containing more acres than was originally estimated. Said James J. Norman remained on said land until his death in 1865, and made valuable improvements on it; and on the 6th day of November, 1865, said J. M. Bennett entered into an agreement with Elijah G. Norman to sell him said 300-acre tract, and also said 150-acre tract, which he says on the face of said agreement James J. Norman claims to have purchased from J. M. Bennett through his agent, lying near said 300-acre tract, for $150, which the said Bennett, not having authorized, reserves time to consider whether he will recognize or confirm, or in any manner give it validity. In the mean time said E. G. Norman was to take possession of the said land, improve it, and otherwise use the said last-mentioned tract as he might deem best, and was to continue to occupy it for such time as might be consistent with said contract; and we find in said agreement this further clause: "In consequence of the insolvency of the said James J. Norman it is known that the 300-acre tract of land must be sold to satisfy the vendor's lien, and the last tract (meaning the 150-acre tract) must be either sold for the supposed purchase money, or be canceled," etc. Now, this agreement was signed by both J. M. Bennett and Elijah G. Norman; and on the 17th day of September, 1866, said J. M. Bennett and wife seem to have conveyed a tract of land containing 187 acres, 1 rood, and 25 poles, which the evidence shows includes said 150-acre tract, to said E. G. Norman, for the consideration of $150.

Although the agreement between J. M. Bennett and J. J. Norman never was recorded, the defendant E. G. Norman cannot claim that he was a purchaser of the same without notice, because it appears that said James J. Norman resided on said 150-acre tract of land until the time of his death, and, although one of the witnesses states that he died in 1864 or 1865, he was living at the date of said agreement between J. M. Bennett and E. G. Norman, because he recites on the face of said agreement that said James J. Norman claims that on the 18th day of September, 1848, he purchased said land from J M. Bennett, through his agent; and he also recites in said agreement that said James J. Norman is insolvent, and the land must be sold for the supposed purchase money, or be canceled; and Jasper Norman, a son of said James J. Norman, states in his deposition that said E. G. Norman "was at his father's house several times during his life-time, and had dealings with him up to the time of his death." See the case of Campbell v. Fetterman's Heirs, 20 W. Va. 399, 6th point of syllabus, where this court holds that "a person in possession of real estate is sufficient notice to a purchaser, contracting with a claimant of such real estate, not in possession, to put him on the enquiry, and, if he takes a conveyance from such claimant, he will be charged in favor of the person so in possession with all the information such enquiry would have given him if diligently pursued." See, also, Manufacturing Co. v. Coal Co., 21st point of syllabus, 8 W. Va. 409. See, also, Frame v. Frame, 32 W. Va. ——, ante, 901.

The next question for consideration is whether said written contract possesses that degree of certainty required in contracts of this character in order that they may be specifically enforced in a court of equity. This court, in the case of Mathews v. Jarrett, 20 W. Va. 422, uses the following language: "It is an elementary principle that a contract which a court of equity will specifically enforce must be certain as well as fair in its

Digitized by Google

terms; and the certainty required has reference both to the description of the property and the estate to be conveyed. Uncertainty as to either, not capable of being removed by extrinsic evidence, is fatal to any suit for a specific performance," and such extrinsic evidence, the court further says, is strictly confined, in cases where no fraud, mistake, or other equitable incident of a similar character is alleged, to the function of explanation, and of exhibiting the surrounding circumstances, etc. Now, in this case the agent of Bennett went upon the land in pursuance of the contract, and surveyed and marked it; and the surveyor, in making his report directed in this case, speaks of a corner made by Thomas Marshall for J. J. Norman; and said J. M. Bennett in the written contract made with E. G. Norman on the 6th of November, 1865, mentions that said J. J. Norman claims that he purchased the tract of land on which he then resided near the 300-acre tract through said Bennett's agent for $150; said J. J. Norman had been living on said land and claiming it as his own and making improvements on it for nearly 17 years; said Bennett had ratified the acts of his agent Marshall by receiving all of the purchase money but $30. When said tract of land was actually run off to James J. Norman does not appear, but Milton Norris says in his deposition that he had run a part of the lower line as early as 1855, and since the war he ran around the entire tract and found the original lines. It must be presumed that this land was run off to said James J. Norman by said Tom Marshall about the time the agreement was made, and said Norman took possession of the land then pointed out and designated by said Bennett through his agent, Tom Marshall, and after said tract of land was so laid off and accepted by said James J. Norman said survey became a part of the contract, and said Norman could not claim beyond its limits; neither could said Bennett, as the owner of the 766-acre tract, of which said 150 acres were originally a part, claim any portion of the boundary so separated from the larger tract.

Another circumstance of importance in this case is that in August, 1852,—about four years after said contract was made,—said J. M. Bennett receipted to said James J. Norman for $120 in notes on said James Long, which, when collected, he agreed to apply as a credit on the bond executed to him by said Norman for a piece of land on Steer run, a branch of the left-hand fork of Steer creek; and when, in 1865, he sold the same tract to E. G. Norman, it seems that he easily found it, because several of the witnesses state that at the time their depositions were taken E. G. Norman was occupying the tract formerly occupied by J. J. Norman. Now, in the case of Creigh's Adm'r v. Boggs, 19 W. Va. 240, this court has held that "either party to a written contract for the sale of land may have the same specifically enforced in a court of equity with such corrections in it, as parol proof may show to be necessary to correct a mistake made in reducing the contract to writing;" also "when the mistake was made, not in reducing the contract to writing, but in the supposition of both parties that the boundaries of the land named in the contract would include a certain mill-site, and, on discovering that it did not, the parties agree by parol to so change the boundaries as to include the mill-site, and under their direction the surveyor makes a plat and report of the land according to these boundaries, and the vendor brings a suit to enforce the contract with this alteration, and the defendant in his answer admits this mistake of the parties and its correction, producing the corrected boundaries and plat, but resists the execution of the contract, relying on the statute of frauds, the court will nevertheless specifically enforce such written contract as modified by the parties to correct such mistake." Now, instead of changing and altering the boundaries by parol as in the last-named case, the parties to the agreement mentioned in this case actually ran off and surveyed the entire boundary, and the vendee by parol accepted the entire boundary as surveyed and designated by the vendor acting by his agent, and was given a plat of the same, which the evidence of Levi Boggs shows was in the hands of said Norman's widow, which plat showed that the survey contained 149 acres. It seems to me that, if a contract in writing in reference to boundaries may be modified and changed by parol, where the written contract provides for the shape of the tract and its locality, extrinsic evidence may be introduced to show that the land was surveyed by the vendor on the waters designated in the agreement and in the shape therein provided for, and was accepted by the vendee.

Upon the hearing of the cause, the court below being of opinion that proof of the declarations of J. J. Norman in his life-time as to the location, lines, and corners of the tract of land claimed by the plaintiffs could not be received and read to identify said tract of land, and that there was not sufficient proof of the location and identity thereof on the part of the plaintiffs, dismissed the bill, amended bill, and bill of revivor, with costs; but the evidence of said J. J. Norman was immaterial in support of his claim, as there was other evidence sufficient to identify said 150-acre tract of land. Now, in the case of Westfall v. Cottrills, 24 W. Va. 763, which was a suit for specific performance, in which there was a parol contract for the sale of land, in which Cottrills agreed to convey to the plaintiff 40 acres of land out of a tract of about 147 acres which he then owned in said county, situate on Beech Fork, the said 40 acres to be run off of the Spring Fork end of said 147-acre tract, being the upper end thereof, this court denied specific performance, holding that "in a suit for the specific execution of a parol contract for the purchase of land, where neither the contract nor proof

Digitized by Google

identifies or defines the tract or boundaries of the land, nor refers to anything by which it may be identified with reasonable certainty, the court will dismiss the bill." This was a very different case from the one under consideration. There was no proof in that case of the identity and locality of the land; here the proof is full, showing that the vendor, through his agent, marked and designated the land.

The defendant J. M. Bennett, in his answer to the amended bill, admits that the title-bond, bearing date on the 18th day of September, 1848, was treated as ratified, but alleges that the 150 acres therein described was part of 300 acres, which was sold to said J. J. Norman under a decree of the circuit court. In this said Bennett is clearly mistaken, as is shown by reference to the title-bond filed as Exhibit 1 with plaintiff's amended bill, which mentions no other land than the 150-acre tract, which appears to have been sold without reference to any other tract, for the consideration of one dollar per acre, while the decree directing the sale of the 300-acre tract on the 31st day of May, 1866, discloses the fact that the purchase money then amounted to $529.89, with a considerable amount of interest to be added. The said J. M. Bennett, having admitted in his answer that he ratified said agreement made by his attorney in fact, Thomas Marshall, and having received nearly all of the purchase money after the boundary lines of said tract had been surveyed and marked, and after said J. J. Norman had been in possession of the same for about four years, and having allowed said James J. Norman to remain in possession, cultivate, and improve said lands until his death, which occurred 1865, a period of about 17 years, and during all that time having asserted no claim to said land, and immediately after the death of said J. J. Norman, to-wit, on the 17th day of September, 1866, having conveyed said land to E. G. Norman, and this suit having been instituted and the bill filed at June rules, 1875, not quite 9 years after said deed was made to E. G. Norman, the plea of the statute of limitations relied on by the defendants cannot avail them.

I am therefore of opinion that the agreement entered into by said J. M. Bennett, evidenced by said title-bond bearing date on the 18th day of September, 1848, under which said J. J. Norman took possession of said land, paid a large part of the purchase money, and occupied it and claimed it as his own during his whole life, should be specifically enforced; and it appearing that E. G. Norman took a conveyance from said J. M. Bennett on the 17th day of September, 1866, for 187 acres, 1 rood, and 25 poles of land, which conveyance included the 150-acre tract sold to said James J. Norman, with full notice of the possession, right, and claims of said James J. Norman's estate thereto, said conveyance to said Elijah G. Norman should be set aside as to said 150-acre tract included within the boundaries of said 187 acres, 1 rood, and 25 poles; and upon the payment of the residue of the purchase money remaining unpaid upon said 150-acre tract, with its accrued interest, by the heirs at law of said James J. Norman, a deed should be directed to be made to them for said 150-acre tract of land. The decree of the circuit court below dismissing the plaintiff's bill, amended bill, and bill of revivor must be reversed, and this cause is remanded to the circuit court of Gilmer county for further proceedings to be had therein, and the costs of this appeal must be paid by the appellees.

SNYDER, P., and BRANNON, J., concurred. GREEN, J., absent.

(32 W. Va. 606)

STATE *ex rel.* WITZ *et al.* *v.* PECK *et al.*

(*Supreme Court of Appeals of West Virginia.* June 28, 1889.)

REMOVAL OF CAUSES—BOND GIVEN IN STATE COURT.

1. Where a suit is brought in a state court in which the defendant has been arrested and given bond under sections 31, 32, c. 106, Code, to answer interrogatories filed before a commissioner of said state court, or, in default thereof, to satisfy the decree rendered in said suit, a plea setting up the fact that said suit had been removed to the United States court, and that no decree had ever been rendered in said suit by the state court, is immaterial.

2. In such case, if a decree has been rendered by the United States court against the defendant, and he fails to answer interrogatories filed before a commissioner of the state court as required in the condition of said bond, he and his sureties upon said bond will be liable for the amount decreed against him in the United States court.

(*Syllabus by the Court.*)

Error to circuit court, Monroe county.

A. F. Mathews, for plaintiffs in error. *John W. Harris*, for defendants in error.

ENGLISH, J. This was an action of debt brought by Levi Witz, Isaac Witz, William T. Beidler, and S. R. Tregallas, partners in trade under the firm name of Witz, Beidler & Co., in the name of the state, against H. A. Peck and others, his sureties, upon a bond with collateral conditions executed, in pursuance of section 33, c. 106, Code. It appears that said firm of Witz, Beidler & Co. had instituted a suit in chancery in the circuit court of Monroe county against said H. A. Peck and others, for the purpose of collecting a debt due from him to them for merchandise amounting to the sum of $1,942.18, and also for the purpose of setting aside certain assignments and conveyances therein mentioned, and alleged to be fraudulent; and in this chancery proceeding the plaintiffs caused an order of arrest to be issued under the provisions of sections 30, 31, c. 106, Code W. Va., under which said H. A. Peck was taken in custody, and gave the bond, with security, upon which this suit is predicated, in pursuance of section 33 aforesaid. The defendants tendered six pleas in writing, and the plaintiffs replied generally to pleas Nos. 1 and 2, which were covenants performed

Digitized by Google

and covenants not broken, respectively, and issues were therein joined; and objected to the filing of pleas 3, 4, 5, and 6, and the court sustained the objection to said pleas 3, 5, and 6, and refused to allow them to be filed, and overruled said objection as to plea No. 4, and allowed it to be filed, to which ruling of the court the plaintiffs excepted. Said plea No. 4 reads as follows: "And the said defendants, by their attorneys, come and pray oyer of the said supposed writing obligatory, and of the condition thereof, which is read to them, and is in the following words: 'Know all men by these presents, that we, H. A. Peck, W. G. Hudgin, W. M. McCormick, George T. McClintoc, Charles H. Hedrick, George W. Graves, Clark Howell, M. M. Ogg, J. N. Alderson, N. B. Sheppard, J. C. Bright, and John Keeny, are held and firmly bound unto the state of West Virginia in the sum of four thousand dollars, to the payment whereof well and truly to be made to the said state we bind ourselves, our heirs and personal representatives, jointly and severally, firmly by these presents. Sealed with our seals and dated this 31st day of December, 1885. The condition of the above obligation is such that whereas, the above-bound H. A. Peck has been arrested by the sheriff of Monroe county under an order of arrest issued from the clerk's office of the circuit court of Monroe county, W. Va., on the 30th day of December, 1885, in the suit of Witz, Beidler & Co. against H. A. Peck and others; now, in case there shall in the said suit be any decree or order on which a writ of *fieri facias* may issue, and within four months after such decree or order is rendered or made, interrogatories be filed, under the fourth section of chapter one hundred and forty-one of the Code of West Virginia, with a commissioner of the circuit court of said county of Monroe, the said H. A. Peck will, at the time the commissioner issues a summons to answer such interrogatories, be in the said county, and will within the time prescribed in such summons file proper answers upon oath to such interrogatories, and make such conveyance and delivery as is required by the said chapter, or, in case of failure to file such answers and make such conveyance and delivery, that the defendant H. A. Peck will perform and satisfy the said decree or order; now, if the above-bound H. A. Peck shall perform said conditions, then the above obligation to be void; else to remain in full force and effect.' For further plea they say that the plaintiffs ought not to have or maintain their action aforesaid against them, because they say that to the said supposed writing obligatory in the declaration mentioned there was annexed certain conditions and stipulations, which are in words following, to-wit: 'Now, in case there shall in said suit [meaning a certain suit then pending in the circuit court of Monroe county in which the said Witz, Beidler & Co. were plaintiffs, and said H. A. Peck and others were defendants, under proceedings in which said suit said supposed writing obligatory was executed] be any decree or order in which a writ of *fieri facias* may issue, and within four months after such decree or order is rendered or made interrogatories be filed under the 4th section of chapter one hundred and forty-one of the Code of West Virginia with a commissioner of the circuit court of said county of Monroe,' that then the said H. A. Peck, at the time the commissioner issues a summons to answer such interrogatories, or these defendants would perform certain other conditions therein specified, and these defendants say that the said conditions and stipulations above set forth were conditions precedent to the performance of the conditions to be fulfilled and performed upon the part of these defendants, and that these defendants could not perform and fulfill, and were not in law bound or obliged or could be required to perform or fulfill, the conditions imposed them, except and until said conditions precedent were performed and fulfilled; and these respondents say that said conditions precedent never have been performed or fulfilled, and they are ready to verify."

The action of the court below in overruling the objection of the plaintiffs to said plea No. 4, and allowing the same to be filed, is assigned as error. Now, it appears that during the pendency of said chancery suit the defendant H. A. Peck appeared in the circuit court of Monroe county, and moved to quash the attachment which had been issued therein, and that he also filed a plea in abatement at the rules in said cause; and that on the 18th day of March, 1888, all of the defendants filed their answers in said cause, which were replied to generally; and on the same day, upon petition of the plaintiffs, said chancery suit was removed to the district court of the United States for the district of West Virginia, sitting at Charleston, and exercising circuit court powers, and that subsequently the defendants appeared in said chancery suit in the United States district court, and a decree was rendered in favor of plaintiffs against said H. A. Peck for the sum of $2,148.36, and execution was directed to issue for the said sum thus decreed, with interest and costs against said H. A. Peck, and the cause was dismissed as to the other defendants; and on the 2d day of January, 1888, a summons was issued by P. Fontaine, commissioner of said United States court, requiring said Peck to appear before him at his office in the city of Charleston, Kanawha county, on the 14th day of January, 1888, at 10 o'clock A. M., to answer certain interrogatories, a copy of which accompanied said summons, which had been filed with him by the plaintiffs in said chancery suit, which summons was returned by the United States marshal of said district, "Not found in his district;" and a like summons was issued by M. J. Kester, commissioner of the circuit court of Monroe county, reciting the fact that a decree had lately been rendered against the said Peck by said United States district court, and commanding him to appear before said

Digitized by Google

commissioner at his office in the town of Union, Monroe county, W. Va., and answer under oath certain interrogatories which had been filed with him by the plaintiffs in said chancery suit, which summons was returned by the sheriff of Monroe county, "Not found."

Did the court below err in overruling the objection to said plea No. 4? And in considering this question it is necessary to look to and consider the legal consequences of the removal of a cause from a state court to the United States court. It is true that this chancery suit was pending in the circuit court of Monroe county, W. Va., at the time the defendant Peck was arrested, and the bond executed in order that he might be released; and it was not then known, or perhaps contemplated, that the case would be removed to the United States court; and the wording of the condition of the bond seems to indicate that it was expected that the case would be proceeded in to final decree in the circuit court of Monroe county, but, said cause having been removed to the United States court, we look to the statute in pursuance of which it was removed, and find that "when any suit shall be removed from a state court to a circuit court of the United States, any attachment or sequestration of the goods or estate of the defendant had in such suit in the state court shall hold the goods or estate so attached or sequestered to answer the final judgment or decree in the same manner as by law they would have been held to answer final judgment or decree, had it been rendered by the court in which such suit was commenced; and all bonds, undertakings, or security given by either party in such suit prior to its removal shall remain valid and effectual, notwithstanding said removal." See Supp. Rev. St. U. S. p. 175, § 4. And by referring to section 4 of chapter 141 of the Code of West Virginia we find: "The judgment creditor may file interrogatories to the debtor and a copy of the judgment with a commissioner of the court wherein the judgment is, or of the circuit court of the county in which the defendant resides or may be found, who shall issue a summons directed," etc.

When the bond on which this suit is predicated was executed, the obligation was entered into both by the principal and sureties, under the light of these statutes which entered into and formed a part of their contract. In the event of a removal to the United States court, the law told them the consequences, and that the bond would go with the suit, and remain valid and effectual; and, although it was contemplated at the time that the bond was given that the judgment would be rendered in the state court, yet the said Peck and his sureties executed said bond with a full knowledge that the case could be removed to the United States court, and if so removed, and a judgment rendered therein, that the obligation of said bond could be enforced against them, unless the condition was complied with by answering said interrogatories, where the law provides they should be answered before a commissioner of the court wherein the judgment is. I do not, therefore, think that it was a condition precedent to the recovery in this action that interrogatories should have been filed before a commissioner in said county of Monroe, or that the defendant Peck should have been summoned before such commissioner in Monroe county to answer the same; but if such was the case he had an opportunity of complying with the condition of his bond by being in the county of Monroe, and answering the interrogatories he was summoned to answer before a commissioner of that county, within four months after said decree was rendered. In the case of Levy v. Arnsthall, 10 Grat. 641, the court in the first point of syllabus hold that the act of March 31, 1851, (which was a very similar statute to the one under consideration,) which authorizes a plaintiff in an action to require security in certain cases from the defendant, constitutes the relation of principal and bail between the defendant and his surety, and it is the right of the surety to surrender his principal; and in the second point of said syllabus the court hold that by the act of April 16, 1852, c. 92, § 4, p. 77, which authorizes the plaintiff to file interrogatories to a defendant in custody, and authorizes the court upon notice to the plaintiff or attorney to discharge defendant from custody, applies to a defendant in custody of his bail as well as a defendant in jail. Now, the order of arrest, provided in sections 31, 32, c. 106, Code, was intended as a substitute for the writ of *capias ad respondendum;* and it will be noticed that said section 31 provides that "when sufficient cause shall be shown for the arrest of a defendant as aforesaid such court, judge, or clerk shall make an order directing the defendant to be arrested and held to bail for such sum as the said court, judge, or clerk shall think fit; and the plaintiff shall thereupon deliver to the clerk of the court in which the action is pending a bond in the penalty of double the amount sworn to," etc., and after the defendant has been arrested, if he gives bond, he is relieved from the necessity of going to jail, but is still regarded in custody of his sureties, who have covenanted "that in case there shall be in the action or suit any judgment, decree, or order on which a writ of *fieri facias* may issue, and within four months after such judgment, decree, or order is rendered or made, interrogatories be filed under the fourth section of chapter 141 with a commissioner of the court wherein such decree or order is, the defendant will at the time the commissioner issues a summons to answer such interrogatories be in the county in which such commissioner may reside, and will within the time prescribed in such summons file proper answers, etc., and make such conveyance and delivery as is required by said chapter, or, in case of failure to file such answer or make such conveyance and delivery, that said defendant will perform and satisfy said judgment, decree, or

Digitized by Google

order;" and by section 35 of the same chapter the court in which the case is pending, or the judge thereof in vacation, may, after reasonable notice to the plaintiff or his attorney or counsel, quash the order and discharge the defendant from custody, or discharge the bond on being satisfied that the same was wrongfully obtained, etc.,—thus giving the defendant or his sureties an opportunity at any time to test the validity of said bond, or show that it was obtained upon false suggestions. The suit was instituted in Monroe county, the declaration was filed in the circuit court of said county, and the arrest was made in said county, and, at the time the bond was given, it was contemplated that the suit would terminate in that county, and for that reason the condition of the bond provides that the interrogatories should be answered before a commissioner of that county; but the law which formed a part of the contract, and which the obligors in said bond are bound to take notice of, provides that the defendant may be discharged from the obligation of said bond in case there shall in the action or suit be any judgment, decree, or order on which a writ of *fieri facias* may issue, by answering under oath, within four months after such judgment, decree, or order is rendered or made, interrogatories filed under the fourth section of chapter 141 of the Code, with a commissioner of the court wherein such judgment, decree, or order is, and, at the time the commissioner issues a summons to answer such interrogatories, by being in the county in which such commissioner resides.

Now, while it is true this decree was rendered in the United States court, and a writ of *fieri facias* was directed to issue by that court, this decree was rendered on the 3d day of November, 1887; and on the 4th day of December, 1887, a summons was issued by M. J. Kester, commissioner of the circuit court of Monroe county, requiring said H. A. Peck to appear at his office, in Union, Monroe county, W. Va., on the 21st of December, 1887, to answer under oath interrogatories which had been filed with him by the plaintiffs, Witz, Beidler & Co., etc., reciting that a decree had been rendered against said H. A. Peck by the district court of the United States, which summons was accompanied by a copy of said interrogatories, which summons was returned by the sheriff of that county, "Not found in my bailiwick." A like summons was issued by a commissioner of the United States court, accompanied by said interrogatories, and placed in the hands of the United States marshal within four months after the date of said decree, and returned, "Not found." Now, it will be seen by said fourth section of chapter 141 that the interrogatories may be filed with a commissioner of the circuit court of the county in which the defendant resides or may be found. The place of H. A. Peck's residence was Monroe county, and within four months after this decree was rendered these interrogatories were filed before a commissioner of the circuit court of Monroe county, and a summons issued requiring him to appear and answer the same on oath on the 21st day of December, 1887, and the sheriff returns him, "Not found." Now, if the commissioner of the United States court had issued no summons, I regard said Peck's absence from Monroe county when said summons was issued by Commissioner Kester a breach of the conditions of said bond. I do not regard the matters set forth in said plea No. 4 as constituting any defense to said action. It presents an immaterial issue, and should have been rejected. In the case of Hopkins v. Richardson, 9 Grat. 486, eighth point of syllabus, the court held "that the admission of an improper plea is error, and the appellate court will not inquire whether or not the plaintiff could be injured by its admission." The judgment of the court below must be reversed, and, it not appearing from the record the amount of costs recovered by the plaintiffs by the decree rendered in the United States district court, this cause is remanded to the circuit court of Monroe county, with directions to render judgment for the amount of the decree recovered in the United States district court, and the costs recovered in said court.

SNYDER, P., and GREEN and BRANNON, JJ., concurred.

(32 W. Va. 600)

LOW v. SETTLE.

(*Supreme Court of Appeals of West Virginia.* June 28, 1889.)

EJECTMENT—EVIDENCE—DEED.

1. In ejectment, when both parties claim to derive title from the same third person, the rule is well settled that it is *prima facie* sufficient for plaintiff to prove such common derivation of title, without proving that such third person had title to the land in controversy.

2. A plaintiff in ejectment against one in actual possession must recover on the strength of his own title, not on the weakness of his adversary's.

3. A deed conveying a tract of land by boundary, but excluding a tract of 50 acres, theretofore sold to another, other than the grantee in such deed, does not pass to such grantee legal title to said 50 acres, even though no deed for said 50 acres had been made to such other person who purchased it.

(*Syllabus by the Court.*)

Error to circuit court, Fayette county; F. A. GUTHRIE, Judge.

J. W. Davis, for plaintiff in error. *John A. Preston*, for defendant in error.

BRANNON, J. This cause was before this court heretofore, and the report of the decision then made is in 22 W. Va. 387, where many of its facts may be learned. It was in ejectment brought February 7, 1881, by Low against Settle in the circuit court of Fayette county. When the cause was remanded from this court a second jury trial was had in that court. Both parties claimed under Sarah Stuart. In September, 1837, Seth Huse purchased from Sarah Stuart, by written agreement, out of a large tract, 50

Digitized by Google

acres, described simply as "fifty acres of land on New river, including the upper improvement that John Scott has in possession." Huse sold Settle this 50 acres in 1845, by writing providing that when the purchase money should be paid Huse should convey, or cause it to be conveyed, to Settle. The agreement between Huse and Stuart was a mere executory agreement, not under seal, and provided that Huse might take in more land at 50 cents per acre. By Sarah Stuart's will she devised lands of which she died seised to her children, and by a codicil empowered Samuel Price, her executor, "to convey any lands that may be sold at the time of my death." These children had parties to divide this land between them, and they made a plat of the division, on which was marked, "Share E, lot No. 5, 5,083⅓ acres, assigned to Agnes Peyton;" and on this plat, inside of "Share E," appears a figure, bounding on New river, and on it the words and figures, "Harrison Settle, 50 acres." On the 12th of August, 1859, these children of Sarah Stuart entered into a deed executing such partition, conveying the lots to one another, whereby lot E aforesaid was conveyed to Agnes Peyton under the language, "The tract or parcel of land designated in the report aforesaid as share E, lot No. 5, of the Loop lands, containing, exclusive of lands sold, 5,083⅓ acres, and bounded as follows;" inserting boundaries, which, as appears from said plat and the calls of the deed, follow the river, and include this 50-acre Harrison Settle land. By deed dated 22d April, 1874, Agnes Peyton and her trustees conveyed this lot 5 to Low; reciting that by resurvey it contained 6,875¾ acres, "and, excluding 1,575 13-160 acres surveyed out, contains 4,792 107-160 acres;" and then giving boundaries, including the Settle tract. This deed to Low contained also this language: "The lands included within the boundary aforesaid, which are surveyed out and excluded from the quantity sold and hereby conveyed, are the following, to-wit: * * * And Harrison Settle 50 acres, among other parcels." In 1874, Settle had a surveyor to survey the 50 acres, in order to obtain calls to get a deed for it, and the surveyor made a plat, and delivered it to Settle, who took it to Price to obtain a deed. He was present at the survey, and specifically directed how the lines should be run. He was told by the surveyor that, as he wished it run, the improvement and his house would be left out, but he insisted upon so running it. Settle, as a witness, denied this. Samuel Price, executor of Sarah Stuart, made Settle a deed by the calls of said survey for said 50 acres, which is dated April 3, 1874, but was not delivered to Settle until March 5, 1878, and recorded March 28, 1878. Settle claims that his land lies on New river, as represented by said figure on the plat of partition between the Stuart children, while plaintiff claims it should be limited to the Price deed, and between the bounds of the Price deed and New river there would be about 15 acres, which is the land in controversy, and includes the Scott improvement. I remark that we have not the aid of the plat filed in the action of ejectment made under order therein. The plaintiff disclaimed any land within the deed from Price to Settle, and Settle disclaimed any land outside the figure marked, "Harrison Settle, 50 acres," on said partition plat. Defendant, Settle, as a witness, stated that he had been in possession of the land in controversy ever since 1845, when he entered upon it under his purchase from Huse, and that Huse had been in possession from the date of his contract with Sarah Stuart in 1837 down to the time he delivered possession to Settle in 1845; that the land in controversy is part of the land purchased by him of Huse, and so held by him in possession, and is covered by the Scott improvement. Settle signed a writing on the back of the agreement between Huse and him, by which he purchased the land, reading: "Rec'd of Harlow Huse, Samuel Price's executor, deed for the within described land, this 5th March, 1878."

On the trial the court gave four instructions asked by plaintiff, to which the defendant excepted, and refused two asked by defendant, to which he also excepted. The jury returned a verdict for the land in the declaration specified in favor of plaintiff, except the 50 acres described in the Price deed, which they found for defendant. Defendant moved for a new trial, which the court refused, and he excepted to this refusal, and judgment was rendered on the verdict, and Settle obtained this writ of error.

There were certain title papers given in evidence by plaintiff in the line of title prior to the ownership of Sarah Stuart, to which defendant objected as ineffectual to pass legal title, and which the court told the jury were effectual to do so. But, as both parties claim under Sarah Stuart, the plaintiff need not have traced his title further back than her to show that she had title, (Laidley v. Land Co., 30 W. Va. 505, 4 S. E. Rep. 705,) and we do not deem it necessary to decide those points raised by the first and second assignments of error.

Defendant assigns as error the giving of plaintiff's instructions Nos. 1, 2, and 4, and the refusal of defendant's instructions Nos. 1 and 2, as follows: Plaintiff's instructions: "(1) If the jury believe from the evidence that the land in controversy is embraced in and conveyed by the deed from A. and H. Stuart, trustees for Agnes Peyton, and said Agnes Peyton and her children to the plaintiff, then they must find for the plaintiff, unless they further believe from the evidence that the defendant has been in exclusive, actual, continual, visible, and notorious possession of the land for more than ten years prior to the commencement of this action, claiming the same under claim or color of title, adversely to the title of plaintiff, and those under whom his title is derived; and the jury is also in-

Digitized by Google

structed that the claim of the defendant, Harrison Settle, derived from Seth Huse and his vendor, could not be adverse to the plaintiff, or those under whom he claims, until the deed of Samuel Price, executor of Sarah Stuart, was delivered to said Harrison Settle, and from that time it was adverse. (2) If the jury believe from the evidence that the defendant, Harrison Settle, entered into possession of the land in controversy under an executory contract, which left the legal title in his vendors, and contemplated a further conveyance of the complete title, his entry was in subordination to the legal title, and in that event a privity existed which precluded the idea of a hostile or notorious possession that could silently ripen into an adverse possession under the statute of limitations. (4) The court instructs the jury that if they believe from the evidence that the defendant, Settle, accepted the deed from Price, executor, to him, which was read in evidence, and surrendered the title-bond from Huse to him to said Huse, as satisfied by said deed, and that no fraud was used by either said Huse or Price to induce him to accept said deed and surrender said title-bond, then they must find for the plaintiff the land in the declaration mentioned, except the land embraced in and conveyed by said deed, and that the defendant may have labored under a mistake as to the contents of said deed can make no difference in this action." Defendant's instructions: "(1) The defendant moved the court to instruct the jury that if they believe from the evidence that in the partition made between the devisees of Sarah Stuart, in 1857, the land in dispute was not divided, and that in the deed of partition between the said devisees of Sarah Stuart made on the 12th day of August, 1859, the land in dispute was regarded as sold land, then the title to the land sued for is not in the plaintiff, and they must find for the defendant. (2) That if the jury believe from the evidence that shortly prior to August, 1859, the devisees of Sarah Stuart made a partition of their lands, and on the map of partition a fifty-acre tract was assigned to Harrison Settle, the defendant, and that by the deed of partition of 1859, between said devisees, as read to the jury, the said devisees, excluded from the conveyance that fifty acres so assigned to Harrison Settle, and that said fifty acres covers the land now in dispute, and that Harrison Settle was in possession of the land in dispute on the day said partition was made, and remained in possession thereof continuously, claiming the same as his own and adversely until the day this suit was brought, then they should find for the defendant."

If we suppose the land in controversy to be land purchased by Huse of Stuart, and that plaintiff's deed conveyed it to him, then Settle would have only the equitable title, while the plaintiff would have the legal title, and defendant could not defend on this equitable title, because he had given no notice of such defense under section 22, c. 90, Code 1887. But he relied on adverse possession. He could not in such case defend on this basis. He and his vendor, Huse, took and held possession under the title of Sarah Stuart under executory agreement with her, contemplating and requiring future conveyance to pass title, and their possession was not adverse to her until, at least, the date of the Price deed, April 3, 1874, or rather the 5th of March, 1878, the date of its delivery, under the law as stated in Core v. Faupel, 24 W. Va. 239. There was evidence tending to this state of facts. For this reason we see no error in plaintiff's instructions 1 and 2.

As to the refusal of defendant's instruction 1. The plat of partition between the Stuart children does represent a figure as the Settle 50 acres, but the deed under it includes in its boundary that 50 acres, and the words, "containing, exclusive of land sold, 5,083½ acres," found, not in the granting clause of the deed, but in the clause giving quantity, do not exclude the 50 acres from the boundary and granting effect of the deed. This instruction assumes a state of facts which there was no evidence to sustain, and is therefore irrelevant. Bloyd v. Pollock, 27 W. Va. 75. The same may be said of defendant's instruction No. 2.

As to plaintiff's instruction No. 4. As executor, Samuel Price had power under the will of Sarah Stuart to convey land which she in her life-time had sold, not land which at her death she owned, except that which as executor he might sell. It appears that the land included in the Price deed to Settle does not include the land sold to Huse; certainly not the Scott improvement. Could Price make a substitution, or both he and Settle, substituting for land which Sarah Stuart sold land she had not sold? It would seem not. It would not bind the devisees, and, if not them, it ought not to bind Settle, for it ought to be mutual. It could not pass legal title. The instruction required the jury by force of that deed to find for the plaintiff, if the facts were as therein assumed. It should not have been given.

As to the motion for a new trial. The deed from Price to Settle, dated April 3, 1874, was not delivered to Settle till March 5, 1878, and that from Peyton and others to Low is dated 22d April, 1874. The words quoted above from the deed to Low exclude from its operation, and therefore it does not pass title to Low for some land, referred to therein as the Harrison Settle 50 acres. To what does this excluding clause refer? We think it refers to the 50 acres sold to Huse, and by him to Settle. The agreement by which Huse purchased is indefinite in its description of the land, general, and uncertain, but certainly includes the Scott improvement, though beyond that uncertain; and these excluding words in the deed to Low would have the effect to exclude that improvement, of which Settle was in possession, and to that extent, at least, plaintiff

Digitized by Google

had no legal title, and could not recover, as a plaintiff in ejectment must recover on the strength of his own title, not the weakness of his adversary's. The motion for a new trial should have been sustained. Therefore the judgment is reversed, the verdict set aside, a new trial awarded, and the cause is remanded to the circuit court to be further proceeded in according to the principles herein indicated, and otherwise according to law. The plaintiff in error, Settle, recovers his costs here.

GREEN and ENGLISH, JJ., concurred. SNYDER, P., absent.

(32 W. Va. 594)

SANDS v. BEARDSLEY *et al.*

(Supreme Court of Appeals of West Virginia. June 28, 1889.)

DEED—RECORDATION—ISSUE OUT OF CHANCERY.

1. A., having the equitable title to real estate, executed a trust-deed thereon to secure a debt to B., which was duly recorded. Subsequently A. sold the property to C., and by direction of A. the holder of the legal title conveyed the same by deed directly to C., who after his deed had been record ed executed a trust-deed upon the real estate to secure a debt to D. *Held*, the recordation of said trust-deed to secure a debt to B. did not operate as constructive notice to D., and the lien of D. will have priority over that of B., unless B. shows that D. had actual notice of the existence of his deed at the time D. acquired his lien.

2. A chancellor should not direct an issue out of chancery until the plaintiff has thrown the burden of proof upon the defendant. Therefore, where there is a direct conflict between two witnesses, the one affirming and the other denying the fact to be proved, no issue should be directed; and if one is directed, upon which the jury render an affirmative verdict, and a decree is made accordingly, the appellate court will reverse the decree, because the issue was improperly ordered.

(Syllabus by the Court.)

Appeal from circuit court, Cabell county; IRA J. MCGINNIS, Judge.

Harvey, Vinson & McDonald, for appellant William Biggs. *Simms & Enslow*, for appellees.

SNYDER, P. The Central Land Company, being the owner of lot 14, block 95, in the city of Huntington, Cabell county, sold and conveyed the same to J. H. Russell and M. E. Miller, by deed dated in 1871, which deed was duly recorded in said county. In 1879, Russell and Miller, by an executory contract which was never recorded, sold said lot to Mary M. Wilson and D. M. Magann, who took possession and built a mill upon it, designated in the record as "Bigg's Mill." By deed dated May 19, 1880, Wilson and Magann conveyed their equitable title to said property to J. N. Potts, trustee, to secure a note executed by them to Margaret Sands, which deed was duly recorded May 24, 1880. Soon thereafter Wilson and Magann, by title-bond which was never recorded, sold their interest in said lot to W. B. Wilson, who was placed in possession of it; and he, by deed dated March 14, 1881, conveyed his equitable interest therein to J. H. Cammack, trustee, to secure a note executed by him to Mary M. Wilson for $325, which note was assigned to and is now owned by George Sampson. This trust-deed was recorded in Cabell county on May 19, 1882. Afterwards the said Russell and Miller, by direction of the aforesaid Mary M. Wilson and D. M. Magann, conveyed the legal title of said lot directly to said W. B. Wilson by deed dated January 24, 1882, but which was not recorded until June 1, 1882. By deed dated February 9, 1883, which was duly recorded on March 15, 1883, said Wilson and wife conveyed the one moiety of said property to A. J. Beardsley; and subsequently Wilson and Beardsley executed two trust-deeds on the property to secure debts due to William Biggs, the first dated February 9, 1883, and recorded February 26, 1883, to H. C. Simms, trustee, and the other to W. T. Thompson, trustee, dated July 13, 1883, and recorded November 30, 1883. The said Wilson and Beardsley having failed in business, they on December 9, 1884, executed to W. T. Thompson, trustee, a general assignment upon all their property, including the aforesaid mill property. By direction of Biggs, the trustee in the aforesaid trust-deed of July 13, 1883, W. T. Thompson, trustee, advertised the said mill property for sale; and thereupon Margaret Sands, on January 31, 1885, filed her bill in the circuit court of Cabell county against said Wilson, and Beardsley, Thompson, trustee, Biggs, and others, claiming that by virtue of the aforesaid trust-deed of May 19, 1880, to secure the debt due her, she had a prior lien on said mill property, and praying that the sale thereof be enjoined until the validity of her lien can be adjudicated.

In her bill the plaintiff sets forth the above facts, and avers that the defendant Biggs had constructive as well as actual notice of the existence of her said trust-deed before and at the time the two trust-deeds aforesaid were executed to secure him. Biggs answered, denying that he had actual notice of the plaintiff's trust-deed, or that the recordation of her deed was constructive notice to him. He also denied that he had either constructive or actual notice of the trust-deed to secure the debt held by George Sampson. Upon the question of whether or not Biggs had actual notice of the plaintiff's trust-deed, the circuit court directed an issue out of chancery to be tried by a jury, submitting two inquiries: *First*, whether or not Biggs had notice or knowledge of the plaintiff's trust-deed before the deed of February 9, 1883, to Sims was executed to secure said Biggs; and, *second*, whether or not Biggs had actual notice or knowledge of the plaintiff's trust-deed before the deed of July 13, 1883, to secure him, or he had advanced all the money secured thereunder. The jury answered the first of these inquiries in the negative, and the second in the affirmative. The defendant Biggs moved the court to set aside this finding of the jury, because the issue was improvidently awarded, and for

Digitized by Google

other causes which it is unnecessary to state. But the court overruled said motion, and on January 17, 1888, entered a final decree in the cause, in which it decided that the aforesaid trust-deed to secure the debt held by George Sampson and also the trust-deed to secure the plaintiff were valid, and entitled to priority over the trust-deed of July 13, 1883, in favor of Biggs, and decreed accordingly. It is from this decree that the defendant Biggs has appealed.

The decree of the circuit court as to the debt of George Sampson is plainly erroneous. There is no claim that either Biggs or his trustee had any actual notice of the trust-deed securing this debt. It will be observed from the facts before stated that this trust-deed was executed by W. B. Wilson on March 14, 1881, before the grantor had acquired any legal or recorded title. The grantor did not obtain the legal title, which was then in Russell and Miller, until it was conveyed to him by them by deed dated January 24, 1882, which was not recorded until June 1, 1882, after the Sampson trust-deed had been recorded. At the time Biggs obtained his trust-deeds, Wilson and Beardsley, his grantors, had the legal title to the property by deed duly recorded subsequent to the recordation of the Sampson trust-deed. Therefore, according to our statute, Biggs was not affected by the recordation of the Sampson deed. Section 10, c. 74, Code 1887; Hoult v. Donahue, 21 W. Va. 294. It is also true, in respect to the trust-deed of Margaret Sands, that it was given by grantors on an equitable title only; and therefore its recordation could not, under said statute, operate as constructive notice to Biggs as a subsequent purchaser from Wilson and Beardsley, who had a duly-recorded legal title at the time the Biggs trust-deeds were executed. But, in respect to this latter, it is alleged by the plaintiff that Biggs had actual notice or knowledge of the existence of her deed at the time he obtained his deed. If such is the fact, then the plaintiff's trust-deed being prior in time, whether recorded or not, it must be given priority over the subsequent trust-deed of Biggs. The important question, then, is, did Biggs have such actual notice? To solve this question the court below directed an issue to be tried by a jury. The appellant here contends that this issue was improvidently directed, because, as he insists, the evidence before the chancellor at the time did not warrant it. The law is well settled in this state that, if the circuit court improperly directs an issue, its action will be reviewed and reversed by the appellate court, regardless of the verdict of the jury. Issues are not directed to enable the party to get additional evidence, and therefore whether the issue was properly directed must depend upon the state of the proofs in the record at the time the order is made. Anderson v. Cranmer, 11 W. Va. 562; Jarrett v. Jarrett, Id. 584. No issue should be ordered until the plaintiff has thrown the burden of proof on the defendant. Beverley v. Walden, 20 Grat. 147; Vangilder v. Hoffman, 22 W. Va. 1.

On the question now before us, William Sands, the husband of the plaintiff, testified that some time during the summer of 1883 he and the defendant William Biggs met on Third avenue, in Huntington; that they walked to the river bank, and after some conversation "he [Biggs] asked me how the Biggs mill was going to do. I told him she would do well if she had capital. He then asked me whether or not my wife had a mortgage on the property, to-wit, Biggs mill. I replied, 'Yes, a small one.'" Then, upon a direct question as to the time of this conversation, he says it was "about April or May, 1883." On the other side, William Biggs, the appellant, testified that he first heard of the Sands trust-deed from his daughter, Mrs. Beardsley, on the night of the 19th day of July, 1884, after he had made the last loan to Wilson and Beardsley; that at the time he took his last trust-deed Wilson and Beardsley told him that his was the first and only lien on the property, but that he did not then, or afterwards until after the assignment, examine the records, or have them examined, to ascertain if there were any liens on the property. On cross-examination he was asked: "In July, 1883, while you were in the city of Huntington, did not you have a conversation with Wm. Sands, on the bank of the Ohio river, below the C. & O. Ry. depot, in reference to the Sands deed of trust, in which you stated that you had loaned money to Wilson and Beardsley, and inquired of Sands if his wife did not have a lien on the mill property also, and Sands said, 'Yes, a small one,' or words to that effect?" to which he answered, "No; never had a conversation about it in my life." This is all the testimony on the subject of notice. It is true that after Biggs was informed that the Sands trust-deed was on record at a date prior to his, he urged Wilson and Beardsley to pay it off, and did not, until after the assignment of December 9, 1884, question its validity as a prior lien; but this is fully explained by the fact that until the record had been examined, and it was disclosed that the record of the Sands deed did not constitute constructive notice to him, he, not being a lawyer, and ignorant of the facts appearing upon the record, supposed that he was bound by the record simply because the Sands deed had been recorded before his; that is, he, as he might well have done, believed that he was chargeable with constructive notice of the Sands deed, although he had no actual notice or knowledge of its existence.

This being the state of the evidence at the time the issue was ordered, it seems to me very clear that the issue was improperly directed. The burden of proving actual notice to Biggs was upon the plaintiff. To meet this burden she offered but a single witness, who was her husband, and his evidence is directly and positively disputed and contra-

Digitized by Google

dicted by the defendant. This simple assertion on the one side, and denial on the other, could not, under any rule of testing evidence, operate to shift the burden of proof, but merely left the burden as it was before this conflicting evidence had been offered, and, consequently, under the rule of law before stated, the burden not having been thrown by the plaintiff upon the defendant, the court erred in directing the issue. For these reasons the said decree of the circuit court must be reversed, and the cause remanded for further proceedings in accordance with views expressed in this opinion.

GREEN and BRANNON, JJ., concurred. ENGLISH, J., absent.

(32 W. Va. 585)

ROOTS *et al.* v. KILBRETH *et al.*

(*Supreme Court of Appeals of West Virginia.* June 28, 1889.)

APPEAL—FINDINGS OF COMMISSIONER.

1. Where questions of fact are referred to and passed upon by a commissioner, and the findings of the commissioner are overruled and disaffirmed by the circuit court, the appellate court must determine for itself, from the facts and circumstances disclosed by the record, whether it will sustain the conclusion of the commissioner or the circuit court.

2. A case in which the appellate court, upon the facts and evidence, sustained the action of the circuit court in overruling the findings of the commissioner, and sustaining exceptions taken to the commissioner's report.

(*Syllabus by the Court.*)

Appeal from circuit court, Mason county; F. A. GUTHRIE, Judge.

Gunn & Gibbons, for appellants. *Knight & Couch* and *Simpson & Howard*, for appellees.

SNYDER, P. At the March rules, 1884, the individuals composing the firm of Roots & Co. commenced this suit in the circuit court of Mason county against the Mason City Salt & Mining Company, G. Y. Roots and James P. Kilbreth, composing the firm of Roots & Kilbreth, and others, to enforce the sale of certain real estate in said county, conveyed by said salt and mining company to a trustee to secure the payment of 140 coupon bonds of $500 each, and to distribute the proceeds among the owners of said bonds. The bill alleged that 80 of said bonds, amounting to $40,000, were held by Roots & Co. as collateral security for the indebtedness of Roots & Kilbreth to said Roots & Co., which indebtedness the plaintiffs alleged was $23,568.93, and that the other 60 of said bonds were held as follows: G. Y. Roots, 30, James P. Kilbreth, 20, and M. M. White, 10, of said bonds. James P. Kilbreth answered the bill, denying that the firm of Roots & Kilbreth were indebted to Roots & Co. in the sum alleged, or in any sum; and by way of affirmative relief prayed that an account be ordered, to state and settle the accounts between the firms of Roots & Co. and Roots & Kilbreth. Kilbreth also pleaded usury, and the statute of limitations, in respect to the alleged indebtedness of Roots & Kilbreth to Roots & Co. The trust-subject was sold, and the sale confirmed, without objection, at the price of $12,500, of which sum it was ascertained that about $6,800 would be applicable to the 80 bonds of Roots & Kilbreth held by Roots & Co. as collateral security. The cause was referred to a commissioner to ascertain the holders of said coupon bonds, and to settle the accounts between the firms of Roots & Kilbreth and Roots & Co., and to report in whose favor the balance exists. On the coming in of said report, the court, without adjudicating the true state of accounts between Roots & Kilbreth and Roots & Co., decided that the evidence in the cause showed that the indebtedness of the former to the latter firm was of such an amount as to entitle Roots & Co. to the said $6,800,—the proceeds of the sale applicable to the payment of said 80 bonds held by Roots & Co. as collateral for said indebtedness,—and entered a decree directing the payment of said proceeds to Root & Co., without prejudice to the right of either of said firms to bring a new suit to settle and ascertain the true state of accounts between them. From this decree the defendant Kilbreth brought the cause by appeal to this court. On the hearing here, this court, being of opinion that the circuit court, before directing said $6,800 to be paid to Roots & Co., should have investigated the accounts between Roots & Kilbreth and Roots & Co., and finally determined whether there was any indebtedness by either of said firms to the other, reversed so much of the said decree of the circuit court as decided that Roots & Kilbreth are indebted to Roots & Co. in a sum equal to the proceeds of the sale applicable to the payment of the collaterals held by Roots & Co., and ordered said sum to be paid to Roots & Co., and remanded the cause to the circuit court for further proceedings there to be had in accordance with the principles announced in the opinion filed by this court. Roots v. Salt & Mining Co., 27 W. Va. 483. After the mandate of this court had been entered in the circuit court, that court made an order referring the same to a commissioner to settle the accounts between the firms of Roots & Kilbreth and Roots & Co. The commissioner made a report, which was excepted to by Roots & Co., and the same was recommitted to the commissioner. The defendant Kilbreth, by leave of the court, filed a cross-bill, to which Roots & Co. filed their answer.

From August, 1872, to about October, 1875, G. Y. Roots and James P. Kilbreth were the joint owners of the coal and salt property in Mason county, which was in 1875 conveyed to the Mason City Salt & Mining Company; and they, as partners under the name of Roots & Kilbreth, carried on with said property the business of mining coal, and manufacturing and selling salt. During the same time Roots & Co., a partnership of which G. Y. Roots was the owner

Digitized by Google

of a seven-tenths interest, was conducting a commission business in Cincinnati, Ohio, and the business of both of said firms was for the greater portion of said time under the management of said Roots, and especially was such the case in respect to the firm of Roots & Kilbreth. Roots & Co. acted as the factors or agents of Roots & Kilbreth for selling salt and furnishing supplies; and, while the latter was in active operation, Roots & Co. rendered itemized accounts to it semi-annually; and, after its dissolution, Roots & Co. rendered to it sundry accounts or statements, making in all 22 in number. These accounts show that no supplies were furnished by Roots & Co. after December, 1875, and the last credit for salt sold was given in 1876. In these accounts Roots & Co. charge Roots & Kilbreth interest at the rate of 10 per cent. upon advances made according to an agreement made by G. Y. Roots, acting for the firm of Roots & Kilbreth, of which Kilbreth was fully informed, and to which he made no objection at the time. Kilbreth, in his cross-bill, charges that said accounts rendered by Roots & Co. to Roots & Kilbreth are usurious; that they contain overcharges of commissions on salt sold by or through them; that clerical errors appear upon their face; that they fail to credit Roots & Kilbreth with the proceeds of eight coupon bonds of $500 each which ought to be credited; and that, by reason of other errors in said accounts, the firm of Roots & Kilbreth, instead of being indebted to Roots & Co. in the sum of $23,568.93, or any other sum, are the creditors of Roots & Co. for a large amount of money. He then avers that he had not, until recently, discovered the said errors and omissions in said accounts. After the circuit court had decided the cause in May, 1875, and before the appeal was taken from that decree, the commissioners who made the sale of the trust property paid over to Roots & Co. $6,774.77, being the portion of the proceeds of the sale applicable to the 80 bonds held by Roots & Co. as collaterals. The commissioner, after considering the depositions and documentary evidence filed in the cause, reformed and restated the accounts between Roots & Kilbreth and Roots & Co., and reported, in lieu of the alleged balance of $23,568.93 in favor of Roots & Co., that said firm was indebted to Roots & Kilbreth, as of February 6, 1888, in the sum of $7,577.10, and that, in addition thereto, Roots & Kilbreth were entitled to the $6,774.77, proceeds of the sale paid over to Roots & Co., as aforesaid, with the interest thereon, making the aggregate indebtedness of Roots & Co. to Roots & Kilbreth, as of that date, $15,572.50. To this report Kilbreth filed two, and Roots & Co. eight, exceptions. The court sustained one of the exceptions of Kilbreth, and two of those of Roots & Co., and overruled all the others. After correcting and reforming the report, so as to make it conform to these rulings, it was found that Roots & Co. was indebted to Roots & Kilbreth, as of May 18, 1888, the date of the decree, in the sum of $2,773.04; and for this, and the costs of this suit, the court entered its final decree in favor of Roots & Kilbreth against Roots & Co. From this decree the defendant Kilbreth has obtained this appeal.

As the real controversy on this appeal is confined to the action of the court in sustaining the third and fourth exceptions of Roots & Co. to the report of the commissioner, and modifying said report and decreeing accordingly, it is unnecessary to consider any part of the record not bearing upon the questions presented by these exceptions. The first of these exceptions so sustained is taken to the action of the commissioner in opening and striking from the stated accounts rendered by Roots & Co. to Roots & Kilbreth certain alleged overcharges of commissions on salt sold by Roots & Co. for Roots & Kilbreth, and charged by Roots & Co. in said stated accounts. The evidence in the record shows that, when Roots & Co. were engaged to act as the factors of Roots & Kilbreth in selling salt, purchasing supplies, and making advances in money for said purchases, Roots, as the managing partner of Roots & Kilbreth, agreed to pay Roots & Co. 25 cents commission per large barrel, and 20 cents per small barrel, for salt sold directly by Roots & Co., and one-half this commission on salt placed by them for sale in the hands of subagents, Roots & Co. guarantying all sales. Subsequently the salt business became depressed. Roots prevailed on Roots & Co. to reduce these commissions to 20 and 15 cents per barrel, the sales still being guarantied, and finally the commission was reduced to 5 cents per barrel, without guaranty. The commissioner found that the quantity of salt sold by subagents of Roots & Co. was 61,759 barrels, on which the one-half commissions amounted to $6,084.77; and this being, in the opinion of the commissioner, an unreasonable charge, he reduced it to $1,852.77, or 3 cents per barrel, making a difference of $4,232 against Roots & Co. No deduction is made in the report on the commissions charged by Roots & Co. for salt sold by them direct; and the reason given for disallowing the commissions to Roots & Co. for the salt sold by their subagents is that these commissions are in addition to the commissions charged by the subagents, and thus subjecting the salt so sold to double commissions, a charge which, in the opinion of the commissioner, ought not to be allowed in the absence of a contract authorizing it. I have been unable to find from the evidence in the record that double commissions have been charged on any of the salt. The charge by Roots & Co. on salt sold by their agents is just one-half of that charged on the salt sold directly by themselves; and the evidence shows that Roots & Co. divided the commissions with the subagents on the salt sold by the latter, thereby making the entire commissions on the sales made by the subagents no greater

Digitized by Google

than that sold directly by Roots & Co. under their contract with Roots & Kilbreth. The commissioner, however, holds that the alleged contract between Roots & Kilbreth and Roots & Co. in respect to these commissions is invalid because made by G. Y. Roots, who had a greater interest in the firm of Roots & Co. than he had in the firm of Roots & Kilbreth. This position would no doubt be correct if such contract had been made and enforced without the consent or acquiescence of Kilbreth, but the evidence shows that Roots, at the instance of Kilbreth, was made the active manager of the business of the firm of Roots & Kilbreth, and that Kilbreth knew all about this contract and the commissions that were being charged by Roots & Co., and he never made any protest or objection thereto until long after the partnership had ceased to do business. The only excuse given now by Kilbreth for not objecting to these charges is that the accounts rendered to him by Roots and Roots & Co. were so indefinite that he did not discover until recently what commissions were charged. It is clearly shown that Kilbreth is a skillful accountant, and fully competent to unravel and understand accounts such as were from time to time furnished him by Roots & Co. These commissions were charged on these accounts in such a manner that a simple calculation from the *data* given would disclose the amounts of the commissions. If, however, such had not been the case, the accounts certainly showed that Roots & Co. were charged commissions on salt sold by subagents, and he had the means before him to inform himself, either by inquiry or calculation, to determine the rate of these commissions, and whether or not they exceeded the rates he had assented to. He had all the *data* then that we have before us now; and, if he could not discover then that there were double commissions which in the aggregate exceeded those charged on salt sold directly by Roots & Co., we are at a loss to know why it is expected we should, without any more detailed statements of the accounts, be able to discover that double or excessive commissions had been charged. As before stated, we are wholly unable to find in the record before us that the aggregate commissions of Roots & Co. and their subagents, on the salt sold by the latter, in any case exceeded the charges made by Roots & Co. on sales made directly by them; and as the commissioner allowed those latter charges, and no exception was taken to the report by Kilbreth on that account, we think the commissioner should not have reduced the commission on the salt sold by the subagents, and that the circuit court properly sustained the said third exception of Roots & Co. to the report.

The second exception so sustained, which is the fourth exception of Roots & Co. to the commissioner's report, relates to a charge against Roots & Co. of four coupon bonds of $500 each. Of the 140 coupon bonds issued as before stated by the Mason City Salt & Mining Company, 30 were, from time to time, delivered to Kilbreth to be disposed of by him, and the proceeds applied to the indebtedness of Roots & Kilbreth to Roots & Co., and a like number of the bonds were to be disposed of by G. Y. Roots for the same purpose. Roots & Co. contend that 4 of these 30 bonds delivered to Kilbreth were never paid for, and Kilbreth contends that he did pay for these bonds at the time he got them. The commissioner decided from the evidence that Kilbreth paid for the bonds, and charged their proceeds to Roots & Co., while the circuit court sustained the exception of Roots & Co. to the said charge, and decided that the bonds had not been paid for, and refused to charge them to Roots & Co. The question here presented is one of fact about which the commissioner and the circuit court have differed. The rule is well settled in this state that when questions of fact are passed upon by a commissioner, and his findings thereon are approved and confirmed by the circuit court, the appellate court will regard those findings in the nature of a verdict of a jury, and will not reverse them unless it plainly appears that they are not warranted by any reasonable view of the evidence. Handy v. Scott, 26 W. Va. 710; Boyd v. Gunnison, 14 W. Va. 19. This rule, however, can have no application in a case such as the one before us, in which the findings of the commissioner have been overruled and disaffirmed by the circuit court. In such case the appellate court must determine for itself, from the facts and circumstances disclosed by the record, whether it will sustain the conclusion of the commissioner, or of the circuit court.

At the time these bonds were being delivered to Kilbreth by G. Y. Roots, acting for Roots & Co., who held all the bonds as collateral security, Roots kept a memorandum book in which he entered at the time of each delivery the numbers of the bonds delivered to Kilbreth, and the amount of the proceeds thereof to be credited for same. This memorandum, which appears in the record, shows that five bonds were delivered and paid for on February 23, 1876, five delivered and paid for March 14, 1876, and then follows this entry: "Also (4) bonds, Nos. 117, 118, 119, 120. Have not received proceeds of these 4 bonds." Following this are 5 entries showing that 16 other bonds had been delivered to Kilbreth, and paid for by him, between October 28, 1876, and October 1, 1878. The books of Roots & Co. also show that, while 30 bonds were delivered to Kilbreth, he is only credited with the payment of 26. The credit opposite the 4 bonds in dispute is left blank; and, during the time these bonds were being delivered to Kilbreth, Roots and Roots & Co. credited Roots & Kilbreth with the proceeds received for them, and at stated times, soon after each credit, sent accounts to Kilbreth, showing the dates of credits, and the amounts of the bonds credited; and on none of these accounts is there any credit for the proceeds of these 4 bonds, though they show credits

Digitized by Google

for the proceeds of all the other 26 bonds. With these accounts before Kilbreth for years before this suit was brought, and until after it had been once decided in the circuit court, and by this court on appeal, he made no claim that he had not been credited with all he was entitled to on account of the bonds delivered to him. It seems to me that the memorandum shows conclusively that he did not pay for these four bonds at the time they were delivered to him, and the circumstances tend strongly to show that he never afterwards paid for them. But, as he admits that he received the bonds, the burden was on him to show that he paid for them. G. Y. Roots testifies that said bonds were never paid for, and his testimony is supported by Stegemeyer, the book-keeper of Roots & Co. Kilbreth testifies that he paid for these four bonds at the time he got them, but he is unable to state to whom he made the payment, or how he paid it,—whether by draft, check, or in currency; and, when asked on cross-examination to examine his bank account in the banks in which he did business about that time, he contents himself with answering that he cannot do that within a reasonable time, and makes no attempt to do so; nor did he offer to search, or make any effort to produce from any source, any entry or memorandum tending to show that he had paid for said bonds. It seems to me almost impossible that a man living in a city, keeping a bank account, and transacting business in a city, a good accountant, having the precise date of the payment of $2,000, could not find, either in the banks where he did business, or among his private papers, some entry or memorandum in reference to such payment if he ever made it. The indifference of Kilbreth, and his absolute failure to produce any such entry or memorandum, or explanation of such failure, is very potent evidence to my mind that no such payment was ever made by him. But, as before stated, the burden was on him to prove the payment; and in my opinion, taking all the evidence into consideration, he has not only failed to establish the payment, but the weight of the evidence, as well as the surrounding facts and circumstances, tend strongly to show affirmatively that the payment was never made. I therefore think that the circuit court did not err in sustaining the said third exception of Roots & Co. to the report of the commissioner.

The appellees, Roots & Co., claim and assign as error the refusal of the court to sustain their exception to the commissioner's report, whereby they were denied interest at 10 per cent. on the advances made by them to Roots & Kilbreth according to contract. They claim that the contract was made and to be performed in Ohio, and that in that state parties are allowed to contract in writing for the payment of interest at a greater rate than 6 per cent., and that such contract is not usurious. The difficulty in sustaining this claim is that the evidence fails to show that there was any contract in writing authorizing Roots & Co. to charge interest at the rate of 10 per cent. G. Y. Roots, the party who made the contract, testifies that it was a verbal contract. The only pretense of any writing to that effect is that, after the accounts of Roots & Co. had been rendered to Roots & Kilbreth, in which interest on advances had been charged at 10 per cent., Kilbreth, one of the members of the firm of Roots & Kilbreth, wrote a letter to Roots & Co., in which he says that they (Roots & Co.) have been getting a liberal interest, of which he makes no complaint. If this letter had been written by the firm instead of by one of its members, it would not constitute a contract for the payment of 10 per cent. interest. It was a mere recognition of the fact that such interest had been charged without objection, but it contained no agreement or promise to pay such interest; and even if it had, being made after the interest had accrued, and not in respect to interest to accrue thereafter, it is very questionable if it could be considered as binding. Clearly, this was no such written contract as would, under the Ohio statute, defeat the plea of usury filed in this cause by Kilbreth. For the reasons aforesaid I am of opinion that the decree of the circuit court should be affirmed.

GREEN and BRANNON, JJ., concurred. ENGLISH, J., absent.

(32 W. Va. 507)

HIMAN v. THORN *et al.*

(*Supreme Court of Appeals of West Virginia.* June 27, 1889.)

VOLUNTARY CONVEYANCES—LIMITATION—PROOF OF FRAUD.

1. When a father conveys to his son a portion of his estate for a consideration not deemed valuable in law, said conveyance cannot be set aside for that cause only, in a suit brought for that purpose after the lapse of five years from the date of said conveyance.

2. Where a bill filed by a creditor alleges that a deed from said father to his son was in fact voluntary, although reciting on its face a valuable consideration, and the son in his answer denies the allegation, and claims that he paid a valuable consideration for said land, the burden of proof is on the son to show that said consideration was paid, and the recital of the deed is no evidence against the creditor.

3. Although fraud in fact, after the lapse of five years from the date of the conveyance, must be alleged and shown to impeach such conveyance, even as to an existing creditor, yet fraud may be inferred from the facts and circumstances of the case.

(*Syllabus by the Court.*)

Appeal from circuit court, Taylor county; WILLIAM T. ICE, Judge.

M. H. Dent, for appellant.

ENGLISH, J. On the 1st day of October, 1867, Dr. Thorn executed his note under seal, payable 12 months after date, to Miles A. Himan, or order, for the sum of $1,500, with interest thereon from date, for value received, being the last payment for the purchase money of said Himan's house and lot in Grafton, and one vacant lot in South Graf-

Digitized by Google

ton; and on the 22d day of September, 1879, Mary L. V. W. Himan, executrix of the last will and testament of said Miles A. Himan, deceased, obtained a decree in the circuit court of Taylor county against said Dr. A. Y. D. Thorn for the amount of said note, and the interest thereon accrued, under which decree certain property belonging to said Dr. Thorn was sold, not sufficient, however, to satisfy said decree, but leaving a balance due on said decree of $1,165.54; and at the November rules, 1880, said executrix filed her bill in said court against said Dr. Thorn and others, for the purpose of enforcing said decree, which had been docketed against other lands of said Thorn, which she alleged were liable to the lien created thereby, in which she alleged that, at the time the debt was contracted upon which said decree was predicated, the said Dr. Thorn was the owner of a large and valuable estate in said county of Taylor, which he continued to hold until he disposed of the same by dividing it out among all his children, conveying it all away until, at the time of filing said bill, he had nothing left but a very small portion of said estate, and was hopelessly insolvent. Plaintiff also alleged that on the 13th day of April, 1880, she caused said decree to be docketed on the judgment lien docket of said county, and that on the 11th day of April, 1870, three years after the said indebtedness was contracted, said Thorn executed a conveyance to his son Abraham Thorn for 123¾ acres of land lying in said county, for the nominal consideration of $600, which she alleged never was paid, and never was intended should be paid, and, if paid, was far below the real value of said land; that on the 9th day of September, 1872, five years after said indebtedness was contracted, said Thorn executed a deed of conveyance to his daughter Louisiana Houser for 68½ acres of land, worth in reality $2,000, for the nominal consideration of $500, and the natural love and affection of said Thorn for his daughter aforesaid; that said sum of $500 was never paid, nor intended to be paid, by said grantee to said grantor; that said grantee had no way or means of raising any such sum of money; that her husband was poor, and without property, and that said conveyance was strictly a gift; that on the 3d day of February, 1873, six years after said indebtedness was contracted, said Thorn executed a voluntary conveyance to his son William Thorn for 95 acres of valuable land lying in said county, for the nominal consideration of five or six hundred dollars, being less than half the value of said land, and that said consideration never was paid, and never was intended to be paid; that on the 31st day of December, 1877, 10 years after said indebtedness was contracted, and some time after suit had been instituted to enforce the collection of the same, said Thorn executed a deed of conveyance to his son George M. D. Thorn for 75 acres of land lying in said county, for the sum of $1,500 cash in hand, which sum the plaintiff alleged never was paid, and it was never intended it should be paid; and that all of said conveyances were made by said Dr. Thorn to his said children upon consideration not deemed valuable in law, and were mere gifts from a father to his children, and, having been executed subsequently to the contraction of said indebtedness, were, as to the same, rendered fraudulent and void by law; that on the 13th day of September, 1879, but a few days prior to the term of court at which plaintiff's decree was rendered, Dr. Thorn, anticipating said decree, having delayed the rendition of the same as long as it was possible for him to do so, for the purpose of further hindering and delaying the plaintiff in the collection of said indebtedness, and for the purpose of defrauding her, executed another deed of conveyance to James N. Turnley, his son-in-law, voluntarily conveying to him a valuable tract of land containing 25 or 30 acres, including a grist and saw mill worth $2,000, for the nominal consideration of $625, which she alleges never was paid, and never was intended to be paid, and that said Thorn ever since has, and still is continuing to hold and enjoy said property; that said deed was made, not only on consideration not deemed valuable in law, but to delay, hinder, and defraud plaintiff, and to avoid the effects of plaintiff's said decree, and is therefore void as to her; that said Dr. Thorn, together with Joseph W. and Isaac N. Davis, conveyed a small lot of ground to Hiram G. Larew, reserving a lien for the sum of $100, unpaid purchase money; that said Dr. Thorn owns a small lot of little value in South Grafton in said county, conveyed to him by Miles A. Himan, deceased, and Elenore Thomas; that Fred Bernhold has two separate judgments against said Dr. Thorn, rendered by the circuit court of said county on the 6th day of October, 1879, and recorded in the judgment lien docket of said county on the 25th day of October, 1879; that about $60 remains unpaid on said judgments, and that they are liens on the said lot sold by said Thorn to said Larew, and should be paid out of the proceeds arising from the sale thereof; and she prayed that said lots and tracts of land may be sold in their proper order, and that, after the discharge of said Bernhold judgments, her decree might be paid and satisfied.

James N. Turnley was made a defendant, and answered said bill, admitting that he purchased said tract of land from Dr. A. Y. D. Thorn on the 13th day of September, 1879, at the price of $625, and claiming that he paid the entire purchase money; that said Thorn owed him a large portion of said purchase money, and had owed him for years, and that said Thorn proposed to sell him said property at the above-named price, which he then and now believes to have been a fair price, and that his principal object in buying said land was to collect what said Thorn owed him; that he had no purpose whatever of perpetrating or assisting said Thorn in perpetrating any fraud upon plaintiff, or any one

Digitized by Google

else; that the price paid was its full value, considering the fact that the wife of said Dr. Thorn did not join in the conveyance, said Thorn being about 75 years of age, and his said wife about 50. He denied all fraud, or intention to hinder or delay plaintiff in the collection of her debt against said Thorn. He admitted that said Thorn was his father-in-law, and had continued to live on said property since he (respondent) bought it. George M. D. Thorn was also made defendant, and answered said bill, claiming that it was not true that the conveyance of 75 acres of land by deed dated December 31, 1879, was upon consideration not deemed valuable in law, and was a mere gift; that he bought said land in good faith from said Dr. Thorn, and paid him therefor the sum of $1,500, which was a full price for the land; and that his deed was recorded long before plaintiff's judgment was rendered. Hiram G. Larew also answered said bill, in which he claimed that the lot of ground near Irontown, in said county, now owned by him, and mentioned in the bill, was sold by said Dr. Thorn to said Joseph W. Davis and Isaac N. Davis on the 23d day of June, 1873, and by said Davis to him on the 31st day of January, 1880, and that said Thorn has never owned it since said 23d day of June, 1873; that no deed from said Thorn was ever admitted to record for said lot in Taylor county until the 9th day of April, 1880, and that the defendant Bernhold's judgments were docketed in the judgment lien docket of said county on the 25th day of October, 1879, and are liens upon said lot, unless they have been paid off, but claimed that they had been paid off in full; that the plaintiff's decree, and said Bernhold's judgments, were both rendered at the same term of court, and are of equal priority, and should be paid *pro rata* out of any real estate owned by said Thorn, and that, therefore, plaintiff has not a first lien upon said lot in South Grafton; that said Dr. Thorn assigned said $100, which he owed him for said lot, to John W. Mason on the 9th day of April, 1880, and that on said day said Mason notified him of said assignment, and that Mason still claims the same, and denied that plaintiff has any lien upon said lot or said money. Abraham Thorn also answered plaintiff's bill, denying the allegation that said 123¾ acres of land was conveyed to him on the 11th day of April, 1870, for a mere nominal consideration, and claiming that he paid $600 for the same, which was a full and fair consideration; that he bought said land, and took possession of it, on the 27th day of February, 1861, and has been in continuous possession of the same ever since; that, at the time of said purchase, said Thorn made and delivered to him a title-bond for said land; that he had paid him $250 before the sale, and executed his two notes for $175 each for the residue, due in four and six years respectively, which notes have been paid long ago; that said Thorn did not make him a deed for said land until the 11th day of April, 1870, which was recorded on the 5th day of September, 1870, long before plaintiff's judgment was rendered; and that, more than five years having elapsed from the time said deed was made to him and recorded to the time of the commencement of this suit by plaintiff, he denies the right of plaintiff to call in question the validity of the same on account of its being voluntary, or for consideration not deemed valuable in law, even if such were the fact. William Thorn also answered said bill, and claimed that he bought the 95 acres mentioned in plaintiff's bill from said Dr. Thorn in the year 1870, at the price of $600, all of which, and more too, he paid, and that a deed was made to him on the 3d of February, 1873; and he denies the right of plaintiff now to inquire into the sufficiency of said consideration, more than five years having elapsed from the time said deed was made to him to the time of the institution of this suit; and claims that, if it had been a mere gift, plaintiff could not now have the deed declared void for that cause. Louisiana Houser and John M. Houser also answered said bill, and claim that the tract of land conveyed to said Louisiana was so conveyed in consideration of $500 named in the deed; that the same was a full and valuable consideration, and that said consideration was all paid by her long before said deed was made; that she bought the land, took possession of it in the year 1861, and had possession of it continuously ever since; that the deed therefor was made to her on the 9th day of September, 1872. They deny that said land was a gift to said Louisiana; and aver that, more than five years having elapsed from the time of making said deed before the commencement of plaintiff's suit, said deed could not now be declared void for that cause, if said land had in fact been a gift, and that no other cause is averred in the bill.

Plaintiff then filed an amended bill, alleging that said Thorn transferred and assigned his purchase-money lien on the Larew property to defendant John W. Mason, and that said Mason now claims to be the owner of said lien. She also alleged that said Larew, at the time he purchased said property and took a deed therefor from said Thorn, had notice of plaintiff's decree and said Bernhold's judgment, and that said Turnley had notice of plaintiff's original suit at the time he purchased said land. On the 2d of August, 1882, a decree was entered directing Commissioner Dent to ascertain the liens, and their priorities, against the real estate of defendant Dr. A. Y. D. Thorn, and the real estate liable to the payment of the same; and, in response to the requirements of said decree, said commissioner reported the aggregate amount of the liens against the real estate of said Thorn at $1,524.21; the amount in favor of plaintiff, including interest, at $1,436.86; and the amount in favor of Bernhold at $48.35; and that said Dr. A. Y. D. Thorn was the owner of the following real estate upon which said judgments are liens, to-wit, a vacant lot in the town of Grafton,

Digitized by Google

worth in fee $50, and of no rental value, also one-fourth of an acre of land, situated near Irontown, in Taylor county, W. Va., represented by deed (Exhibit N) filed with plaintiff's bill; and he submitted to the court the question as to whether the tract of land conveyed to James Turnley by said Dr. Thorn, described in Exhibit M with the bill, was so conveyed without consideration deemed valuable in law, or whether the same was made to hinder, delay, and defraud his creditors, and also whether the conveyance made by the said Dr. Thorn to his son George M. D. Thorn, on the 31st day of December, 1877, was a gift, and not for a valuable consideration; and, if these questions were found affirmatively, then said Turnley tract, and the tract sold to his son George M. D. Thorn, were liable, and should be subjected in the order in which they are named in said report; and said commissioner returned the depositions and papers read in support of his report, and upon which the same was made.

The defendant Hiram Larew excepted to so much of said report as charged the lot sold to him with the judgment of plaintiff against Dr. A. Y. D. Thorn; and on the 7th day of August, 1885, the court, by its decree, sustained the commissioner's report, so far as it ascertained that the Bernhold judgment and plaintiff's decree were on equal footing in point of priority, overruled the exception of said Larew, confirmed said commissioner's report, and directed that, unless said judgments be paid in 30 days, the vacant lot in South Grafton, and said lot sold by said Thorn to Hiram G. Larew on the 9th day of ———, 1885, be sold by a commissioner, therein mentioned, in the order and upon the terms therein set forth; and the court further ascertained from the pleadings and proofs in the cause that the lands in said bill mentioned and described as conveyed to William Thorn, Abraham Thorn, George M. D. Thorn, Louisiana Houser, and James M. Turnley by said Dr. A. Y. D. Thorn are not liable for the plaintiff's judgment, and that none of them should be sold therefor, and directed a dismissal of the bill as to them. From this decree the plaintiff appeals to this court.

Did the court below err in holding that the lands in said bill and proceedings mentioned and described as conveyed to William Thorn, Abraham Thorn, Louisiana Houser, George M. D. Thorn, and James M. Turnley by A. Y. D. Thorn were not liable for plaintiff's decree, and that none of them should be sold therefor, and in dismissing plaintiff's bill as to said parties? As to the tracts conveyed by said Dr. Thorn to his children Abraham Thorn, Louisiana Houser, and William Thorn, the conveyances are assailed by plaintiff on the sole ground that they are voluntary; and said defendants plead and rely upon the fourteenth section, c. 104, of the Code, which limits a suit, which is brought to set aside a conveyance on the ground alone that it was voluntary, to five years; and I am of opinion that said plea is a complete defense to plaintiff's suit, so far as said conveyances to Abraham Thorn, Louisiana Houser, and William Thorn are concerned. As to the conveyance made to the defendant George M. D. Thorn, it is attacked on the ground that the same was voluntary, and was made, not only after the contraction of the indebtedness, but after said suit was brought by plaintiff to enforce the collection of the same; and said George M. D. Thorn merely denies that said conveyance was voluntary, and claims that he bought the land in good faith, and paid him therefor the sum of $1,500, which is a full price for the land; that all of said money was paid prior to the institution of plaintiff's suit; and that his deed was recorded before plaintiff's judgment was rendered. In the case of Cohn v. Ward, ante, 41, recently decided by this court, we find the court uses this language: "It is the settled law of this state that the recital in a deed of the payment of a consideration for the conveyance is not evidence as against a stranger, or a creditor of the grantor, assailing it as voluntary, and therefore fraudulent as to him. In such case the burden of proving that the deed was made for a valuable consideration rests upon the grantee or persons claiming the benefit of the deed." See Rogers v. Verlander, 30 W. Va. 620, 5 S. E. Rep. 847. In the last-named case (third point of syllabus) the court held that, "where a subsequent creditor of a grantor assails in a chancery suit a deed made by the grantor, as voluntary and fraudulent, the recital in the deed that the grantee had paid the grantor a valuable consideration is not evidence against the creditor of such payment, and the burden of proving that a valuable consideration was paid by the grantee to the grantor is upon the grantee, but the burden of proving that the deed was fraudulent in fact is upon the creditor." It will be perceived that the defendant George M. D. Thorn has taken no proof whatever to sustain the allegation in his answer that he paid his father $1,500 for said 75-acre tract of land, and that the same was a full price therefor, and that the same was paid before the institution of appellant's suit, but that he seems to rely entirely on the recitals of his deed to show what consideration was paid; and as the burden of proof was on him, and said recitals proved nothing as against the plaintiff's allegation that the deed was voluntary, said conveyance must be considered and held to have been made by the grantor without any consideration deemed valuable in law, and therefore void as to the claim asserted by the appellant in her suit, and the creditors of said Doctor Thorn. As to the conveyance made by said Dr. Thorn to his son-in-law, William A. Turnley, its validity is assailed on two grounds—*First*, that it was voluntary; and, *secondly*, that said deed was made with intent to hinder, delay, and defraud the plaintiff, and to avoid the effects of her decree; and the burden of showing that this deed was fraudulent in fact rests upon the plain-

Digitized by Google

tiff. In the case of Livesay v. Beard, 22 W. Va. 585, this court has held that "fraud may be legally inferred from the facts and circumstances of the case, when the facts and circumstances are of such a character as to reasonably lead to the conclusion that the conveyance was made with the intent to hinder, delay, and defraud creditors;" and, although no depositions were taken by the plaintiff to support the allegation of fraud on the part of said Thorn in making said deed to Turnley, there are circumstances apparent in the case which, taken in connection with the depositions of said Turnley and Thorn, must lead us to the conclusion that said conveyance to Turnley was made with intent to hinder, delay, and defraud the appellant.

It will be seen that the debt due the plaintiff was a large one, and doubtless by far the largest debt owed by said Thorn. It originated as early as October, 1867, at which time it was $1,500; and the interest was allowed to accumulate until the 22d of September, 1879, when a decree was taken for said claim, then amounting to $2,216.91; and under that decree some property of defendant Thorn was sold, sufficient to reduce the debt to $1,165.57, upon which balance this suit is predicated. Now, is it possible that Turnley, the son-in-law of Thorn, was ignorant of the existence of this debt, to enforce the collection of which suit was pending at the time said conveyance was made to him, and had been so pending some time previous thereto? And yet said Turnley, in his deposition, makes the following answers to the questions propounded to him: "*Question.* How did you happen to be at Dr. Thorn's at that time? *Answer.* Dr. Thorn sent for me. *Q.* What did he say he wanted with you? *A.* He said he could not pay me what he owed me, and he wanted me to buy the place, so that I could make my money. *Q.* Why did he say he wanted to sell it? *A.* He told me he could not pay me, and wanted to sell the place to me. *Q.* Did he say anything about owing anybody else? *A.* Yes, he spoke of these executions against the place, and that he owed some bills at Wheeling. I do not remember whether he mentioned owing any one else or not. *Q.* Did he not tell you at that time that he owed the debt due the plaintiff in this case? *A.* No, sir; he did not. *Q.* Did he not tell you that there was a suit pending against him to enforce the collection of this debt out of some property he owned in Grafton? *A.* Dr. Thorn told me he had a suit in Grafton, but he did not tell me it was against the property I bought, or against any other property that I know of."

Now it is, to say the least of it, somewhat remarkable that Dr. Thorn should send for his son-in-law, and tell him he was about broken up, and propose to sell him this mill property to secure said Turnley some small amounts he had paid for him at different times, and mention nothing about this large claim which was pressing him most severely, and on which a decree was obtained a few days afterwards; and in this connection it will be noticed that the plaintiff, in her amended bill, alleges that said Turnley had notice of her original suit at the time he purchased said land; and no answer has ever been filed by him denying said allegation. Another circumstance which may be regarded with suspicion is the fact that the defendant Dr. Thorn, in his deposition, when asked, "Did he not pay you the whole of the purchase money on that day?" (meaning the day the deed was executed,) answered, "No, sir; he did not. Only that I owed him might have been considered paid." He also states that he took no writing from said Turnley, showing when or how he was to pay the purchase money; and, when asked why he did not keep the deed until the purchase money was paid, answered, "The deed was written here and acknowledged, and I just gave it to him to have recorded." It further appears from his deposition that no settlement was at that time made between him and said Turnley, and it was not ascertained what amount was to be paid in cash. Said Thorn was permitted to remain in possession of the property after the deed was made and delivered, free of rent, and so yet remains; and no acquittance of any character seems to have been executed or delivered by said Turnley to Thorn for the alleged indebtedness of Thorn to him, which he says was to be considered as part of the purchase money paid; and Turnley seems to have held possession of the notes he claims to have paid for Thorn at the time his deposition was taken in this cause; and, while the testimony in regard to the adequacy of consideration is somewhat conflicting, it seems to me that the weight of the disinterested evidence is that the amount contracted to be paid by Turnley was grossly inadequate.

In the case of Livesay v. Beard, supra, we find this court has further held that, "where the facts and circumstances in any case are such as to make a *prima facie* case of such fraudulent intent, they are to be taken as conclusive evidence of such intent, unless rebutted by other facts and circumstances in the case." "Although a deed may be made for a valuable and adequate consideration, yet, if the intent of the grantor in making it be fraudulent, the deed will be void if the grantee had notice of such intent." "Where, after an absolute conveyance of real estate by a debtor in failing circumstances, he remains in possession of the land, without contract, and without accounting for the use of the land, these facts are evidence of fraudulent intent in such conveyance." "Concurrent possession of both the grantor and grantee in an absolute deed after the conveyance is a badge of fraud." Now, applying these principles, and the principles laid down in the case of Lockhard v. Beckley, 10 W. Va. 87, to the facts and circumstances developed in this cause, with reference to said conveyance made by Thorn to Turnley, we must conclude that said conveyance was made with intent

Digitized by Google

to hinder, delay, and defraud the plaintiff, and is void as to the claim asserted by her, as executrix in this cause, and also as to the other creditors of said Thorn. As to the lot near Irontown in said county, now held by Hiram G. Larew, which was sold by Dr. Thorn to Joseph W. Davis and Isaac N. Davis on the 23d of June, 1873, and by said Davis to said Larew on the 31st of January, 1880, it appearing that said Bernhold's judgments were rendered at the same term of court that the plaintiff's decree was rendered, any amounts remaining unpaid on said judgments would be entitled to a *pro rata* satisfaction out of property liable thereto belonging to defendant Thorn; and, in subjecting said property, the plaintiff should resort to and exhaust the other property belonging to said Thorn, including the tracts he attempted to convey to George M. D. Thorn and James Turnley, before resorting to the said lot now held by said Hiram G. Larew.

The decree complained of must be reversed, and the cause is remanded to the circuit court of Taylor county for further proceedings to be had therein in accordance with the rules of equity and the principles herein announced, with costs to the appellant.

SNYDER, P., and GREEN and BRANNON, JJ., concurred.

(32 W. Va. 546)

STATE v. TINGLER.

(*Supreme Court of Appeals of West Virginia.* June 26, 1889.)

FORGERY—INDICTMENT—CERTIORARI.

1. A writ of *certiorari* is effectual on suggestion in this court of diminution of the record to bring to this court the true and correct record as it is in the court below, no matter in what respect the transcript, as certified in the first instance, may vary from or misrepresent such record.
2. The form of indictment for forgery and uttering forged instruments, found in Mayo's Guide, (Ed. 1860,) p. 537, is good as to both counts.
3. Neither in an indictment for uttering or attempting to employ as true a forged instrument, nor one for forgery, is it necessary to name the person intended to be defrauded, as section 8, c. 158, Code 1887, dispenses with that in both such cases.
4. It is not necessary in such indictment to allege that the act was to the prejudice of another's right, but it must appear from the description of the writing in the indictment that it is such as might prejudice his right.

(*Syllabus by the Court.*)

B. F. Ayres, for plaintiff in error. *Attorney General Caldwell*, for defendant in error

BRANNON, J. Writ of error to a judgment of the circuit court of Ritchie county sentencing Tingler to confinement in the penitentiary for two years. A preliminary question arises upon a motion by defendant to dismiss a writ of *certiorari* awarded in this cause. The transcript of the record accompanying the petition for the writ of error states that the grand jury presented "an indictment against Thomas Tingler for a misdemeanor. A true bill." The attorney general suggested a diminution of the record, and this court awarded a writ of *certiorari* to the clerk of the circuit court of Ritchie and the record as certified by him under the mandate of said writ shows that the grand jury presented "an indictment against Thomas Tingler for a felony. A true bill." The defendant moves this court to quash this writ of *certiorari*. His counsel cites the provision in section 7, c. 135, Code 1887, that "such court may in any case award a writ of *certiorari* to the clerk of the court below, and have brought before it, when part of a record is omitted, the whole, or any part, of such record." *Certiorari*, as an auxiliary writ, used by appellate courts to present to them for decision of errors assigned the record in the court below as it in truth exists there, is a remedial writ belonging to such courts under the common law, without this statute, and its office should not be hampered by too strict construction. If counsel means by citing the statute that it does not lie in this case because the statute gives it, "when part of the record" is omitted, and because the transcript as it first appeared showed the indictment to be for a misdemeanor, and was full on this point, I do not think the point well made. The attorney general suggested that this word "misdemeanor" in the transcript was a clerical error, and that in the record-book it was in truth "felony," not "misdemeanor." Literally, if such is the fact, here is a part of the record omitted, in the language of the statute,—the word "felony,"—and the statute would apply. Certainly, where the clerk, by accident, in making the copy substitutes one word for another found in the record, the spirit and object as well as the letter of this act, as well as the common-law function of the writ, would seem to afford a remedy whereby the record, as in truth it is, can be brought to this court a better record. In Shifflet v. Com., 14 Grat. 652, where there appeared an omission in the transcript of the finding of the indictment, a *certiorari* was held proper to secure a better record. So in William's Case, 14 W. Va. 869. If a record is defective or incorrect, the errors or omissions should be suggested in this court, and a *certiorari* moved to bring up a correct record. Hudgins v. Kemp, 18 How. 530. "Where the clerk's certificate to the transcript is, in point of fact, not true, the remedy is by *certiorari* to supply deficiencies," says WAITE, C. J., in Railroad Co. v. Dinsmore, 108 U. S. 30, 2 Sup. Ct. Rep. 9. In short, this writ is properly used by this court to get before it the record of the court below, as it in fact exists, no matter what the character of the defect in the transcript as certified in the first instance here. Defendant's counsel relies on Seibright's Case, 2 W. Va. 591, which holds that the purpose of the writ is, not to cause a record to be made or corrected, but to have brought before the appellate court, when part of the record is omitted, the whole or any part of it. That case does not apply here. There, after

Digitized by Google

signing the bill of exceptions, the judge, during the term, had interpolated certain words, and the defendant asked a *certiorari* with the intent to have the bill certified as it was before the interpolation of those words, and, the facts being agreed, the court held that the court had the right to insert those words, and the real point of the decision was that the record as already before the court was correct and true, and refused the writ. Judge MAXWELL remarked that a *certiorari* could not be used to cause a record to be made or corrected. This is so. Its office is only to bring the record as already made by the court below. Any amendment or correction of that record is to be made by that court in a proper proceeding. Vest's Case, 21 W. Va. 796; Bias v. Floyd, 7 Leigh, 647. A *certiorari* will not do this. But in this case the state, by the *certiorari*, is not seeking to alter, amend, or correct the record from its present showing as it now is in the circuit court, but simply to present it here as it is there.

The motion to quash the *certiorari* is overruled. The indictment is as follows: "State of West Virginia, Ritchie county, to-wit: The grand jurors of the state of West Virginia, in and for the body of the county of Ritchie, and now attending said court, upon their oaths present that Thomas Tingler, on the ——— day of ———, 1888, in said county, feloniously did forge a certain paper writing, purporting to be an order signed by ——— MacFadden, and to solicit Mr. Collins to let the bearer have three dollars' worth of goods, and which said forged order is of the following purport and effect, to-wit: 'Feb. the 23, 1888. Mr. Collins: Please let the bearer have three dollars' worth of goods, and oblige me. I will pay you in tobacco. MACFADDEN.' With intent to defraud against the peace and dignity of the state. *Second Count.* And the jurors aforesaid, on their oaths aforesaid, do further present that the said Thomas Tingler afterwards, to-wit, on the ——— day of ———, 1888, in said county feloniously did utter and attempt to employ as true a certain paper writing, purporting to be an order payable to bearer, which said last-mentioned order is of the following purport and effect, that is to say: 'Feb. the 23, 1888. Mr. Collins: Please let the bearer have three dollars' worth of goods, and oblige me. I will pay you in tobacco. MACFADDEN.' With intent to defraud, he, the said Thomas Tingler, at the time he so uttered and attempted to employ as true the said last-mentioned forged order and paper writing, to-wit, on the day and year last aforesaid, well knowing the same to be forged, against the peace and dignity of the state. On information of Creed Collins and William MacFadden, sworn and sent to the grand jury to give evidence at the instance of the state. H. PECK, Pros. Atty. Indorsed: A true bill. J. M. MACKINNEY, Foreman." Defendant moved the court to quash the indictment, and each count, and his motion was overruled. He then pleaded not guilty, was tried by a jury, and a general verdict of guilty as charged in the indictment was rendered. He moved the court to arrest judgment and grant him a new trial, because the verdict was contrary to law and evidence. The court overruled the motion, pronounced the said sentence, and he excepted. The bill of exceptions shows that the state proved by Creed Collins that the order was presented to him at his store in Ritchie county by the prisoner about the time of its date, who said that his name was Thomas Campbell, and that the order presented signed "MACFADDEN" was given to him by William MacFadden for work; that Collins gave prisoner three dollars in goods for the order, and charged them to MacFadden, who afterwards refused to pay the same because he had not given it, and that he (Collins) had lost the amount of the order, three dollars. The state introduced the order set out in the indictment, and proved by William MacFadden that the name of the prisoner was Thomas Tingler; that he was not indebted to Tingler at the time when the order bears date; that he did not write or sign the name "MACFADDEN" thereto, and did not authorize any one to do so, nor did he ever recognize it as good, and refused to pay it to Collins, and Collins lost three dollars thereon. MacFadden, on cross-examination, stated that since he first had knowledge of the existence of the order he had said if prisoner had paid him $100, he would not have prosecuted him; that he meant by that that he would have avoided going before the grand jury. He said he was the only William MacFadden in Ritchie county. The state proved by Hallam that prisoner had been in his custody as jailer upon this charge; that he was not kept locked in the cell, but was permitted to be at large in the room containing the cells or cages; that the door of the room was not locked, but propped with an iron poker from the outside; that prisoner pried one of the hinges of the door loose and escaped, was gone three months. A reward was offered, and he was captured by a man named Frey. An account was shown witness in his favor against the state, sworn to by him, for criminal charges, charging for receiving and discharging this prisoner at date of escape, and he admitted swearing to the account, stating that he was mistaken, and should have charged only for receiving the prisoner.

Treating, as we must, the record of the finding of the indictment as correctly shown by the record sent up by the clerk under the *certiorari*, there is nothing to sustain the motion to quash or in arrest of judgment, so far as they rest on that point. Is the indictment good in both counts? We think so. The prisoner's counsel argues that the second count is bad because it does not specify the person to be defrauded. The counsel admits that the first count, though it does not name such person, and though bad at com-

Digitized by Google

mon law, is good under section 8, c. 158, Code 1887, providing that "where an intent to injure, defraud, or cheat is required to constitute an offense, it shall be sufficient, in an indictment or accusation therefor, to allege generally an intent to injure, defraud, and cheat, without naming the person intended to be injured, defrauded, or cheated;" but contends that the second count, that for uttering, is not helped by this statute. We do not concur in this view. We think that such intent exists in the uttering and employing as true a forged instrument, knowing it to be forged, as much as in the act of forging it. In Henderson's Case, 29 W. Va. 147, 1 S. E. Rep. 225, the count for uttering did not charge whom it was intended to defraud, though it did charge to the prejudice of Leonard, and it was held good. So in Koontz's Case, 31 W. Va. ——, 5 S. E. Rep. 328, it was held good, though it did not name the person to be defrauded. This indictment is in the form found in Mayo's Guide, which has for many years been used in both Virginias. In assigning errors, the prisoner's counsel points out as a defect in the indictment that it does not allege that the act was to the prejudice of any one's right. Powell's Case, 11 Grat. 822, is a full answer to this point. There it was held that the words "to the prejudice of another's right," found in the statute against forgery, need not be used in the indictment, because they are descriptive, not of the offense, but of the instrument. Having specified various instruments as subjects of forgery, it being impossible to specify all, section 7 says: "If a person forge any writing other than such as is mentioned in the first and third sections of this chapter, to the prejudice of another's right," plainly intending by these words to describe or characterize the writing, not the act. If the instrument itself be of such character as may prejudice another's right, it is enough. There is no error, therefore, in overruling the motions to quash and in arrest of judgment. Was there error in refusing a new trial? Prisoner's counsel urges that the evidence does not show that the forgery was committed in Ritchie county. The prisoner in Ritchie county has the order in possession, and passes it about the date of the order. If he forged it, why may it not be said that he forged it there? In Poindexter's Case, 23 W. Va. 805, this court held that on a trial for forgery if it be proved that the writing was found in the hands of prisoner in the county where he uttered or attempted to employ it as true, and there is no evidence that the forgery was done in another county, the jury may infer from these facts that the forgery was committed in that county. In Spence's Case, 2 Leigh, 751, the court held that evidence that the prisoner had the notes in his possession in a county was proper evidence to go before the jury of the fact that he committed the forgery there. See 3 Greenl. Ev. § 112. The jury having found against the prisoner as to this point, it being the judge of the weight of the evidence, this court could not find otherwise unless we considered the evidence manifestly insufficient. But the verdict, it may be added as pertinent to this point, is general. It finds the prisoner guilty of uttering and employing the order as true as much as it finds him guilty of forgery, and this certainly occurred in Ritchie; and this consideration would render the question of the place of the forgery immaterial, even if there were anything of substance in it. We are of opinion that the evidence justifies the verdict. Judgment is to be affirmed.

SNYDER, P., and GREEN and ENGLISH, JJ., concurred.

(32 W. Va. 526)

HOOPER *et al.* v. HOOPER *et al.*

(*Supreme Court of Appeals of West Virginia.* June 27, 1889.)

EXECUTORS — JUDGMENT — SURETIES — WITNESS — PROMISE TO PAY DEBT OF ANOTHER.

1. Two partners are engaged in business in another state,—one living in this state, one in the other,—and the one living in this state dies, and the other becomes one of his executors, under a qualification, in this state. At his death the business is closed up, and partnership debts are to be collected and paid, and the effects sold. If, when this is accomplished, the survivor is insolvent, the sureties in the executorial bond are not liable for the interest of the deceased in the partnership; but, if said survivor is then solvent, they are liable.

2. If, at the time when it may be said under the law that the business was in such condition that it was the duty of the survivor to turn into his hands as executor the share of the deceased in the assets, the survivor was insolvent, his sureties in such bond are not liable; if he is then solvent, they are liable.

3. If, when the survivor makes a statement of receipts and disbursements as surviving partner in winding up the business, showing a balance in his hands to be divided, he is insolvent, so that such balance is not substantial assets, his sureties in such bond are not liable for such balance; if then solvent, they are.

4. Liability of sureties in the bond of an executor or administrator is limited by the terms of the covenant of the bond, and cannot be extended by implication.

5. A judgment against an executor is conclusive, both as to the validity and amount of the demand, on both executors and legatees.

6. Where A., for a valuable consideration paid by him, purchases property of B., which is, by the terms of the sale, to be conveyed to C., and is afterwards so conveyed, and C. promises in consideration thereof to pay a debt due from A. to D., the promise of C. to pay such debt, though not in writing, is binding on him, if assented to by D.

7. After C.'s death B. is a competent witness to prove C.'s promise.

8. An executor is not to be charged with a debt when it becomes due, but only when he actually receives it, unless it is shown to have been lost by his negligence or improper conduct.

9. A debt due to an executor individually from a legatee may be insisted on as part payment of the legatee's legacy.

(*Syllabus by the Court.*)

Appeal from circuit court, Marion county.

Suit in chancery by Harry B. Hooper, Sarah Hooper, and Rose P. Sullivan, instituted in the circuit court of Taylor county, and removed to Marion county, against Charles E. Hooper and W. S. Hooper, executors of the will of John W. Hooper, deceased, to sur-

Digitized by Google

charge and falsify their account, and settle the same, and, the executors being insolvent, obtain a decree against the sureties on the bond for *devastaverunt*. For further statement of the case see former opinion, 1 S. E. Rep. 280. From a final decree of the circuit court of Marion county, rendered July 10, 1888, directing defendants to pay to said Sarah Hooper $1,552.31 and interest from that day; to said Harry B. Hooper $2,111.31 and interest from that day; and to said Rose P. Sullivan $991.49 and interest as aforesaid,—plaintiffs appeal.

Woods & Martin, for appellants. *A. F. Haymond*, for appellees.

BRANNON, J. This cause has been in this court once before. See 29 W.Va. 276, 1 S. E. Rep. 280. Since it was remanded to the circuit court of Marion county additional evidence has been taken, and a further report has been made by Commissioner Hayden, to which exceptions were filed by plaintiffs and defendant Sarah Hooper, and by defendants Brinkman, Doonan, and Grimes, administrators of Charles E. Hooper, and by defendant Whitescarver. On these exceptions the case here turns. This is an appeal from a decree of the circuit court of Marion, taken by the plaintiffs and Sarah Hooper, and some errors have been assigned by defendants Brinkman and Doonan.

A very important matter in the cause, raised by appellants' exceptions 1 to 5, inclusive, is as to certain furniture and other personal property employed in the operation of an hotel at Cumberland, in the state of Maryland, known as the "Revere House." Shall its value be decreed against the sureties in the executorial bond given by W. S. Hooper and Charles E. Hooper, as executors of John W. Hooper, deceased, upon their qualification before the recorder of Taylor county, West Virginia? The bill treats this property as the property of the decedent, John W. Hooper, never suggesting that it was the property of a partnership composed of John W. Hooper and his son, Charles E. Hooper, one of his executors; but Charles E. Hooper, in his answer, denied that it was the property of John W. Hooper, and alleged that such a firm existed, and that this property was owned by it. When Judge JOHNSON delivered the opinion on the former appeal he held that the evidence did not establish such a partnership, and hence he did not place the opinion on that basis, but treated this property as the sole property of John W. Hooper. The question then arose whether this hotel property, which at John Hooper's death was in Cumberland, in the hands of Charles E. Hooper, who was managing said hotel, and part of which was there sold by Charles E. Hooper, and a part brought into this state and sold by him, could be charged to the executors and their sureties. Judge JOHNSON, after discussing the case of Tunstall v. Pollard, 11 Leigh, 1, and other cases, says: "In none of the cases which we have seen was the direct question decided which is here presented, whether the sureties are liable for goods brought by the executor from another state into this, and wasted. * * * If the executor, as such, is liable, there can be no doubt his sureties are." Nor did he decide the question, though his evident leaning is in favor of the position that they would be liable. As I do not think the case, as it now is, involves that question, I simply refer to authorities bearing on it. Tunstall v. Pollard, 11 Leigh, 1; Powell v. Stratton, 11 Grat. 792; 1 Rob. Pr. (New,) 162, 166, 189, 191, 192; Schouler, Ex'rs, §§ 174–176; Andrews v. Avory, 14 Grat. 229; Mackey v. Coxe, 18 How. 104; Wilkins v. Ellett, 9 Wall. 740; and cases cited 29 W. Va. 291, 1 S. E. Rep. 280; Burnley v. Duke, 2 Rob. (Va.) 130. As above stated, Judge JOHNSON did not decide the question just indicated; but his decision that the bond held its obligors liable for this hotel property rested on the fact that the will directed the sale of testator's personal property, "wherever situated," and, the bond having covenanted for a faithful discharge by the executors of their duties under the will, the court held the sureties responsible for the proceeds of such sale. But since that decision evidence taken in the case has established that a partnership existed between John W. Hooper and Charles E. Hooper in the name of J. W. & C. E. Hooper in the carrying on of the Revere House hotel, and the property in question was property of the firm, not of John W. Hooper solely; and so this clause of the will directing the sale of testator's property could not apply to it, and therefore the reason so pointedly stated by Judge JOHNSON on page 297, 29 W. Va., 1 S. E. Rep. 296, as the ground of the decision, does not now apply. The able counsel for appellants in his brief virtually concedes that this partnership has been proven, and argues on that basis.

Therefore the question now is: Are the sureties in the executorial bond liable for the testator's interest in this property? At testator's death this property was in the hands of Charles E. Hooper, the legal title resting in him as surviving partner, with power to sell. Hooper v. Hooper, 29 W. Va. 285, 1 S. E. Rep. 280. It was the duty of Charles E. Hooper as surviving partner to close the business, collect the assets, dispose of the effects, and, after settling debts against the firm, to adjust the accounts between himself and his copartner, and turn over to his estate his interest in the net social assets, after discharging the social debts. But this duty, we may say, arose before the executorial bond was given; at least he had formed a relation,—that of copartner,—from which that duty might at any moment fall upon him. It did fall upon him. Then this property was in his sole and exclusive possession as surviving partner, and in another state. He still carries on the hotel for eight months after his father's death, and incurs expenses in so doing, loses in so doing, sells the property there in larger part, brings some to this state, sells

Digitized by Google

it, and wastes it. It is true, he had no right after his father's death to continue this business. Story, Partn. § 343; Hooper v. Hooper, supra. But he did continue it. Are the sureties liable for the misconduct and waste of the partnership property by the surviving partner because he was executor? The liability of a surety in the bond of an administrator or executor is limited by the terms of its covenants, and cannot be extended by implication. 7 Amer. & Eng. Cyclop. Law, 217. Courts go no further against sureties than the scope of their obligation compels. Brandt, Sur. § 102. The condition of the bond in this case is for the faithful discharge of their duties as executors. Clearly the duty of closing the partnership and paying over to himself, as executor, the share of John W. Hooper in the firm assets, rested on Charles E. Hooper as surviving partner, in the first instance; (1) because his position as partner, with all duties which might ensue therefrom, began before he became executor; (2) because the legal title of the partnership property, the exclusive possession, the sole and absolute power of selling it, and the function of paying debts, were all vested in him. John W. Hooper's estate was not, at the instant of his death, vested with any right to a specific sum in it, but only an interest to be developed by a collection and disposition of the firm assets and satisfaction of the firm debts. Before his estate could be said to have any defined interest it must undergo closing and settlement, consisting, it may be, of the performance of many acts, and the consumption of considerable time. This did not take place for a considerable time after his death, if it even has yet, and when it did take place C. E. Hooper may have been insolvent, for there is considerable evidence to show his insolvency. The sureties did not expressly stipulate in the bond for the proper performance of C. E. Hooper's duty as surviving partner; but it is claimed that, as C. E. Hooper had these partnership assets in his hands, and should have saved and accounted for them, and not wasted them, as it was a debt due from him to the estate, he should have collected it as well from himself as if it had been in the hands of another person. But the answer is that until the closing of the partnership there was no ascertained debt in favor of the estate, and he may have failed in his duty as partner before the time came for him to act as executor in reference to that fund, and when that time arrived he was perhaps insolvent.

It is also to be added that this property was in another state, the business in another state, and he sold and realized the bulk of the assets there, and never brought a large part of the property into this state; he brought here, if insolvent, only a naked liability of an insolvent man. If he had given a bond as partner, and was insolvent, could the sureties in that bond shift the liability from their shoulders to rest upon the sureties in the executorial bond? I think not. In Gilmer's Adm'r v. Baker's Adm'r, 24 W. Va. 72, it was held that "an insolvent fiduciary cannot transfer his mere indebtedness in one capacity to himself in another capacity, so as to exonerate his sureties in the one capacity, and throw the burden upon his sureties in the other. To make the transfer valid in such case it must consist of something more than a naked liability; it must be substantial assets. But if substantial assets be in the hands of the fiduciary, or he is solvent and able to pay over his indebtedness in the one capacity to himself in the other capacity, all that is required to make the transfer in such case is for him to make his election to hold it in the latter capacity, and manifest that election by some act, admission, or declaration, and such election will bind his sureties on his bond given in the latter capacity." These principles apply to this case. The sureties did not guaranty for the conduct of the surviving partner. If he acted badly as such, and at the time when he should have turned over the assets as surviving partner to himself as executor, at the close of the partnership, he was insolvent, why should the sureties pay his default as surviving partner? In Pearson v. Keedy, 6 B. Mon. 128, the Kentucky court of appeals held that partnership funds coming to the hands of a surviving partner, who has been appointed administrator of a deceased partner, come to him as survivor, not as administrator, and that the sureties are not liable therefor. We do not go so far. But we hold that if the survivor wastes the social assets, and when the partnership affairs are, or under the law should be regarded as, closed the survivor is insolvent, his sureties as personal representatives are not liable; but if he is solvent at that time they are liable. The case of Caskie's Ex'rs v. Harrison, 76 Va. 85, is cited as sustaining the contrary. That case may be distinguished from this on its particular facts. Judge STAPLES, in his opinion, says: "It appears that, at the death of John Caskie, James Caskie was indebted to the firm $10,000 in round numbers. Between the death of John Caskie and the month of September, James Caskie collected funds belonging to the firm to the amount of $62,000, nearly all of which were in the year 1868 embarked and lost by him in private cotton speculation. * * * It is obvious that whatever may have been the trouble or delay in disposing of the tobacco in foreign ports, there could have been no sort of difficulty or obstacle in the way of a proper disposition of the funds actually received by James Caskie, and converted by him to his own private use. He was in possession of all the books, accounts, and papers of the concern, and must be presumed to be familiar with its condition, assets, and liabilities. * * * He knew certainly that the partnership owed no debts, and all he had to do was to divide the money, as it was from time to time received, between himself and the estate of his deceased partner." Here note that the firm owed no debts. The reporter puts that fact

Digitized by Google

in italics. Note that Judge STAPLES thought that, this being so, the survivor should have turned over the half of the $10,000 and the $62,000 at once, because they were not needed to adjust partnership debts. Note that he seems to recognize a distinction between this money actually realized, and the tobacco in foreign ports. Note that these sums, actually in the hands of the executor, and not needed for partnership debts, were invested by the survivor in his own private cotton speculations. But in this case, at the death of John W. Hooper the assets were to be sold and collected, debts were to be paid, both consisting of many items, as claimed by exhibits filed by Charles E. Hooper, and which he testifies to. The surviving partner never did any act electing to hold this property as executor except in regard to the sum of $223.35, the balance shown by his said exhibit, which was charged against the sureties by the decree. But we are without *data* to decide finally this feature of the case. There has been no settlement of the partnership accounts in this case. There are several questions which the record does not satisfactorily answer. Was there any, and, if any, what, surplus remaining after payment of partnership debts? What was the amount of John W. Hooper's interest in it, all or a part of it? When was the partnership closed? When were its last debts paid? When the partnership was closed, was Charles E. Hooper insolvent? If he was then insolvent, the sureties would not be bound for the interest of John W. Hooper in such surplus; otherwise they would. There must be a formal settlement of the partnership accounts to ascertain what was the surplus, if any, and John W. Hooper's interest in it; to ascertain the date of the close of the partnership,—that is, when the last substantial debt was collected, or the last valid debts paid, (Boggs v. Johnson, 26 W.Va. 825; Sandy v. Randall, 20 W. Va. 244;) and whether, when such close of the partnership occurred, Charles E. Hooper was insolvent. The circuit court erred in acting on this partnership matter against the appellants in decreeing only $223.35, without having a settlement of the partnership accounts, and against appellees in decreeing even that sum, in the absence of such definite settlement.

Appellants' Exception 6. Shea debt. In their *ex parte* settlement this note was charged to executors, principal and interest, by separate items. This makes it *prima facie* a correct charge. In his answer Charles E. Hooper alleges that it was not collected, but there is a general replication to this answer. The note is not produced, so far as I see, or proven as yet in executor's hands. If not collected, why not produce it? Though with that settlement there is returned a list of insolvent notes, this is not among them. Charles E. Hooper does not in his deposition say anything about it. Shea's mother testifies that he never had any property, but does not say he never paid this note. We think it should be charged, and that there was error in overruling this exception.

Appellants' Exception 7. George W. Brown & Co. debt, $271.02. In the first *ex parte* settlement are found two items of $200 and $231.22, allowed as disbursements to the executors for payments to George Brown. Turning to the account made out in name of G. W. Brown & Co. against J. W. Hooper, these two items are found there as payments. This is the same account. The receipt was signed "G. W. BROWN." Hence the items credited in the *ex parte* settlement are credited in his name. Their presence in that settlement makes them *prima facie* correct. C. E. Hooper makes oath to the justness of the charge, and the affidavit of G. W. Brown asserts their justness and the fact of payment by the executor. C. E. Hooper, in his deposition, says he examined into this and other demands, and believed them just. John W. Hooper kept the large hotel known as the "Grafton House," and an eating-house at Parkersburg, and the charges are for whisky,—an article likely to be consumed in such business. I do not think the charge should be disallowed. The account was for a larger amount, but some of it was sold after John W. Hooper's death, while, as the evidence shows, the family still kept the Grafton House; but the commissioner has allowed only the sales prior to John W. Hooper's death, two items of $91.32 and $179.70, making the $271.02. No error in overruling this exception.

Appellants' Exception 8. Rogers' debt. The credit of $762.02 is erroneous. Rogers sued the executors in *assumpsit* on this beef account, and recovered judgment for $570.43. The matter in issue in that action was whether any, and, if any, what amount, was due from Hooper's estate to Rogers, and the judgment is conclusive as to the validity and the amount of the debt, both on the executors and the legatees. Bigelow, Estop. 78; Corrothers v. Sargent, 20 W. Va. 351. "A judgment against an administrator is binding on the creditors and legatees of the estate." Freem. Judgm. § 163. There was error in overruling this exception to the extent stated.

Appellants' Exception 9. John W. Hamilton's debt. Charles E. Hooper owed Hamilton $1,000. Said Hooper sold a stock of goods to Casteel for $1,100, of which $100 was paid in cash, $1,000 in a lot in Grafton. By the agreement of sale this lot was to be conveyed, and was afterwards conveyed, by Casteel to John W. Hooper, and the $100 cash payment was credited by Casteel on an account of his against John W. Hooper. Of this arrangment John W. Hooper was aware, approved it, and accepted the deed for the lot from Casteel; in fact, most likely advised and procured the arrangement. He allows his son to sell his goods to pay for a lot to be conveyed to him, and in consideration of such conveyance promises to pay Hamilton this $1,000 debt due him from the son. It is

Digitized by Google

contended by the plaintiffs that it is not a valid debt against John W. Hooper's estate, because it was a promise to pay the debt of another, and, not being in writing, is void under Code, c. 98, cl. 4, which provides that "no action shall be brought to charge any person upon a promise to answer for the debt, default, or misdoings of another," unless the promise be written: This statute does not apply to this matter. It is a part of what is called in the law-books the "statute of frauds and perjuries," and was made to suppress frauds; but, if applied here, it perpetrates a fraud. This instance is simply an original promise by John W. Hooper, based on the valuable consideration of a conveyance of a lot to him to pay money in return as purchase money for the lot. He buys property, and agrees to pay for it. Does not the transaction create a debt against him? Is it not his own debt he agrees to pay? The mere circumstance that he agreed to pay that debt in a particular way,—that is, pay it to Hamilton on a debt due him from Charles E. Hooper,—does not make it any the less his own debt. He might have agreed to buy property, and deliver it to Charles E. Hooper, or to deposit the money in bank, or to pay a debt for him. The stipulation to pay it to Hamilton was but an incident or circumstance in the transaction, not its essence, for that was the reception by John W. Hooper of property, and his promise to pay for it. Browne, St. Frauds, § 166, says: "Under the same head may be treated those arrangements frequently made by which one man who owes a debt to another agrees with him to discharge the obligation by assuming and paying a debt which he (the creditor) owes to a third person. Upon such an agreement, if so communicated to him and accepted by him as to make him privy to it, such third person may of course resort to the party making the promise, and recover the amount of his immediate debtor's obligation. Nor is the promise of the defendant in such case within the statute of frauds, as to pay the debt of another." In Barker v. Bucklin, 2 Denio, 45, a party owed a debt, and delivered to his brother horses, and the latter agreed to pay their price to the creditor on his debt against his brother, and Judge JEWETT says: "It was not a promise to answer for the debt of another person, but merely to pay the debt of the party making the promise, to a particular person designated by him, to whom the debt belonged, and who had a right to make such payment a part of the contract of sale. Such promise was no more within the statute of frauds than it would have been if the defendant had promised to pay the price of the horses directly to his brother, from whom he purchased them." If Charles E. Hooper himself had conveyed the lot to his father for $1,000, to be paid to Hamilton, he assenting, would not such promise, though oral, have been valid? He procured another to convey it. He simply procured another to convey it, he paying his stock of goods, thus prejudicing himself, which would be a valuable consideration moving from him. In Dearborn v. Parks, 5 Greenl. 81, a purchaser of land agreed as part of the price to pay outstanding notes of vendor on the land. The court held it good not in writing, Judge WESTON saying that, although the effect was to pay another's debt, yet the defendant paid his own debt, and that constituted "the operative motive by which he was actuated." If there is an understanding between the parties that the defendant, in consideration of his own indebtedness, shall pay the plaintiff what is owing him by another, it seems reasonable to regard the transaction as a mere payment by the defendant of his own debt, though the language of the parties would not be formal to that effect. Browne, St. Frauds, § 166 et seq. Roberts states the rule to be that, if the consideration of the new promise "spring out of any new transaction, or move to the party promising on some fresh and substantive ground of a personal concern to himself, the statute of frauds does not attach." See Browne, St. Frauds, § 212. In Sayre v. Edwards, 19 W. Va. 359, when it was argued that the promise was void under the statute, JOHNSON, P., said: "This is incorrect, because it was not to pay the debt of another, but to pay an obligation which he had individually assumed; that is, to pay his own debt."

Judge LEE, in Hopkins v. Richardson, 9 Grat. 494, says of the promise in that case: "It seems to fall rather within the third class of cases mentioned in Story on Promissory Notes, § 457, where the promise to pay the debt of another arises out of some new and original consideration of benefit or harm moving between the newly contracting parties, which class of cases, the author adds, is not within the statute of frauds. The distinction between this class of cases and those in which the promise is regarded as an undertaking for the debt of another within the statute of frauds is also recognized in Forth v. Stanton, 1 Saund. 211, note 2, and by Chief Justice KENT, * * * in Leonard v. Vredenburgh, 8 Johns. 29-32." "The statute contemplates a promise to answer for another's debt; a promise for that purpose; a mere guaranty; and it never was meant that a man should set it up as a pretext to escape from the performance of a valid promise for another purpose because, in performing that, another's debt was indirectly involved." Browne, St. Frauds, § 212. "Where a debtor transfers funds or property to another for the purpose of paying his debt, and the person thus holding the debtor's funds or property promises the creditor to pay his debt, such promise is held good, though not in writing. * * * We apprehend the true principle why the promise to the creditor is valid without writing is the same in both these classes of cases. In both the party making the promise holds the funds of the debtor for the purpose of paying his debt; and, as between him and the debtor, it

Digitized by Google

is his duty to pay the debt, so that when he promises the creditor to pay it, in substance he promises to pay his own debt, and not that of another; and, though the debtor still remains liable for the debt, his real relation is rather that of a security for the party whose duty it is and who has promised to pay his debt, than of a principal for whom the other has become security or guarantor. He holds a fund in trust under a duty to pay it to the creditor. * * * The cases which decide that where a creditor holds a security for his debt, and surrenders it to a third person for his own benefit, upon his promise to be answerable for the debt, stand really upon the same substantial principle." Fullam v. Adams, 37 Vt. 397; Browne, St. Frauds, note 1, p. 259. Hamilton accepted this arrangement. Though not a party to it, (unless the statute prevents, which it does not,) on the promise to pay his debt he could sue John W. Hooper under section 2, c. 71, Code 1887, providing "if a covenant or promise be made for the sole benefit of a person with whom it is not made, or with whom it is made jointly with others, such person may maintain in his own name any action thereon which he might maintain in case it had been made with him only, and the consideration had moved from him to the party making such covenant or promise." 3 Rob. Pr. (New,) 20. Had John W. Hooper failed to pay the debt, and Charles E. Hooper had paid it, he could have sued his father for damages for breach of his promise to pay.

Our attention is called to the case of Radcliff v. Poundstone, 23 W. Va. 724, which holds that "where the consideration of a defendant's undertaking or promise is for money or property to be furnished to or received by a third person, if the transaction be such that the third person remains responsible to the person who furnishes him with such money or property, or from whom the consideration proceeds, such promise or undertaking is collateral, and under the statute of frauds will not bind the defendant, unless in writing." But at once it is seen that this does not fit our case. "Where the consideration of a defendant's undertaking or promise is for money or property to be furnished to or received by a third person," says that case. Here the third person is Charles E. Hooper. But in this transaction between Casteel and the Hoopers nothing was to go to Charles E. Hooper; no promise to pay him anything was made; but he paid his goods to get property conveyed to his father, to induce him to pay Hamilton's debt, such conveyance being the consideration of the father's promise. From it no principal liability was imposed on him to which his father's promise could be collateral. His liability to Hamilton remained, it is true, but it was not born of this transaction. So this was a valid debt against the estate, and properly paid by the executors. I do not forget that Judge JOHNSON, on page 298, 29 W. Va., 1 S. E. Rep. 297, not expressly mentioning this debt, but probably having it in view, said: "Of course no debt of another, assumed by the testator, is chargeable to the estate unless that assumption was in writing." Then there was no evidence to sustain it except Hooper's, which was incompetent. Since then Casteel's evidence has been taken. Judge JOHNSON did not intend this casual remark as deciding this matter. It is argued that Casteel is incompetent as a witness. He is not a party to the suit. He is not one from, through, or under whom Charles E. Hooper derived any interest or title by assignment or otherwise. It is said that Charles E. Hooper is assignee of Casteel. Assignee of what? Casteel sold him a lot to be conveyed to John W. Hooper, but no title, legal or equitable, ever vested in Charles E. Hooper, for by the terms of the sale it was to go to John W. Hooper. Even if it might be said, as counsel suggests, that he sold Charles E. Hooper the lot, and he sold it to his father, that lot has been conveyed to the father, and is not involved in this case.

Casteel has no interest to be furthered by his evidence; and it is to prevent a living man from furthering his own interest, either in his own behalf or in behalf of his alienee or assignee, where he will be prejudiced by the failure of alienee or assignee to make good his title, and so come back on him, that the statute as to the evidence is intended. I do not perceive that Casteel's connection with this matter is such as to inspire in him a motive from self-interest to favor Charles E. Hooper. It is suggested that he is assignee of John W. Hooper. He conveyed him a lot, but it is not involved; nor is Casteel seeking to establish a debt in his favor against John W. Hooper.

Appellants' Exception 10. As to $127.34 paid Hoffman; $123.33 paid Horner; $27.60 paid Dent; $25.86 paid Forbes & Collins. Charles E. Hooper includes these items in a list of items paid by him, and in his deposition says: "Before any of the foregoing claims were paid, I examined them as carefully as I could, and believe them to be proper charges against the estate. In most of the cases I knew my father was dealing with the parties who presented the claims." His brother and co-executor says: "He was not indebted to either of them in any sense," saying no more, giving no reason, not indicating that he had any knowledge as to them. The item paid Dent is allowed in first *ex parte* settlement, and is therefore *prima facie* right. It is verified by Dent's affidavit. In said settlement an item of $20.61 is allowed, not of Forbes & Collins, but Forbes, Collins & Craig. Inspecting the Forbes & Collins account, I find at one point:

Balance	$25 86
Board	5 25
	$20 61

Undoubtedly this is the same account found in *ex parte* settlement, and the sum $20.61 at bottom of account is inadvertently allowed

Digitized by Google

instead of $25.86. This *ex parte* settlement gives it *prima facie status*. The account of Hoffman is for sausage; that of Horner for eggs, poultry, butter, and a few plums,—articles likely to be used at the Grafton House. They are all receipted as paid by executors shortly after testator's death. Under these facts they seem just, and no wrong is done the estate by their allowance. There is no error in overruling the exception as to them.

Appellants' Exception 11. As to $83.85 paid for November, 1871, rent for Grafton House. Evidence shows it was paid before testator's death, and it is to be disallowed. It was error to overrule this exception.

Appellants' Exception 12. Twelve small charges, in all $189.38. The executors exhibit receipts for most of these items, and accounts of specification. They are in the said list of debts which Charles E. Hooper says he examined, and believed to be just, and that he knew his father dealt with the parties. There is no denial of them by the other executor. Most, if not all of them, are allowed in said *ex parte* settlement, though for different sums, arising from the fact that Commissioner Hayden allowed no items arising after testator's death, whereas the accounts have items dating since his death, and the commissioner in *ex parte* settlement so allowed them. Even before the statute making parties competent as witnesses, small items might be allowed executor on his own oath. 2 Lomax, Ex'rs, p. 332, § 35; 2 Rob. Pr. (Old,) 367. This exception was properly overruled.

Appellants' Exception 13. Stock in agricultural and mechanical society, $100. It was charged to executor in *ex parte* settlement. Charles E. Hooper alleges in his answer that it was worthless, and in his deposition that the executors "never received anything for it, and that he understood it to be worthless." There is no showing to the contrary. It is not such a chose as could be collected, so far as appears, by suit, nor is it shown to be salable. With respect to that part of the estate which consists of choses in action, the law has long been settled that, although debts of every description due the testator are assets, yet the executor or administrator is not to be charged with them till he has received the money. 1 Williams, Ex'rs, side p. 1509. The rule in West Virginia and Virginia is: "An executor is not to be charged with the debts due the estate of his testator at the time when they become due, but only at the time when he actually received them, except such debts are lost by his negligence or improper conduct." Reitz v. Bennett, 6 W. Va. 417; Evans v. Shroyer, 22 W. Va. 581; Cavendish v. Fleming, 3 Mumf. 198. His account, rendered under oath, is *prima facie* evidence of its truth. Cavendish v. Fleming, supra. This exception was properly overruled.

Appellants' Exception 14. Taxes on land. This land was devised to Sarah Hooper for life. The life-tenant must pay taxes. Tayl. Landl. & Ten. § 318. So the court held in this case. Code 1868, § 26, c. 29, and chapter 54, Acts 1875, provide: "Where the owner has devised the lands or a freehold estate therein absolutely, the assessor shall charge such land to the devisee." Mrs. Hooper's life-estate was a freehold, and she was chargeable with these taxes. Charles E. Hooper, both in his answer and deposition, states that he paid taxes amounting to $593.62, and tax-bills are filed as vouchers, with reports in the cause. Can Charles E. Hooper set off these taxes paid by him against the claim of Sarah Hooper as legatee? Should he have credit for them under the circumstances of this case? I think they should be charged against her. She was bound for the taxes. He had funds of hers in his hands, probably all she had, and the relation of mother and son existed between them. The land was vested in her for life, remainder in him and the other children. Is it not reasonable to say that an understanding existed that he should pay the taxes with money of the estate in his hands? Such payment inured to her benefit as well as the children's, he being one of them, and saved her estate as well as theirs from loss. True, one person cannot, being a mere stranger, without request, pay another's debt, and hold him responsible. Neely v. Jones, 16 W. Va. 625. But the relation here existing was not that of mere stranger. Had Charles E. Hooper not paid, and the land been sold for the taxes, and he had bought, he being a remainder-man, probably he could not have held against her, but he would hold the land in trust for her. It may be that as remainder-man he would be entitled to apply money in his hands of hers to protect the remainder from loss by reason of non-payment of taxes. But I do not place this position on these grounds. In her deposition Mrs. Hooper admits that some taxes charged by Charles E. Hooper against her as paid by him are just charges. These other taxes were charged by him under the idea that they should be charged to the general fund, whereas they were chargeable to her. She also says in her deposition: "I frequently paid Charlie money to pay taxes, but I do not know how much, or when." Thus it seems that she knew the taxes were to be paid, recognized her obligation for them, and desired them paid, and that by the hands of her son. Is this not an implied consent that he should pay them out of her funds in his hands? Having funds of hers in his hands, and knowing that she wished the taxes paid, was it not reasonable that he would consider himself authorized by her to pay them, and just to her that he should pay them? And if she says other items of taxes were properly paid by him, why not also these? She does not deny that he paid them. She gives no reason why she should not pay them; specifies no ground why they were not binding on her equally with other taxes. She says she paid him some money to pay taxes, but does not specify how much. We

Digitized by Google

think this exception because of the allowance of these taxes was properly overruled. Counsel on each side interprets Judge JOHNSON'S expression as to this tax matter as deciding it in favor of his side. I do not understand him as deciding it at all, further than that the taxes could not be charged in the account between the executors and the estate. He said: "Of course, the taxes on the real estate left to Mrs. Hooper by will are chargeable to her as life-tenant, not to the estate." He did not mean to decide either that they could or could not be set off as between the executors and Mrs. Hooper. If he did decide it, it was that she should be charged with them. Counsel contends that no amount of evidence would make these taxes a set-off in favor of the executor, because they are sued as executors, and this is a demand against Mrs. Hooper individually, and thus the claims are not in the same right; citing 5 Rob. Pr. 976, and 2 Lomax, Ex'rs, 417. The latter lays down the rule thus: "A defendant, sued as executor or administrator, cannot set off a debt due to him personally; nor, if sued for his own debt, can he set off what is due to him as administrator, because debts sued for and intended to be set off must be mutual and due in same right." These principles refer to cases where representatives are sued merely as such in their representative capacity for a demand against the estate, where they cannot set off debts due to them individually; or where they sue for a debt due the estate, where their individual debts cannot be set off. Not so here. Here the executors are sued because they were executors for a fund in their hands due to legatees. It is not against the estate, but is a personal demand against the executors. 2 Lomax, Ex'rs, side p. 400. The authorities cited relate to suits at law, not suits brought by legatees against executors for recovery of legacies, where the accounts between the parties are always adjusted. I see no reason why in such a suit by a distributee or legatee for his share a debt due from him to the personal representative may not be set off. "Money lent and goods delivered by the executor to the legatee, it has been held, might be insisted on by the executor on a bill filed to recover from him the legacy, as part payment." Id. 490. Moreover, it might not be going too far to say that under the circumstances such taxes should be treated, not as offsets, but payments by the implied understanding of the parties.

Appellants' Exception 15. I do not think it reasonable to charge Charles E. Hooper with $600 family board at the Revere House, as being contemplated by the parties, as his presence there was indispensable to the business, and he was giving his personal service, for which he could not charge, while his father did not give such service. Such would not be the case with any firm funds used by him in paying services of a nurse, or used for his family expenses. They would be chargeable to him on a settlement of the partnership account. But it would be a debt due the firm, and for reasons given above would be included in the partnership balance. 7 Amer. & Eng. Cyclop. Law, tit. "Executors," XI. par. 6, p. 218, and note 5.

Appellees' Exception 1. Illinois lands. On the former appeal this court adjudicated this question, holding that it should be charged to the executors. There was no error in overruling this exception.

Appellees' Exception 2. Items $5 paid Casteel, $100.14 to Simpson, Boyd & Co., $28 to Trahern, $3.95 to G. E. Jarvis, were allowed executors in first *ex parte* settlement, and are therefore correct *prima facie*, and have not been overthrown. Receipts for the first two are shown, and Charles E. Hooper swears to them in his deposition. S. Warfield item of $141.54 is also allowed in said settlement. The account shows that $134.29 of it was prior to testator's death. I do not construe Charles E. Hooper's answer as admitting that it was after said testator's death, as suggested by counsel. He says: "If the following accounts [this being one] named in said bill were contracted before." The items of $8 paid Shutt & Son for funeral expenses, $40 to Miller for gas, and $4.17 to John A Cole, are sustained by evidence of Charles E. Hooper, and are such charges as are probably correct. The said items of $5, $100.14, $28, $134.29, $8, $40, $3.95, and $4.17 should be credited to executors; and the court erred in wholly overruling them. The Simpson, Boyd & Co. item of $108.10 should not be allowed. It was not in the *ex parte* settlement. There is no proof of it, and the account shows that it comes from two items of $46.80, dated December 13, 1871, and $61.80, dated December 22, 1871, —both after testator's death. I see nothing to justify the allowance of $63 paid to John M. Rogers. It was error to wholly overrule this exception.

Appellees' Exception 3. This exception was sustained as to $30.10, goods bought at sale by Mrs. Hooper, and executors allowed that. She received the benefit of these items. They were such as she needed on the farm, and are probably correct, and sustained by Charles E. Hooper's deposition. The other items, as will appear from Statements C and 9, were allowed executors, except $56.25 insurance. Statement 9 gives executors credit for these items, except insurance, after crediting Mrs. Hooper with $180 collected from Doll. I see nothing to justify charging $56.25 insurance to Mrs. Hooper. She did not authorize the payment. The court did not err in overruling Exception 3 as to that item. It allowed executors the other items, though their counsel do not so understand it.

Appellees' Exception 4. I do not think the evidence justifies the charge of $400.68 to Harry B. Hooper, and there was no error in overruling this exception.

Appellees' Exception 5. As to $2,544.50 in Martinsburg Bank. William S. Hooper says it was all checked out by Charles E.

Digitized by Google

Hooper, but the checks on that bank were signed by both of them, and I do not see that to their extent the money was chargeable solely to Charles E. Hooper. The report seems erroneous as to this. But as yet there has been no decree as between the executors. Nothing has yet been decreed to William S. Hooper's assignee, Whitescarver, or to Charles E. Hooper. Legatees must be paid, as against both of them, before they can get anything, no matter which received the assets, as one is surety for the other. Hooper v. Hooper, 29 W. Va. 277, 1 S. E. Rep. 280. This matter is not important, and may never be.

Appellees' Additional Exceptions, marked "N." Exceptions 1 and 2. Properly overruled. There is no evidence to charge Mrs. Hooper with any part of the $1,508.18, unsold property at the Grafton House. The preponderance of evidence is against any agreement between her and her sons to continue business there, at least of such character as to charge her with waste of the property.

Appellees' Exception 4. Properly overruled, as report charges William S. Hooper with $725.

Exception 5. There should have been a stated account between the executors for purposes of a decree as between them.

George M. Whitescarver excepted because the commissioner did not report him, as assignee of W. S. Hooper, entitled to the same amount as reported in favor of Harry B. Hooper. This exception is not well taken. William S. Hooper, as an obligor in the bond, is a surety, and he or his assignee cannot get anything until other legatees are paid in full. Harry B. Hooper was not on the bond. But the court never acted on this exception, or rendered any decree as to the rights of Whitescarver.

The decree is to be reversed, with costs, and cause remanded for further proceedings in accordance with principles herein indicated, and further according to principles governing courts of equity.

SNYDER, P., and GREEN and ENGLISH, JJ., concurred.

(83 Ga. 44)

VANN v. STATE.

(*Supreme Court of Georgia.* July 8, 1889.)

MURDER—TRIAL—INSTRUCTIONS.

1. It appeared that defendant, who was drunk, had pursued the deceased from early in the morning until late in the afternoon, heaping upon him curses and abuse whenever they met; that at their final meeting defendant continued his abuse, and finally drew a pistol with which he slapped deceased's face. Deceased then pushed him down. As he arose he pointed his pistol directly at deceased and fired. Deceased then drew his pistol and fired twice at defendant, and as he was about to shoot the third time he was called to by some bystanders to desist, whereupon he lowered his pistol and walked away. As he was walking away, and had gone some six or seven steps, defendant took deliberate aim, shot, and killed him. *Held*, that a conviction for murder was sustained by the evidence.

2. Evidence of threats uncommunicated to defendant was properly excluded.

3. A charge that "where a dangerous and deadly weapon is used with violence upon the person of another, and this has a direct tendency to destroy life, or to do some great bodily harm to the person assailed, the intention to take life or do some great bodily harm is a necessary conclusion from the act," is not objectionable because of the use of the word "necessary."

4. A charge that "the doubt must be a reasonable doubt, not a conjured-up doubt,—such a doubt as you might conjure up to acquit a friend, but one that you could give a reason for," correctly states the law on the subject of reasonable doubt.

5. Where the court charges fully and fairly the doctrine of reasonable doubt, a charge that if, after they have examined the evidence fairly and impartially, they are satisfied that defendant is guilty, they ought to so find, is not objectionable because it omits to state that they ought to be so satisfied beyond a reasonable doubt.

6. A request to charge that "while drunkenness is no excuse for crime, yet it may be considered as to whether the prisoner was excited at the time of the killing by passion or malice," is too indefinite, and a refusal to charge is not error, as under Code Ga. § 4325, passion will only mitigate the offense when there has been an assault upon the person killing or some attempt by the deceased to commit a serious personal injury on the person killing, or other equivalent circumstances to justify the excitement of passion and exclude all ideas of deliberation or malice. Simply to show that defendant was drunk is not sufficient.

7. The court charged that if the defendant, without any sufficient provocation, assaulted deceased, and deceased did no more than push him (which he would be justified in doing, under the circumstances,) then, if defendant began shooting at deceased, the latter had the right to defend himself with a pistol or anything else, provided he went no further than a reasonable, prudent man would go in his defense. Also, in charging as to the use of opprobrious language, the court said that, "if the defendant used the first opprobrious language, the fact that the deceased used opprobrious language back would not justify his assaulting him by putting his pistol in his face, if he did, nor an assault and battery; nor should the use of opprobrious words in any case authorize a man to assault another with a deadly weapon." *Held*, that these were not expressions of opinions on the evidence, but the statement of the law applicable to certain hypotheses in the case, if the jury believed such facts to be true.

8. On the trial one of defendant's counsel said: "Those clothes were offered in evidence. We do not care anything about their going out if the counsel on the other side do not." The court said: "Yes; we must be particular about that. The McCoy Case was reversed partly on that ground. Do you desire that they should go, or not?" Upon the reply of defendant's counsel that they did not, the court said to the jury: "Very well, gentlemen, you may retire and make up your verdict." *Held*, that the court did not, by referring to the McCoy Case, which was one that had been recently tried in the county, and in which a verdict of conviction had been set aside, intimate that the defendant ought to be convicted.

9. The court charged that "while the presumption is in favor of innocence, yet, when the evidence shows the fact that one man has killed another, the law presumes that the killing was with malice, and he stands as a murderer in the eyes of the law until he shows that he was not; either that it was justifiable or excusable;" or that there were mitigating circumstances. "That burden is upon defendant, and, if he fails to show that fact, the law presumes that it was a malicious killing." *Held*, that the charge did not place upon defendant the burden of proving his innocence.

10. Interruptions of the argument of counsel by the court for the purpose of correcting immaterial misstatements of the law and the evidence are not

Digitized by Google

grounds for a new trial, especially where the jury are charged that they must decide for themselves the truth of the matter.

11. When court and counsel differ as to what a witness swore to it is proper for the court to require the stenographer to read the testimony of the witness.

12. The court charged: "If you find the defendant guilty of murder, then you have the right, within your discretion, to recommend that he be punished by confinement and labor in the penitentiary of this state for and during his natural life. If you make that recommendation, then the court is bound to pass that sentence, and that would be the sentence; * * * and as to whether you make the recommendation or not, the court has nothing to do. It is a matter solely with the jury, * * * and it is for you to say, under the law and evidence in the case, whether you see fit to make this recommendation or not." *Held*, that the charge imposed no restrictions unauthorized by law.

13. On a motion for a new trial in a criminal case, because of the previously expressed opinion of one of the jurors who rendered the verdict, where the evidence is conflicting as to the expression of such opinion, the finding of the trial judge will not be disturbed.

Error from superior court, Chattooga county; MADDOX, Judge.

Wright, Meyerhardt & Wright, James M. Bellah, and *Wesley Shropshire*, for plaintiff in error. *W. M. Henry* and *Chas. G. James*, Sol. Gen., for the State.

SIMMONS, J. The defendant was indicted, tried, and convicted upon the charge of murder. He made a motion for a new trial upon many grounds, which was overruled, and he excepted.

1. The fourth, fifth, and sixth grounds may be considered together. In these grounds it is complained that the court instructed the jury, in substance, that if, after they had examined the evidence, and weighed it fairly and impartially, without favor or affection to either party, they were satisfied the defendant was guilty, they ought to so find. The objection to this instruction was that the court failed to add, "if the jury were satisfied beyond a reasonable doubt." Taking the whole charge together, we do not think the exceptions taken in these grounds are well founded. We do not think it is necessary for the court to qualify every principle it gives in charge to the jury by the addition of these words. If the court charges fully and fairly the doctrine of reasonable doubt, that is sufficient, and it is unnecessary to repeat it at the end of every sentence of his charge when instructing the jury how they should find if they believe the evidence makes out a case of guilt. Darby v. State, 79 Ga. 63, 3 S. E. Rep. 663.

2. Complaint is made in the seventh ground that the court charged the jury that "while the presumption is in favor of innocence, yet, when the evidence shows the fact that one man has killed another, the law presumes that the killing was with malice, and he stands a murderer in the eyes of the law until he shows that he was not,—either that it was justifiable or excusable, or that there were circumstances that mitigated it or brought it down to a lower offense. He can show that either by his own evidence or by the state's evidence, or by circumstances themselves, if he can. Nevertheless that burden is upon him, and if he fails to show that fact, the law presumes that it was a malicious killing." The objection to this charge was that it placed the burden of proof on the defendant to show his innocence. Reading the whole charge on this subject together, we think the court meant that, the state having proved an intentional killing by the defendant, the presumption of innocence is so far overcome as to make it necessary for the defendant to show that such killing was either justifiable or attended with such mitigating circumstances as to make the crime less than murder. "When an unauthorized killing is shown, the law presumes it was done with malice, unless the proof accompanying it shows that it was not done with malice. If the proof shows the unlawful killing, in the absence of all else the law presumes that it was done with malice aforethought. If the proof that shows the killing itself discloses that it was done without malice, of course the presumption does not exist, but if the accompanying proof does not then the burden is thrown upon the defendant to show that it was done without malice." And this has been the law, as far as we know, from the time of Sir MICHAEL FOSTER down to the present day. It certainly has been the doctrine announced by this court from the case of Hudgins v. State, 2 Ga. 173, to Marshall v. State, 74 Ga. 26. In the case of Hudgins v. State, supra, LUMPKIN, C. J., says: "The law presumes every homicide to be felonious until the contrary appears from circumstances of alleviation, of excuse, or justification, and it is incumbent on the prisoner to make out such circumstances to the satisfaction of the jury, unless they arise out of the evidence produced against him." See, also, cases collected in Hopk. Pen. Laws, §§ 858, 859.

3. The eighth, ninth, and tenth grounds are as follows: "(8) That the court erred in charging as follows: 'If Vann, without any sufficient provocation, made an assault upon White, and White did no more than push him, (which he would be justified in doing, under the circumstances,) then, if Vann began shooting at White, White had the right to defend himself with a pistol or anything else, provided he did not go further than the circumstances would justify; that is, further than a reasonable, prudent man might go in his own defense.'" This is alleged to be error because it quotes from the testimony of the state, and expresses an opinion on that testimony, and particularly because the court expressed the opinion that if White did no more than push Vann down, he would have been justified in doing so under the circumstances. "(9) That the court erred in charging as follows: 'If the defendant used the first opprobrious language, the fact that the deceased used opprobrious language back

Digitized by Google

would not justify his assaulting him by putting his pistol in his face, if he did, nor an assault and battery, nor should the use of opprobrious words in any case authorize a man to assault another with a deadly weapon.'" This is alleged to be error because it quotes from the testimony of the state, and thereby expresses an opinion on the testimony. "(10) That the court erred in charging as follows: 'If you believe from the evidence that Vann was the assailant, and White did no more than a reasonable and prudent man would do to defend himself when he pushed him down and fired the shots he fired, and then, after doing no more than you think he had the right to do, was walking off, and made no attempt to attack the prisoner, if the prisoner shot and killed him that would be no justification; because, if he brought about the emergency, he could not take advantage of it, any way, because if White did no more than was necessary to his defense, he had the right to do that, and if Vann did that it would be no justification.'" This is alleged to be error because it stated to the jury what the testimony was, and what had been proved. The objection in each of these grounds is that the charge of the court quotes from the state's testimony, and is an expression of opinion on that testimony. We do not think that the court, in the charges here complained of, gives any expression of opinion as to what has been proved. His purpose evidently is to charge upon the effect of certain testimony, provided the jury believe this testimony to be the truth of the case. He says: "If you are satisfied that these are the facts, then White had the right to defend himself with a pistol," etc. The portion of the charge which is specially objected to in the eighth ground is, in substance, that if the jury were satisfied that Vann, without any sufficient provocation, made an assault upon White, and if they were satisfied that White did no more than push him, then he would be justified under the circumstances. There was no error in this. Taking the view of counsel for plaintiff in error, still we think it is true that, if a man assault another without sufficient provocation, the person thus assaulted would be justified in pushing him; and, construing it most strongly against the state, that may be what the court meant in this part of the charge. We think, however, that the charge means that if the jury believed that Vann, without sufficient provocation, made an assault upon White, and if they believed that White did no more than push him, and if they believed he would be justified under the circumstances, then, if Vann began shooting at White, White had the right to defend himself. It was no expression of opinion on the evidence, but was a sound exposition of the law. The court did not say that such an assault had been made, but that if the jury believed such an assault had been made White would have been justified in pushing the assailant. Besides, after charging in the language complained of that the jury might have both sides of the case impartially before them, the court goes on to say: "Every man has the right to defend himself. If this matter was a scheme of White's to get advantage of Vann; if he provoked the difficulty and got Vann into it, and took advantage of him and shot when he was the aggressor,—then Vann would have the right to defend himself." Taken in connection with the whole charge on this subject, we think that the jury properly understood it, and that no injustice was done to the accused. Nor, as we have said, do we think there was any expression of opinion in the charge complained of in the ninth ground. It seems to us that the court, in this portion of the charge, studiously avoided saying what had been proved, simply charging as to the effect of certain testimony, provided the jury believed it to be true. By reference to the charge of the court itself, it will seem that at the time the language objected to was used the court was charging generally as to the use of opprobrious words; and, after using the language complained of, the court said: "You are to see how this matter was brought about,—who was in fault," etc. And again, "And you are the judges of the evidence and what it shows, and the court intimates nothing to you about what has or has not been proven." The same remarks will apply to the objection made in the tenth ground. The charge there complained of was given in the same general connection with the charges complained of in the two preceding grounds, and here, as in those cases, the court is but presenting an hypothesis of the care, the truth of which the jury is left to determine, and charging the law which governs such a case should the jury believe it to be true. As to the language particularly objected to on this ground, it is clear to our minds, from the connection, that the court meant to say: "If you believe he was doing no more than he had a right to do," and "if you believe he was walking off," etc., and thus read it is not an expression of opinion.

4. The eleventh ground of the motion for a new trial complains of this charge: "But the doubt must be a reasonable doubt, not a conjured-up doubt,—such a doubt as you might conjure up to acquit a friend, but one that you could give a reason for." This is objected to on the ground that it does not correctly give the law on the subject of reasonable doubt. We see no objection to this charge. It seems to us that it correctly states the doctrine of reasonable doubt. While the language used is unusual, it is substantially in accordance with the recognized definition of reasonable doubt. In using the words, "not a conjured-up doubt,—such a doubt as you might conjure up to acquit a friend," the court evidently meant to say "not such a doubt as might influence you in the case of a friend in whose favor you are strongly prejudiced;" because, in the absence of such a caution, even an imaginary doubt might de-

Digitized by Google

cide a juror in favor of a friend in whom his confidence was so great as to make it difficult for him to credit him with the commission of such a crime. It is difficult to see what construction could be reasonably placed upon this charge which would take away from the prisoner the benefit of a reasonable doubt, as understood by the law.

5. The next ground (the twelfth) is too trivial for serious comment. The only objection made to the charge complained of in this ground is the use by the court of the words, "There is something said in regard to drunkenness;" it being contended that these words had a tendency to make light of the plea of drunkenness, which was strongly insisted upon by the defendant, the jury being led to believe that the court attached no importance to this plea. We will not discuss it further.

6. The thirteenth ground complains that the court refused to charge, as requested by counsel for the defendant, that "while drunkenness is no excuse for crime, yet it may be considered as to whether the prisoner was excited at the time of the killing by passion or malice." We do not think there was error in the refusal to give this in charge. It is too vague and indefinite. Passion will only mitigate when there has been "some actual assault upon the person killing, or an attempt by the person killed to commit a serious personal injury on the person killing, or other equivalent circumstances to justify the excitement of passion, and to exclude all ideas of deliberation or malice, either express or implied." Code, § 4325. Simply to prove that a man was drunk, and killed another in passion, would not reduce the crime from murder to manslaughter.

7. The alleged error complained of in the fourteenth ground is also too trivial to mention. The court said: "I believe there was something said about intention, which I might have given you in another connection," etc. This is alleged to be error as tending to make light of the defense on the question of intention.

8. The fifteenth ground complains that the court erred in charging as follows: "Where a dangerous and deadly weapon is used with violence upon the person of another, and this has a direct tendency to destroy life or to do some great bodily harm to the person assailed, the intention to take life, or do some great bodily harm, is a necessary conclusion from the act." The use of the words "is a necessary conclusion" is assigned as erroneous. We see no error in this charge. It seems to us that if a man uses a dangerous and deadly weapon with violence upon another, and the use of that weapon, and the manner of its use, has a direct tendency to destroy human life, or to do some great bodily harm, it is a necessary conclusion that the person thus using the weapon intended to take life or do great bodily harm. The judge who gave this in charge to the jury seems to have had very high authority for the soundness of the principle thus announced. The charge upon this subject (of which the part here complained of is an extract) seems to have been taken from the case of Com. v. York, 9 Metc. 93. See that case for an able and learned opinion on this subject by Chief Justice SHAW, which also discusses the error complained of in the seventh ground of the motion, which we have already discussed. This case is quoted with approval by Mr. Greenleaf, in 1 Greenl. Ev. § 34, and 3 Greenl. Ev. § 14, the charge complained of being embodied in the third foot-note of the latter section. It is also sustained by the case of Rex v. Farrington, 1 Russ. & R. 207, where, the defendant being indicted for setting fire to a mill with intent to injure the occupiers thereof, it was held that, an injury to the mill being a necessary consequence of setting fire to it, the intent to injure might be inferred, for a man must be supposed to intend the necessary consequences of his own acts. In the case of Freeman v. State, 70 Ga. 736, it is said: "Every person is presumed to intend the natural and necessary consequences of his acts." Other authorities might be cited on this subject, but these we think are sufficient.

9. The sixteenth ground complains that the court engaged in the following colloquy with one of the counsel for the defendant: Counsel said: "Those clothes were offered in evidence. We do not care anything about their going out if the counsel on the other side do not." The court said: "Yes, we must be particular about that. The McCoy Case was reversed partly on that ground. Do you desire that they should go out or not?" Whereupon one of the counsel for defendant said: "No, sir." *The court:* "Very well, gentlemen, you may retire and make up your verdict." This was alleged to be especially erroneous in that the court said: "The McCoy Case was reversed on that ground," thereby intimating that in this case the jury would or should find the defendant guilty, and that the clothes should go out, so that the verdict might not be reversed on that ground. The jury were familiar with the facts in the McCoy Case, McCoy having been recently tried in Walker county for the killing of a sheriff in Chattooga county. It was contended that this colloquy between court and counsel tended to prejudice the jury against the defendant, and lead them to believe that the court was in favor of his conviction. While this remark by the court might have been omitted, still we do not see that it could do the prisoner any harm. It is not susceptible of the construction put upon it, that it intimated an opinion of the court as to what the verdict would or should be. The court evidently meant that caution should be used against the commission of error, which would make another trial necessary in the event the case reached the supreme court.[1]

[1] For the McCoy Case, see 3 S. E. Rep. 768.

Digitized by Google

10. The seventeenth ground complained that the court erred in failing to charge that it was the duty of the state to make out its case, and that the allegations in the bill of indictment must be proved beyond a reasonable doubt. It does not appear that the court was requested to give this in charge, and the charge given, as a whole, sufficiently covers the points here presented.

11. The eighteenth ground complains of the following charge: "If you find the defendant guilty of murder, then you have the right, within your discretion, to recommend that he be punished by confinement and labor in the penitentiary of this state for and during his natural life. If you make that recommendation, then the court is bound to pass that sentence, and that would be the sentence; but if you fail to make that recommendation, and you find him guilty, and stop there, the court would be obliged to pronounce the sentence of death; and as to whether you make that recommendation or not, the court has nothing to do. It is a matter solely with the jury. It is a matter which you have, in your discretion, the right to do, but you have the right to refuse to do it. Therefore you take the case; you are responsible for the verdict you find in it, and it is for you to say, under the law and the evidence in the case, whether you see fit to make this recommendation or not. If you think it ought to be done, and have the desire to do so, you have the right, as I have said, and nobody has any right to question your right to do so." This is alleged to be error as vague and misleading, and as imposing restrictions upon the jury not authorized by law, in saying: "It is for you to say, under the law and the evidence in the case, whether you see fit to make this recommendation or not." This charge seems clear enough, and we do not see how the jury could fail to understand from it their right to recommend to mercy. Nor do we think the language quoted imposed a restriction upon the right of the jury to so recommend, especially when taken in connection with the rest of the charge on the subject. The court told the jury, "It is a matter solely with the jury; it is a matter which you have, in your discretion, the right to do," etc. Again, just following the language specially objected to, he says: "If you think it ought to be done, and have the desire to do so, you have the right," etc. In the case of Inman v. State, 72 Ga. 269, the trial judge, in charging the jury upon this subject, said: "If you find him guilty, and the case be one in which you think you are justified in doing so, —the facts and circumstances justify you in doing so,—you can say in your verdict that 'We recommend,'" etc. This language was upheld by this court. In the case of Valentine v. State, 77 Ga. 470, the trial judge charged the jury as follows: "It is for you to say, from the evidence,—from all the facts and circumstances of the case,—in the event you find him guilty, whether you are warranted in recommending him to imprisonment in the penitentiary for life;" and this court held that to be no error.

12. The nineteenth ground complains that the court erred in frequently interrupting counsel in their argument to the jury, the interruptions being unneccessary, and calculated to prejudice the jury against the defendant and his counsel. The interruptions are then set out, and consist of corrections by the court of counsel in their statements of the evidence and of the law. We see no error in the action of the court as complained of in this ground. In the case of Grady v. State, 11 Ga. 253, this court say that it is not only the privilege of the court, but its solemn duty, to interrupt counsel when misstating the evidence to the jury. In the case of Green v. State, 43 Ga. 368, the same ruling was made, and the decision in Grady v. State, supra, quoted and approved. While the corrections in this case appear to have been immaterial, we cannot say that the court erred in interrupting counsel to make them, especially when the court instructed the jury that, when the court and counsel differed, they must decide for themselves what was the truth of the matter. Had we been presiding in the court below, possibly we might not have interrupted counsel for these small mistakes, especially as the state's counsel was to follow him in the argument, but we cannot hold that it was reversible error to do so. Nor do we think it was error, when court and counsel differed as to what a witness swore to, for the court to require the stenographer to read from his notes the exact words of the witness. My observation in the superior court has been that, when counsel differ among themselves, or with the court, as to what is the testimony, it is an every day occurrence to call upon the stenographer to read his notes in order to settle the difference.

13. The twentieth ground is also too trivial to notice. It complains of what the court said in private conversation with one of the counsel for the defendant. The same may be said of the twenty-first ground, which complains that the court said to Mr. Shropshire, who had suspended the argument while the jury were drinking water, "Go on, Mr. Shropshire," and then remarked, "I am getting tired."

14. The twenty-second, twenty-third, and twenty-fourth grounds complain of the ruling out of certain threats made by White, the deceased, against Vann. These threats were ruled out because they had not been communicated to Vann. There was no error in the rulings complained of in these grounds. The threats had never been communicated to Vann. Lingo v. State, 29 Ga. 470; Hoye v. State, 39 Ga. 718; Peterson v. State, 50 Ga. 142.

15. The twenty-fifth ground claimed that a new trial should be granted because of certain so-called newly-discovered evidence which relates to the disqualification of John Pollock, one of the jurors who tried the case. This

Digitized by Google

ground is supported by the affidavits of J. W. Wood and A. W. Wood. They swear, in effect, that, on the first Sunday in May preceding the trial, John Pollock was at the house of Messrs. Wood in Floyd county, and that he said to J. W. Wood, in the presence of A. W. Wood, "If I am one of the jurors that try Vann his neck will be broken." The character and credibility of the Messrs. Wood are testified to by J. C. Moore, the sheriff of Floyd county, and J. H. Lanham. The defendant and his counsel made affidavit that they were not informed of this until after the trial. Pollock, the juror, made an affidavit denying the statement made by the Messrs. Wood, so far as making the remark ascribed to him is concerned. He says that it is quite likely that, in reply to some question or remarks on the subject, he may have said something to the effect that from what he had heard it was likely that Vann would be hung; but that if he said anything of the kind it was merely the expression of an immature opinion, arising and expressed only a few days after the homicide from mere rumors of facts then afloat in the county; that he had no well-grounded, fixed, or matured opinion as to the guilt or innocence of Vann; that his feelings towards Vann were, and have remained, entirely friendly; and that when he was sworn at the trial of the case as to his competency he answered the questions propounded to him on his *voir dire* truly and exactly, and that, if the evidence had not shown the defendant guilty under the law, he could and would have returned a verdict of acquittal. The character and credibility of Pollock are testified to by Taliaferro, Worsham, the sheriff of the county, and Edwards. On a motion for a new trial in a criminal case, because of the previously expressed opinion of one of the jurors who rendered the verdict, the circuit judge, as to this question, occupies the place of a trier, and this court will not undertake to control his judgment as to the credibility of the proof, unless it is clear and manifest from the record that he has erred. Ray v. State, 15 Ga. 223; Costly v. State, 19 Ga. 614. In this case the judge heard the witnesses, he knew their character and credibility, and he decided that Pollock was a competent juror. We cannot say that he erred in so doing.

16. Having discussed all the special grounds of the motion which we deem worthy of notice, it only remains now for us to discuss the general ground that the verdict is contrary to the evidence. We have read the evidence carefully several times, from beginning to end, and we are convinced that, instead of the verdict being contrary to the evidence, the evidence really demanded the verdict. This unfortunate man seems to have been the aggressor throughout the whole difficulty. From early morning until late in the afternoon he seems to have pursued the deceased, heaping upon him curses and abuse whenever they met. The deceased avoided him, and failed to resent any of the insults heaped upon him. The accused filled himself with whisky, which excited his mind and inflamed his passions,—so much so that he was a terror to the peaceable citizens of the town. At their final meeting late in the afternoon he continued his abuse, and the use of vulgar and obscene language towards White, heaping upon him the vilest epithets, and finally drawing a pistol, with which he slapped White upon the face. White then pushed him down. As he arose, he pointed his pistol in the direction of White, and fired. White then drew his pistol, and fired at Vann twice in rapid succession, whereupon he was told by some of the bystanders to desist, and, although he had his pistol in position to shoot the third time, he immediately lowered it and walked off. As White was walking away from Vann, and was six or seven steps off,—some of the witnesses say as far as ten,—Vann took deliberate aim, and shot and killed him. This state of facts, under the law, makes a clear case of murder. If he had killed White while White was shooting at him, under the evidence it would still have been murder, because he brought on the emergency by his own conduct; but, after White had ceased to shoot, after the difficulty was apparently over as far as White was concerned, and as White was walking away from him, making no demonstration against him, he shot and killed him. There was no urgent and pressing danger at the time of the shooting; indeed there was no danger whatever. The law is that, "if a person kill another in his defense, it must appear that the danger was so urgent and pressing at the time of the killing that in order to save his own life the killing of the other was absolutely necessary." Nothing of this kind appears from the record in this case, but the whole evidence shows that it was a cold-blooded, premeditated murder on the part of Vann. We sympathize with him and his unfortunate family upon the dreadful fate which he has brought upon himself, but courts and juries cannot yield to their sympathies. The law must be executed. The more strictly it is enforced in cases like this, the less cause will there be for its enforcement. "The way of the transgressor is hard," and he must learn that "the velvet glove of liberty incases the merciless hand of the law." Judgment affirmed.

(31 S. C. 267)

DE LAINE *v.* ALDERMAN.

(*Supreme Court of South Carolina.* July 6, 1889.)

FORCIBLE ENTRY AND DETAINER—FIXTURES.

1. Gen. St. S. C. §§ 2294, 2295, provide that "if any person be put out or disseised of any lands or tenements in forcible manner, or put out peaceably, and be afterwards holden out with strong hand, * * * the party aggrieved in this behalf shall have an action against disseisor," and recover treble damages. Defendant, the owner of a sawmill, with the right to run a tramway connecting it with a railroad, laid a temporary iron-rail track, and in doing so straightened the tramway. No objection was made at the time, but, when the defendant commenced to take up the track for the purpose of moving the mill, plaintiff gave notice

Digitized by Google

that the track ran over a corner of his land, and that the rails, by being laid there, had become fixtures. *Held*, that the action of forcible entry and detainer would not lie against defendant for removing the rails, as plaintiff was not thereby disseised of any of his "lands or tenements."

2. Nor can the action be maintained as trespass *vi et armis* on the theory that the rails were plaintiff's property. As the rails were only laid for a temporary purpose they never became fixtures, and the act of plaintiff in permitting the rails to be laid without objection amounted at least to an executed license, which he could not revoke at his option so as to appropriate the rails.

3. Nor can the action be maintained for going upon plaintiff's land by force and treading down the grass, thereby breaking plaintiff's close, as defendant entered upon the land to lay the rails with plaintiff's consent, and this carried with it the right to remove the rails in a peaceable manner; and besides, plaintiff admitted that his land was not damaged either by laying down or removing the rails.

Appeal from common pleas circuit court of Clarendon county; PRESSLEY, Judge.

M. C. Galluchat and *Charles Boyle*, for appellant. *John S. Wilson* and *Joseph F. Rhame*, for respondent.

MCGOWAN, J. The complaint stated that "on or about May 2, 1887, the plaintiff was in possession of a tract of land in Clarendon county, and that the defendant, by himself and his servants, unlawfully entered upon said land, and with force and violence did remove from said land iron rails which were fixtures, property of said plaintiff, whereby plaintiff lost said iron rails, to the damage of the said plaintiff five hundred dollars, and thereby defendant, by force of section 2295 of the General Statutes of the state, forfeited and became liable to the plaintiff in treble the amount of said damages, wherefore plaintiff demands judgment against the defendant for the sum of fifteen hundred dollars." It seems that the defendant had purchased a saw-mill and the right to run a tram-road by which to transport his lumber, connecting with the Central Railroad. Afterwards he wished to improve the road so as to run an engine on it, and for that purpose he hired iron rails from the Wilmington, Columbia & Augusta Railroad Company, and laid a temporary iron-rail track, and in doing so straightened somewhat the tramway. This new track was used without any complaint of the change on the part of the land-owners, who had given Bradham (from whom the defendant purchased) permission to build the tramway. The timber, however, became exhausted in the locality, and the defendant commenced taking up the track, when for the first time the plaintiff claimed that the track ran over a corner of his land,—about 200 yards in an uninclosed bottom,—and gave notice that the rails must not be removed, for by being laid there they had become "fixtures," and belonged to him as the owner of the soil. The defendant, nevertheless, removed the rails, and the plaintiff brought this action for $500 damages, and the consequent forfeiture of three times that amount, ($1,500,) against the defendant, as a "disseisor," in forcible entry and detainer. The defendant put in a general denial, and, interposing several specific defenses, denied that the plaintiff owned the land mentioned in the complaint, or, if so, that he ever objected to the entry and laying down of the rails, but reserved his objections to the removal of them; that the plaintiff knew that the rails were laid only for a temporary purpose; and that the land was not in the slightest degree injured, either by laying down or taking up the rails, which was admitted by the plaintiff. The plaintiff's attorney made the following requests to charge, which were declined by the judge: "(1) That if the jury believe the plaintiff notified the defendant not to come upon his land, and the defendant unauthorized did go, then the plaintiff is entitled to recover something for such unlawful invasion of his rights; (2) that if the defendant laid rails and fastened them to the soil, as for a railway on plaintiff's land, without consulting plaintiff, then they became fixtures and a part of the land, and defendant had no authority, without plaintiff's permission, to remove said rails; (3) that if defendant rented rails, and attached them to the soil of plaintiff's land, the fact that the rails belonged to third parties would not justify the defendant in forcibly removing said rails, when forbidden to come upon plaintiff's land; (4) that if the jury believe that the defendant attached the rails to the soil of plaintiff, whether the rails belonged to the defendant or to some other party, who had given him dominion over them, the rails, nevertheless, became 'fixtures,' and a part of plaintiff's land, and the defendant is responsible to plaintiff for removing them," etc. Under a full and lucid charge the jury found for the "defendant," and the plaintiff appeals to this court upon the following exceptions, alleging error in addition to the refusal of the requests to charge: "*First*, that the complaint did not allege any trespass, and that the only damages claimed under the complaint was the value of the iron rails removed by the defendant; *second*, that the rails, though attached to the land by the defendant, who had leased them from the Wilmington, Columbia & Augusta Railroad Company, were not fixtures, and in no wise connected with the land so as to give plaintiff any right of property in them, or right to damages for their removal by the defendant; *third*, that the rails not being the property of the defendant, but belonging to the Wilmington, Columbia & Augusta Railroad Company, the plaintiff could not recover from the defendant for removing them, and defendant was not liable to plaintiff for their value, and the jury could not find any damages for their removal by the defendant; *fourth*, that his honor erred in charging the jury, also, that there was no evidence of force and violence used by the defendant or his agents in entering upon the land, or in removing said iron rails," etc.

We agree with the circuit judge that it is rather difficult to determine the precise character of this case. The complaint indicates

Digitized by Google

that it is simply an action for removing certain iron rails from the land of the plaintiff, under the provisions of the law upon the subject of "forcible entry and detainer," of which sections 2294 and 2295 of the General Statutes provide as follows: "If any person be put out or disseised of any lands or tenements in forcible manner, or put out peaceably, and be afterwards holden out with strong hand, * * * the party aggrieved in this behalf shall have an action against such disseisor. If the party aggrieved recover in such action, and it be found by verdict, or in any other manner by due form of law, that the party defendant entered with force into the lands and tenements, or, after his entry, did hold them with force, the plaintiff shall recover treble damages against the defendant," etc. We do not think that this action can be maintained under these provisions of the law of "forcible entry and detainer." There has been no "disseisin" here. The defendant is holding forcibly no part of the plaintiff's lands, but, on the contrary, the plaintiff is in quiet possession of all his real estate. If it is intended to assert that the iron rails now removed from the land are, in the sense of the above provisions, "the lands and tenements" of the plaintiff, which are holden with strong hand from him, so that in respect to them he can maintain an action for forcible entry and detainer, we cannot accept the view. Such actions for damages and forfeiture are very rare with us, if this is not the first in the state; the remedy generally resorted to for the "restitution" of possession in cases of forcible detention being the summary process allowed, somewhat in the nature of a criminal proceeding. See State v. Huntington, 3 Brev. 111. As it seems to us, both from the nature of the wrong and the terms of the statute itself, the civil action for damages and penalty was given for "the detainer," not of any sort of property as at common law, but only of "lands and tenements." It is clear that the plaintiff can have no right to the rails in contention, except as an incident and part of his land, as to which there is no allegation of detainer. "Forcible entry cannot be of a way or other easement, or of a common or office." 1 Toml. Law Dict. tit. "Forcible Entry and Detainer."

As the action was under the statute, this would seem to be an end of it. But it is suggested that the action is maintainable as an ordinary trespass *vi et armis*. This could be only on the ground that the rails were the property of the plaintiff. He certainly had no right to them when they were first laid upon his land, but it is insisted that as soon as they were so laid they became his property by operation of law,—the doctrine of "fixtures,"—by which personal property which is affixed to the freehold becomes a part of the freehold, so that the ownership of it is merged in that of the soil. Without reference to the undoubted fact that the rails did not belong to the defendant, but were hired from the railroad company for the purpose of using them on the temporary track, we agree with the circuit judge that they were not laid on the plaintiff's land in such manner, and under such circumstances, as to make them "fixtures," transferring the title to the owner of the soil. As was said by this court in Evans v. McLucas, 15 S. C. 70: "As a general rule all things that are annexed to the land become a part of it. But to this there are exceptions, as where there is a manifest intention to use the alleged 'fixtures' in some employment distinct from that of the occupier of real estate, or where the chattel has been annexed for the purpose of carrying on trade, it is not, in general, considered as part of the realty. In modern times, for the encouragement of trade, many things are now considered as personal property which seem to be attached to the freehold. This is particularly true as between landlord and tenant for years. The tenant may take away chimney-pieces or a cider mill and press or pump erected on the land," etc. It is said that the defendant here was not a tenant, but a mere intruder. He had purchased the right to the tram-road. No objection was made to improving it by substituting the iron rails. The plaintiff, seeing the rails laid down, stood by in silence, and we think all the circumstances amount, at least, to an executed license, which the plaintiff could not revoke at his option, so as to appropriate the rails which, with his knowledge, were placed on his land for a temporary purpose without objection on his part. Besides, it was manifestly the expectation and intention of all the parties that the track was to be temporary in its character, and not a permanent structure as an improvement of the land. See Sullivan v. Jones, 14 S. C. 367; Dominick v. Farr, 22 S. C. 585; and Jones, Chat. Mortg. § 133. In this last reference, the principle, as we understand it, is correctly stated: "The purpose of the annexation as well as the mode of it determines the character of the property annexed. The same mode may exist, and yet the property be personal in the one case and real in the other. For example, trees growing in a nursery are annexed to the soil in the same way as trees growing in an orchard; but in the former case they are cultivated for the purpose of trade, in the latter as a permanent accession to the land. The general principle to be kept in view, underlying all questions of this kind, is the distinction between the business which is carried in or upon the premises and the premises or *locus in quo;* the former is personal in its nature, and articles that are merely accessory to the business, and have been put on the premises for this purpose, and not as accessions to the real estate, retain the personal character of the principal to which they appropriately belong, and are subservient," etc.

But it is still further urged that, conceding that the removed rails were not, in the sense of the forcible entry law, "lands and tene-

Digitized by Google

ments," nor the personal property of the plaintiff as "fixtures," still the defendant, after being forbidden to do so, did go upon the plaintiff's land by force, and did tread down the grass thereon growing, thereby in law breaking his close; and therefore, in any event, the plaintiff was entitled to recover something for such unlawful invasion of his rights. It will be remembered that the plaintiff never objected to the defendant entering upon his lands and laying down the rails, but only objected to his entering for the purpose of removing them. It was then too late to object, for, as we have seen, the plaintiff, by his previous conduct, had at least given license to lay and use the rails, and that, as we think, carried the right to remove them in a quiet and peaceable manner. The plaintiff himself proved that his land was in no way damaged either by laying down or removing the rails. The judge did charge that "there was not a *scintilla* of proof as to the defendant committing any trespass in entering on the land to lay the rails, and that the plaintiff admitted on the stand that his land was not injured by the taking up of the iron;" but he also charged that while the engineer who removed the rails had the right to enter upon the plaintiff's land for that purpose, yet he had no right to commit an "outrage" upon the plaintiff; and if he did so, by cursing or otherwise, while cutting up the trees which had been thrown across the track, or in taking up the iron rails, "the jury must find for the plaintiff such damages as would compensate him for any outrage committed upon his person or feelings." The judgment of this court is that the judgment of the circuit court be affirmed.

SIMPSON, C. J., and MCIVER, J., concur.

(31 S. C. 276)

HODGE *et ux.* v. WEEKS *et al.*

(*Supreme Court of South Carolina.* July 6, 1889.)

MORTGAGES — ABSOLUTE DEED — SPECIFIC PERFORMANCE—LACHES.

1. The evidence in an action to compel a reconveyance of land showed that the land had been conveyed to defendants' testator by plaintiffs, with the usual covenants of warranty and delivery of possession; that at the time of the conveyance no money passed; that the consideration recited as "paid,"—about one-fourth of the value of the land,—was the amount which plaintiffs alleged they owed on a note to testator; that testator agreed in writing that he would reconvey on payment of the purchase money, interest, and taxes, and that the writing was afterwards lost; and that during the time testator was in possession—more than 10 years—no right to redeem was asserted by plaintiffs. *Held*, that the transaction was a sale with the right to repurchase, and not a mortgage.

2. Specific performance of a written contract by a decedent to convey land, which was lost during decedent's life-time, will not be enforced, 10 years after its execution, against decedent's representatives.

Appeal from common pleas circuit court of Clarendon county; PRESSLEY, Judge.

M. C. Galluchat and *Charles Boyle*, for appellants. *John S. Wilson*, for respondents.

MCGOWAN, J. On March 8, 1877, A. O. Hodge and his wife, H. J. Hodge, united in conveying a tract of pine land in the county of Clarendon, containing 277 acres, more or less, to James D. Weeks. The deed was in the usual form, in consideration "of $150 paid," with general warranty, and was regularly recorded March 17, 1877. The donee, James D. Weeks, took possession, and held and used it as his own until April 26, 1887, when he died, leaving a will, by which he devised the land to his widow, Elizabeth Weeks, and his children, Amanda C. Weeks, Glovender B. Weeks, and John W. Weeks, the last-named of whom was executor of his will. Soon after the death of James D. Weeks, leaving his wife and children in possession of the land, A. O. Hodge and his wife brought this action against them, alleging that the aforesaid deed was not intended to be absolute, but in fact a mortgage; that at the time it was executed no money was paid, but the consideration of $150 expressed as "paid" was a note which the plaintiff A. O. Hodge owed James D. Weeks for money previously borrowed from him, and that the deed was made on the distinct understanding "that upon the payment to the said James D. Weeks of the note for $150, and the interest that might be due thereon, and the taxes paid on the land by the said Weeks, that he would reconvey the said land to the plaintiffs, which agreement or defeasance the said James D. Weeks, a few days after the deed was delivered, did execute and deliver to the plaintiffs in writing, duly signed in the presence of two witnesses; that in June, 1888, the plaintiffs, in accordance with said agreement, tendered the principal and interest on the $150 note, and the taxes paid on the land; and their complaint demanded judgment that the said deed be declared to be a mortgage; that an account should be taken; and that, upon the payment of the amount due, the plaintiffs should have the right to redeem," etc. The cause came on to be heard by Judge PRESSLEY, and all the evidence is in the brief. There was evidence tending to show that no money passed at the time the deed was executed; that at that time the land was worth much more than the $150 note,—probably three or four times as much; that when the deed was executed, James D. Weeks verbally promised that he would reconvey the land to the plaintiffs when they should pay him the purchase money and interest on $150 and the taxes; and in a few weeks after he did sign and deliver an agreement to that effect at the house of plaintiff in the presence of two witnesses, H. S. Briggs and I. S. Hodge, but that said paper was never recorded, and is now lost, so that it cannot be produced. There was some evidence as to the value of the turpentine lands per year, but from the view the court takes it will not be necessary to consider that subject. The circuit judge held as follows: "A. O. Hodge assigns no reason for his long delay to seek from J. D. Weeks, in his life-time, performance of his

Digitized by Google

said contract. He says he was not able to do so, but does not say why he did not raise the money for that purpose on the land now sought; nor does he say that he has any other means now of raising the amount. The above facts reduce the question before me to one of enforcing specific performance of a lost contract, made more than eleven years before the court is asked to enforce it, and that after the death of the person who made it more than ten years before his death. Though well satisfied that the plaintiffs did not receive half the value of their land, and therefore being very reluctant to refuse them relief, yet I find no case or legal authority which would justify that relief, after such gross negligence and long delay to apply either to the other party or to the court for performance of the contract, and whilst, in this case, I might stretch my discretion to relieve hardships, yet the result would most certainly be mischievous in its tendency to promote and stir up endless litigation and stale claims. It is best, as a general rule, to keep all persons impressed with the doctrine that they must not sleep too long upon their rights. The complaint is dismissed without costs," etc.

The plaintiffs appeal to this court upon the following grounds: "(1) Because his honor erred in finding as a matter of fact that at the time of the execution of the deed (by the plaintiffs) Weeks (the defendants' testator) promised the plaintiffs that he would reconvey the said land to them, when they should pay him the purchase money; when he should have found that the said Weeks promised to reconvey the said land when the plaintiffs paid back the money that they had borrowed from him, namely, $150, with interest thereon, and the taxes paid. (2) Because his honor erred in finding that the transaction was an absolute conveyance to Weeks by Hodge and his wife, and a written obligation by Weeks to reconvey the land to them when they should repay the $150 and interest and taxes; when his honor should have found in addition that the said transaction was for the purpose of securing the payment to Weeks of the $150 that Hodge and his wife had borrowed from him. (3) That his honor erred in stating as a conclusion of law that the facts in the case reduced the question before him to one of enforcing specific performance of a lost contract; when he should have found from the facts as developed by the testimony that the question before him was whether the deed given by Hodge and his wife, and the agreement given them by Weeks, taken together, constituted a mortgage to secure the payment of the money Hodge and his wife had borrowed from Weeks. (4) That his honor erred in not finding as a matter of fact that Hodge and his wife had borrowed from Weeks $150, and that in consideration thereof conveyed the said land to Weeks, and that Weeks gave them an agreement to reconvey the land upon the payment of the $150 with interest and taxes. (5) That his honor erred in not decreeing that the said deed given by Hodge and his wife to Weeks, together with the agreement given them by Weeks, taken together, constituted a mortgage to secure the payment of the $150 Weeks had loaned Hodge and his wife, with the interest and taxes. (6) That his honor having found that plaintiffs had not received half the value of the land, and that at the execution and delivery of the deed no money was seen by the persons present to have been paid, and the evidence showing that the plaintiffs were indebted to the grantee in the sum of $150, and the plaintiffs testifying that the deed was given to secure the repayment of the money borrowed, with the understanding given in writing in the lost paper that the land would be reconveyed to himself upon the payment as aforesaid, that his honor erred in not decreeing that the whole transaction amounted to a mortgage. (7) That his honor should have decreed that the plaintiffs were entitled to an accounting from the defendants for the rents and profits of the land, and that the plaintiffs were entitled to deduct from the amount due to the defendants an account of the $150 borrowed, and the interest and costs as aforesaid, whatever amount was due by the defendants to the plaintiffs for said rents and profits of the land, and that upon a payment by the plaintiffs of any amount that may have been found due them upon such accounting, that the defendants do reconvey said land to the plaintiffs, their heirs and assigns, forever," etc.

It is obvious that the principal point made by the appellant is that the circuit judge erred in holding that the facts reduced this case to a question of enforcing specific performance of a lost contract, when he should have held that the question was whether the deed from Hodge and wife was unconditional, or should be considered with the subsequent agreement to reconvey, so as to make one transaction,—a conveyance coupled with a defeasance,—that is to say, a mortgage. The two things are very distinct, and it is important, especially in reference to the question of laches, to distinguish them. The fundamental characteristic of a mortgage is that it is considered to be a security for a debt; and, while the mortgagee has the right to secure the payment of his debt by a foreclosure of the mortgage, the mortgagor has the corresponding right to redeem the security by paying the debt. It is true that there are cases in which a deed absolute on its face will be declared to be a mortgage,—not an absolute conveyance of the land, but a mere security for a debt. This cannot be done, however, unless the facts and circumstances are of such a character as to lead clearly to the conclusion that such was the intention of the parties. It is the old question whether the transaction is a mere sale with contract of repurchase, or a mortgage. This is always largely a question of fact, each case depending on its own circumstances, subject, however, to some very general and obvious rules as guides. Considering that this land was

Digitized by Google

conveyed for a grossly inadequate price, it would not, as it seems to us, be matter of regret if the facts were such as to authorize the view that the transaction amounted to a mortgage to secure the payment of the $150 note as a debt due by the plaintiffs to Weeks, the grantee. The circuit judge thought otherwise, and we must say that we concur with him. The conveyance was absolute on its face; the consideration of $150 was referred to as "paid;" there was the usual warranty; the possession of the land was delivered; while a mortgagor holds the title, and generally the possession. Nothing was heard of a debt due to Weeks, nor of a claim to redeem the land on the part of Hodge, for over 10 years, or until after the death of Weeks. We are forbidden to conclude that during the whole of that period Hodge and Weeks stood to each other in the relation of debtor and creditor, and the debt was secured by a mortgage of the land which was in the possession of Weeks. Mr. Pomeroy says: "Whether any particular transaction does thus amount to a mortgage, or to a sale with a contract of repurchase, must to a large extent depend upon its own special circumstances, for the question finally turns in all cases upon the real intention of the parties as shown upon the face of the writings, or as disclosed by extrinsic evidence. A general criterion, however, has been established by an overwhelming consensus of authorities, which furnishes a sufficient test in a great majority of cases. * * * The practical test is whether there is a liability, * * * independent of the conveyance and contract of reconveyance, which the grantee can enforce against the grantor. If a loan is made to the grantor at the time of executing the conveyance, and the continued existence of his indebtedness therefor is evidenced by some collateral engagement given by the grantor, such as a note or bond, the case would be simple, and the transaction clearly a mortgage. * * * But if this antecedent debt is wholly satisfied and extinguished by the conveyance, so that no liability remains under any circumstances against the grantor, then there is no mortgage, since there is no debt to be secured thereby. In such a case the surrender up by the grantee of the written evidences of the original indebtedness * * * would be a very material circumstance," etc. 3 Pom. Eq. Jur. § 1195. We cannot doubt that in this case there was no debt to be secured, and therefore there was no mortgage. The agreement to reconvey was an independent contract.

Considering, then, the contract to reconvey on the conditions stated to be independent of the deed to Weeks, was it error to refuse an order requiring it to be specifically performed? In the first place the contract was lost. We would not undertake to say that the court would not, under any circumstances, require specific performance of a lost contract; but it is established as one of the prerequisites to specific performance that the proof of the terms of the contract must be clear, definite, and certain. As the contract is lost, and there is no copy of it, its terms must rest only on the uncertain, slippery memory of witnesses. The loss of the paper was a great misfortune to the plaintiffs, and it is difficult to understand why the matter of the loss was not stirred earlier, and in the life-time of Weeks, who could have given a new contract, or at least have acknowledged the old one lost. But over and above this difficulty, the application for relief was delayed too long. We agree with the judge that, considering the condition of the parties, there certainly was most extraordinary negligence, which amounted to laches, and that the claim is stale. See Blackwell v. Ryan, 21 S. C. 124, and Gregory v. Rhoden, 24 S. C. 98. The judgment of this court is that the judgment of the circuit court be affirmed.

SIMPSON, C. J., and MCIVER, J., concur.

(31 S. C. 322)

ELLIS v. YOUNG.

(*Supreme Court of South Carolina.* July 12, 1889.)

MORTGAGES—BONA FIDE PURCHASER.

A vendee of land, having received from his mother-in-law a part of the money used in the purchase, executed a writing under seal, acknowledging the receipt of the money and its application, and stating that the writing was executed in order to secure to her an interest in the land to the extent of her advances. The paper was never recorded, and the mother-in-law lived with the vendee on the premises as a member of the family, and upon her death the vendee, as her executor, brought an action to foreclose the alleged mortgage against a purchaser on execution against the vendee. *Held*, that the residence of the mother-in-law on the premises as a member of the vendee's family was not such an open and unconcealed possession as would charge the execution purchaser with notice of her claims.

Appeal from common pleas circuit court of Abbeville county; T. B. FRASER, Judge.

Action by John E. Ellis, executor of Cynthia Ann Wakefield, deceased, against Henry M. Young, to foreclose a mortgage, which was as follows: "State of South Carolina, Abbeville District. Know all men by these presents, that I, John E. Ellis, of said district and state, did receive from Cynthia Ann Wakefield the following amounts of money, to-wit: 22d October, 1860, one hundred dollars; December, 1860, one hundred and seventy-five dollars; 1st January, 1861, one hundred and fifty dollars; these amounts making in all four hundred and twenty-five dollars. This money was received by me to pay for a tract of land bought by me from W. H. Parker, commissioner in equity, and known as the 'Brownlee Tract,' containing two hundred and thirty-two and one-quarter acres, more or less, being said district and state, lying on headwaters of Job creek, bounded by lands of R. M. Ellis, Z. Haddon, Andrew Stevenson, Wm. J. Johnson, Bethlehem Church, and others. And now, in order to secure the amount of four hundred and twenty-five dollars to Cynthia Ann Wakefield, now

Digitized by Google

this indenture or contract in writing is made this day by me to give and secure to Cynthia Ann Wakefield an interest in said tract of land bought by me from W. H. Parker, commissioner in equity, October 3d, 1859, containing two hundred and thirty-two and one-fourth acres, more or less, and she does from this time forth hold an interest in said land before mentioned to the amount of four hundred and twenty-five dollars. In witness whereof I have hereunto set my hand and seal this first day of January, 1861. JOHN ELI ELLIS. [L. S.] Witness: L. D. WRIGHT. ABNER L. HUGHES." Complaint dismissed, and plaintiff appeals.

Frank B. Gary and *Eugene B. Gary*, for appellant. *Walter L. Miller* and *Benet & Cason*, for respondent.

SIMPSON, C. J. John E. Ellis, plaintiff-appellant, in 1859, bought from the commissioner in equity for Abbeville county a certain tract of land, containing some 230 acres, and in 1861, having received from Mrs. Cynthia Ann Wakefield, his mother-in-law, at different times, $425 in the aggregate, which amount was applied to the purchase money of said land, he executed a paper under seal (which is found in the case) in which he acknowledged the receipt of this sum and of its application, as above, stating therein that, in order to secure Mrs. Wakefield, said paper was made with the view to give her an interest in the land to the amount of $425, advanced to him, and by him used as above stated. Mrs. Wakefield, as already stated, was the mother-in-law of Ellis, and lived with him on the premises mentioned. The paper above was never recorded. On sales-day in 1885, the sheriff of Abbeville sold this land under an execution in favor of Cochran & Banner vs. Ellis, and it was bid off by the defendant, Young, at $1,205, who paid the purchase money and received title. In 1888, Mrs. Wakefield having died in the mean time, and the said Ellis being executor of her will, the action below was instituted by said executor, upon the instrument above, styling it a mortgage, and praying a foreclosure thereof, a sale of the land, and an application of the proceeds to executor's claim as above stated. The defendant, Young, interposed the defense of a *bona fide* purchaser without notice, and pleaded the statute of limitations and presumption of payment by lapse of time. The master to whom the case was referred found, as matter of fact, that Young had no actual knowledge of the existence of the paper sued on up to the time when he completed his purchase from the sheriff by paying the purchase money and receiving titles, and he sustained the defense of *bona fide* purchaser without notice, overruling the other defenses. Upon exceptions to the master's report from both sides, his honor, T. B. FRASER, holding that the defenses of the statute of limitations, and of the presumption of payment by lapse of time, were personal privileges which might be waived, overruled said defenses, but decreed that whatever might be the character of the interest of Mrs. Wakefield, and whether the paper sued on should be regarded as a mortgage, or the evidence of a resulting trust in favor of Mrs. Wakefield, yet it was never recorded, and the fact that she lived with her son-in-law, Ellis, could not have the effect of notice of her claim, whether an interest in the land or a claim to have a debt paid out of it; the testimony not showing that she exercised acts of ownership from which any claim of interest could be inferred in favor of Mrs. Wakefield. He therefore ordered and adjudged that the complaint be dismissed.

The plaintiff has appealed, alleging error to this decree, and to the facts upon which it was predicated, as found by the circuit judge. The defendant also gave notice that he would ask the supreme court to sustain the decree and to dismiss the complaint, on the grounds that the claim of plaintiff was barred by the statute of limitations, and by the presumption of payment by the lapse of time, and also because the paper offered by the plaintiff as a mortgage is not a mortgage, but an evidence of an interest in land.

The primary and main question in the case is as to the first defense of the defendant. The defense of a *bona fide* purchase without notice may be defeated in one of three ways: (1) Where the adverse claimant stands upon a deed or other paper, by proving its record, according to law; (2) by showing actual knowledge of its existence before the defendant has completed his purchase by payment of the purchase money, whether it has been recorded or not; and (3) where the party claims by having been in possession by showing open and unconcealed possession, of the character and as announced in Sheorn v. Robinson, 22 S. C. 40, and the other cases on that line. These are all questions of fact, and in this case they have all been determined against the appellant, both by the master and the circuit judge. The vital point, therefore, in the appeal of plaintiff, resolves itself into the question whether these concurrent findings must be sustained. There is no claim that the paper under which plaintiff demands relief was ever recorded, so there is no foundation for the appeal on that ground. As to actual notice, true, there is a conflict in the testimony, but the master who had the witnesses before him found for the defense, in which the circuit judge concurred. We see no reason to overrule this finding. And as to the third ground, to-wit, possession on the part of Mrs. Wakefield, we think the findings were sustained by evidence. In fact, the very character of appellant's action is in substance a denial of such possession. The appellant regards the paper under which he claims as a mortgage executed to secure the payment of borrowed money He styles it a mortgage, and sought its foreclosure as a mortgage. He repudiates the idea of its being an instrument conveying an interest in land, and he rests upon it as a security for money advanced by his testatrix; and it is

Digitized by Google

only in that view that he has any standing in court. The land was purchased by the plaintiff in the first instance, and we suppose he went into possession as such purchaser. True, his mother-in-law, Mrs. Wakefield, lived with him, not, however as part owner, but as one of his family, and holding a mortgage to secure the money which she had loaned Ellis, and which Ellis had used in part payment of his purchase money But there is no pretense that she was a mortgagee in possession. The only evidence of possession came from the appellant, and he only says "that she lived there. Made that her home, and we supported her. She died at my house. She didn't work any of the land herself. I worked it all, and she just lived there as one of the family," etc. "As her home, I considered that she had an interest in the land." We do not think that such residence on the land in the house of the defendant under such circumstances brings the case up to the principle announced in Sheorn v. Robinson, supra, or any other of the cases cited. Having reached the conclusion which we have on these questions we have not regarded it necessary to consider the questions raised by the defendant's notice, nor whether he adopted the proper practice therein. His purpose was to sustain the decree upon the grounds stated in his notice in the event that the ground upon which it was based should fail. That ground has not failed; therefore, defendant's grounds have not been reached.

It is the judgment of this court that the judgment of the circuit court be affirmed.

McIver and McGowan, JJ., concur.

(31 S. C. 282)

Utley v. Cavender *et al.*

(Supreme Court of South Carolina. July 6, 1889.)

Usury—Recovery of Excess.

1. An agreement in writing, made by a debtor with his creditor, eight months after maturity of a note on which 7 per cent. interest was reserved, in consideration of extension of the time of payment of the note, to pay 10 per cent. interest from its maturity, is valid under Acts S. C. 1882, p. 36, which provide that the legal rate of interest shall be 7 per cent. in the absence of a written agreement for a higher sum, but the parties may stipulate in writing for any rate not exceeding 10 per cent.

2. Under Acts S. C. 1882, p. 36, which provide that the legal rate of interest shall be 7 per cent. in the absence of a written agreement for a higher sum; that the penalty for lending money at a greater interest is a forfeiture of all interest and a limitation to recover only the principal sum; and that where illegal interest has been received the recipient shall forfeit double the illegal interest so received, to be recovered by the debtor in a separate action or by counter-claim in any action brought by the creditor for the principal sum,—payment of 10 per cent. interest upon deferred payments of interest on a bond drawing 7 per cent. without a written agreement to do so by the debtor, is usurious, and the debtor is entitled to recover double the excess over 7 per cent.

Appeal from common pleas, circuit court of Richland county; T. B. Fraser, Judge.

Action by Harmon G. Utley against Thomas S. Cavender and others for $7,000 and interest upon a promissory note, and to foreclose a mortgage securing the same. Plaintiff claimed as assignee of the note and mortgage under one George Barnard, to whom it had been assigned by one David Utley, father of plaintiff, and since deceased. An order of reference was made on motion of plaintiff to take testimony and report any special matter. Defendants excepted to the master's report, which was confirmed by the circuit court. From decree of the circuit court both parties appeal. Judge Fraser's decree is as follows: "This is an action to foreclose a mortgage given by defendant T. S. Cavender to David Utley, under whom plaintiff claims. Several other lien creditors have been made parties defendant. All the issues were referred to the master. Since the hearing before the master the defendant Cavender has sold the land covered by the several liens set up in the pleadings, for an amount more than sufficient to pay them all in full, and out of the proceeds of the sale he has paid off all the liens in full except the bond and mortgage, but has not paid any costs to the attorneys for defendants who have answered. He has paid also to the plaintiff on his bond and mortgage the sum of seven thousand five hundred dollars, and has deposited in court the further sum of three thousand dollars to await the decision of certain issues still pending in this cause. The mortgage, by the order of the court, has been marked 'satisfied;' and the lien thereof transferred to the fund so deposited in court. The sum of three thousand dollars, under the terms of the order, has been deposited in the savings department of the Carolina National Bank, subject to the further order of the court in this case. The master's report, dated 20th October, 1888, finds that there was then due to plaintiff on his bond and mortgage the sum of $9,564.64, and that there had been since the hearing paid thereon the sum of $7,500.00, leaving a balance then due of $2,064.64. Plaintiff's bond and mortgage bear date 6th May, 1881, and are conditioned for the payment of $7,000.00 in five years, with interest at seven per cent. per annum, payable semi-annually. Various payments of interest were made on said bond up to 10th November, 1885. On 15th November, 1886, a payment of $134.95 was made as interest on deferred payments of interest to 6th November, 1886, and this interest was calculated at 10 per cent. On 20th January, 1887, the defendant Cavender made with David Utley a written agreement in which there was the following stipulation: 'And now, in consideration that the bond and mortgage is to be extended, I agree to pay the said David Utley, or his heirs or assigns, a sum equal to ten per cent. per annum on said amount from 10th May, 1886.' The defendant contends that inasmuch as by this agreement he contracted to pay 10 per cent. for past use of money, and the consideration named in the written agreement is future extension of time for payment, plaintiff has incurred the forfeitures

Digitized by Google

and penalties of the act of 21st December, 1882, on the subject of usury. This statute is a penal one, 'imposing forfeitures and penalties,' and 'penal statutes must be strictly construed, and never extended by implication.' In this case there has been the agreement in writing to pay interest at the rate of ten (10) per cent. per annum. I do not see how the penalties of the act can be incurred when the only conditions prescribed by the act have been complied with. It may raise a question of the sufficiency of the consideration where the agreement is to pay interest for past use of money, but I do not see how such an agreement, being in writing, and not for over 10 per cent. interest, can work any of the penalties or forfeitures of the act of 1882. So far as I have been able to examine the authorities cited by the master and the counsel, I am satisfied with the conclusions of the master on the subject of the consideration. I cannot concur with the master as to the unconstitutionality of the second section of the act of 1882. It is certainly germane to the subject of the regulation of interest to which the section of the General Statutes, which is amended, refers. The payment of $134.95 as interest on interest does not modify the terms of the bond or of the written agreement, and must be confined alone to the interest on interest to which it refers. It was not in writing, and I therefore think was against the plain provisions of the act, one of which, I think, does make compliance with a parol agreement penal, where it would not have been penal if the contract had been in writing. I therefore hold that defendant is entitled to his counter-claim of ($269.90) two hundred and sixty-nine 90-100 dollars. It is therefore ordered and adjudged that the master's report as to the amount of plaintiff's claim be confirmed, except as above stated. It is ordered that it be referred to the master to report what will be the balance due on the claim of plaintiff, after deducting the said sum of $7,500.00 and the amount of the counter-claim herein allowed, and that on the coming in and confirmation of the master's report the amount due plaintiff be paid out of the fund in court. It is also ordered that out of said fund there be paid the costs of plaintiff, and then the costs of the lien creditors and their attorneys in the order of their priorities."

Robert W. Shand, for plaintiff. *Clark & Muller*, for defendants.

SIMPSON, C. J. This was an action to foreclose a mortgage given by the defendant Cavender to one David Utley, under whom the plaintiff claims. The other defendants were lien creditors. The decree of his honor, Judge FRASER, hereto appended, sufficiently states the facts. It appears that the mortgage was given to secure the payment of a bond, dated May 6, 1881, for a large amount, borrowed money, payable five years after date, with interest at 7 per cent., payable semi-annually. Various payments were made on this note up to November 10, 1885, and on the 15th of November, 1886, some six months after the note fell due, the defendant Cavender made a payment of $134.95, which was interest at 10 per cent. up to 6th of November, 1886, on the deferred payments of the semi-annual interest, which had not been paid promptly as per note; and in January, 1887, Cavender made a written agreement with David Utley, in which he stipulated that, in consideration of extension of time on the bond and mortgage, he would pay a sum equal to 10 per cent. per annum on said bond from the 10th of May previous, to-wit, from the 10th of May, 1886. One defense set up was that both of these transactions were usurious, and that plaintiff could not, therefore, recover except only the principal, forfeiting all interest and costs, and that the defendant was entitled to double the amount of $134.95, the alleged usurious interest paid, which he claimed by way of counter-claim. His honor sustained this last defense, and allowed the counter-claim, to-wit, $269.90, but overruled the other, holding that the written agreement above was not usurious, and he decreed that the plaintiff be allowed his debt after deducting the amount paid and the counter-claim. Both parties have appealed, the plaintiff on the ground that the payment of the $134.95 was held to have been usurious, and on the allowance of double that sum to the defendant as a counter-claim, because of the usury, and the defendant on the ground that the written agreement made in January, 1887, to pay 10 per cent. interest from May 10, 1886, a past date, was not held usurious.

Usury consists in receiving more than the legal rate of interest for the use of money, and it has been held that even any advantage, certain or uncertain, contingent or otherwise, to the creditor over and above the legal rate of interest amounts to usury. In our state 7 per cent. is the legal rate in the absence of any written agreement for a higher sum, but the parties may stipulate in writing for any sum above 7 per cent. to 10. The penalty for lending or advancing money or other commodity at a greater rate is a forfeiture of all interest, and a limitation to the recovery of the principal sum without costs, (Acts 1882, p. 36,) and where the illegal interest has been actually received, a forfeiture, also, of double the amount so received, to be recovered by the debtor in a separate action, or by counter-claim to any action brought by the creditor to recover the principal sum, (Acts 1882, supra.) Now, the questions before us may be resolved into questions of fact: *First.* Has the plaintiff lent or advanced money to the defendant at a greater rate of interest than 7 per cent. in the absence of written agreement to pay more, or has he charged a greater sum? *Second.* Has he received a greater rate than 7 per cent. on any money lent or advanced without a written agreement to pay the same?

If either of these questions must, upon the testimony, be answered in the affirmative, then usury is present in the matter thus af-

Digitized by Google

firmed. As to the first. It is conceded that the money sued for was originally lent for a period of five years from the 6th of May, 1881, at 7 per cent., to be paid annually. There was certainly no usury in this. The bond fell due on the 6th of May, 1886, when, according to law, the bond would have still borne 7 per cent. until paid, with accumulated unpaid interest, if any, added and incorporated. The bond was not paid when it fell due, and in January thereafter, to-wit, January, 1887, the defendant, desiring further time, in consideration thereof agreed in writing to pay 10 per cent. upon the bond, the 10 per cent. to commence on the 10th of May previous, about the time the bond had become due; and upon this written agreement the plaintiff now charges the 10 per cent. from said time. Now, can it be said upon these facts that the plaintiff has either lent or advanced money to defendant at a greater rate of interest than 7 per cent., in the absence of a written agreement to that effect, or that he has thus charged a greater rate? Certainly not. He lent the money originally at 7 per cent., and since it has become due the defendant has made a new contract, by which he was to pay 10 per cent. from the time of maturity. Whether this contract was founded upon a sufficient consideration is not before us. The fact is it was made, and it is in writing, and to that extent is in compliance with the act. Under these circumstances it does not seem to us that the plaintiff can be said to have violated the usury law. He has neither lent nor advanced money at a greater rate of interest than 7 per cent. without a written agreement; nor has he charged a greater interest in the absence of such an agreement. There is nothing more in this transaction than that the defendant, while liable only for 7 per cent. for the money borrowed from May 6, 1886, to January, 1887, on the latter date, in consideration of further forbearance, agreed in writing to pay 10 per cent. during that time, and during the further extension. In other words, he agreed to increase the rate of interest to the limit allowed by the act, and, as required by the act, put it in writing. The plaintiff had the right to collect the bond when it fell due, to-wit, May 6, 1886, and had the written agreement, supra, been made at that time in consideration of further extension no one would have contended, we suppose, that this would have been an usurious transaction, because it would have amounted to a new loan upon a new contract, in writing, at a higher rate of interest, but within the limit of the act, and in accordance with its provisions. What is the difference in view of the fact that the agreement was made after the maturity of the bond, and not at that moment? There can be none as to the question of usury. True, the bond between May 6, 1886, and January, 1887, was running under the original contract, at 7 per cent., and the plaintiff, if he had attempted to charge more, without a written agreement to that end, would have been guilty of usury; but no attempt of this kind was made. On the contrary, the defendant, for his own advantage, and upon what seems to us now a sufficient consideration, changed the existing contract as to the rate of interest, and made it reach back to the said maturity of the bond; and it is upon this changed contract, which is in writing, that the plaintiff now demands 10 per cent. instead of 7. The plaintiff, then, is not charging a higher rate of interest than 7 per cent. for money lent or advanced in the absence of a written agreement by his debtor to pay said higher rate.

The other transaction stands upon a different ground, and we think with his honor below was usurious, but we think his honor erred in the amount allowed upon the counter-claim of the defendant. In that transaction the plaintiff patently received more than 7 per cent. interest on the deferred semi-annual unpaid interests on the bond, and this, too, without any written agreement on the part of the defendant to pay the same. According to the terms of the bond the defendant was required to pay the interest thereon semi-annually at 7 per cent., and by the law on failure to meet these semi-annual installments when due they bore interest at 7 per cent. It seems that some of these semi-annual installments had not been paid when the bond fell due, and the defendant, instead of paying them with 7 per cent. interest, on the 15th of November, 1886, paid thereon 10 per cent. interest, amounting to $134.95, which the plaintiff actually received. Here, then, was a clear case of more than 7 per cent. received by a creditor, for the forbearance of money, without a written agreement to pay the same by the debtor, which was in violation of the act of 1882. That act imposes a forfeiture of double the amount of the illegal interest, as this court has held in Hardin v. Trimmier, MS. Dec.; also ante, 342. See, also, Bank v. Parrott, 8 S. E. Rep. 199. Seven per cent. would have been and was the legal interest to which the plaintiff was entitled; all over that, to-wit, the 3 per cent. excess, was illegal, and double that excess should have been the amount allowed to the defendant on his counter-claim, no more.

As to the constitutionality of the second section of the act of 1882 we concur with the circuit judge. This section was germane to section 1288, Gen. St., regulating interest, and was sufficiently embraced in the title of the act of 1882, amending said section. It is the judgment of this court that the judgment of the circuit court be modified so as to allow by way of counter-claim to the defendant double the amount of 3 per cent., the excess over 7 per cent, embraced in the payment of $134.95, instead of double the said sum of $134.95, and that in all other respects the said judgment be affirmed.

McIver and McGowan, JJ., concur.

Digitized by Google

(31 S. C. 290)

YOUNG v. GARLINGTON.

(*Supreme Court of South Carolina.* July 6, 1889.)

APPEAL—PARTIES—JOINDER.

1. An exception on the ground that the judge "failed to sustain plaintiff's exception to the master's report, and that he did not give plaintiff the relief he asked," is too general under rule 5 of the supreme court, which provides that "an exception for the purpose of an appeal must contain a statement of the proposition of law or fact which it is desired to review, and a mere reference to an exception taken to the report of the master * * * will not be sufficient, and an exception so taken will not be considered."

2. Under Code S. C. § 142, providing that, "when a complete determination of the controversy cannot be had without the presence of other parties, the court must cause them to be brought in," the court may properly, of its own motion, direct to be made a party one who, as shown by the master's report, may have an interest in the controversy.

3. Where an action is brought against one individually, and it is afterwards found that as to the matter in controversy he was agent for another, who is then brought in, other matters between plaintiff and defendant in his own right will not be considered.

Appeal from common pleas circuit court of Laurens county; NORTON, Judge.

Haskell & Dial, for appellant. *Ferguson & Young*, for respondent.

SIMPSON, C. J. Stobo D. Garlington, defendant, respondent, some time in 1876 contracted to purchase from his mother, Susan W. Garlington, a certain house and lot situate in the village of Laurens, of this state, and in completion of this contract he executed a bond, conditioned to pay to the said Susan W. Garlington $5,000 in five equal annual installments, with interest, etc. This bond was secured by a mortgage of the premises. Mrs. Susan W. Garlington died ——— day of ———, leaving a will in which the plaintiff, appellant, was appointed executor, and, who having qualified, the action below was brought on said bond, and to foreclose said mortgage, praying judgment for the sale of land, and that execution be awarded for any balance, if any, after application of the proceeds of the sale. The defendant answered, claiming that he was a legatee under the will of his mother, the plaintiff's testatrix, and that the action of plaintiff should be suspended until the estate was settled. He further claimed that he held a large note on his mother, amounting to some $1,226.27, and also other claims, consisting of moneys advanced and supplies furnished to a considerable amount, which, by agreement between his mother and himself, should be credited on the bond sued on. To this defense plaintiff replied that defendant was indebted to him as executor in a large amount, arising out of the fact that defendant had possessed himself of 100 shares of the stock of the South Carolina Railroad and Southwestern Bank, of the par value of $125 per share, and of 125 shares of the stock of the South Carolina Railroad Company, of the par value of $50 per share, belonging to his said mother, and also that he had received the rents and profits of certain real estate in Florida, belonging to his said mother, all of which he had refused to account for. Plaintiff also denied any knowledge, information, or belief as to the claims set up by the defendant.

The case was referred to the master, and although the bond and mortgage was signed by the defendant, S. D. Garlington, "trustee and agent," and the deed of conveyance conveyed the land to him with the same words, "trustee and agent," added, yet the case was conducted before the referee as if it was an individual matter, entirely, with the said S. D. Garlington, as there was nothing in the papers showing for whom Garlington was trustee and agent, and upon this state of facts the master made his report, finding a large amount due on the bond after allowing all payments and credits, and also finding that the defendant held, as trustee for his mother, the railroad and bank stocks mentioned, which he had refused to turn over to the executor, and which had been lost in his hands. Upon exceptions to this report, his honor, Judge HUDSON, concluding that a final judgment could not be pronounced in view of the fact that the master had not reached a definite conclusion as to the value of certain items of alleged indebtedness set up in the plaintiff's reply to defendant's counter-claim, etc., recommitted the case to the master; and it appearing in the testimony reported by the master that Mrs. Mary Y. Garlington, the wife of the said S. D. Garlington, might perhaps be the *cestui que trust* indicated in the words "trustee and agent" appearing in all of the papers, in recommitting the case he ordered that said Mary Y. Garlington be made a party defendant to the action, and that upon her filing an answer the reference proceed with the view to ascertain the amount due on the bond and mortgage, and with leave to report on any special matter that might be raised. Under this order Mrs. M. Y. Garlington became a party, and answered, setting up the claim that her husband, S. D. Garlington, was her agent and trustee of certain of her interests in the state of Tennessee, and in substance claiming that the real estate in question was purchased by her husband for her, and that she was entitled to the payments and credits set up by her said husband in the former reference, etc. The master, in the second reference, sustained this view of the case, and reported, in accordance therewith, the amount due on the bond September 8, 1887, by Mrs. M. Y. Garlington to be $4,412.41, for which he recommended judgment against the said Mrs. M. Y. Garlington. The case assuming in the second reference this new shape, the master declined to allow the plaintiff's claim against S. D. Garlington, individually, as to the matters presented in plaintiff's reply to the counter-claim set up in the answer of S. D. Garlington before his wife was made a party.

This report, upon exceptions, was heard by his honor, Judge NORTON, who confirmed the same except as to some errors in the calculation of interest, and, upon recasting the

Digitized by Google

same, he found due on the bond the sum of $3,779.53 on the 3d day of September, 1887, and he ordered a sale of the property, or so much thereof as might be necessary to pay this sum, with interest and costs, etc. He further held that the personal matters between S. D. Garlington and the estate of his mother could not be litigated in this action, and that the pleading relating to them should be dismissed, without prejudice to either side, etc.

From this decree the plaintiff has appealed upon 16 exceptions. The first alleges error to his honor, Judge HUDSON, "because he failed to sustain plaintiff's exceptions to the master's report, and that he did not give the plaintiff the relief he asked." This exception is entirely too general, and under rule 5 of this court cannot be considered. That rule provides that "an exception for the purpose of an appeal must contain a statement of the proposition of law or fact which it is desired to review; and a mere reference to an exception taken to the report of the master or a referee, or to the decree of a judge of probate, will not be sufficient, and an exception so taken will not be considered." The plaintiff filed 18 exceptions to the master's report, to all of which the exception above refers, with no distinct proposition of either law or fact stated to which error is alleged. The second exception alleges error because his honor ordered that Mrs. Mary Y. Garlington be made a party defendant on his own motion, and in recommitting the cause to the master. Section 142 of the Code provides that, "when a complete determination of the controversy cannot be had without the presence of other parties, the court must cause them to be brought in." It appeared in the testimony reported by the master that Mrs. Garlington might have an interest in the pending controversy, and, if so, as she was not before the court, the judgment would not bind her, and therefore that the whole proceeding would be nugatory and useless, settling nothing. Under these circumstances we do not think that his honor's order was *ultra vires*. It was in the line of preventing unnecessary litigation, and was authorized by the section of the Code, supra. Exceptions 3, 4, 5, 6, 7, 8, and 11 involve questions of fact, and under the rule which requires either an entire absence of all testimony to support findings of fact by a circuit judge, or an evident preponderance of testimony against them before they can be disregarded, these exceptions must be overruled. Here the findings objected to were reported by the master, and concurred in by the circuit judge, and, upon examination, we cannot say that they were unsupported. In fact, if the witnesses were credible, which was a matter for the master and the circuit judge, we do not see how the findings could have been otherwise. The ninth exception alleges error because his honor did not hold that the accounts mentioned in exception 7 were barred by the statute of limitations. The evidence showed that these accounts were regarded and understood to be payments on the bond at the date of being contracted, so found by the master and the judge. The statute was therefore inapplicable, and, while not strictly carrying interest, they would "stop interest," as held by the judge. Exceptions 10, 11, and 12 claim that his honor erred in holding that the claim set up in plaintiff's reply against S. D. Garlington could not be adjudicated in this action. When Mrs. M. Y. Garlington was brought in, the case, as we have stated above, assumed a very different *status* from that which existed when it commenced. At the beginning it appeared to be a case against S. D. Garlington individually, but the subsequent facts developed that it was really a case against Mary Y. Garlington. The bond sued on was against her, the mortgage was hers, and the land purchased was really hers, and the payments and credits had been made from her funds. Such were the facts subsequently found, which findings we have not felt authorized to overrule. Upon these established facts the entire litigation was between the plaintiff and Mrs. M. Y. Garlington. Such being the character of the cause the circuit judge could not, under the rules of pleadings, etc., have allowed an independent litigation to go on between the plaintiff and the defendant, S. D. Garlington, in reference to matters in which Mrs. M. Y. Garlington had no interest. This would have been a joinder of actions for which there was no warrant. (15) The railroad stock, being an individual matter with S. D. Garlington, was not properly in the case. Exceptions 13 and 14 have already been considered. It is the judgment of this court that the judgment of the circuit court be affirmed.

McIVER and McGOWAN, JJ., concur.

(31 S. C. 330)

ERWIN *et al.* v. LOWRY.

(*Supreme Court of South Carolina.* July 12, 1889.)

MARRIED WOMEN—MORTGAGES.

A married woman, whose separate estate was incumbered by a mortgage, borrowed money, giving her note therefor secured by mortgage, to pay off the first mortgage, but the amount borrowed exceeded the amount of the first mortgage, and the excess was used by her husband for his own purposes. It did not appear that the mortgagee knew of this fact. Subsequently, in order to change the incumbrance to another tract, a portion of the second mortgage was paid, and a third mortgage given for the balance. There was no evidence as to who furnished this money, but the trial court found that the excess used by the husband was embraced in this payment. *Held*, that she was properly adjudged liable for the full amount of the third mortgage.

Appeal from common pleas circuit court of York county; KERSHAW, Judge.

Action by James A. Erwin as administrator of M. Agnes Lindsay, deceased, and Lewis M. Grist against Martha B. Lowry to foreclose a mortgage. The trial court, in decreeing foreclosure, filed the following opinion:

Digitized by Google

"This action came on for a hearing upon the pleadings and testimony,—the testimony of defendant, by consent, having been taken subsequently, and forwarded to the presiding judge for consideration. The facts are as follows: On the 21st day of February, 1879, J. T. Lowry, by his deed, conveyed to his wife, the defendant, a tract of land called the 'Dennis Land in York County,' which deed was recorded on the 1st day of September, 1883. At the foot of that deed, and recorded with it, is the following: 'I consent to the mortgage to Marie Moltke, given on this land by J. T. Lowry, and hereby acknowledge the same as valid and binding on said land. June 30, 1883. [Signed] M. B. Lowry.' This note is explained by the fact that on the 4th day of April, 1883, a mortgage had been made of the said land by J. T. Lowry to Mrs. Marie Moltke, to secure the sum of $500.00 advanced to him by her, without notice of the previous conveyance of the land to the defendant. This mortgage was duly recorded on the 6th day of April, 1883. It was satisfied on the 25th day of March, 1885, the sum of $534.24 being then due thereon. This money was obtained by the defendant from M. Agnes Lindsay upon her note for $630.00, dated 26th March, 1885, payable at one, two, and three years, secured by a mortgage of the same land, which was duly recorded, and was satisfied May 10, 1886, the entry whereof on the record is in the words following, to-wit: 'In consideration of a new mortgage executed to secure the debt herein described, the within mortgage is hereby marked "Satisfied." Received, $300.47. Bal. due, $400.00. May 10, 1886. [Signed] J. A. ERWIN, per C. E. SPENCER, Att'y.' The same day, May 10, 1886, Martha B. Lowry, the defendant, mortgaged to the said J. A. Erwin, (who was administrator of Mrs. Lindsay,) as administrator, a parcel of land in said county, called the 'Burnt Lot,' to secure the sum of $400.00, balance due on the above loan of $630.00, as noted in the entry of satisfaction of the mortgage therefor, above recited. This last mortgage was duly recorded. On the 10th day of September, 1886, J. A. Erwin, as administrator as aforesaid, had occasion to borrow money for the estate of M. A. Lindsay, deceased, and obtained $350.00 from the plaintiff L. M. Grist, payable one day after date, with interest from date at ten per cent. per annum till paid, and secured the same by an assignment of the balance of the debt due the estate of M. A. Lindsay on the note of M. B. Lowry to her for $630.00, secured to the said Erwin as administrator by the mortgage of the 'Burnt Lot' above recited; the said balance being, as stated, $400.00, with interest. The said J. T. Lowry, defendant's husband, acted as her agent in the transactions above recited relating to the negotiations of the loan to pay the mortgage debt of Marie B. Moltke, and the subsequent partial settlement of the Lindsay mortgage, and the transactions were accepted and ratified by her.

"The plaintiffs bring the present action to foreclose the last above-described mortgage, the particulars of which are set forth in the complaint, with a description of the land, and also for judgment against the defendant for the amount due thereon. The defendant claims that she is not bound by the aforesaid mortgage, sought to be foreclosed against her separate property, because of her disabilities as a married woman. As the law stood at the time when the mortgage of J. T. Lowry to Marie Moltke was executed, and when defendant entered upon her deed an acknowledgment of the same as valid and binding on the said land,—June 30, 1883,—a married woman could contract as to her separate estate, with all the powers and liabilities of a *feme sole*. Aultman v. Rush, 26 S. C. 524, 2 S. E. Rep. 402. The only restriction upon her powers was that she could only contract as to her separate estate. As construed by the court in that case, the words 'as to her separate estate' contained in the act of 1882, as thus qualifying her power to contract, were intended to confine her to such contracts as were made for the benefit of her separate estate, or at least to such as had some direct reference to it, independent of any other contract to which it might be attempted to be pledged as collateral. Therefore it was held that she could not mortgage her estate as security for the debt of her husband. The acknowledgment by defendant of the validity of her husband's mortgage as a lien on her land, if without other consideration than to subject her property to a debt of her husband as collateral security, though contractual in its character, would be void according to the principles announced in Aultman v. Rush. If, however, there were considerations moving to her, involving or affecting her separate estate, I apprehend her acknowledgment would be binding. It will not be doubted that the mortgage of her husband, so admitted by her, made for value, without notice of her title, and after the time fixed for recording the same, and before it was recorded, did bind the land in question. It was therefore practically just what she acknowledged it to be. Was there, then, any consideration to support such acknowledgment as a contract affecting her separate estate? I think it may be found in the fact that, had she failed to admit the liability, she would have been subjected to a litigation which would have resulted in the establishment of the mortgage at the expense of considerable costs to which her land would have been subjected, in addition to the mortgage. I think, therefore, that there was sufficient consideration to support the acknowledgment as a contract, and that it was for the benefit of her separate estate. If her land was bound for the mortgage of her husband, then all the other mortgages and securities given to secure the means of paying off the incumbrance were good, valid, and binding on her, and this, whether we regard the land as bound for the mortgage of her husband in

Digitized by Google

consequence of her acknowledgment, or independently of it. Contracts made with a view to obtain the means wherewith to remove an incumbrance on her separate property must certainly be 'as to her separate estate,' and for the benefit of it, or at least so intended. So, also, with regard to subsequent contracts made with a view to the settlement of the debts contracted for the purpose of removing such incumbrance. Mortgages made to secure the payment of loans for such purposes are binding on the separate estate so mortgaged. Aultman v. Rush, 26 S. C. 525, 526, 2 S. E. Rep. 402. It is supposed that because the mortgage debt for which her land was liable to Mrs. Moltke only amounted, when paid, to $534.25, she had no authority to borrow $630.00 with which to pay it, and hence that as to the excess, $95.75, she could not be held liable. But a married woman is not treated as a minor or imbecile in regard to transactions of this character. She is bound to the exercise of good faith, and cannot be permitted to shield herself from the consequences of her conduct by pleading her disabilities after having enjoyed the fruits of her want of good faith, unless in cases where the party with whom she contracted was guilty of negligence, and failed in the proper diligence in informing himself as to the powers of the woman to contract. Here, undoubtedly, she contracted this debt to pay off and remove an incumbrance on her separate estate. This she could legally do. She borrowed too much money for that purpose from Mrs. Lindsay, and mortgaged her separate estate for $630.00. In order to pay off that incumbrance she gave a new mortgage on another portion of her separate estate, for $400.00, and paid the balance of the debt now in the hands of the administrator of Mrs. Lindsay. All this was done without notice to the administrator of the claim here set up. Good faith required that it should have been then asserted. Mr. Spencer, attorney for the administrator, who took the mortgage on the 'Burnt Lot,' required as a condition that the debt should be reduced to $400.00 by the payment of $300.47. She accepted the terms, and gave this mortgage. The separate property is certainly chargeable with that amount. To the extent of this sum,—$95.75,—I think it may and ought to be considered as embraced in the cash payment made. If paid voluntarily, it could not be recovered back. Neither can it be recouped in the way here attempted.

"There is another view. The defendant had the power to make the mortgage in reference to her separate estate. She did so, but exceeded the sum she had authority to contract. This was done without fraud, and with full knowledge on her part of all the facts. Why should she not be held estopped by the deed? Or if she could plead, as she does, the want of authority, and it is found only to extend to part of the deed, can she avoid so much of the deed as is without authority, without restoring the money obtained on it? True, her husband received the money, and appropriated it to his own use, but he was her agent, and she acquiesced in it. Under all these circumstances, I cannot use the powers of a court of equity to sustain the defense. Let the plaintiffs have judgment for the sum of four hundred dollars, ($400.00,) with interest thereon at ten per cent. per annum, from the 10th day of May, 1886, and also, for the satisfaction thereof, let the mortgaged premises be sold for foreclosure, and the defendant, and all other persons claiming the same under her, be forever barred and foreclosed of all right and equity of redemption of the same; and the plaintiff Lewis M. Grist be paid the amount due him as above stated, with the interest due him; and the balance be paid to James A. Erwin to the amount of the judgment above ordered. First, however, before any of said payments, let the costs of this action and expenses of sale be paid. If any balance of said judgment and costs be due after making such payments, let the plaintiffs have leave to take out execution on said judgment for the amount. And should there be any surplus left after satisfying said judgment, interest, and costs out of the proceeds of said sale, let the same be paid to the defendant. Let the formal judgment and order of sale be prepared by counsel in accordance herewith."

Hart & Hart, for appellant. *C. E. Spencer*, for respondents.

McIver, J. This was an action to foreclose a mortgage of real estate, and the defense was that defendant, being a married woman, had no power to make the contract upon which the action was founded. The facts upon which this controversy turns do not appear to be disputed, and may be stated briefly as follows: On the 21st February, 1879, J. T. Lowry, the husband of the defendant, conveyed to her by deed a tract of land known as the "Dennis Land," which, however, was not recorded until the 1st of September, 1883. In the mean time J. T. Lowry had mortgaged the land to Marie Moltke, who had no notice of the previous conveyance to his wife, which mortgage was duly recorded on the 6th of April, 1883. At the foot of the deed from Lowry to his wife, and recorded with it, was the following indorsement, signed by defendant: "I consent to the mortgage to Marie Moltke, given on this tract by J. T. Lowry, and hereby acknowledge the same as valid and binding on said land." On the 26th of March, 1885, the defendant borrowed from M. Agnes Lindsay the sum of $630, giving her note therefor, secured by a mortgage of the same land, for the purpose of paying off the Moltke mortgage, which was then paid, and marked "Satisfied." It appears, however, that the amount borrowed from Mrs. Lindsay exceeded the amount necessary to pay off the Moltke mortgage by the sum of $95.75, which excess was received and used by defendant's husband for

Digitized by Google

his own purposes. On the 10th of May, 1886, with a view to relieve the Dennis land from the lien of the mortgage resting upon it to secure the note for $630, the husband of defendant applied to the attorney for the estate of Mrs. Lindsay, who had died in the mean time, to take a mortgage on another piece of land known as the "Burnt Lot," and release that on the Dennis land. To this proposition the attorney assented, provided the amount then due on the $630 note, $700.47, should be reduced by payment to the sum of $400. Accordingly the sum of $300.47 was paid, and credited on the $630 note, and a new mortgage taken on the "Burnt Lot" to secure the balance left due—$400—on that note, and the mortgage on the Dennis land was marked "Satisfied." There was no evidence as to who furnished the $300.47, paid on the note, or where it was obtained from, but it did appear that in all these transactions the defendant was represented by her husband as her agent. The circuit judge rendered judgment in favor of the plaintiffs for the whole amount,—$400,—and interest, and defendant appeals upon the following ground: "Because his honor erred in holding that the separate estate of the defendant, a married woman, was liable for the item of $95.75, the excess over the sum necessary to satisfy the mortgage debt existing when the loan of the $630 was made; erred in holding that the $95.75 may and ought to be considered as embraced in the cash payment made on May 10, 1886; and erred in including the said amount in the judgment, and as secured by the mortgage." It will thus be seen that the defendant, while contesting, in the court below, her liability for any portion of the mortgage debt, by her appeal she only raises the question as to her liability for so much of the money borrowed as was in excess of the sum necessary to relieve her land—her separate estate—from a lien upon it.

While it may be quite possible that where a married woman, under the pretext of borrowing money for the purpose of relieving her separate estate from a lien previously fixed upon it, at the same time borrows a sum in excess of the amount necessary for that purpose, with a view to let her husband have the benefit of such excess, and these facts are known to the lender, she could only be made liable for the amount borrowed for the legitimate purpose of discharging such lien, yet, according to the view which we take of the facts of this case, that is not the question before us. In the first place, there is no distinct evidence that the lender of the money here knew that the defendant was borrowing more money than was necessary to satisfy the Moltke mortgage, though, in all fairness, it must be admitted that the probability is that such was the fact. The witness Wallace, being the agent both of Mrs. Moltke and of Mrs. Lindsay, probably knew that the amount borrowed was more than was necessary to satisfy the Moltke mortgage, but there is not the slightest evidence that he knew that the excess was borrowed for the use of defendant's husband, and certainly none that Mrs. Lindsay knew anything about it. Her agent, Wallace, knew that the main purpose was to borrow money for a purpose for which defendant had a right to contract, and, even assuming that he knew she was borrowing more than was necessary for that particular purpose, he might very well assume, in the absence of any evidence to the contrary, that the whole sum borrowed was for a like legitimate purpose. But, be that as it may, it seems to us that the conclusion reached by the circuit judge may be sustained on one of the grounds taken by him. He holds that the excess—$95.75—should be considered as embraced in the cash payment of $300.47; and, if this be so, then clearly the $400 then left due represented money borrowed by defendant for a legitimate purpose, and there was no error in rendering judgment against her for the whole amount. There being no evidence as to who furnished the money with which the cash payment was made, it certainly would be a fair inference that the husband, who unquestionably was liable for the excess to his wife, at least, if not to the holder of the note, might have paid that much himself. But, even assuming that the defendant furnished the whole amount, and assuming that the excess was a debt for which her husband was alone liable, if she saw fit to pay it, that would extinguish that portion of the debt; and, the circuit judge having found that it was so paid, we do not see how we can say there was any error in such finding. At all events, it is quite certain that the amount which the defendant has been adjudged to pay is not in excess of the amount for which she was originally clearly liable, and we cannot say that there is any error in such judgment. While, therefore, we are not to be understood as indorsing all of the grounds upon which the circuit judge has rested his decision, we cannot say that there is any error in the judgment rendered by him. The judgment of this court is that the judgment of the circuit court be affirmed.

SIMPSON, C. J., concurs in the result. MCGOWAN, J., concurs generally.

(31 S. C. 326)

CHEATHAM *v.* MORRISON *et al.*

(*Supreme Court of South Carolina.* July 12, 1889.)

REPLEVIN BOND.

A warrant was issued under the South Carolina landlord's act to enforce the landlord's lien on crops. The tenant gave notice that the rent was not due and replevied the crops seized, giving a bond conditioned for the delivery of the property in case delivery should be adjudged to the plaintiff, and for the payment to plaintiff of such sum as might in that action be recovered against defendant. No further proceedings were taken on the warrant, but plaintiff commenced an action by summons and complaint against the tenant, reciting the steps taken under the warrant and seizure, and alleging an indebtedness under the lease, and recovered judgment against the tenant. *Held*, that an action could not be maintained against the

Digitized by Google

sureties on the replevin bond for the amount of this judgment as it was not recovered in the proceeding in which the undertaking was given, and a nonsuit in such an action is proper. McGOWAN, J., dissenting.

Appeal from common pleas circuit court of Abbeville county; FRASER, Judge.

Action on a replevin bond by James H. Cheatham against B. L. Morrison and Basil Maddox. Nonsuit ordered, and plaintiff appeals.

Graydon & Graydon, for appellant. *Eugene B. Gary*, for respondents.

SIMPSON, C. J. In December, 1884, one M. M. Seawright rented from the plaintiff for the year 1885 certain mills and land located in Abbeville county,—the mills at a rental of $250 and one-fourth of the crop raised on the land. And these parties entered into a written agreement to that end, in which it was stipulated that Cheatham should have a lien on all the crops raised on the place for the year 1885, with all the privileges and rights given to landlords by the act of the general assembly of the state. In December, 1885, Cheatham, upon an affidavit that Seawright was about to sell and dispose of the crops subject to the lien, and to defeat the same, obtained from the clerk of the court a warrant authorizing the seizure of the crops referred to, and certain portions thereof having been seized by the sheriff, Seawright gave written notice to said sheriff that the amount claimed was not justly due, and he demanded the right to retain the property upon giving the proper security, which security having been given, with the defendants herein as sureties, the property levied upon was released. The proceedings under the agricultural warrant appear to have stopped at this point. Some time after this, however, (but at what precise time does not appear in the case, as there is no date to the papers,) the plaintiff commenced an action by summons and complaint against Seawright, reciting the steps taken under the warrant of seizure, and alleging an indebtedness by Seawright under the contract, *supra*, in the sum of $250, and one-fourth of all crops raised on the premises mentioned for the year 1885, and praying judgment for the same, etc. In this action a judgment was obtained in 1888, upon a verdict of the jury, for $376.71, which was rendered upon certain issues ordered by his honor, Judge NORTON. Seawright having left the state after this, and a *nulla bona* return having been made upon the execution issued on the judgment *supra*, the action below was commenced on the undertaking *supra*, against the defendants, sureties thereon, at the trial of which his honor, Judge FRASER, upon motion of defendants, ordered a nonsuit. The main question in the appeal is the correctness of this order. It is hardly necessary, in view of the frequent decisions in recent cases by this court on the foundation of nonsuits, to say more here than that a nonsuit is proper where there is an absence of all competent and pertinent testimony to any one or more of the contested issues raised in the case. Was there such absence here? The action below was brought upon the undertaking given by Seawright when he replevied the property seized by the sheriff under the agricultural warrant, and of course it antedated the suit against Seawright in the court of common pleas, upon which the judgment mentioned above was obtained against him. In that undertaking the parties stipulated, after reciting that certain crops had been seized in the case entitled "J. H. Cheatham vs. M. M. Seawright," that for procuring a return thereof, and in consideration thereof, they should become bound to the said plaintiff in the sum of $500 for the delivery of the property mentioned to the plaintiff in case said delivery should be adjudged, and for the payment to said plaintiff of such sum as might in that action for any cause be recovered against the defendant. Now, the ground of the nonsuit seems to have been that the proceeding under the warrant of seizure never reached judgment, nor was it ever pressed to a conclusion in any way; and, inasmuch as the undertaking sued on was given in that proceeding, and the stipulations therein had reference only to the result of that proceeding, and, there being no testimony connecting said undertaking with the subsequent action herein mentioned, a nonsuit was inevitable. The action below was upon a contract made by the defendants. These parties had the right to stand upon the contract made, and to demand of the plaintiff proof of a breach before liability attached. Their contract was, in express terms, to be responsible, if they failed to have returned to the plaintiff the property replevied in case a return was adjudged to him, and for the payment of such sum of money as in that action might be recovered against Seawright. What action was referred to? No other action was then in existence except the agricultural proceeding, nor any other contemplated at that time, so far as known. The stipulation, then, could have had no reference except to that proceeding. To make the parties liable, therefore, there should have been some evidence that said proceeding had resulted either in a judgment of delivery of the property or a payment of a sum of money, and a refusal by defendants to respond; and, in the absence of all testimony as to either or both of these facts, the defendants were entitled to the nonsuit. This may seem at first view somewhat technical, as it may be urged that there has been a substantial establishment in the subsequent case of the facts, upon which the defendants were to become liable. This may be so. But it is admitted that this has not been done in the proceeding under which they agreed to become liable, and we know of no power on the part of the court which can extend the liability of these defendants beyond their own express contract, and without their consent. And besides this, it may have turned out under the attachment proceedings that no recovery could have been had there-

Digitized by Google

under if that proceeding had gone on, because of the fact that an agricultural lien was imposed for the rent of mills, instead of for the rent of lands for farming purposes; while no such objection could have been interposed in the subsequent action, upon which the judgment was obtained. We do not adjudge this, but use it as an illustration to show that parties have the right to stand on their contracts as made. It is the judgment of this court that the judgment of the circuit court be affirmed.

MCIVER, J., concurs.

MCGOWAN, J., (*dissenting.*) It seems to me that the undertaking sued on should be construed according to the manifest intention of the parties. And I have no doubt that the words "in this action" were intended to make the parties liable for what might be recovered on the claim made in this proceeding. The technical words used should not be allowed to defeat the intention of the parties and the plain justice of the case.

(31 S. C. 313)

MCATEER *v.* MCATEER.

(*Supreme Court of South Carolina.* July 12, 1889.)

MORTGAGES—PAROL EVIDENCE.

1. Where a note was given for a sum certain, secured by mortgage, but no money passed, and the object of the transaction does not appear from the note or mortgage, it may be shown by parol what the agreement was and what the mortgage was intended to secure.

2. Where it is conceded by both parties that the note and mortgage do not express their whole agreement, but were to secure the mortgagee against certain contingent liabilities, the rule that the sum mentioned in the papers is presumed to be due and owing as therein stated, and that the burden is on the mortgagor to show the contrary, does not apply.

3. Where there is a conflict in the testimony in a chancery case, the judgment of the trial court is *prima facie* right.

Appeal from common pleas circuit court of Lancaster county; HUDSON, judge.

Action to foreclose a mortgage brought by A. J. McAteer against Martha E. McAteer. Judgment for defendant, and plaintiff appeals.

R. E. & R. B. Allison and *Henry & Gage*, for appellant. *Ira B. Jones*, for respondent.

MCGOWAN, J. Many years ago, the time not being clearly stated, J. J. McAteer died intestate, leaving a widow, Martha E., the defendant, and four children, viz., Amelia, (afterwards married to one Jennings,) John, Mary Jane, and Andrew J., the plaintff. It seems that the mother, Martha E., owned two tracts of land, the "Thompson tract" and the "Home place," where the widow and her children lived together; that the mother owed some few debts, and among them small balances still due to each of her children upon their shares of their father's estate in her hands as administratrix, besides a larger debt which she owed as surety, spoken of as the "Adams' debt," to secure which she had mortgaged the "Thompson tract." About the year 1874 the youngest son, A. J. McAteer, the plaintiff, undertook to look after his mother's business, to run the farms, and to do the out-door work for her, and, as he was not married, he lived with his mother and sisters as one family, they cooking, washing, and helping what they could on the farm, and he overseeing all, and getting to his own use all the surplus that was made without accountability. Matters went on in this way until the elder children, Amelia and John, came of age, left the family, and wished the balance of their shares in their father's estate. On January 27, 1879, all the parties went to Lancaster C. H., and, in Mr. Moore's office, had a settlement. It appeared that the defendant, as administratix, owed John $50, Amelia $205, and Mary Jane $205, making $460, for the payment of which amounts Andrew J. became surety for his mother. Andrew was also entitled to $205, but he acknowledged that it had been paid him in property, and on that day receipted in full for his share of his father's estate. After this settlement had been made, but on the evening of the same day, the plaintiff and defendant, mother and son, went to another lawyer's office, and the mother signed a note to her son for the round sum of $1,000, and secured it by a mortgage of her only remaining tract of land, the "Home place." The parties still continued to live together as one family,—that is to say, the mother, Mary Jane, and the plaintiff,—the latter having control and getting what was made after paying the debts and supporting the family, until Andrew J. married, when he instituted this proceeding in 1887 to foreclose against his mother the mortgage, which she had executed at Lancaster in January, 1879. The action was for foreclosure on the note pure and simple. It is true that in her answer the defendant, after denying the consideration of the note, went on to demand an account for the rents and profits of the Home place for a number of years, and of the Thompson tract for the years 1879, 1880, and 1881, before it was sold to pay the Adams' debt; and the plaintiff replied, as if he were the owner of the whole establishment, by setting up a very large amount, covering a period of 11 years, against his mother, for board, lodging, clothing, shoes, medical account, repairs, taxes, etc. But these charges and counter-charges are outside of the case, which was only for foreclosure of the mortgage, and to that the inquiry must be limited.

The plaintiff and defendant both concur that no money was paid or consideration given at the time the note and mortgage were signed, but that they were executed for purposes other than what appeared on the face of the papers. The parties, respectively, were allowed to testify as to what these purposes were. The mother testified that the only purpose was to save harmless and indemnify Andrew for whatever sums

Digitized by Google

he, as her surety, might have to pay to Amelia, John, and Mary Jane, ($460,) and, as she said, "It was put $1,000, at Andy's request, to prevent the Adams' debt reaching out and seizing the Home place;" and she declares that the contingent liabilities referred to were never incurred by Andrew, as he never paid anything of his own money on the debts for which he was surety, and therefore the consideration had utterly failed, or, in other words, the contingency on which the mortgage was to be binding never arose, of which Andrew was so conscious that, when requested to give up the note and mortgage, he always replied, "It will never come against you;" while, on the other hand, Andrew says that the mortgage was not only intended to indemnify him against what was due to Amelia, John, and Mary Jane, but covered his own claim against his mother for $205, making the actual consideration $665; and in respect to the remainder, in the words of his reply, (after amendment,) "plaintiff had paid large sums of money for defendant to remove mortgage and judgment on the land, and he assumed other debts and liabilities for her, lawyer's fees, and other things,"—claiming that he had paid John and Amelia with his own money; that he had paid Mary Jane by board at the common table; and that he had incurred all the liabilities which the mortgage was intended to indemnify him against. It was referred to M. J. Hough, Esq., as special referee, to take the testimony, determine the issues, and to report thereon. He took a small volume of testimony, and after careful consideration, and with some hesitation, he sustained the note and mortgage, and recommended foreclosure, holding, among other things, as follows: "On that day [January 27, 1879] defendant gave the note and mortgage in consideration that plaintiff would pay Amelia Jennings $205.00, John McAteer $50, and Mary Jane McAteer $205.00, making $460, and the consideration of the balance of the note and mortgage was past services due him, and that he was to assume and pay off whatever other indebtedness of his mother should then be outstanding," etc. Both parties excepted to this report, and after argument Judge HUDSON overruled the report, and dismissed the complaint, saying: "A careful scrutiny of the plaintiff's own testimony convinces me that his services in the management of the farm constituted no part of the consideration of the note. I am satisfied that the version of the transaction given by the mother and other witnesses is correct. Her only means of paying off the other distributees were from the products of the farm, and she was liable on a large security debt besides. Her eldest [youngest] son was her only manager, and expected so to continue. He and his mother and some younger [elder] members of the family were living together in harmony, and laboring together on the farm. * * * For eight years longer [after the mortgage] the plaintiff lived with his mother just as before, and had the free use of all crops made on the place, except what was consumed by the family, and what was expended in repairs and improvements. Making allowance for all this, there still remains to him the lion's share, so to speak," etc. From this decree the plaintiff appeals to this court. The exceptions are long and numerous, (19 in number,) and they are all in the brief, and need not be again set out here.

The first exception makes a point of law "that the circuit judge erred in allowing and using the parol testimony which was taken down by the referee, after objection made, to contradict the note and mortgage given by the defendant." It does not seem to us that this was a case in which parol evidence was offered to vary the terms of a written instrument. It appeared that no money passed at the time the note and mortgage were given. These papers were in the usual form, and contained no indication of the object or purposes for which they were given. It was therefore necessary to resort to parol proof to ascertain the agreement of the parties. We are not called upon to give construction to the note and mortgage, but to determine from the evidence in what way and for what purpose they were to be used. The precise point was ruled in a case very much like this, (Kaphan v. Ryan, 16 S. C. 352:) "Parol testimony may be received to prove an agreement in which a written instrument originated, and of which it constituted only a part. Thus, where a note was given for a sum certain, payable at a day certain, secured by mortgage, but no money passed, and it is admitted by both parties that these instruments were a security for future advances, it may be shown by parol what the agreement was, and what the bond and mortgage were intended to secure," etc. See McCaughrin v. Williams, 15 S. C. 505; Calvert v. Nickles, 2 S. E. Rep. 116; Fullwood v. Blanding, Id. 565; 1 Jones, Mortg. §§ 64, 384, 612; 2 Jones, Mortg. § 1297, and notes. All the other exceptions, in one form or another, complain of the findings of fact by the circuit judge overruling the referee. The rule of this court upon that subject is well known. Being a case in chancery, we have the right to consider all the testimony. There is conflict in it, and in that case the judgment of the circuit judge is *prima facie* right. See Maner v. Wilson, 16 S. C. 481. In this connection, also, it was strongly insisted that the existence itself of the written note and mortgage raised a presumption of fact that the $1,000 referred to was due and owing at the time in manner and form as stated, and consequently the *onus* was on the defendant to overthrow that presumption. We think that such papers, duly executed, would ordinarily afford at least *prima facie* evidence of the truth of the statements contained in them. But such rule cannot apply where, by common consent, the papers do not express the whole agreement of the parties, or the real state of the facts, but were executed

Digitized by Google

in form solely for the purpose of securing the party against future contingent or doubtful liabilities. In such case there is no presumption, and the facts underlying the papers, like other facts, must be proved. The circuit judge concurred with the referee in most of his findings. He concurred with him that plaintiff's express liability for his mother, which went into the consideration of the mortgage, did not exceed the amounts due to Amelia, John, and Mary Jane, viz., $460, and that the amount due Mary Jane was never paid by "boarding" or otherwise. But as to the remainder of the consideration, viz., $540, the referee found that it was "for past services due him," and that he was to assume and pay "other debts" of his mother, vaguely stated without names, dates, or amounts. In this finding the circuit judge did not concur, holding that it was not supported by the weight of the evidence. We have read the mass of testimony carefully, and found it so confused and conflicting that we are not surprised that there should be different views as to its proper force and effect; but, after giving it all the consideration we could, we cannot say that the finding of the circuit judge was erroneous. From 1874 to 1879 her daughters and son Andrew lived with Mrs. AcAteer on the old homestead as one family, Andrew superintending the farm and receiving the proceeds of crops, and his mother and sisters cooking, washing, and doing what they could to keep up the common establishment. No strict accountability was exacted of Andrew, and there was not any agreement or expectation that he was to be paid regular wages as an overseer. That, as it strikes us, was an after-thought. (1) The plaintiff, in his reply to the answer of the defendant, wherein he undertook to give an account of the mortgage and its consideration, did not claim that his "past services" entered into it. (2) On the morning of the day on which the mortgage was executed, the plaintiff receipted to his mother for his share of his father's estate, without saying anything about a claim "for services." It seems to us that if he held such a *bona fide* claim, he would at least have mentioned it on that occasion. (3) The referee, in another part of his report, states (as we think correctly) "that his services were to stand against rent, everything included, taking care of family," etc. It does appear with reasonable certainty that the plaintiff was an active, successful farmer, and, the wants of the family being few and simple, he made the farm profitable. In that he was enabled to assist his aged mother and her unmarried daughter, and to that extent he certainly deserves credit; but we cannot take the view that, in addition to his comfortable support thus secured, and in addition to the whole surplus crops and rents, he should also be allowed now, after the lapse of years, to raise a lumping charge for services sufficient to absorb the estate itself, leaving his mother and unmarried sister penniless and homeless. The judgment of this court is that the judgment of the circuit court be affirmed.

SIMPSON, C. J., and MCIVER, J., concur.

(31 S. C. 309)

REMBERT *v.* SOUTH CAROLINA RY. CO.

(*Supreme Court of South Carolina.* July 12, 1889.)

INSTRUCTIONS—PLEADING.

1. In an action for damages caused by plaintiff's team falling off from a bridge maintained by defendant, the court properly answered, in reply to defendant's request to charge that there was no law requiring a railroad company to build a bridge of any particular width, that "it must be a safe structure."

2. In such action it is not a violation of the constitutional provision against instructing the jury "in respect to matters of fact," for the court to call the jury's attention to the broad powers of eminent domain granted to railroad companies.

3. An allegation in the complaint that defendant is a corporation is not put in issue by a general denial.

Appeal from common pleas circuit court of Kershaw county; ALDRICH, Judge.

Brawley & Barnwell and *P. H. Nelson*, for appellant. *W. M. Shannon*, for respondent.

MCGOWAN, J. This action was brought by the plaintiff against the defendant company for damages on account of injuries to the property of the plaintiff, caused by the negligence of the company. The complaint alleged that the defendant is a railroad company, duly incorporated under the laws of the state of South Carolina; that at a certain point in Kershaw county the railroad track of the company crosses the public road, and within their right of way they had opened a ditch across the highway, and built a bridge over it, which it was the duty of said company to keep in repair; that on January 6, 1888, the plaintiff, driving a two-horse buggy, was returning to his home, and, being obliged to cross the bridge, it was so negligently constructed that the plaintiff's horses fell off into the ditch, and were thereby seriously injured, and the buggy and harness badly broken, to the damage of the plaintiff $500. The answer was that "the defendant above named, by Brawley & Barnwell, its attorneys, answering the complaint herein, says it denies each and every allegation in the complaint contained." The cause came on for trial before Judge ALDRICH and a jury. There was evidence tending to show that the bridge was about nine feet wide; that it was a temporary structure, the lumber being already there to make a permanent bridge; that one of the horses shied, and knocked the other into the ditch; that the other horse and the buggy followed; that the horses broke loose from the buggy, leaving it considerably damaged, and ran off, etc. Upon the close of the plaintiff's testimony, the defendant's attorney moved for a non-suit, on the ground that the plaintiff had failed to prove his case; that the complaint alleged that the defendant company is "duly incorporated," which was not proved; that the

Digitized by Google

answer was a general denial, which put in issue every allegation of the complaint. The judge refused the motion, ruling that it was not necessary, under a general denial, for the plaintiff to prove that the defendant was "an incorporated company," but if it were necessary he would allow the plaintiff then to offer the proof. The case went to the jury. The defendant made several requests to charge, but it is unnecessary to notice any of them, except the one as to which the charge was objected to. Defendant's attorney requested the judge, as a matter of law, to instruct the jury "that there is no law in this state requiring a railroad company to build a bridge any particular width," to which the judge replied: "It must be a safe structure." The jury found a verdict in favor of the plaintiff for $200, and the defendant appeals upon the following exceptions: "(1) Because his honor erred in refusing the motion for a non-suit (made after the announcement by the plaintiff that his testimony was closed) upon the failure of plaintiff to prove the corporate existence of the defendant company. (2) Because his honor erred in not charging, as requested by the attorney for the defendant, 'that there is no law in this state requiring a railroad company to build a bridge of any particular width,' after charging the jury, and telling them to inquire, 'Did the length or the width of that bridge complained of have anything to do with this accident?' (3) Because the charge of his honor was in violation of article 4, § 26, of the constitution, and influenced the minds of the jury, in that he spoke of the 'high privileges granted railroad companies, their rights to pass through a man's land or his house, or over the graves of his ancestors, or of his wife and children,'" etc.

Properly, as we think, the last ground of appeal was not pressed here in the argument. The whole charge, taken together, was certainly not unfavorable to the defendant. We do not think that the general observations of the judge, as to the privileges granted to railroad companies, were, "in respect to matters of fact," in the sense of the inhibition in the constitution upon that subject. The matter adverted to was not before the jury for consideration, but was rather in the nature of "an illustration," like the remark in the case of Fitzsimons v. Guanahani Co., 16 S. C. 194: "I suppose it would take me ten years of hard study to qualify myself to perform the duties of an inspector of phosphates," etc. Nor can we hold that the second ground of error was well taken. When asked to charge that there was no law in South Carolina which required a railroad company to build a bridge of any particular width, the circuit judge properly replied that "it must be a safe structure." The appellant seems to rely principally upon the first exception, that it was error in the judge to refuse the non-suit, for the want of proof to sustain the allegation of the complaint that the defendant company was "incorporated." There is no doubt, as a general rule, that it is incumbent upon the plaintiff to make proof of every material allegation of his complaint which is controverted by the defendant; but was the allegation that defendant was "an incorporated company" a material allegation in plaintiff's case in issue by the pleadings? If the allegation was not denied, it was under the Code admitted. Was the fact denied? It is well settled in this state that an allegation that the plaintiff is a corporation is not put in issue by a general denial, so as to make it necessary to prove the fact. The reasons are fully given in case of Lumber Co. v. Risley, 25 S. C. 309, where it was held that "an allegation in the complaint of the corporate existence of the plaintiff is no part of the cause of action, and is therefore not put in issue by a general denial." This being so as to a plaintiff being a corporate body, it seems to us that *a fortiori* it must be true as to a defendant, which, sued as a corporation, made no specific objection on that account, but regularly appeared, and by attorney answered to the merits. That was a substantial admission of the character in which it was sued. See Graveley v. Graveley, 20 S. C. 104. Besides, if there were any doubts about it, there can be none that, upon motion, the circuit judge had the discretion to be exercised in the interest of truth and justice to allow the proof to be offered, even after the plaintiff's attorney had formally announced that his testimony was closed. See Kairson v. Puckhaber, 14 S. C. 627; Cantey v. Whitaker, 17 S. C. 528. The judgment of this court is that the judgment of the circuit court be affirmed.

SIMPSON, C. J. and MCIVER, J., concur.

(31 S. C. 301)

WANDO PHOSPHATE CO. *v.* ROSENBERG.

(*Supreme Court of South Carolina.* July 9, 1889.)

AFFIDAVITS IN ATTACHMENT.

Affidavits in attachment alleging that defendant had disposed of or secreted his property with intent to defraud his creditors are insufficient where they only show that defendant, who was doing a large business, had sold goods cheaply, and in some cases below cost, and state that in the impression of the community he was doing a reckless business.

Appeal from common pleas circuit court of Darlington county; HUDSON, Judge.

The Wando Phosphate Company sued Joseph Rosenberg in attachment. From an order refusing to grant the motion to vacate the attachment defendant appeals.

Ward & Woods, for appellant. *Boyd & Brown*, for respondent.

SIMPSON, C. J. An attachment was granted by his honor Judge HUDSON in the action below upon certain affidavits submitted by the plaintiff (respondent.) A motion was afterwards made by the defendant (appellant)

Digitized by Google

to dissolve or discharge said attachment, and affidavits were submitted both by respondent and appellant. This motion was refused by his honor Judge HUDSON, who heard the same. The defendant has appealed on the ground that the attachment was both irregularly and improvidently issued, and also upon the further ground that his honor erred in considering the conduct of the defendant subsequent to the issue of the attachment in determining the question of irregularity, etc., on the motion to discharge. First, should the attachment have been discharged because of irregularity? This question calls for an examination of the affidavits upon which it was issued, and also for a statement of the legal principles which control in such cases. Attachments are statutory proceedings, and they are intended to summarily dispossess a party of his property, and to hold it subject to the result of an action in progress, and being in direct conflict with that dominion and right which every one has at common law over his own, and which government is constructed to protect, statutes authorizing such proceedings have always been strictly construed, and all of their requirements absolutely demanded to be present. True, they are efficient and useful remedies, and very advantageous to commerce and trade, but still they are harsh and summary, and are only allowed upon the conditions found in the statute, which must be made to appear in the affidavit submitted. This, too, not upon allegations founded upon information and belief and hearsay merely, but upon the averment of facts and occurrences which, if true, would at least furnish *prima facie* evidence of the existence of the statutory condition upon which the attachment is sought. This is the law in this state, as adjudged in several cases. Myers v. Whiteheart, 24 S. C. 202; Smith v. Walker, 6 S. C. 169; Brown v. Morris, 10 S. C. 469; Claussen v. Fultz, 13 S. C. 478; Ivy v. Caston, 21 S. C. 583. Now, in the action below the attachment was moved on the ground that the defendant had disposed of or had secreted his property with intent to defraud his creditors, or was about to dispose of or secrete said property with said intent. These are some of the conditions found in the attachment act, and if the affidavits submitted contain an averment of facts which would *prima facie* sustain these charges, and the existence of which does not depend upon mere information and belief or hearsay, but which are susceptible of proof by competent and sufficient evidence, then the warrant was properly issued; otherwise it was irregularly issued, and should have been discharged. To be a little more distinct, we mean to say that the affidavit is the primary foundation for the attachment, and it must contain an allegation of the existence of one or more of the conditions prescribed in the attachment act, or of facts from which they may be inferred, resting upon the knowledge of the affiant or of some one else as the source of the information. Now, the question is, did the affidavits here conform to this principle? They were several in number, and to be sufficient it was necessary that they should show a disposition or secretion of property by the defendant with intent to defraud his creditors, or a purpose to do so. As to these precise grounds there is nothing in the affidavit of Hucker, the president of the plaintiff company, except a general charge founded entirely on his belief, based upon information received from others, to-wit, from Huggins and Blackwell, whose affidavits accompany his. Upon examination of these it will be seen that they are equally deficient with that of Hucker upon the exact points involved.. The only fact stated upon the knowledge of Huggins is that he bought 11 barrels of flour at $5.75 per barrel from defendant, of the brand of "Michigan Straight," which he thought was cheap. He however, states the reason given by the defendant, why he could sell at that price, to-wit, that he had bought before the rise. Blackwell does not make any statement upon his own knowledge except that he knew of sales by the defendant on several occasions, below cost, and that the defendant was selling goods at five different stores. The balance of his affidavit is upon information and belief founded upon hearsay, and stating the general impression of the community as to whether the defendant was doing a safe or a reckless business. The other affidavits, as it appears to us, altogether fail to touch the main points, to-wit, whether the defendant was disposing of or secreting his property with intent to defraud his creditors, or was about to do so. If an attachment can issue simply because a merchant is doing a large business, sometimes selling below cost, and extensively advertising, and perhaps producing the impression in the community that a crash is approaching, but few enterprising merchants would be entirely safe. And yet, when the affidavits here are analyzed, they amount to nothing more than this, and fail entirely to sustain the charge that defendant was disposing of his property to defraud his creditors, or was about to do so. We think, under the authority of our cases cited above, and because of the insufficiency of the affidavits upon which the warrant was issued, the motion of the defendant to discharge the attachment should have been granted. See, particularly, Myers v. Whiteheart, 24 S. C. 202. Such being our conclusion it is unnecessary to adjudge the other questions raised in the appeal. It is the judgment of this court that the judgment of the circuit court be reversed on the ground stated herein above, and that the attachment be discharged.

MCIVER and MCGOWAN, JJ., concur in the result.

Digitized by Google

(31 S. C. 605)

SCOGGINS *et al.* *v.* SMITH *et al.*

(*Supreme Court of South Carolina.* July 9, 1889.)

SPECIFIC PERFORMANCE—QUANTUM MERUIT.

1. Plaintiffs sued their brothers and sisters for the enforcement of a contract made with their father for the devise of land. They alleged that it was mutually agreed that a tract of land descended to plaintiffs and defendants from a deceased brother should be conveyed to their father, and that he should devise the same, and all his other property, to plaintiffs, in consideration for the services of the latter in caring for him and his wife. It appeared that at the time the conveyance was made, which purported to be for the consideration of natural love, plaintiffs, who were single women of advancing years, were living with their parents, and continued to do so for some time, rendering such services as are usually rendered by children when members of their father's family, the other children having married and left home. Four years later the father made a will, devising his property to his wife and plaintiffs jointly, and although in it he recognized the duty of providing for a granddaughter, who had not released her interest in the deceased son's land, he did not allude to any contract with or obligation to plaintiffs. Plaintiffs afterwards married, and one of them removed to some distance, while the other remained on the plantation, her husband being her father's tenant. The father afterwards made another will, revoking his former one, and making equal provision for all his children. There was oral testimony that testator said that he intended plaintiffs to have all his property. The direct evidence as to the existence of any agreement was conflicting. *Held*, that the plaintiffs failed to establish any contract.

2. The evidence does not warrant a finding of an implied contract of *quantum meruit* for the services rendered by plaintiffs.

Appeal from common pleas circuit court of Chester county; J. H. HUDSON, Judge.

Action by Sarah S. Scoggins and Martha Howard against Leroy Smith in his own right and as administrator *c. t. a.* of John Smith, deceased, and William Smith, Hemphill Smith, Josephine Lemmonds, and Nancy Kitchens, all the parties being heirs of said John Smith, to enforce a contract for a devise of land made between plaintiffs and defendants, or alternatively, to recover for services rendered by plaintiffs to decedent, as much as said services were reasonably worth. The testimony is voluminous, and the essential facts appear in the following extract from the decree of the circuit court, from which plaintiffs take this appeal:

"The following leading facts are stated in the complaint and established by the evidence: In 1871 Riley Smith, a son of John Smith, died intestate, seised in fee of a tract of one hundred and sixty-six acres of land, which the plaintiffs and defendants, his brothers and sisters, conveyed to their said father, the consideration expressed being for natural love and affection, and then John Smith, the father, became seised in fee of the whole tract. In 1875 the said John Smith executed his last will and testament, in which he conveyed the whole of his property, real and personal, to his two daughters, the plaintiffs, and to his wife, Elizabeth, their step-mother. These two daughters were then unmarried, and lived with their father and step-mother. All the others had married and left the state, except Mrs. Kitchens, who was married, but resided in the state. On 20th September, 1882, the plaintiffs having then married, and one having left their father's home, the said John Smith executed a second will, revoking the first, in which a different disposition was made of his property, and all his children were made legatees and devisees. The wife, Elizabeth, predeceased her husband, and died intestate. In 1886, John Smith died, leaving the will of 1882 unrevoked and of full force and effect; and on the 9th day of December, 1886, letters of administration were duly granted to Leroy Smith with the will of 1882 annexed, which was admitted to probate. The plaintiffs allege that it was agreed and contracted by and between the parties to this action that they should convey to the said John Smith all their interest in the land of Riley Smith, in consideration that John Smith would will the whole of his property to his wife and the plaintiffs, if the plaintiffs would agree to take care of and nurse Elizabeth and John Smith during their respective lives. To this arrangement the plaintiffs and John Smith and the defendants all agreed, and accordingly the conveyance of 1871 was made to John Smith, and the plaintiffs undertook the nursing and care of their parents, and continued faithfully to discharge this duty to the date of their respective deaths. Pursuant to the agreement John Smith also, in 1875, made and executed his last will and testament, wherein he bequeathed and devised his entire property, personal and real, to Elizabeth, his wife, and the plaintiffs absolutely; but thereafter, on the 20th day of September, 1882, in violation of his contract, the said John Smith made and executed his second last will and testament, and revoked that of 1875. In this action the plaintiffs seek to set up the will of 1875, and to have the contract of 1871 specifically enforced; and, in case that cannot be done, they ask to recover of the estate of John Smith the sum of $7,000, the price and value of the services rendered by them in nursing and caring for their father and his wife. They also ask that the administrator do account for his administration, and that partition of the estate be ordered. It was referred to the clerk of this court, as special referee, to take the testimony, and report the same to this court, all the material allegations of the complaint touching the alleged contract having been denied by all the defendants in their answers. The referee proceeded to hold references, and examined a large number of witnesses in behalf of the contending parties, and reported to this court the testimony, which is voluminous. Upon this the isues came on to be heard by me.

"Were I to attempt in this decree to restate even the leading portions of the testimony on both sides, it would render it unreasonably long, and I deem it sufficient to give only my conclusions and findings, after a full hearing and subsequent examination of the argument and the testimony. Such a

Digitized by Google

contract as is set up in the complaint, in order to justify its enforcement by a court, must be established by the decided preponderance of the testimony. It must be clearly established. The evidence must show either a positive agreement, or must fully establish facts and circumstances from which a contract is inferred from necessary implication. It is not sufficient that it should appear that the party rendering the services expected compensation, but it must also clearly appear that the parent should know this, and intended to compensate. Where children, after majority, continue to live with the parent, who maintains and supports them, affection and kindness shown by them to this parent, and services rendered, will be presumed to be gratuitous, and to spring from filial affection, until the contrary is made clearly to appear. In the case before us the plaintiffs lived long with their father and step-mother, and did not marry until late in life. During all this time they were maintained and supported by their father, performing only their share of domestic service as dutiful daughters. The others married earlier in life, and went off to support themselves, ceasing to be a burden to their father. As soon as the plaintiffs married, one of them likewise left, and returned only occasionally to visit her parents, during which visits, some of which were protracted longer than others, she was kind to the old people, and ministered to their wants as dutiful children always do. One of them was thus absent from the parental roof nine years before John Smith's death, occasional visits excepted. They do not pretend that they supported and maintained their aged parents, nor that they contracted so to do, but they claimed that they nursed them, and that for this duty they were to get two-thirds of the property. I fail to find that, while living unmarried with their parents, they rendered services worth more than the support they derived from their parents, and in fact not so much; and, after they married and left, their occasional visits to the old home, and the duties there discharged, were such as are exacted by the laws of nature, and merit no special or extra compensation. Upon the *quantum meruit*, therefore, I am constrained to decree against them. But if there was a contract, and they have performed their part, a specific performance must be decreed against the defendants. But according to my view of the testimony the plaintiffs have failed to establish it, and the preponderance of the evidence is against them on this point. The deed of 1871 was expressed to be and was for natural love and affection only. The will of 1875 was not in pursuance of a contract, but was the voluntary act of the testator. His daughters were then unmarried, and needed help, and the parent so thought. His other children were married and self-supporting. The will was creditable to his parental kindness and providence. Doubtless no change would have been made by the testator had the girls remained unmarried; but they did marry, and were then placed on a footing with the other children, and one of them took leave of the parental roof. John Smith then changed his will to meet this altered state of the family, and made equal provision for all his children, as any other good father would have done. All things are proved to have proceeded according to the unrestrained will of a kind and just father. The plaintiffs are disappointed that the first will was revoked. This is human nature, but no injustice was done them thereby. They had derived from their father a good support for a long time,—much longer than the others. Their father weighed this fact; they do not."

Sanders & Whitlock, for appellants. *Hemphills & Brice*, for respondents.

McIVER, J. The questions raised by this appeal being solely questions of fact, under the well-settled rule, it is incumbent on the the appellants to show that the conclusions reached by the circuit judge are without any testimony to support them, or are contrary to the manifest weight of the testimony. This the appellants have wholly failed to do, and, on the contrary, the conclusions reached below are in our judgment well sustained by the evidence. The facts out of which this controversy arose, so far as they are undisputed, are so fully and clearly stated in the circuit judge's decree, and his reasoning as to the disputed facts so fully sustains his views, that it would seem to be a work of supererogation to attempt to add anything to what is there said. The claim of the plaintiffs is presented in their complaint in a double aspect: (1) For the specific performance of a contract in reference to real estate; and, (2) in the event of a failure to to establish such contract, then for the value of the services which they claim to have rendered their father, the testator. No question was raised as to the propriety of joining these two causes of action in the same complaint, and perhaps none could have been raised, as they both arise out of contract. As to the first aspect in which the claim was presented, it seems to us that after eliminating such of the testimony as was incompetent under the statute of frauds, and under section 400 of the Code, there is but very little evidence of any contract, certainly not that clear and satisfactory proof which a court of equity requires in such cases. In the deed by which the plaintiffs, with their brothers and sisters, conveyed their interests in the estate of their deceased brother, Riley Smith, to their father, there is not the slightest intimation that such conveyance was ever prompted by any expectation of compensation, or rested upon valuable consideration of any kind. On the contrary, the only consideration expressed is the very proper one of natural love and affection. And even when we examine carefully the parol evidence, coming from the plaintiffs themselves, it is at least not clear that there was any other consideration. Then

Digitized by Google

as to the will of 1875, which plaintiffs claim was executed in pursuance of the contract of which they now seek specific performance, it is quite clear that there is nothing whatever in its terms which recognizes in the remotest degree that it was even prompted by the fact that plaintiffs had released their interest in their brother Riley's estate in favor of their father. But it is observable that the testator, while not recognizing any obligation to provide for the plaintiffs by reason of the release of their interest in Riley's estate, does expressly, in the fifth clause of that will, recognize his obligation to provide for a granddaughter who had not released her interest in Riley's estate by giving her a pecuniary legacy to the amount of what he supposed would be equivalent to the value of her share in that estate. This shows conclusively that when the will was made the testator had in his mind the fact that Riley's estate had been surrendered to him, and if the plaintiffs had, as they claim, released their interests in that estate under a promise or agreement that they would be compensated therefor by a provision in their father's will, it is scarcely conceivable that the testator would have omitted all reference to such promise or understanding; but, as in the case of the granddaughter, he would at least have made some allusion to it as an explanation of the provision made for the plaintiffs to the exclusion of his other children. As to the other consideration upon which the alleged contract is claimed to rest,—the services rendered and to be rendered by the plaintiffs to the testator and his wife,—we agree with the circuit judge that the weight of the testimony is against any such claim. We look in vain for any testimony tending to show that the testator ever expected or intended to compensate the plaintiffs for their services, either in money or in any other way. The most that can be said is that the testimony shows that the testator did on several occasions express an intention to give his property to the plaintiffs, or a desire that they should have it. Indeed we think it not improbable that as the plaintiffs were unmarried and had attained an age which, at least, rendered it doubtful whether they would ever marry, the testator did desire them to have his property, and this desire he plainly expressed in the will of 1875. But when they, too, married, and one of them left the paternal roof, and settled in an adjoining county, some 40 miles distant, and the other, though remaining at the paternal homestead, was there more as a tenant than as a member of her father's family,—for the testimony is that her husband rented the place from the old man,—it was quite natural that the testator, finding these two daughters thus provided for, should desire to change his will, made under different circumstances, making the provisions found in the will of 1882, which seems to have been duly admitted to probate, whereby, after some small pecuniary legacies to others, he divides his property equally among all of his children. But it is scarcely necessary to pursue the discussion. It is quite certain that the testimony is conflicting as to the material facts upon which appellants' case rests, and when that is the case this court rarely, if ever, feels warranted in disturbing the conclusions reached by the circuit court. The judgment of this court is that the judgment of the circuit court be affirmed.

SIMPSON, C. J., and MCGOWAN, J., concur.

(31 S. C. 91)

CLYBURN v. REYNOLDS *et al.*

(*Supreme Court of South Carolina.* July 8, 1889.)

EQUITY—PRACTICE—JUDICIAL SALES—SERVICE BY PUBLICATION.

1. After the lapse of 20 years, and the acquisition of titles under a decree based on an order of publication as to non-resident defendants, slight evidence as to the proof of non-residence on which it was issued, and of its due publication, will be sufficient, and regularity will be inferred though no affidavits showing these facts appear in the record, when a book kept in the office of the commissioner in equity contains a printed copy, cut from a newspaper, signed by the commissioner, which copy recites that the fact of non-residence appears to his satisfaction, and requires the defendants to appear within 40 days, and the printer's marginal mark shows that publication was ordered to be made until the day for appearance, and the order *pro confesso* following the slip in the book is in common form.

2. A decree within the scope of a bill in equity affecting lands devised to one for life, remainder to his issue, and in default thereof to such of a class as he should by will appoint, and, in default of appointment, remainder over, is binding on the contingent interest of the person to whom such appointment is afterwards made, though not a party to the bill in his capacity as a possible appointee, as the tenant for life, being a party, represents the interests of the contingent remainder-men.

3. A decree on a bill by an executor against the heirs, devisees, and legatees of his testator's will, filed to obtain a construction thereof, and for other purposes connected with the administration of the estate, which is represented to be solvent, and which bill does not purport to be one for general administration, nor to make parties of any creditors but two who are joined for special purposes, is not binding on other creditors, though, under a prayer for partition and general relief, it orders the sale of land, the proceeds of which are applied in part to debts of the estate.

4. A decree for a sale of land to pay debts is within the scope of a prayer "that by orders herein arrangements may be made to pay the debts; * * * but, if this cannot be promptly effected, he [complainant] asks the aid of the court herein," and if not appealed from is binding on all parties to the bill who have appeared or been served with process.

5. If sufficient land has been sold under a decree of court to satisfy the debts and legacies chargeable on each particular tract, no more can be sold to pay creditors and legatees, who were parties to the suit, though the proceeds have been misapplied, as the parties are bound to guard against such misapplication.

6. A decree recited to be by consent of "defendants' solicitors" will be presumed to have been consented to only by those defendants who have appeared in the suit.

7. A receiver may be appointed at the hearing, though not specially prayed for in the bill.

8. The proceeds of an insurance policy payable to a life-tenant, if collected after his death go to the remainder-man, unless they are used in rebuilding the destroyed house.

Appeal from common pleas circuit court of Kershaw county; WITHERSPOON, Judge.

J. T. Hay, R. W. Boyd, Edward Mc-

Digitized by Google

Crady, Jr., W. D. Trantham, W. H. R. Workman, Lyles & Haynesworth, C. L. Winkler, and *Thos. J. Kirkland,* for various parties.

FRASER, Special Judge. James Chesnut, the elder, styled in his last will and testament, under which this litigation has arisen, "James Chesnut, of Mulberry," died 17th February, 1866, having executed his said will 16th February, 1864. By this will James Chesnut, Jr., his son, and David R. Williams, a grandson, were appointed executors, and Mrs. Mary Chesnut, his wife, was appointed executrix thereof. Mrs. Mary Chesnut, his wife, predeceased him, leaving a last will and testament, duly executed, dated 11th March, 1848, one codicil dated 27th July, 1853, and one dated ——— day of ———, 1858, and of which James Chesnut, the elder, her husband, and James Chesnut, Jr., her son, were appointed executors. James Chesnut, Jr., became the sole qualified executor of the will of James Chesnut, the elder, and also of the will of Mrs. Mary Chesnut, both of which were duly admitted to probate. By the will of James Chesnut, the elder, a legacy of $12,000, and regarded by the testator as a debt due by him in consideration of some property of his wife which had come to his hands, and in lieu of dower, was given to his wife, and in case she should predecease him the said legacy was made subject to such disposition as she might make by will, or instrument in the nature of a will. The property of James Chesnut, the elder, consisted of large sums due him, and other assets, but mainly of estates in lands and slaves, (some 400 in number,) with such live-stock, provisions, and other personal property as were necessary and proper for the successful management of such estates. The will was long and complicated in its provisions, and was rendered especially difficult of administration in consequence of the fact that, between the time when the will was executed and the death of the testator, the emancipation of the slaves had taken place, and the scheme of the will had thereby become impracticable. It became necessary to invoke the aid of the courts to adjust the rights of the parties to the new state of things growing out of the loss of property in the slaves, the insolvency of persons who were largely indebted to the testator, and whose fortunes had also perished in the general derangement of values which followed the civil war. On 23d February, 1867, a bill in equity was filed by James Chesnut, Jr., the executor, in which all the parties then in being, who were then, by any possibility, interested under the provisions of this will, were named as parties defendant. Two creditors were also named as parties defendant to-wit: Lynch H. Deas, in his own right, and William Wallace as administrator of William C. Workman. The purpose for which they were brought in will be hereafter stated.

The testator, so far as will be necessary to state here, devised and bequeathed as follows: (1) Two tracts of land on "Jumping Gully Creek" to his executors and executrix in trust for his two daughters, Mary C. Reynolds and Sarah Chesnut, and his two granddaughters, Mary C. Grant and Harriet S. C. Grant. (2) A parcel of land known as "Bloomsberry" to his daughter Sarah Chesnut. (3) A tract of land known as "Sanders Creek" to his grandson John Chesnut. (4 *a*) To his wife, Mary Chesnut, for life four (4) plantations,—"Belmont and Town Creek" and "Mulberry and Sandy Hill,"—with the slaves, live stock, provisions, and so forth on them, and called his "planting interest." (*b*) He charged on the income of said "planting interest" certain annuities or annual payments in favor of Mary C. Reynolds, Sarah Chesnut, his two daughters, and Mary C. Grant and Harriet S. C. Grant, two granddaughters, and also provided as follows: "Should my wife die before my debts [including therein the legacy of $12,000 to her and the interest thereon] shall have been fully paid and satisfied, it is my will and desire, and I devise accordingly, that my whole 'planting interest' shall remain in the hands of my executors to be used and employed by them for the satisfaction of said debts and legacy." (*c*) Subject to this provision he devised the plantations known as "Belmont and Town Creek" to his two daughters, Mary C. Reynolds and Sarah Chesnut, and to his two granddaughters, Mary C. Grant and Harriet S. C. Grant, under certain trusts, and with remainders over. (*d*) Subject to the same provision he gave to his son, James Chesnut, Jr., for life the plantations known as "Mulberry and Sandy Hill," and at his death to his issue, and in default of issue subject to his appointment by will in favor of one of the male descendants of the testator, and, in default of such appointment, then to the children and grandchildren of testator then living. There is also a power of appointment in the twentieth clause of the will confined to one of the testator's "grandsons bearing the name of Chesnut," and to which we will hereafter refer. (5) Testator in his will gave to the children of a deceased son, John Chesnut, a "bond" of James Chesnut, Jr., for $16,000, secured by a mortgage of "The Hermitage, Camden Mills, and Pinetree plantations," which he had conveyed to his said son, James Chesnut, Jr., in his life-time. (6) Testator directs that certain interests in lands in Pennsylvania be sold, and the proceeds divided among his children and grandchildren. (7) There are sundry small specific and pecuniary legacies to different persons of not much importance. (8) Testator gives a legacy of $5,000 to his grandchildren Mary S. C. Witherspoon and David R. Williams, to be paid out of debts due testator in the west. (9) Testator directs that all money due to him on account of debts due at his death be applied to the payment of his debts and then to the payment of the legacy of $12,000, if

Digitized by Google

not otherwise fully satisfied. (10) Testator, by the tenth clause of his will, gives all other tracts of land, not hereinbefore specifically devised, to his son, James Chesnut, Jr., and his heirs. (11) And the thirty-third clause of the will he gives all the rest and residue of his estate, real and personal, to his children and grandchildren therein named. This brief statement of the provisions of the will is, perhaps, sufficient for the present purpose.

The specific purpose for which Deas and Wallace, the two creditors, were made parties, was to have an adjudication of the value of their claims in good money, they having been created during the war, and in consideration, as alleged, of 4 per cent. certificates borrowed by testator for the payment of taxes. They were not called in as representatives of a class, as is usually done in a bill to marshal the assets of an estate which is insolvent. Other creditors were not called in, and the bill expressly states that there is "no ground upon which to invoke the restraining process of this court, as the estate is abundantly good for all liabilities of testator." It appears that the claim of Deas has not been paid, but the claim of Wallace seems to have been paid, as no mention is made of it in the reports of the master.

It appears from an examination of the bill that its scope and purpose were: (1) To determine the value in good money of the claims of Deas and Wallace, administrators, two creditors who were made defendants; (2) to obtain an order of the court for leave to carry out a proposed compromise of a large debt due by parties residing in Mississippi; (3) to obtain a construction of the court of the power of appointments given in the sixth and twentieth clauses of the will; (4) to subject the choses in action, stocks, etc., and the Mississippi lands (to be taken under the proposed compromise for the Mississippi debts) to the payment of the debts, and the legacy of $12,000, and for an order for the sale of these assets as well as the residuary estate for this purpose; (5) to have an order for the partition of Belmont and Town Creek plantations; (6) for general relief. The nature of this general relief is indicated in the bill in these words: "If the estate was longer to be kept together to meet the debts of the testator, your orator well hopes that by orders herein arrangements may be made to pay the debts, and to assign and allot to each the portions assigned them in the will; but if this cannot be promptly effected he asks the aid of the court herein." Sarah Chesnut, Mary C. Reynolds, and her daughters, Mary R. De Saussure, Emma C. Reynolds, Ellen C. Reynolds, Sally Reynolds, and Esther S. Reynolds, James J. Frierson, and Mary C., his wife, Harriet C. Stockton and her child, Lucian W. Stockton, and Lynch H. Deas appeared and answered the bill. The bill was taken *pro confesso* against all the other defendants.

No one has called in question, in this appeal, the regularity of this order *pro confesso* except David R. Williams, who takes the ground that he has never been properly made a party, either as one of the devisees under the will or as appointee under the power given in the will to James Chesnut, Jr. The case came before Chancellor W. D. JOHNSON for a hearing, and he rendered a decree in the cause dated 6th March, 1868. Of this decree it is only necessary here to say that the construction put by it on the power of appointments was the one followed by James Chesnut, Jr., in executing that power in favor of David R. Williams, one of the "male descendants" of the testator, and that by it a writ of partition was ordered to be issued, in accordance with the prayer of the bill, to divide "Belmont and Town Creek plantations" among the parties entitled thereto under the will, subject, however, to any claims of the creditors of James Chesnut, the elder, that may not be satisfied out of the portions of the estate first chargeable with debts, and to such contributions among devisees and legatees as may be necessary to meet deficiencies towards paying debts and other charges. To the writ thus issued a return was made by the commissioners in partition recommending a sale, which by law was one of the exigencies of a writ of partition. Upon this return an order was made by Judge BOOZER, dated 22d September, 1869, confirming the return, and directing a sale. By this same order James Chesnut, Jr., and William M. Shannon were appointed receivers, and without sureties, and they were authorized to make the sales, and were directed, after the payment of certain costs and fees, to hold the balance of the purchase money and securities taken, subject to their due proportions of the debts of the testator and to the further order of the court. Large sales were made by the receivers under this order, to which reference will be made hereafter. On 20th January, 1871, an order was made by Judge MELTON for the sale of 2,663⅓ acres of "Mulberry." On 2d October, 1872, an order was made by Judge MELTON for the sale of 601⅓ acres of "Mulberry." Both of these orders for the sale of portions of Mulberry directed the sales to be made by James Chesnut, executor, and he was directed to hold the proceeds "subject to the *pro rata* share of debts and legacies chargeable upon them." These orders were made on motion of the attorney for James Chesnut, Jr., executor, and with the consent of "J. B. Kershaw, defendants' solicitor," and "J. M. Davis, defendants' solicitor." We think the only proper inference is that they were the attorneys or solicitors for all of the defendants who had answered, but for none of those who had not answered, and as to whom there was entered an order *pro confesso*. What is called "Mulberry" in these orders seems to have been meant portions of Mulberry and Sandy Hill, which were sold under these orders. Large portions of Mulberry and Sandy Hill were sold by James Chesnut, Jr., under these orders, to which we will hereafter refer.

Digitized by Google

It will be noticed that under all of these orders for sale of the four plantations the court, at the suggestion and on motion of eminent counsel, seems to have guarded the interests of creditors, and seems to have regarded the proceeding as one in which their rights were involved, even though not made parties, having before the court the executor who was trustee for the creditors first, and whose interest it was his duty to protect, even against the legatees and devisees. The case, about 1870, was dropped from the calendar. On 12th December, 1883, a notice was served on Mary C. Reynolds, Sarah Chesnut, Mary R. De Saussure, Emma C. Reynolds, Ellen C. De Saussure, Esther S. Davis, Mary S. C. Witherspoon, David R. Williams, Thomas W. Chesnut, James Chesnut, Teresia Haile, Mary C. Frierson, and Harriet C. Stockton of a motion (1) to restore the case to the calendar; (2) to provide for the sale of those portions of "Mulberry and Sandy Hill" not sold under previous orders; to substitute the proceeds for the lands so sold; to provide for the life-estate of James Chesnut, Jr., and for the interest of those in remainder in the lands so sold, or in the fund so substituted for them; (3) to provide for contribution among those interested to pay legacies and other charges, so as to equalize payments made and to be made; (4) to provide for a final settlement of the estate of the testator. On 8th February, 1884, an order of reference was made in pursuance of this notice looking to an accounting by James Chesnut, executor and receiver, William M. Shannon having died, and to a final settlement of the estate. By some order not in the "case" P. H. Nelson had been appointed receiver, and the master, by a report dated 15th September, 1885, recommended a sale of (1) "Indian Mound or Taylor's Field" and a "Sandy-hill tract" containing 177 acres, which were lands passing under the residuary clauses of the will; (2) of all or a portion of the "Hermitage lands," being land conveyed to James Chesnut, Jr., by his father, James Chesnut, the elder, in his life-time, and covered by a mortgage to secure the bond of $16,000, and given by the will to the children of John Chesnut, deceased. An order for the sale of these lands was made by Judge HUDSON, dated 16th September, 1885. James Chesnut, Jr., the executor, had died 1st February, 1885, and when this order was made it does not appear that any one had been made a party to the cause, representing the estate of James Chesnut, the elder, James Chesnut, Jr., or any one as heir of James Chesnut, Jr. Reference will hereafter be made to the sales made under this order. James Chesnut, Jr., the executor, and life-tenant of "Mulberry and Sandy Hill," by a last will and testament under the power given to him in the sixth clause of the will of James Chesnut, the elder, appointed David R. Williams one of the "male descendants" of James Chesnut, the elder, there being a default of issue of the said James Chesnut, Jr., to take and hold the said "Mulberry and Sandy Hill plantations."

Stephen C. Clyburn has been appointed administrator *de bonis non cum testamento annexo* of the estate of James Chesnut, the elder. In August, 1886, he filed a supplemental complaint in which all the parties made defendants in the original complaint were made defendants, and also Mrs. Mary B. Chesnut, who is the only new party, and made such as the widow of James Chesnut, Jr. The appointment, by the will of James Chesnut, Jr., in favor of David R. Williams is set out in this supplemental complaint and he is made a party defendant in this new relation as appointee. The prayer of the supplemental complaint is for judgment (1) that the "Mulberry and Sandy Hill" plantations, appointed by the will of James Chesnut, Jr., under the power to David R. Williams, be adjudged liable for their proper proportions of the debts of James Chesnut, the elder; (2) that the defendants, the descendants of John Chesnut, may be adjudged to account for any portions of the $16,000 legacy paid to them, and that the sums already paid, and any balance not yet paid, be adjudged liable for the payment of debts in exoneration of the real estate; (3) for the relief demanded in the original complaint, and for any further relief proper in the cause. Harriet C. Stockton, Lucian W. Stockton, James Frierson and Mary, his wife, answered this supplemental complaint, joining in the prayer thereof. The descendants of John Chesnut who are interested in the $16,000 legacy (1) deny their liability to account for what has been paid to them on this account, or to contribute out of that legacy to the payment of debts in exoneration of the realty. (2) They deny that the power of appointment under the will of James Chesnut, the elder, was properly executed in favor of David R. Williams, and claim that the power could have been exercised only in favor of a grandson bearing the name of Chesnut, as provided in the twentieth clause of the will. (3) They claim payment of any unpaid portions of the $12,000 legacy under the joint wills of James Chesnut, the elder, and Mary Chesnut, his wife.

David R. Williams has answered claiming (1) that he holds "Mulberry and Sandy Hill" under a valid execution of the power; (2) that he was never properly made a party defendant to the original bill of complaint filed in 1867, in any capacity, and if it should be held by the court that he was properly made a party defendant in any capacity; (3) that he was not made a party in his new capacity and relation as appointee under the power, the appointment not having been made; (4) that therefore he is not bound by any of the orders heretofore made, or transactions under them, especially such as are outside of the scope of the bill; (5) that there was ample personal estate to pay the debts and legacy of $12,000, and that he is in no way responsible for the appropriation of the proceeds of portions of "Mulberry and Sandy Hill" to the payment of the debts and this legacy of $12,000; (6)

Digitized by Google

that, while not bound by the sales made under these orders of portions of "Mulberry and Sandy Hill," he would elect to confirm such sales if the court would charge such of the children and grandchildren of testator who consented to these orders, and who, under the will, are entitled to be paid by the appointee under the power the full two-thirds value of these plantations, not including the value of the residences, with the amount of sales made; (7) that there was abundant real and personal estate applicable to the payment of the debts and this $12,000 legacy; and (8) that all such debts and such portions of said $12,000 legacy as may not have been paid, are barred by the statute of limitations, and as to them he sets up also the presumption of payment from the lapse of 20 years, and the laches of the said creditors and legatees in neglecting to realize their claims out of funds applicable to and provided for their payment. On 10th February, 1886, a petition in the cause was filed by Mrs. Mary B. Chesnut, widow of James Chesnut, Jr., in which it was stated that a short time before his death James Chesnut, Jr., took out a policy of insurance in the Home Insurance Company of New York on the residence on Sandy Hill for the sum of $2,250; that the policy was taken out by mistake in the name of James Chesnut, as executor; that the residence was destroyed by fire in his life-time, and proof of loss was made out before his death; that questions having arisen as to who was entitled to the money it was paid to P. H. Nelson, receiver, and is now in his hands, subject to the order of the court; that the said policy should have been in the name of James Chesnut as an individual, as the same was intended for his own benefit. She therefore claimed that the money should be paid to the administrator of James Chesnut, Jr., in order that the same may be applied to the payment of his debts, she holding a large claim against his estate by judgment. Mrs. Mary B. Chesnut has since died, and David R. Williams, Jr., her administrator, has been substituted as a party in her place in this cause. There are several elaborate reports of the master covering the issues raised in the original bill, in the supplemental complaint, and in this petition, in reference to the insurance money. These reports bear date respectively 16th January, 1885, 1st September, 1887, 3d September, 1887, and 29th August, 1887; the latter being the report in reference to the insurance money. All these reports came up before Judge WITHERSPOON on exceptions, and a judgment was rendered by him bearing date 15th February, 1888. It is on exceptions to this judgment that the cause is now before this court on appeal.

It will not be necessary to take up these exceptions *seriatim*, but we will take up in order the questions raised by them. The points adjudicated by the judgment of the circuit court will be better understood by the statement of a few facts which appear in the "case:"

There was realized from the sale by W. M. Shannon and James Chesnut, Jr., receivers of portions of Belmont		$13,416 90
From sale of portions of Town Creek by them		19,876 84
From sales of reserved lands (portions we take it of Belmont and Town Creek) by them		1,880 00
Total		$34,873 74
From sales of Sandy Hill and portions of Mulberry by James Chesnut, executor	$ 3,937 23	
From sales of Mulberry	10,806 55	
Total		14,740 78
Total from sales of real estate		$49,714 52
Total not accounted for from Belmont and Town Creek		$13,963 42
Total not accounted for from the reserved lands		1,880 00
Total		$15,863 42
Total not accounted for from Mulberry and Sandy Hill		6,886 96
Total unaccounted for		$22,749 39
Total of payments from Belmont and Town Creek		$19,011 81
Total of payments from Mulberry and Sandy Hill		7,853 82
Total of payments		$26,865 13

There is nothing in the "case" to show what has been collected or paid out from the choses in action and the residuary personal estate; the unsatisfactory condition of the accounts of the executor and the receivers being perhaps due to the death of Mr. Shannon and the loss of a book in which he kept the accounts of the estate. These reports of the master show that on the 15th August, 1884, a short time before the death of James Chesnut, Jr., the executor, there remained as outstanding claims:

Judgment of W. A. Ancrum, obtained in 1867	$ 760 86
Judgment of L. H. Deas, obtained in 1869	1,117 11
On legacy of $12,000, to Mary Witherspoon	973 57
" " " " " Sarah Chesnut	2,516 46
" " " " " Minnie L. Deas	443 80
" " " " " Amelia Chesnut	67 45
" " " " " Ellen Chesnut	67 45
" " " " " Amelia Taylor	523 14
Total	$6,489 84

The claim of William Wallace, administrator, does not appear in the list, and must have been paid.

W. A. Ancrum, one of the judgment creditors, has never in any way been made a party to this cause, and he cannot be bound by any order herein. He must proceed as he may be advised. It does not appear that any of the proceeds of the sales made by the receivers above referred to, or by James Chesnut, Jr., executor, are within the reach of the court, but if there are any such they are applicable to these claims in their proper order. The judgment from which this appeal is taken has made no order in reference thereto. The following is an approximate statement of the funds now in the hands of P. H. Nelson, receiver, and of the sources from which they are derived:

Digitized by Google

Insurance money	$2,250 00
Hermitage lands	2,450 00
Rents of Hermitage and Town Creek	1,062 00
"Indian Mound" or "Taylor's Field" paid on debts of L. H. Deas and W. A. Ancrum without prejudice to the rights of parties to this action	840 00
	$6,622 00

The exceptions to the judgment of the circuit court, in which the views of the master were in part adopted, raise questions as to the principles on which this estate must be settled, which, after proper inquiry, may be hereafter applied, unless this court concurs in the view taken by the circuit judge.

The first, and perhaps the most important, question which meets us is as to the effect of the previous orders in the case, and the transactions under them, upon David R. Williams as one of the legatees under the will, or in his new relation as appointee of James Chesnut under the power given to him in the will. No other party has called in question the validity of these orders except David R. Williams, unless it be the descendants of John Chesnut, and they only question the construction given by Chancellor JOHNSON to the power of appointment, which was adopted by James Chesnut, Jr., and under which David R. Williams claims as appointee. As to the order *pro confesso* against David R. Williams as an absent defendant. There is in the record no affidavit, as required by the act then in force, that David R. Williams and others did not reside in the state, and there is no affidavit that the order of publication was inserted in a newspaper the requisite number of times. We find, however, an "order of publication clipped from the paper in which it was published at the time, and appears pasted in a book in the office of the commissioner in equity." This printed order was signed by the commissioner, "J. D. DUNLAP, C. E. K. D." These parties are required in the order to appear, etc., within 40 days. This order has on it the printer's private mark to show how long it was ordered to be published "t d," till day, and in it is recited the fact that it appeared to the satisfaction of the commissioner that David R. Williams and others are without, and reside beyond, the limits of the state. Then follows without date, but in the usual form, the order *pro confesso*. Nearly 12 months after the date of the *sub. ad res.* the decree of Chancellor JOHNSON, above referred to, was rendered. It must be remembered that this record is now an old one,—over 20 years,—and that it has run the gauntlet of the reconstruction period in this state. It is held in Illinois that if substantial service by publication or otherwise appears, and the court rendering the judgment declared the proof of regularity sufficient, the existence of incidental facts may be presumed to aid its jurisdiction. Secrist v. Green, 3 Wall. 751. It is not necessary here to go to the extent of this ruling, because we think that the fragmentary evidence before us points almost conclusively to the existence of the affidavits which were necessary in the case, and certainly nothing to the contrary appears in the record. It would be very dangerous, after such lapse of time, to hold that the mere absence from the record of affidavits usually written on loose sheets of paper should render invalid proceedings under which important rights have been adjudicated and valuable titles been acquired. We therefore hold that the order *pro confesso* against David R. Williams was properly taken, and that he and all the other defendants in the same situation are bound by all orders properly taken within the scope of the bill.

Now what was the scope and purpose of this bill? If it had been a bill to call in the creditors and marshal the assets of the estate as well in the interests of the creditors as of the devisees and legatees, there could be no doubt that the court would have a right to bar the rights of all parties interested in the estate, and who are properly made parties. The claims of creditors are paramount to all others. We hold that the general doctrine is that whenever the court of equity finds it necessary to take jurisdiction of an estate in lands, and when it becomes necessary to control and dispose of the fee, it has the right, by a sale for this purpose, to bar the rights of all mere contingent remainder-men who have no personal interests, and cannot be therefore made parties. Williman v. Holmes, 4 Rich. Eq. 475; Farr v. Gilreath, 23 S. C. 502. This last case was only for the change of investment, and the trustee and life-tenant alone were made parties, and the court held contingent remainder-men bound by the orders for sale made in the case. If there had been a failure of issue of James Chesnut, Jr., as there was, and a failure to make an appointment by James Chesnut by will, "Mulberry and Sandy Hill" would have gone to the children and grandchildren of testator then living, clearly giving them contingent remainders. The appointee stands in the same position in reference to this property as he would have done if he had taken it as one of the children and grandchildren then living, except that he takes the whole property subject to the charge. "Immediately upon the execution of such a power the estates limited in default of appointment cease and are defeated, and the estates limited under the power take effect from the time of the execution of the power in the same manner as if they had been contained in the deed creating the power." 2 Sugd. Powers, 33, 52. While, therefore, it is true that, as laid down in Fraser v. Charleston, 13 S. C. 533, a party to an action can be bound by the judgment of the court only in that capacity in which he has been impleaded, there is no reason why, in a proper case, a contingent remainder-man, or, as here, the appointee of a power given on a contingency, may not be bound by the orders and judgment of the court where he has not been, and even could not have been, made a party.

Digitized by Google

The creditors, as a class, were not called in as parties to this bill, and as such they are not bound by the orders made therein, except such as were made parties. The executor is trustee first for the creditors, and then for the devisees and legatees. The creditors could have reached the property of the estate by suits at law against the executor alone, or, as our courts are now organized, by an action on the law side of the common pleas. If this had been a case in which the estate was insolvent, and the creditors, as a class, had been called in, as well as those defendants who were interested as devisees and legatees under the will, there can be no doubt that sales made would have been binding on all who were interested in the estate, whether for life or in remainder, vested or contingent, or under a power of appointment not then executed and dependent on some contingency which might never happen. It may be doubted, and this seems to have been the theory on which the bill was framed, whether, in case of a solvent estate as this was, the creditors could have been compelled, with a full remedy in their hands to come in as parties to a litigation between the devisees and legatees, as to the order and proportions in which they should contribute to the payment of the debts, and as to the relative rank of their respective interests under the will. A partition of "Belmont and Town Creek" was prayed for in the bill, and this carried with it, as a necessary incident, a prayer for a sale of the lands if the same could not be divided without injury to the parties. The proceedings under this bill from the beginning, so far as the orders of the court were concerned, were taken with a special reference to the rights of creditors, in whose interest the executor was before the court; the proceeds of every sale having been charged with the *pro rata* share of the debts of which the $12,000 legacy was one, having been put by the testator in his will on the same footing as a debt, at least so far as the devisees and legatees are concerned. The same remark applies to all the sales made of "Belmont and Town Creek," and of "Mulberry and Sandy Hill." All persons interested in "Belmont and Town Creek" then in being answered the bill, and are bound by the sales made, and do not now call them in question. We concur in the construction of the will as to the power of appointment given in the decree of Chancellor JOHNSON, which has not been appealed from. We therefore hold that David R. Williams is entitled to hold as appointee under the power given to James Chesnut, Jr., but for the reasons above given we do not think that he has any right to set aside the sales of "Mulberry and Sandy Hill," made under the orders in this case, and that these orders are within the general scope of the bill "that by orders herein arrangements may be made to pay the debts, * * * but if this cannot be promptly effected he asks the aid of the court herein," and which seems to have been the view acted on by the distinguished counsel in the case and adopted by the court. It is true that these orders for sale are by agreement or consent of parties who had answered, and by their solicitors, no other persons being bound by the consent, while by this consent parties were cut off from the rights of appeal from these orders. If they were made in open court, and were within the scope of the pleadings, they are in all respects binding as orders or judgments, if not appealed from; all parties who have been served and made parties being presumably for all purposes covered by the pleadings present in court, and bound by what is done. The fact that some of the parties to an action consent to an order or a judgment in open court does not render them invalid as to those who do not consent, unless in proper time, as was done in the case of Hand v. Railroad Co., 10 S. C. 406, an appeal is taken, and the order or judgment set aside as to the parties who do not consent, on good and sufficient grounds other than the want of "consent."

The sales of "Belmont and Town Creek" were made by William M. Shannon and James Chesnut, Jr., who were appointed receivers for this purpose. The bill did not pray for the appointment of receivers, but the appointment was not void for this reason. "A receiver may be appointed at the final hearing, even though the bill contain no prayer for such relief." High on Receivers, § 83. The sales of "Mulberry and Sandy Hill" were made under the orders of the court by James Chesnut, Jr., as executor, and not as receiver. It has been the practice, perhaps one not to be commended, to require the party before the court, holding the property under some trust, to make such sales. It may be that on appeal it might have been held that such an order was irregular, and that the sale should have been made by an officer of the courts, or it may be that James Chesnut, Jr., would have been held, in effect, a receiver. However this may be it is now too late to disturb these sales on this account; there having been no appeal, and valuable rights acquired under them.

If, then, these orders, and the sales under them of portions of "Belmont and Town Creek" and "Mulberry and Sandy Hill," are valid, it is too late now for any of the parties to this proceeding, who are interested in the proceeds of such sales for the payment of their debts and legacy, and which proceeds were largely in excess of their claims, to demand that any other portions of the estate, real or personal, shall be subjected to their payment, or to call for any other contributions for their benefit. They have had the prior claim on those proceeds which have been provided at the expense of other parties, and within the control of the court. If these proceeds can be reached they can have the orders of the court to do so, and if they cannot be reached it is their own fault that they have been allowed to pass out of their reach, and it is not just that they be allowed to

Digitized by Google

levy further contributions for their benefit. They should have seen to it that these proceeds should have been properly applied. If more of "Mulberry and Sandy Hill" has been sold than was sufficient to pay their *pro rata* share of the debts and legacy, and the fund has been lost, all of these parties, including David R. Williams, the appointee, must bear their proportions of the loss. Those who were in court, and consented by their solicitors to these orders of sale, did not thereby warrant to the appointee or to each other that the fund arising from the sales would be properly accounted for and applied. We therefore hold that David R. Williams, the appointee who is in possession of the unsold portions of "Mulberry and Sandy Hill," is entitled to hold such unsold portions, subject to the payment of the two-thirds value of such unsold portions, not including the value of the residences thereon, to the children and grandchildren of the testator living at the death of James Chesnut, Jr., in the proportions prescribed in the will of testator.

If the sales already made of portions of these four plantations have not been sufficient to pay the debts which may still be valid claims, it may become necessary to resort to other portions of the estate for this purpose, and certain funds now in the hands of the receiver, or to come into his hands, have been ordered in the judgment appealed from, except "those derived from the sale of lands specifically devised" to be paid (1) to costs; (2) to the two judgments referred to; (3) to balance of legacy of $12,000, without interest, after the receivers were in funds to pay them. It is necessary, therefore, under the exceptions to consider the order of liability of different portions of the estate. The "Hermitage" lands were conveyed by testator to his son James Chesnut, Jr., and the bond for $16,000, secured by the mortgage of "Hermitage" and other lands, is clearly a specific legacy. Williams, Ex'rs, 845. "Indian Mound" or "Taylor's Field" passed either to James Chesnut, Jr., under the tenth clause of the will, or to the children and grandchildren under the thirty-third clause, and as to which parties have not been heard. Now the order of liability of the assets in this case, not referring to classes which are not represented here, so far as we know is as follows: (1) Money received on debts due to the testator at his death, and charged therewith in the twenty-ninth clause of the will; (2) the general residuary personal estate; (3) the rents, if any, or other income from "Belmont and Town Creek," "Mulberry and Sandy Hill," and the proceeds of the sales of any portions of these plantations heretofore sold, or hereafter to be sold, if any debts should appear, which have not been paid, and not barred by lapse of time or otherwise; (4) specific legacies, and lands whether devised in terms specific or residuary, *pro rata*. This is intended as the order only as to the assets which seem to be within the province of this case. See Warley v. Warley, Bailey, Eq. 397; Jarm. Wills, 449, 450. The money on hand from sale or rents of "Hermitage" is clearly not liable until the previous classes have been exhausted. The rents from "Town Creek" are liable in the third class above.

The only other question which remains is as to the insurance money, $2,250, now in the hands of the receiver, P. H. Nelson, and which has been subjected to the payments ordered by the circuit judge. James Chesnut, Jr., had carried for several years a policy of insurance on the residence on "Sandy Hill Plantation." The policy had expired; and a short time before his death, and while he was in very feeble health, the policy was renewed in the name of James Chesnut, executor. It is not clear whether he intended to have the policy in his own name or as executor, and in the view we take it is not important. It is now well settled in this country as to how far a tenant for life is responsible to the remainder-man for "accidental fires." 4 Kent, Comm. 82. A sum of money paid to the guardian of an infant tenant in tail for rebuilding a copy-hold tenement that had been burnt was held to belong to the remainderman. The personal representative of the infant being entitled to the interest as compensation for rents and profits, copy-hold tenants were liable for waste unless by the act of God. Rook v. Worth, 1 Ves. Sr. 461, 462. In case of a total loss by fire the fund arising from general insurance is substituted for the destroyed property, and the life-tenant will be entitled to the interest for life, and the remainderman to the principal. Haxall's Ex'rs v. Shippen, 10 Leigh, 536; Graham v. Roberts, 8 Ired. Eq. 99. In the case of Annely v. De Saussure, 26 S. C. 505, 2 S. E. Rep. 490, an insurance policy taken out by one tenant in common was held not to inure to the benefit of the co-tenant. One tenant in common is not in any sense a trustee for his co-tenant, and has no insurable interest in his share of the property. A life-tenant, on the other hand, is a trustee for the remainder-man, and is certainly liable for loss by fire caused by his negligence. He ought not to be allowed to put himself in a position in which he would have no motive for proper care of the estate by having a policy of fire insurance by which, in case of loss, he could substitute the full fee-simple value of the buildings in place of his interest for life. We therefore think that a sound public policy requires that any money collected by a life-tenant on a total loss by fire should be used in rebuilding, or should go to the remainder-man, reserving the interest for life for the life-tenant. We quote as appropriate the language from 4 Wait, Act. & Def. 22, in reference to insurance beyond the value of interest of the insured: "And where the insurance is beyond the amount of the interest at stake the effect is the same, for, although the amount of the loss only can be properly recovered, there will be a hope of getting more." It would be in the nature of "gambling." In accord with

Digitized by Google

these views is the case of Parry v. Ashley, 3 Sim. 97, and our own case of Paper Co. v. Langley, 23 S. C. 129, in which the court uses these words: "If * * * the defendants stood in the relation of *quasi* trustees towards the plaintiffs, then the money received by them for the insurance on the house of the plaintiffs belonged *ex æquo et bono* to the plaintiffs." With these views of this case we hold that the insurance money now in the hands of the receiver belongs to David R. Williams, and that he is not liable to account for it in estimating the two-thirds value of Sandy Hill in his settlement with the other children and grandchildren of testator, but liable for its *pro rata* share of any valid debts, according to the above views, yet to be paid out of the estate.

It is therefore ordered that the judgment of the circuit court be reversed so far as inconsistent with the principles herein announced, and that the case be remanded to the circuit court for such further proceedings as may be necessary and proper to carry out the views herein expressed, and as may be necessary to adjust the rights of the parties, under the principles herein set forth.

SIMPSON, C. J., and MCGOWAN, J., concur.

(31 S. C. 337)

MOORE v. CHRISTIAN.

(*Supreme Court of South Carolina.* July 16, 1889.)

PLEADING—AMENDMENT—ORDER.

1. In a suit on a note the complaint alleged that it was a promissory note, and had been destroyed. This allegation was not denied. It appeared from the evidence that it was a sealed note, and plaintiff asked leave to amend his complaint to correspond with the proof. The request was refused, and nonsuit granted. Subsequently, and before the jury dispersed, the court made an order rescinding the order of nonsuit, and allowing plaintiff to amend as to the kind of note, "and otherwise as he may be advised to be material to his cause of action in said complaint." *Held*, that the court had power to correct any error during the term in which it occurred, and that the amendment to the complaint was properly allowed, as there had been no denial of a material allegation, and no failure of proof,—only a variance between the proof and an allegation of the complaint.

2. Where an order allowing plaintiff to amend concludes with the words, "and otherwise as he may be advised to be material to his cause of action in said complaint," the language will be construed as restricting the amendment to the specific cause of action set up in the original complaint.

3. It is no serious objection to an order allowing an amendment to a pleading that it does not specify the time within which the amended pleading shall be filed, as the court has power to prevent, by subsequent order, any improper delay.

Appeal from common pleas circuit court of Abbeville county; FRASER, Judge.

Perrin & Cothran, for appellant. *Gary & Gary*, for respondent.

MCIVER, J. The complaint in this case was divided into four distinct and separate paragraphs. By the first appropriate allegations as to the character in which plaintiff sues are made. In the second the allegation is that the intestate, Eliza Perrin, some years before her death, loaned to the defendant the sum of $100, and that defendant "as an evidence, and in acknowledgment of the said indebtedness, made his promissory note at Abbeville court-house, on the same day the money was lent to him, and thereby promised to pay to the said Eliza Perrin, one day after the date thereof, the sum of one hundred dollars, with interest at 7 per cent. per annum, for value received." In the third paragraph it is alleged that the interest "on said indebtedness" was paid up to the time of the death of Eliza Perrin. The allegation in the fourth paragraph is that defendant took possession of said note, and destroyed it some time after the death of Eliza Perrin, and has refused upon demand to pay the same, and that plaintiff is "the lawful owner of the said debt.' Wherefore judgment is demanded "for the said principal sum and interest." The answer contains no general denial of the allegations of the complaint, but is confined to specific denials of paragraphs 3 and 4 of the complaint, and sets up two specific defenses which are not pertinent to the present inquiry. At the trial a witness offered by the plaintiff, having testified "that the note given in evidence of the loan by Eliza Perrin to T. M. Christian was a sealed note," the plaintiff moved to amend by inserting the word "sealed" in place of the word "promissory" note in the second paragraph of said complaint. This motion was then refused, and a nonsuit was granted, on the ground of "an entire failure of proof on part of plaintiff as to the cause of action stated in the complaint." Subsequently, and before the jury dispersed, the circuit judge reconsidered his order of nonsuit, and granted another order of the following purport: That the order of nonsuit be rescinded, "and that the plaintiff have leave to amend his complaint, by striking out the word 'promissory' in section second of said complaint, and inserting in lieu thereof the word 'sealed,' and otherwise as he may be advised to be material to his cause of action stated in said complaint, and defendant have leave to answer in twenty days after service of complaint," upon which the case was continued to the next term of the court. A few days afterwards the amended complaint was served. From this order defendant appeals upon four grounds: (1) Because of error in rescinding the order of nonsuit; (2) because of error in granting the leave to amend; (3) because of error in permitting the plaintiff to amend his complaint "otherwise as he may be advised to be material to his cause of action stated in said complaint;" (4) because of error in not limiting the time within which such amendments must be made. At the same time that the amended complaint was served a notice was also served that plaintiff would ask the supreme court to sustain the order rescinding the order of non suit, on the ground "that the order of nonsuit was erroneously granted; there being evidence before the court tending to sustain

Digitized by Google

the cause of action stated in the complaint, which should have gone to the jury."

The first ground of appeal may be considered under two aspects: (1) As presenting a question of jurisdiction,—whether the circuit judge had the power to rescind the order of nonsuit even if erroneously granted; (2) whether the order of nonsuit was in fact erroneous.

1. As to the first view, it is too well settled to admit of argument that, at least during the same term, the circuit judge has the power to correct any errors into which he may have inadvertently fallen. Indeed, this is impliedly conceded by council for appellant, who does not make the point in his argument.

2. Was the order of nonsuit erroneously granted? We think it clear that it was, even aside from the amendment allowed. It will be observed that there was no denial of any of the allegations contained in the second paragraph of the complaint, and hence, under the express provisions of the Code, those allegations should have been taken to be true. The question, therefore, as to the kind of note by which the debt sought to be recovered was evidenced, was not an open one, but was concluded by the pleadings. Upon this ground, therefore, the order of nonsuit was clearly erroneous. But in addition to this there was no failure of proof as to the cause of action, but simply a variance between the *allegata* and *probata* as to the manner in which the real cause of action was evidenced. The plaintiff alleged, in the second paragraph of his complaint, that his intestate had loaned to the defendant a certain sum of money, and "as an evidence, and in acknowledgment of the said indebtedness," had taken his promissory note, whereby he promised to pay said intestate the said sum of money at a time specified therein; and, these allegations having been admitted by the course of defendant's pleading, the plaintiff would clearly have been entitled to judgment, unless the defendant had made good some one of his defenses. There was therefore clearly no room for a nonsuit.

The second ground of appeal cannot be sustained. The amendment allowed made no substantial change in the plaintiff's claim, and was therefore permissible under the provisions of the Code. Sibley v. Young, 26 S. C. 415, 2 S. E. Rep. 314.

Nor do we think that the third ground of appeal was well taken. While it may be true that an order for leave to amend, in general terms, as the party may be advised, without qualification, would be objectionable, as involving a permission to make any amendment, even though the claim or defense should be thereby substantially changed, which would not be permissible at the stage of the case at which the amendment here in question was allowed, yet such is not the character of the leave granted in the present case. On the contrary, the general terms used are so qualified as to limit the permission to such as would not substantially change the plaintiff's claim. If the order had simply granted plaintiff leave to amend "otherwise as he may be advised," it would have been amenable to the objection taken. But qualified as it is by the additional words, "material to his cause of action stated in said complaint," we do not think it subject to the objection. These additional words were doubtless added for the very purpose of so limiting the right to amend as that the plaintiff's claim should not thereby be substantially changed; and this, we think, is the legitimate construction of the terms of the order.

As to the fourth ground of appeal, while it may be the better practice that an order granting leave to amend should always limit the time within which such amendment should be made, yet we cannot say that there was any error of law in failing to do so in this case. The power of amendment is left largely to the discretion of the circuit judge, who is invested with the right to prescribe the terms upon which he thinks it just that the leave should be granted, one of which usually is that the amendment shall be made within a time prescribed, yet, if the circuit judge sees fit to omit fixing that as one of the terms, we cannot say that he has committed any error of law. Besides, it is manifest in this case that no harm has resulted from the omission, for it is stated in the "case" that the amendment was made, and the amended complaint served within some 10 or 12 days after the leave was granted; and in any case we suppose the circuit court would have the power to prevent any improper delay by subsequent orders for that purpose. The judgment of this court is that the order appealed from be affirmed.

SIMPSON, C. J., and MCGOWAN, J., concur.

(31 S. C. 605)

JONES *et al.* *v.* QUATTLEBAUM *et al.*

(*Supreme Court of South Carolina.* July 17, 1889.)

CONSTRUCTION OF WILL.

1. Where a testatrix devises to C. "all that tract of land," a part of which is known as the "R. Place," parol evidence is admissible to show what tract of land was intended by such description.

2. Testatrix was the owner of 655 acres of land lying in a body. She devised to C. "all that tract of land," a part of which is known as the "'R. Place,' containing 100 acres, more or less;" and to J. "all the balance of my real estate" purchased at a certain sale, and containing "500 acres, more or less," "and not hereinbefore disposed of." All of the land was bought at the above-mentioned sale. *Held*, that the devise to C. was of a definite tract of land, containing 803 acres, and was not a devise of 100 acres only, to be cut off to include the R. place, and J. took the balance of the estate only, though such balance was thereby reduced to 352 acres.

Appeal from common pleas circuit court of Edgefield county; FRASER, Judge.

Lewis Jones and L. P. Jones, as executors of the last will and testament of Elizabeth C. Watson, deceased, and in their own right, filed their bill against C. P. Quattlebaum, as

Digitized by Google

executor of the last will and testament of Elizabeth C. Watson, Marina Gregg, Sarah Quattlebaum, I. B. Jones, L. P. Jones, Loula S. Jones, I. W. Jones, and E. C. Jones, minors under the age of 14 years, and others, to obtain the construction of a will, partition of the estate, and general relief. From the decree of the court Lewis Jones, Abram Jones, and C. A. Quattlebaum appealed.

Sheppard Bros. and *R. W. Shand*, for Lewis and Abram Jones. *Johnsons & Quattlebaum*, for C. A. Quattlebaum.

SIMPSON, C. J. The decree of his honor, the circuit judge, sufficiently states the facts of this case; and the legal points involved, growing out of this decree, will appear from the exceptions attached. The case turns upon the construction which shall be given to certain clauses in the will of the late Mrs. Elizabeth Watson, deceased. We concur in the view taken by the circuit judge as to said clauses, and, inasmuch as we could hardly add anything to the force of his reasoning in support of his conclusions, we do not deem it necessary to elaborate the points discussed by him, thinking it sufficient to simply adopt and affirm said decree, which, with the exceptions, is herein incorporated.

"DECREE.

"This case came before me for a hearing at the term of the court held in November, 1888. The action was brought, among other things, for a partition or 'division of land' mentioned and described in the seventh and 'eighth (7 and 8) clauses of the will of the testatrix, among the parties entitled thereto,' under the terms of the will. The questions before me refer entirely to the real estate passing under clauses 7 and 8 of the will; all other issues raised by the pleadings either having been disposed of, or being reserved for the future order and judgment of the court. In the seventh clause of the will the testatrix devised to Charles A. Quattlebaum 'all that tract' of land, a part of which is known as the 'Henry Raiford Place,' 'containing one hundred (100) acres, more or less,' with certain remainders at his death. In the eighth clause she devises 'all the balance of my real estate, situate near Ridge Spring, purchased by me at the sale of the real estate of the late Major Tillman Watson, deceased, made by order of this court, not hereinbefore disposed of, lying on the south side of the C. C. & A. R. R., and containing five hundred and fifty-five (555) acres, more or less,' to the plaintiff Lewis Jones and the defendant Abram Jones, to be equally divided between them, the share of each to be held for life, with remainder over. It is admitted that the land covered by these two clauses (7 and 8) contains six hundred and fifty-five (655) acres, and that the land is contiguous and in one body. The defendant Charles A. Quattlebaum claims that the devise to him is of a certain tract of land, and that the devise cannot be limited to (100) one hundred acres, but that the tract of land devised is a tract of land which contains (303) three hundred and three acres. Lewis Jones and Abram Jones claim that this construction of the will would cut down the devise to them to only (352) three hundred and fifty-two acres. They claim that the devise to Charles A. Quattlebaum shall be so construed that he shall have the Henry Raiford place of about (90) acres, and so much more land as will make in all one hundred (100) acres.

"It is scarcely necessary to refer to any authority to show that no parol testimony will be sufficient to add to the words of a will, or to strike out any words that are in it. If it were a matter of any consequence whether the words 'more or less' are properly in the will, or were put into it by inadvertence by the careful lawyer who drew it, it is now too late to consider. The testatrix executed the will according to the forms of law, and it has been adjudged valid by the proper tribunal. The question in the case is whether this is a devise of (100) one hundred acres of land, to be cut off for Charles A. Quattlebaum, so as to include the Henry Raiford place, or of a certain definite tract or parcel of land called in the will 'all that tract of land.' Whether this is a devise of (100) one hundred acres, or of a certain definite tract of land, can be determined only by the words of the will itself, and parol testimony on the subject is incompetent to aid the court. I am unable to construe the words of this devise to mean anything else than that it is a devise of a certain definite tract of land, and not of (100) one hundred acres. It is no objection to the location of a grant that the quantity is ascertained to be more than four times the amount stated in the grant. Fulwood v. Graham, 1 Rich. Law, 491. This is a rule of location, and applies to wills and deeds. So far as the parol testimony goes to show what tract of land was intended, it is competent. Proposition, 5 Wig. Wills, 151, lays down the rule to be that parol evidence is competent to show what person or what property was intended by the terms of the will, when the knowledge of extraneous facts is necessary to enable the court to apply the terms of the will. The testimony shows that the testatrix bought at the sale of the real estate of Tillman Watson various tracts of land, including the land covered by clauses 7 and 8 of the will. They seem to have been designated by several plats, and to have been conveyed by number in the deed under which she held title. Among them was a tract called 'No. 7,' containing 303 acres, a part of which was the Henry Raiford place. The testimony of Gen. Quattlebaum shows that she had for a long time in her possession a plat on which the tract of 303 acres was designated by lines dividing it from the balance of the land, owned by her and contiguous to it. Some of the advantages to Charles A. Quattlebaum, to which the testatrix referred in speaking of her devise to him, I do not think could be enjoyed if he was confined to the Henry Raiford place, and about 10 acres more to be cut off by the commissioners in

Digitized by Google

partition in any eligible shape, and I do not find in the will any intimation of a discretion lodged in any person or court as to the location of said (10) ten acres. Taking all the testimony together, I am satisfied that the testatrix intended by the description in the seventh clause of her will to give to Charles A. Quattlebaum tract No. 7, purchased by her at the sale of the real estate of Tillman Watson, and containing 303 acres. If there was in the eighth clause any definite tract of land given to Lewis Jones and Abram Jones, the seventh clause would be controlled by it. Such, however, is not the case. The eighth clause only gives to them the balance of the land, or what is left after taking out the devise to Charles A. Quattlebaum, when the same is properly located. The court cannot consider any parol evidence to show that the testatrix intended to divide this part of her real estate in the proportion of 100 to 555, and not in the proportion of 303 to 352, unless such parol evidence will aid the court to find that intention expressed in proper form in the will. For this purpose the number of acres mentioned in the will and by the testatrix at various times is not sufficient. It is therefore ordered and adjudged that Charles A. Quattlebaum is entitled to hold the said tract No. 7, containing 303 acres, under the terms of the will. It is ordered and adjudged that a writ of partition do issue to five commissioners, two to be appointed by Lewis Jones and two by Abram Jones, and one by the clerk, to divide the balance of the real estate of the testatrix mentioned in the eighth clause of her will as herein contained, and that they do each hold the one-half in value of said balance of real estate in severalty under the terms and limitations of the will. It is ordered that the costs of witnesses and other costs of the trial before me be paid by the defendant Charles A. Quattlebaum, and Abram Jones, and the plaintiff Lewis Jones, severally, which were so incurred by them. All other questions in the case, including costs not herein provided for, are reserved.

"T. B. FRASER, Presiding Judge.

"8th January, 1889.

"PLAINTIFFS' NOTICE AND GROUNDS OF APPEAL.

"To the Hon. T. B. Fraser, Circuit Judge, and Messrs. Johnsons and Quattlebaum, Defendants' Attorneys: Please take notice that Lewis Jones and Abram Jones appeal to the supreme court of South Carolina from the decree of his honor, Judge T. B. Fraser, filed herein on the 8th day of January, A. D. 1889, and will move said court at the next ensuing term thereof, or as soon thereafter as counsel can be heard, to reverse the same, on the following grounds, to-wit: *First.* Because his honor, the circuit judge, erred in holding that 'whether this is a devise of (100) one hundred acres, or of a certain definite tract of land, can be determined only by the words of the will itself, and parol testimony on the subject is incompetent to aid the court.' *Second.* Because the circuit judge erred in disregarding the testimony adduced in behalf of appellants, that the testatrix intended to devise to Charles A. Quattlebaum one hundred acres of land only. *Third.* Because the circuit judge erred in deciding as follows, to-wit: 'I am unable to construe the words of this devise to mean anything else than that it is a devise of a certain definite tract of land, and not of one hundred acres.' *Fourth.* Because the circuit judge erred in ordering and adjudging that Charles A. Quattlebaum is entitled to hold the said tract No. 7, containing 303 acres, under the terms of the will.'

"SHEPPARD BROS., Appellants' Attorneys.

"DEFENDANTS' NOTICE AND GROUNDS OF APPEAL.

"To Messrs. Sheppard & Bro., Plaintiffs' Attorneys: Please take notice that Charles A. Quattlebaum appeals to the supreme court of South Carolina from the decree of his honor, Judge T. B. Fraser, and will move said court, at the next term thereof, to correct the rulings thereof in the following particulars, to-wit: *First.* Because his honor, Judge T. B. Fraser, erred in not holding and deciding that Lewis P. Jones was incompetent, under the 400th section of the Code, to testify to any transaction or communication between himself and Elizabeth C. Watson touching the devises to Charles A. Quattlebaum and to Abram Jones and Lewis Jones, made in the will of Elizabeth C. Watson; his competency having been objected to when offered. *Second.* Because his honor erred in not ruling out the evidence of Lewis P. Jones and William B. Griffin touching the insertion of the words 'more or less' in the seventh clause of said will, after the words 'one hundred (100) acres,' the same having been taken subject to objection. *Third.* Because his honor erred in not ruling out all the evidence offered by the plaintiffs (and taken down subject to objection) which in any way tended to vary or contradict the terms of the seventh clause of the said will devising a tract of land to the defendant Charles A. Quattlebaum.

"JOHNSONS & QUATTLEBAUM,

"Attorneys for C. A. Quattlebaum."

It is the judgment of this court that the judgment of the circuit court be affirmed.

McIVER and McGOWAN, JJ., concur.

(86 Va. 191)

STUART *et al.* v. HEISKELL'S TRUSTEES *et al.*

(*Supreme Court of Appeals of Virginia.* June 18, 1889.)

RES JUDICATA—EXECUTION.

1. Where, in a suit to correct a mistake and for an accounting, the court below held that the payment by the grantee in a deed of certain incumbrances on the land should be considered payments on the price, which decree was affirmed in that respect on appeal, on a second accounting, under the decree of the appellate court, the question whether the payments of the incumbrances were payments on the price or to be treated as set-offs is *res judicata*.

2. Where a decree is rendered in favor of a com-

Digitized by Google

plainant in an original bill, and also a complainant in a cross-bill, it is not error to direct execution to issue to them severally for the sums due them respectively.

Appeal from circuit court, Washington county.

Routh & Stuart, for appellants. *White & Buchanan*, for appellees.

LEWIS, P. The first assignment of error in the petition for appeal is that the circuit court erred in treating as payments, instead of set-offs, the sums paid by the appellants in discharging incumbrances on the Claiborne interests in the King Salt-Works. The facts in relation to the matter are these: In October, 1862, Thomas L. Preston conveyed, with general warranty, to the appellants his interest in the said salt-works, and at the same time left in their hands $3,000, for the purpose of removing incumbrances on the property conveyed. It afterwards turned out, however, that the Claiborne interests conveyed by Preston were greater than they were supposed to be when the deed was executed, —that is, they were 11-540 instead of 6-540, as was supposed; and, this being a mutual mistake of the parties, it was held by the court below, whose decree in this particular was affirmed by this court on the last appeal in this cause, (80 Va. 789,) that it was proper to correct it, and that Preston was entitled to compensation accordingly. After the case went back to the circuit court, it was referred to a commissioner, as directed by the said decree, to take an account between Preston and the appellants, charging the latter with what was due by them on account of the Claiborne interests, and "crediting them with any incumbrances paid off and discharged by them" on the said interests. The amount ascertained to be due by the appellants on account of those interests was $3,240.74, and with this sum, together with the $3,000 left in their hands by Preston, they were charged as of October 1, 1862, and credited by all sums paid by them in discharging incumbrances as aforesaid. These sums were treated by the commissioner, whose report was confirmed, as payments, and not as set-offs, and of this mode of stating the account the appellants complain. As to the $3,000 left in their hands by Preston for the express purpose of discharging incumbrances, there can be no doubt that the action of the commissioner was right. Indeed, this is conceded. But as to the sums paid by the appellants over and above that amount it is contended that they ought to have been treated as set-offs, and not as payments, because as to them there was no agreement. The argument is that, to constitute a payment, money or some other thing must be delivered by the debtor to the creditor for the purpose of extinguishing a debt, and the creditor, or some person authorized in his behalf, must receive it for the same purpose; that here the sums paid in discharging incumbrances, over and above the $3,000, were not paid in extinguishment of a debt, in pursuance of any agreement, and hence ought to be treated, not as payments, but as set-offs against the purchase price of the interests conveyed by Preston, which were subject to those incumbrances. We do not controvert the proposition that to constitute a cross-demand a technical payment an agreement to that effect must be proved. But the principle does not affect the present case. This was a suit in equity for the correction of a mutual mistake, and it was competent for the court to make such decree in the matter as the equities of the case required. The appellants had been in the possession and enjoyment of the entire interests conveyed by Preston since the date of the deed, and in settling the principles of the cause, as the decree of February 25, 1884, did, it was considered equitable, and the court accordingly decreed, that, in taking the accounts between the parties, the payments made by the appellants in discharging liens on the property should be treated as payments by them on their purchase of the property, and upon this basis the accounts were taken. The decree, it is true, does not so declare in terms, but such is its meaning and effect; and having been affirmed on the above mentioned appeal in all particulars save one, which is not material to the present appeal, the matter is now *res judicata*, although the question does not appear to have been formally raised or considered on the former appeal. Stuart v. Preston, 80 Va. 625; Findlay v. Trigg's Adm'r, 83 Va. 539, 3 S. E. Rep. 142.

The next and only other assignment of error by the appellants, which is that it was error to direct execution to issue severally in favor of Heiskell's trustee and Massie's administrator for the sums decreed to them, respectively, is also not well taken. Both were complainants before the court,—one in the original bill, the other in the cross-bill,—and the provision in the decree giving them the right to have execution severally is both proper and in accordance with the usual practice in such cases.

As to the two assignments of error by the appellees under the ninth rule of the court, namely: (1) That it was error to credit the appellants with the sum of $1,567.25 on account of "the James King interest;" and (2) with the payments actually made by them on account of the dower claims of Mrs. Claiborne and Mrs. Morgan,—it is sufficient to say that these credits were properly allowed under the decree above mentioned, which directed the appellants to be credited with all incumbrances paid and discharged by them on the interests conveyed by Preston, and the decree in this particular, also, having been affirmed, the answer of *res judicata* applies as well to the objections of the appellees as to the first assignment of error by the appellants. The decree must therefore be affirmed.

Digitized by Google

(86 Va. 233)

TRINKLE v. JACKSON.

(*Supreme Court of Appeals of Virginia.* June 18, 1889.)

VENDOR AND VENDEE—SALE IN GROSS.

A vendor gave a bond for title, which recited "the land hereby sold is all the lands owned by said [vendor] lying on Peach Bottom creek, in one body, and is supposed to contain from two to three thousand acres, but the sale hereby made is a sale in gross, and the [vendee] purchases the same without reference to quantity, and is composed of several tracts, but coterminous and is the same lands formerly owned by" the vendor's father. The deed was one of warranty, and conveyed all the lands owned by the vendor's father at his death, "lying in one body, on Peach Bottom creek;" "the several tracts of land hereinafter described aggregating, according to the face of the several titles referred to, two thousand three hundred and seventy-six acres, be the same more or less, and however much more or less, the sale hereby made being in gross." The several tracts are then described by metes and bounds. The vendee was better acquainted with the land than the vendor, and no fraudulent representations were shown. On a subsequent measurement it was found that there was a deficiency of 436 acres, one of the tracts being included entirely within the limits of another. *Held*, that the sale was one in gross, and that the vendee was not entitled to any abatement in the price.

Robert Crockett, for appellant. *Fulton & Hackler*, for appellee.

LACY, J. This is an appeal from two decrees of the circuit court of Grayson county, rendered, respectively, on the 13th day of November, 1888, and on the 16th day of April, 1889. The bill was filed at February rules, 1888, by the appellant, to enforce the vendor's lien reserved on the face of the deed executed by her to the appellee on the 2d day of October, 1883, for the lands therein mentioned, situated in the county of Grayson, and concerning which this controversy has arisen. On the 13th day of April, 1888, a decree was rendered in the cause, ascertaining that a balance of the purchase money, evidenced by two bonds, of $3,000 each, with interest, was still due, and which directed a surveyor to cut off 1,500 acres, and directed a special commissioner named in said decree to make sale of this part of the tract of land in question to satisfy the unpaid purchase money. In making the survey so directed it was discovered that the lands in dispute did not contain 2,376, as mentioned in the deed, but only 1,936, acres. The bill, up to this time, had been taken for confessed as to the defendant, who had not answered; but the defendant now appeared, and filed his bill in the cause, and asked to have the decree heretofore entered enjoined, and the deficiency in the quantity of the land saved to him; which the court, in the progress of the cause, allowed to him, and allowed him a credit of $1,893.75 upon the purchase-money bonds still due by him. The plaintiff then filed an amended bill in the cause, seeking to set up and have relief upon the basis of the original title-bond executed at the time the contract for a sale was entered into. But this bill was dismissed, and the plaintiff appealed to this court. The appellant insists here that the sale in this case was a sale in gross, and not by the acre, and that defendant was not, therefore, entitled to any allowance on account of the deficiency. The appellee insists that the sale was for six tracts of land, as set forth by the deed, and that the deficiency was of 436 acres, one entire tract, and a good deal more besides, and that it was not the understanding of the parties that the purchaser waived the quantity and purchased only in gross, without regard to the number of acres. The deed set forth that, in consideration of $12,000, to be paid as stated therein, the grantor granted, "with covenants of general warranty, unto said grantee the several tracts of land hereinafter described, aggregating, according to the face of the several titles referred to, 2,376 acres, be the same more or less, and however much more or less; the sale hereby made being in gross, and being all the lands owned or possessed by David Sexton at the time of his death, lying in one body, on Peach Bottom creek, in the county of Grayson," etc. It then proceeds to set forth the several deeds and patents, with general reference to these for metes and bounds of several tracts. It turned out upon the survey that one of these tracts had no separate existence, but was located within the boundaries of one of the other tracts.

The question involved here is one that has often been the subject of judicial consideration and decision; and if an estate be sold at so much per acre, and there is a deficiency in the number conveyed, the purchaser will be entitled to a compensation; and the rule is the same, although the land is neither bought nor sold professedly by the acre. Nelson v. Carrington, 4 Munf. 332; Harrison v. Talbot, 2 Dana, 258; Grant v. Combs, 6 T. B. Mon. 281; Bierne v. Erskine, 5 Leigh, 59; Hoffman v. Johnson, 1 Bland, 109; Marbury v. Stonestreet, 1 Md. 147; Tarbell v. Bowman, 103 Mass. 341. And the general rule is that when a misrepresentation is made as to the quantity, though innocently, the right of the purchaser is to have what the vendor can give, with an abatement for so much as the quantity falls short. Judge BROCKENBROUGH said in Russell v. Keeran, 8 Leigh, 14: "There is no doubt that where an estate is expressly sold at a certain price by the acre, and there is a deficiency in the number of acres conveyed, the purchaser will be entitled to a compensation for that deficiency. * * * So, too, where the land is neither bought nor sold expressly and professedly by the acre, but both parties, in fixing the price for the land, have regard to the quantity which they suppose the estate to consist of, the same rule as to liability for deficiency will prevail. In such case the demand of the vendor and the offer of the purchaser are supposed to be influenced in an equal degree by the quantity which both believe to be the subject of their bargain. A ratable abatement of price will probably leave both in nearly the same relative situation in which they would have stood if the true quantity had been originally known. * * * Such sale must be considered as in fact and

Digitized by Google

according to the intention of the parties, though not expressly, a sale by the acre." Hill v. Buckley, 17 Ves. 401; Stebbins v. Eddy, 4 Mason, 414; Reynolds v. Vance, 4 Bibb, 215; Nelson v. Carrington, 4 Munf. 332; Nichols v. Cooper, 2 W. Va. 347; Watson v. Hoy, 28 Grat. 704; Blessing v. Beatty, 1 Rob. (Va.) 287; Caldwell v. Craig, 21 Grat. 136; Triplett v. Allen, 26 Grat. 721; Hoback v. Kilgores, Id. 442; Yost v. Mallicote, 77 Va. 610.

But when the lands in a conveyance are mentioned to contain so many acres by estimation, or the words "more or less" are added, if there be a small portion more than the quantity, the vendor cannot recover it; and if there be a small quantity less the purchaser cannot obtain any compensation in respect of the deficiency; and even a large excess or deficiency has not been considered a ground for relieving a vendor or purchaser. Stebbins v. Eddy, 4 Mason, 414, opinion of Mr. Justice STORY; 4 Kent, Comm. (11th Ed.) 467, and cases cited; Tyson v. Hardesty, 29 Md. 305. And, although the contract state the property to contain a given quantity, yet the purchaser must be content with a much less quantity, if it be stipulated that the quantities shall be taken as stated, whether more or less, without any compensation, and that the statements in the documents of title shall be deemed conclusive evidence of the properties.

In the case of Jollife v. Hite, 1 Call, 284, decided in this court in 1798, and in which all the judges delivered opinions, it was held "that, in all cases of contracts for the sale of lands by a specific number of acres, the parties are entitled to compensation for a deficiency or excess in that quantity beyond what may reasonably be imputed to small errors from variations of instruments or otherwise,—the estimate being supposed to be made from mistake in the parties; and are not precluded in equity from inquiry into what was the real contract, by the words 'more or less' inserted in the deed of conveyance. But where the real contract is to sell a tract of land, as it may contain more or less, fully understood to be so, the purchaser takes the tract at the risk of gain or loss by deficiency or excess in the number of acres contemplated, and neither can resort to the other for compensation on the ground of either event." In the case of Hull v. Cunningham, Judge TUCKER (St. George) said, speaking of this subject, (1 Munf. 335:) "Here the words of the bond do not amount to a warranty of the quantity, inasmuch as, in speaking thereof, there is this caution used: 'Said to contain 370 acres, be it more or less, to-wit, all that tract left him by his father, John Cunningham, deceased.' These circumstances indicate a contract in gross, and not by a specific number of acres." And Judge ROANE, in the same case, in which the court was unanimous, said, speaking of this contract: "These principles are decisive of the present case, unless we say that a party is not as competent to take upon himself a risk, with respect to the manner in which the lines of a tract of land may run, as with respect to the actual number of acres contained in the tract." Judge TUCKER, (Henry St. George,) speaking of a controversy of this character in the case of Keytons v. Brawfords, 5 Leigh, 47, in which there was an alleged deficiency in the quantity of land sold, as to whether there could be any relief, said: "This depends upon the question whether the sale was in gross or by the acre; for if it was a contract of hazard, in which each party took upon himself the risk of excess or deficiency, there can be no relief afforded to either, whatever may be the actual quantity in the tract sold."

Questions of this character have frequently been before this court, and nothing is better established than the law of the subject, when the real intention of the parties in the contract is once ascertained. But this intention it is sometimes difficult to discover, from the carelessness of the parties, from the use of equivocal expressions, and from the glosses which are given to the transaction by the testimony of witnesses. Contracts of hazard, such as those we are now considering, never have been discountenanced by our law. Where they are already established they are valid. It is not readily to be presumed that the parties designed to enter into such a contract, unless it is clearly sustained by the facts.

In the case of Russell v. Keeran, 8 Leigh, 18, CABELL, J., used the following emphatic language: "I am of opinion that the decree of the chancellor of the 13th of December, 1828, is wholly erroneous. It declares that, although the sale of the land was a sale in gross, yet it was not a sale of hazard as to quantity. This is contrary to first principles, for every sale of land in gross or by the tract is, *ex vi termini*, a sale of hazard as to quantity; the vendor being debarred from claiming any addition to the purchase money, in case the real quantity * * * shall fall short of the estimated quantity. I am also clearly of opinion that the sale in this case was a sale in gross, and consequently that, although the land has turned out, on actual survey, to be about one hundred acres short of the estimated quantity, yet the vendee is entitled to no abatement of the purchase money, but is bound to pay the whole thereof, with interest." In that case the sale was of 405¼ acres, be the same more or less. This deficiency was more than one-fourth of the entire tract, the sale being as stated, and the actual quantity established by the survey only 289⅛ acres. The case was considered upon the terms of the title-bond, the bill and answer, and the evidence of witnesses, as to the true intention of the parties; the latter being held admissible because of the ambiguity in the terms of the title-bond, the words "more or less" being so held. In that case there was no deed.

There is no necessity for further citation

Digitized by Google

on this subject. The law is well settled and generally well understood by the profession. I am aware of no conflict in the decisions from the earliest case in this court down to the latest decision here, (Cunningham v. Millner, 82 Va. 530,) where it is said in the opinion of LEWIS, P.: "Here the contract was one of hazard, in which each party took upon himself the risk of excess or deficiency, —a contract which, while not favored, yet is not discountenanced, by the law, and will be enforced when reasonable and clearly established. And in such cases it is well settled by the repeated decisions of this court that no relief can be afforded to either party." Citing Benson v. Humphreys, 75 Va. 196; Trust Co. v. Foster, 78 Va. 413; and other cases already referred to.

The decision of the circuit court of Grayson county in this case is distinctly contrary to these well-settled principles. The learned judge in this case considered "that the contract as to the quantity of the land named in the several title papers by which it was sold was one of hazard, is not and cannot be controverted. That such a contract, clearly proven, is valid, and will be upheld in equity, is well established by a long line of Virginia decisions." "But," he says, "the hazard taken in this case cannot be extended beyond the evident intention of the parties; that is, to the number of acres found in the aggregated parcels. It cannot possibly be extended to the number of tracts sold, severally described and severally conveyed by deed with warranty." The deed, as we have already seen, is for the conveyance of "all the lands owned or possessed by David Sexton at the time of his death, lying in one body on Peach Bottom creek, in the county of Grayson, Va.," although it sets out the several tracts of land of which it was composed. They are set forth as all lying in one body. If there is any ambiguity in this, we must look to the original title-bond, and the testimony of witnesses, in order to ascertain the intention of the parties at the time of the sale. The title-bond says: "The land hereby sold is all the land owned by said Lettie M. Trinkle, lying on Peach Bottom creek, in one body, and is supposed to contain from two to three thousand acres; but the sale hereby made is a sale in gross, and the said J. Calhoun Jackson purchases the same without reference to quantity, and is composed of several tracts, but coterminous, and is the same lands formerly owned by David Sexton, the father of said Lettie M. Trinkle." The evidence shows that there was no fraud or concealment by the vendor; that she was a lady residing in the town of Wytheville, 30 miles distant from the tract of land, and had never been on it but once in her life, while the vendee was a resident in that section, living a few miles from the land in question, and had visited and inspected it before buying, and who rested for years in quiet possession of the land without taking any concern about the number of acres, until it became necessary to sell a part of the land to pay a part of the purchase money due and unpaid by him. A survey being made to cut off 1,500 acres for that purpose, the large deficiency was discovered; and he then brought his suit, with the result stated.

There can be no question that the vendee in this case knew more about the land than the vendor, as to the quantity it contained, and it is clear that he was not misled by any false or fraudulent misrepresentations on her part. The agreement between them was for a tract of land in gross, and the number of acres was in nowise a basis of the purchase price. The falling short or the running over the estimated quantity of land could form no basis for the relief of either party. If the increase in the number of acres upon a survey had been great, the vendor could have had no valid claim for compensation for them against the vendee; and, on the other hand, when the quantity falls short of the estimated quantity, the vendee has no valid claim for any deduction on that account in the purchase price, because each distinctly took upon himself the risk of this. The one sold and the other purchased a tract of land in gross, without reference to quantity, and composed of several tracts, but coterminous.

In what respect is the subject varied by a purchase of several tracts in one body, or several acres in one body? It is at least a purchase of one body, in either event, in gross; and in either event, without reference to quantity; and in either event it is a contract of hazard, and there can be no relief. The contract is not breached by an excess nor by a deficiency. However this results, the thing purchased—the tract of land—remains the same, and both parties have their agreement maintained as they made it, and there is no basis upon which either can, in either event, complain of an injury nor ask for relief. The decision and decree of the circuit court of Grayson county cannot be maintained either upon reason or upon authority, is clearly erroneous, and must be reversed and annulled, and the cause remanded, with instructions to proceed to subject the lands in the bill mentioned to the payment of the unpaid purchase money due thereon, under the decree of April 13, 1888.

(86 Va. 201)

LANCASTER'S ADM'R *et al.* v. LANCASTER'S ADM'R *et al.*

(*Supreme Court of Appeals of Virginia.* June 13, 1889.)

APPEALABLE ORDERS.

A bill was filed by the personal representatives and heirs of T. against the personal representatives and heirs of J., to compel the conveyance to complainant heirs of certain real estate in which they claimed a trust resulting from conveyances made by T. to J., and to set aside a conveyance fraudulently procured by J. to be made to himself by T.'s wife under a power of appointment in a deed by T. to her; also to obtain a decree for the interest or amount due from J.'s estate to T.'s estate on account of T.'s share in the profits of a

Digitized by Google

banking business carried on by J., and for an account of the profits made by J. on the sale of certain personalty, and of the rents and profits of certain of the real estate mentioned. *Held*, that an order overruling a demurrer to the bill was not an order adjudicating the principles of the cause, within the meaning of Code Va. 1873, c. 178, § 2, authorizing any party to any case in chancery, wherein there is an order adjudicating the principles of the cause, to present a petition for an appeal from such order. The effect of the order is not to declare that the case depends upon an account of the alleged partnership, and to compel the account, but it merely declares that if the plaintiffs establish the case made in the bill they may be entitled to the relief sought.

Appeal from circuit court, Washington county.

D. Trigg, for appellants. *Fulkerson & Page*, for appellees.

HINTON, J. The only facts necessary to be stated, in the aspect in which this case is now presented, are these: At November rules, 1887, of the circuit court of Washington county, a bill was filed by the personal representatives and heirs at law of Thomas C. Lancaster, deceased, against Robert L. Harrison and Samuel Anna Lancaster, who were the foreign administrator and administrix of John J. Lancaster, deceased, and the said Samuel Anna Lancaster, in her own right, and Agnes Lancaster, Julia Duncan Lancaster, and Howel Moody Lancaster, infant children of the said John J. Lancaster, deceased, and Julia A. Lancaster, widow of Thomas C. Lancaster, deceased, Lewis Woodville Lancaster, and George W. Lancaster, minor children of R. T. Lancaster, deceased, the purpose and object of which was to compel the infant children of John J. Lancaster to convey to the heirs at law of Thomas C. Lancaster, deceased, certain real estate in Goodson, Va., and in Jackson, Tenn., to which the said heirs of T. C. Lancaster alleged they were entitled by resulting trust from conveyances thereof alleged to have been made by the said T. C. Lancaster, in his life-time, to their father, the said John J. Lancaster. Another object of the bill was to annul and set aside a deed from Mrs. Julia A. Lancaster to John J. Lancaster, dated November 18, 1882, under a power of appointment in a deed executed to her by her husband, the said T. C. Lancaster, on account of the alleged fraudulent and improper conduct of the said John J. Lancaster in procuring himself to be designated as the recipient and appointee of the said property. The other objects of the bill were to obtain a decree for the interest or amount that might be found due from the estate of John J. Lancaster to the estate of T. C. Lancaster on account of the shares of the said T. C. Lancaster in the profits of a certain banking business carried on by the said John J. Lancaster in the state of New York, and to have the following amounts, namely, an account of the proceeds of certain sales of property so conveyed, alleged to have been made by John J. Lancaster; an account of the rents and profits of certain of the real estate mentioned in the bill as having been conveyed by the said T. C. Lancaster to the said John J. Lancaster; and an account of the proceeds of an insurance policy taken upon the life of Thomas C. Lancaster for the benefit of his wife, the said Julia A. Lancaster. To this bill the foreign representatives of John J. Lancaster filed a plea in abatement, which was sustained by the court upon the ground that the plaintiffs had failed to make out a case entitling them to sue a foreign administrator in the said circuit court, and thereupon the bill was dismissed as to such representatives. The cause having been remanded to rules, with leave to amend the bill, subsequently, to-wit, at March rules, 1888, the plaintiffs, the personal representatives of T. C. Lancaster, deceased, certain of the heirs of the said T. C. Lancaster, and the administrator of one of the said heirs who had died, filed their amended bill against the personal representative of John J. Lancaster in Virginia, whom they had, pending this litigation, caused to be appointed, and against the widow of T. C. Lancaster, and the other heirs of T. C. Lancaster, who had not been named as plaintiffs, and the infant heirs of John J. Lancaster, who are the appellants here. In this amended bill the allegations and prayers of the original bill are reiterated, the only new allegation being that since the filing of the said original bill the will of John J. Lancaster, made in New York, the place of his residence at the time of his death, had been admitted to probate in the state of Virginia, and that letters of administration had been granted thereon. To the amended bill, infant children of John J. Lancaster, by their guardian ad litem, filed their demurrer, which being overruled, they took this appeal.

It thus plainly appears that the first, and perhaps the only, question we have to decide is whether an appeal lies from such a decree; for, unless this inquiry can be determined affirmatively, the court has no election, although, if it were permitted to examine the bill, it might be of opinion the bill was multifarious, or demurrable for misjoinder of parties, or that it should have been dismissed for want of jurisdiction, but must dismiss the appeal. Now, that the jurisdiction of this court in relation to such appeals is purely statutory, there can be no doubt. Elder's Ex'rs v. Harris, 75 Va. 68. Does, then, the present case come within the words or purview of the statute? This is the inquiry. The statute (section 2, c. 178, Code 1873, the language of which is identical with section 3454 of the Code of 1887) provides that any person who is a party to any case in chancery wherein there is a decree or order dissolving an injunction, or requiring money to be paid, or the possession or title of property to be changed, or adjudicating the principles of the cause, or to any civil case wherein there is a final judgment, decree, or order, may present a petition, if the case be in chancery, for an appeal from the decree or order. It is not pretended that this is a final decree,

Digitized by Google

or that it belongs to either of the classes first enumerated in the statute. But it is insisted with much earnestness and plausibility that the decree in the present case is a decree adjudicating the principles of the cause. The theory of the appellants is that the effect of the action of the court is to declare that the correct decision of the case is dependent upon an account of the alleged partnership, and to compel such an account. But in this we think the appellants are mistaken. The effect, at most, of the overruling of the demurrer is to say that, in the opinion of the court, if the plaintiffs establish the case made in their bill, they may be entitled to the relief sought therein.

It is difficult, if not impossible, to define exactly what is meant by adjudicating the principles of the cause in such a way as to fit every case; but it must mean that the rules or methods by which the rights of the parties are to be finally worked out have been so far determined that it is only necessary to apply these rules or methods to the facts of the case in order to ascertain the relative rights of the parties with regard to the subject-matter of the suit. If this be so, why then manifestly the action of the court does not adjudicate the principles of the cause, but only indicates an opinion that the rendering of the account is necessary to a correct determination of the question whether there shall be a reconveyance of the property or not. But, apart from the special circumstances of this case, the court is of opinion that a decree of this kind does not fall within the purview of the statute. While I can find no case in which the question has been adjudged or even raised in this state, that is a circumstance in itself from which, considering the multitude of instances which have occurred in which it must have been to the interest of both parties to have had an appeal from just such decrees, it appears that the opinion of the bar is and has been adverse to the pretension. I find, however, that in West Virginia, where the statute is doubtless similar to our own, that the question has been directly adjudged, and in accordance with this view. Buehler v. Cheuvront, 15 W. Va. 480. It follows as the result of these views that the appeal must be dismissed as having been improvidently awarded.

(86 Va. 165)

RICHMOND & D. R. CO. *v.* WILLIAMS.

(*Supreme Court of Appeals of Virginia.* June 13, 1889.)

INJURY TO RAILROAD EMPLOYÉ.

Plaintiff, a brakeman, was ordered by the conductor of a freight train to go up on a freight-car, while the train was standing, to let off a brake. The upper round of the ladder was broken, which was unknown to plaintiff, and while he was leaning out, attempting to get on the roof, the conductor signaled the engineer to back up, and, the dead-block being broken, the cars came together, and plaintiff was caught between them and crushed. *Held*, that the conductor was negligent in starting the engine, knowing the position of plaintiff, and defendant was liable for his neglect.

W. R. Staples and *L. C. Berkeley*, for plaintiff in error.

LACY, J. This is a writ of error to a judgment of the corporation court of Danville City, rendered on the 12th day of July, 1888. The action was by the defendant in error for damages for personal injuries sustained while in the employment of the plaintiff in error as a brakeman. The case is as follows: On the 16th day of February, 1888, at 2:45 A. M., the defendant in error was engaged on the crew of the yard-engine, shifting cars in the said city on the side tracks of the said plaintiff in error. It was the duty of the said defendant in error to couple and to uncouple cars. Having made a required coupling, he was directed by the conductor, who was his superior, and not his fellow-servant, to get upon the top of the cars, and turn off the brakes, he saying: "Hop up, and let her go." He climbed upon the nearest ladder, and, when he reached the top of the car, he reached for the hand-hold to the ladder, and it was gone, had been broken off, and he twisted his body to one side to reach the foot-board over the center of the top of the car, to pull up. At this instant, the defendant in error carrying a lantern on his arm, the conductor signaled the engineer to come back, and by reason of his body being sideways, and the combing or roof of the cars coming very close together, and one dead-block being broken off, the body of the defendant in error was caught and mashed, injuring him seriously. There was a demurrer to the evidence by the plaintiff in error, and a verdict by the jury, subject to the judgment of the court upon the demurrer, for $2,000, and judgment was rendered for the plaintiff by the court; whereupon, the case was brought here by writ of error.

The case will be heard and considered here upon principles well understood when the case comes up upon a demurrer to the evidence. See Railroad Co. v. Moore's Adm'r, 78 Va. 93; Ware v. Stephenson, 10 Leigh, 155; Trout v. Railroad Co., 23 Grat. 619; Green v. Judith, 5 Rand. (Va.) 1; Hansbrough's Ex'rs v. Thom, 3 Leigh, 147; Stephens v. White, 2 Wash. (Va.) 203, 210; Steam-Ship Co. v. Nottinghams, 17 Grat. 115.

The testimony of the plaintiff below, taken as true here, is that the broken hand-hold was unknown to the plaintiff, the defective car having come in that night; that the conductor knew that these cars came so close together as to make it dangerous to go between them when in motion, and that he had so instructed the defendant in error; that the said conductor directed him to ascend them while standing; that before he got upon them, as he was in the act of ascending, and in a position which the conductor could see, or ought to have seen, as he carried a lantern, the conductor caused them to come back, and take up the slack, and so injure him. This negligence of the conductor is the negligence

Digitized by Google

of the company. And while it is true that the injury would, nevertheless, not have happened but for the defective ladder, this defective ladder was also the negligence of the company. It is true that when a servant enters upon an employment he accepts the service subject to the risks incident to it. Clark v. Railroad Co., 78 Va. 709; Darracott v. Railroad Co., 83 Va. 288, 2 S. E. Rep. 511; Railroad Co. v. Moore's Adm'r, supra. It is, however, the duty of the company to exercise all reasonable care to provide and maintain safe, sound, and suitable machinery, roadway, structures, and instrumentalities; and it must not expose its employés to risks beyond those which are incident to the employment, and were in contemplation at the time of the contract of service, and the employé has a right to presume these duties have been performed. Here was a broken ladder. See Railroad Co. v. Moore's Adm'r, supra. Here was a railroad train set in motion by the conductor, under such circumstances as to imperil the life of an employé, and to injure his person. See Ayers v. Railroad Co., 5 S. E. Rep. 582; Railroad Co. v. Ross, 112 U. S. 377, 5 Sup. Ct. Rep. 184; Railroad Co. v. Cottrell, 83 Va. 519, 3 S. E. Rep. 123. The dangerous character of these cars was known to the conductor. The position of the brakeman, the defendant in error, was known to the said conductor. If he had waited until his order had been obeyed, and the brakeman was upon the car before he drove them together, the injury would not have happened, and the delay in getting up was caused by the broken ladder, which was the negligence of the company. As the injury was caused solely by the negligent conduct of the company's agent, the case was clearly with the plaintiff on the demurrer to the evidence, for the company is clearly bound by the acts of the conductor in this case, who could not be held the fellow-servant of the defendant in error, (Railroad Co. v. Ross, supra;) and, the corporation court of Danville City having rightly so decided, the judgment of that court must be affirmed.

(86 Va. 206)

KRAKE v. ALEXANDER *et al.*

(*Supreme Court of Appeals of Virginia.* June 13, 1889.)

GAMBLING CONTRACTS.

A judgment was obtained against a surety on notes given as margins on grain and pork options. The surety borrowed money from K. to pay the judgment, securing K. by a deed of trust on land. K. had no connection with the option transaction, nor was it shown that he had any knowledge of it. *Held*, on a creditors' bill to audit the liens on the lands of the surety, that the trust-deed to K. was not void as against the other creditors, as being based on a gambling consideration.

G. D. Gray and *J. F. Bixey*, for appellant. *G. A. Mushback* and *W. L. Jeffries*, for appellees.

FAUNTLEROY, J. This cause comes here on an appeal by J. H. Krake from a decree of the circuit court of Culpeper county, rendered on the 4th day of June, 1888, in a creditors' suit in chancery, instituted by the Mifflin County National Bank, complainant, against J. P. Alexander and others, defendants, for the purpose of having audited the liens by deeds, judgments, etc., on the lands of the said J. P. Alexander, and of subjecting the said lands to sale for the payment of the said liens, in the order of their priorities. The bill was filed on the 11th of June, 1887, and on the 14th of September, 1887, the court decreed that an account be taken and reported by a master commissioner of the said land, and of the liens thereon, in their order; which account was accordingly taken and reported March 3, 1888. On the 23d of March, 1888, the cause was heard on the papers formerly read, and on the said commissioner's report, to which there was then no exception; and the court, without confirming the said report, decreed a sale of the lands of the said defendant J. P. Alexander. On the 30th of May, 1888, the said lands were sold for an amount not aggregating quite one-half of the total of liens reported, which sale was reported to the said circuit court, and was confirmed by decree at June term, 1888; and the commissioners of sale were directed to receive the entire purchase money from the purchaser, who was desirous of paying it all then. Among the liens reported by the master commissioner as forming the fourth class were two bonds or notes of J. P. Alexander, aggregating $1,900 principal, with interest at 8 per cent. from 16th October, 1885, payable to J. H. Krake, appellant here, amounting then to $2,254.67. These two bonds or notes were secured by a deed of trust, dated 16th of October, 1885, duly executed and acknowledged by said J. P. Alexander and wife, conveying the lands of the said J. P. Alexander to Frederick J. Flamm, trustee, in trust to secure to J. H. Krake the payment of $1,900, as evidenced by a note for $900, due four months after date, and another note for $1,000, due eight months after date, with interest at 8 per cent., of even date with the deed of trust, and payable at the Bank of Commerce, in St. Louis, Mo., to the order of J. H. Krake. At the said June term, 1888, of the said circuit court, G. H. Robinson & Sons, creditors of J. P. Alexander, of the tenth class, filed an exception to the said report of the master commissioner, as follows: "Because the 4th lien reported by commissioner, viz., that of J. H. Krake, is, as shown by the testimony in the cause, based on a gambling consideration, and is a gambling debt, and void under the law, and as against the debt due exceptant, and is not a lien upon the land." At the said term, June 4, 1888, the cause was heard on the former papers, the report of the sale showing the collection of the entire purchase money for the land sold, and on the said exception filed by G. H. Robinson & Sons; and the court, by decree of June 4, 1888, sustained the said exception of G. H. Robinson & Sons to the debt reported in the fourth class in favor of J. H.

Digitized by Google

Krake for $2,254.57; and it also ordered the commissioner of sale to pay certain of the liens reported out of the purchase money in hand. From this decree, so far as it sustains the said exception of G. H. Robinson & Sons to the report of the said lien in favor of said J. H. Krake, the said Krake has taken this appeal.

We are of opinion that the circuit court erred in sustaining the said exception. The issue is solely between appellant, Krake, and the exceptants, for themselves and the creditors junior to the fourth class. The question before this court is whether the lien reported in favor of Krake is shown by the testimony to have been based on a gambling consideration, and, as such, void under the law; and, further, if such were the fact, whether Krake had notice of it. The only testimony or other evidence in the cause on this matter is the depositions of J. P. Alexander and Ard. Alexander, and the deed of trust aforesaid, made to secure Krake. The depositions of J. P. Alexander, defendant, and of Ard. Alexander, his brother, were taken on behalf of the creditors. J. P. Alexander testifies "that a man named J. S. Phelps borrowed $2,000. J. P. Alexander and Ard. Alexander were on his note, payable to Imbs & Co. Phelps failed, and Imbs & Co. indorsed the note to Hartman, who sued and obtained judgment against us. My wife and I were in St. Louis about two years ago last fall, and we gave notes—one for $900, and the other for $1,000—in satisfaction of the judgment, and these are the two notes or bonds reported by the commissioner." He further certifies that Phelps used the notes given by him to Imbs & Co., on which he (J. P. Alexander) and his brother were sureties, as margins on grain and pork options; that Imbs & Co. were commission merchants; that the note of Phelps, on which he and his brother were sureties, was indorsed by Imbs & Co. to Hartman, who obtained judgment on it; and that to reimburse Imbs & Co. the said notes for $900 and $1,000 were given; and that Krake had married a relative of Imbs. Ard. Alexander testifies to the same, and says, also, that, "in the spring of 1883, I received a letter from J. S. Phelps, inclosing a note in favor of J. F. Imbs & Co., for $2,000, payable in ninety days, with 8 per cent. interest. Phelps stated in his letter that he wished to use it as margins on pork and wheat options with Imbs & Co., and asked me to go his security, together with my brother, J. P. Alexander. I and my brother signed the note, and Phelps used it with Imbs & Co. I saw Phelps take it into the office of Imbs & Co., and hand Imbs the note, who told him he wanted the money, and not the note; whereupon Phelps told him to indorse the note, and he would get the money, which Imbs did; and Phelps got the money from Hartman, and gave it to Imbs, which also I saw. After maturity of the note Hartman sued Phelps, my brother, and myself, and obtained judgment against us. Phelps was then insolvent, and Hartman required Imbs to pay the judgment, which he did, and took an assignment of the judgment. I was informed that he afterwards required J. P. Alexander to pay or secure the judgment to be paid to him. Phelps bought 20,000 bushels October wheat, and 2,000 barrels of pork, I think for September, and the money obtained on the note was put up as a margin for the speculation." This is all the testimony in the cause.

There is nothing in these depositions to show any knowledge by Krake of the transaction of Phelps and Imbs & Co., or of Alexander's connection with it, be that transaction what it may.

The record shows a plain and ordinary business transaction between J. P. Alexander and Krake. Alexander wanted $1,900, and he borrowed it from Krake, giving his bonds or notes secured by a deed of trust. Krake was no party to the transaction of 1883, and, so far as the record shows, he knew nothing about it. He had married a relative of Imbs, but that does not necessarily make him cognizant of the business transactions of Imbs & Co. He, no more than any other lender of money, was not bound to inquire of his borrower what he wanted the money for, nor is he to be affected by any use to which Alexander, his borrower, chose to make of the money, which became Alexander's property by the loan.

There is nothing in the record to impeach the transaction between Alexander and Krake, nor to take it out of the category of the like transactions, fair, legitimate, and usual, had in the every-day business of men. It would be hazardous and wrong to allow mere conjecture, or suspicious theories, unsupported by fact or evidence, to impair the validity of deeds of trust, where the creditor has lent his money on the faith of security such as that in this case; and still greater would be the danger and injury of holding the lender creditor responsible for the use which the borrower might make of the loan. Whatever the character of the original transaction may have been, Krake was no party to it. His loan to Alexander was not made at the time and for use in the proposed intent or speculation, for that was all passed and gone by. Alexander was only a security for Phelps, and, if he could have resisted the demand on him, yet the law does not compel him to plead the gambling act, any more than it would compel him to plead the statute of limitations; nor would it be more unlawful to lend money to a man to be used in paying an old obligation, which he could resist under section 2836, Code 1887, than it would be to lend him money to pay an old debt barred by time.

Whether speculations or transactions in options and margins be unlawful in Virginia is a question which this court is not called on to consider in this case. The evidence of the two Alexanders, besides being loose and vague, and much of it hearsay and unpro-

Digitized by Google

duced letters, falls far short of proving the material details of the transaction, intended or actually made, as to terms, delivery, time, etc., to justify this court in deciding it to be in violation of the gambling act, or of the statute of frauds, even as between the actual parties to it. Still less can this court make proof, so deficient, the basis for avoiding the contract evidenced by the bonds and deed of trust between Alexander and Krake. The circuit court erred in sustaining the exception of Robinson & Sons to the report of the master commissioner in favor of Krake's lien in the fourth class; and the decree, so far as complained of, must be reversed and annulled; and the cause must be remanded to the circuit court for a decree to pay the lien of the appellant, Krake, as reported in the fourth class, out of the purchase money for the land sold in the hands of the court; and for costs in favor of appellant.

(86 Va. 169)

PAGE'S ADM'R *et al.* v. LINDSAY *et al.*

(*Supreme Court of Appeals of Virginia.* June 18, 1889.)

TRUSTS.

One P. was trustee of some real and personal property for his adult children. He rented an hotel, listed the furniture for taxation under oath, and paid the bulk of the purchase money in his own name. One of the children was a partner in the business with him. The real estate remained unsold, and the personal property was insufficient to make the purchase. After the death of the trustee the children claimed the furniture as part of the trust-estate, as against P.'s creditors. *Held*, that the evidence was insufficient to establish the trust.

O. Howard, for appellants. *J. Lyons* and *H. Willison*, for appellees.

LACY, J. This is an appeal from a decree of the chancery court of the city of Richmond, rendered on the 25th day of February, 1888. The case is as follows: A creditors' bill was filed in March, 1884, against John M. Page's administratrix, the appellant. The said John M. Page, then deceased, had been the lessee of the St. James Hotel, in the city of Richmond, and at his death his wife, the appellant, qualified as administratrix upon his estate, giving a bond in the penalty of $200. The bill of Lindsay and others, (Lindsay being the butcher who supplied the hotel with meat, and Charles H. Page, coal and wood dealer, who had furnished fuel to the hotel,) in behalf of themselves and all other creditors who should come into the suit, set forth that they were creditors in large amounts; that John M. Page had left $7,000 or $8,000 worth of furniture and fixtures at the hotel belonging to his estate, which had gone into the hands of his administratrix, and which she was trying to sell and dispose of, although she had given only a $200 bond, the said administratrix claiming that the property was not the individual property of John M. Page, but was trust property, not liable for his debts; that the said administratrix was personally insolvent; that there was a lien on the property to secure the rent to the lessors, Belvin's executrix and executor; praying for an injunction, and a receiver to take charge of the property, and sell the same for the payments of the debts of John M. Page, deceased. The administratrix, the widow, and the children of the said John M. Page answered, claiming under the alleged trust. Belvin's executor filed a petition claiming a rent of $2,000, and sued out also a distress warrant for the said rent. Other creditors came in, and there was a consent order, by which the property was sold, and the money placed in bank, to the credit of the cause, the sales amounting to over $5,000. Some testimony was taken, and the cause referred to a commissioner, who reported in favor of the trust as claimed by the administratrix, saying: "It has been with the greatest difficulty and labor that your commissioner has been able to get evidence sufficient to make any report in response to the inquiries directed by said decree of June 30, 1885,—the counsel in the cause, whose business it was to furnish the information necessary, seeming to have lost all interest in the same;" reported the debts of the said plaintiffs, but seemed to regard the proof as to them as far from satisfactory. On the 25th of February the court sustained the exceptions filed by the creditors of the said John M. Page, the said Belvin's executor, and the petitioning creditor, the Ottoman Cahvey Company, and decreed them their debts out of the fund in bank; "and the court being of opinion that it would be premature to pass further upon the said report of Commissioner Steger, and the exceptions thereto, until the inquiries to be directed, reserved all other questions, and directed accounts—*First*, of the transactions of John M. Page as trustee, and the balance due from him on that account; *second*, to make up a scheme for the distribution of the remainder of the fund remaining after the payment of the rent, and the debt to the executors and creditors, and the priority of the debts; *third*, an account of the trust fund, if any, due W. S. Page, the son and business partner of John M. Page; *fourth*, for any other accounts appearing necessary or required." From this decree the administratrix and the children of John M. Page appealed to this court.

By the action of the court in sustaining the first exception of Belvin's executors, the court decided that the conclusion of the commissioner, that the property in the St. James Hotel was purchased by John M. Page with money derived from the trust fund mentioned in said report, is not justified by the evidence in the cause. This involves the simple question of fact whether the evidence is clear and distinct in the establishing by proof that trust funds had been here invested by the trustee in the purchase of property in his own name. The commissioner, as we have seen, regarded the evidence as meager, and the court considered it as insufficient. So far as the evidence in the record goes,

Digitized by Google

there is no proof of a trust fund in the hands of the alleged trustee sufficient to make the purchase which was made, and it is not to be doubted that a large part of the alleged trust property was not actually sold, but removed to the St. James Hotel from the Charlottesville Hotel. While it is clear that the lease was taken by John M. Page in his own name, all the property listed under oath for taxation under his own name, and the bulk of the purchase money actually paid in his own name, while the beneficiaries of the alleged trust were adult persons, one of them a partner and participator in all this, there is no hint of any trust in the matter of this purchase until the alleged trustee fell behind, and had to borrow money to meet a payment. There was a trust of real and personal property granted to this party by the will of her husband, W. C. Page. The real estate has not been sold, and the personal property in the first place was insufficient to make this purchase, and in the second place does not appear to have been so indicated by sufficient and adequate proof. The decree of the chancery court not appearing to be erroneous, but plainly right, the same must be affirmed.

(86 Va. 173)

ALVEY *v.* CAHOON *et al.*

(*Supreme Court of Appeals of Virginia.* June 13, 1889.)

EJECTMENT — JUDGMENT — AMENDMENT — DEMURRER.

1. Under Code Va. 1873, c. 177, § 5, which provides that the judge in vacation may, on motion of any party, amend a judgment or decree in which there is any mistake, miscalculation, or misrecital of any name, sum, quantity, or time, when the same is right in any part of the records or proceedings, according to the truth and justice of the case, an amendment of a judgment in ejectment for plaintiffs, "for their term yet to come in the lands," etc., so as to conform with plaintiff's claim and the requirements of Code Va. 1849, which adopts the action of ejectment to try conflicting titles to real property, as well as to gain possession of land, and making the real claimant plaintiff in the action, is not erroneous, for, the fictitious form being abolished, the possession of the land is recovered.

2. Where there is no demurrer to a declaration, which on its face states a good cause of action, no errors can be assigned thereto on appeal.

John B. Donovan, for plaintiff in error. *McCandlish, Jones & Stubbs*, for defendants in error.

LACY, J. This is a writ of error to a judgment of the circuit court of Matthews county, rendered in an action of ejectment in the said court. The case is as follows: The defendants in error brought their action of ejectment in the said court for the recovery of the possession of the land in controversy, and, a jury being mutually waived, the case was submitted to the court on the whole question of law and fact, and a judgment rendered for the plaintiffs "for their term yet to come, in the lands," etc., and a writ granted to the sheriff to cause them to have possession of their term aforesaid. The defendant applied for and obtained a writ of error to this court, because there was a judgment for a term, whereas the action was not to secure a term, but the possession of the premises claimed in fee, which writ of error was dismissed here at the January term, 1888. Subsequently the execution issued upon the judgment was quashed by the circuit court, and upon motion the judgment corrected so as to make the recovery, not for a term, but in accordance with the claim of the plaintiff; and thereupon the plaintiff in error again applied for a writ of error, which was awarded; the error assigned now being that the circuit court erred in amending the judgment.

If the original judgment be erroneous in matter of law, one writ of error thereto here having been dismissed and finally determined, it cannot again be inquired into in any court. If dismissed for matter merely formal, as for failure to print, the effect is, so far as any rehearing is concerned, the same as an affirmance in this court. Woodson v. Leyborn, 3 S. E. Rep. 878, and cases cited. The judgment having been rendered for the term yet to come, according to the old form in use before the Revision of 1849, the old *ejectione firmæ* giving a remedy only in damages, and in the reign of Edward IV. it being resolved that a plaintiff in ejectment should recover possession of his term, and so adjudged solemnly in 14 Hen. VII., *quod recuperet suum præceptum*,—was a judgment, as we have said, not warranted by the original writ, which goes only to damages for the trespass. Soon thereafter ejectments were applied to recovering possession of land and trying titles as a remedy more simple, and less inconvenient and tedious, than the multifarious and complicated proceedings in the great variety of real actions. Then, as a term was to be recovered, a term was created by the claimant, and an ejectment effected against the trespasser in the name of the plaintiff's lessor. 4 Reeve, Eng. Law, 241, 242. The judge of the court below was moved to amend the judgment, so as to conform to the requirements of our law on ejectment adopted in the Code of 1849, by which the revisors sought to adapt the action of ejectment to the trial of conflicting titles to real property, as well as to the recovery of the possession thereof, and at the same time to strip the remedy of such fictions as were supposed to disfigure it,—the real claimant being inserted as plaintiff, and all the provisions of law concerning a lessor of a plaintiff made applicable to him, and no fictitious person allowed to bring such action; and the possession is to be recovered and delivered accordingly, the declaration being required to describe the premises with sufficient certainty to this end.

This motion was granted under the authority of the fifth section of chapter 177 of the Code of 1873; the mistake as to the quantity of estate recovered having been made by following the old form for a judgment in

Digitized by Google

ejectment anterior to the adoption of the Code of 1849, and set forth in the Forms and Practice of Mr. Conway Robinson, published anterior to the change in the law, and in other old volumes. Mr. Bouvier, speaking of this action, says that the plaintiff recovers his term and damages, or damages merely, when the term expires during suit; saying, further: "Where the fictitious form is abolished, however, the possession of the land generally is recovered." Our statute is a substantial reprint on this subject of the Revised Statutes of New York, (volume 2, p. 302;) and the judgment should be for the real plaintiff according to his right, and the writ to the sheriff should deliver the premises accordingly. We think there was no error in the said action of the circuit court.

As to the errors assigned because of supposed defects in the declaration, we are of opinion that the declaration is sufficient. There was no demurrer in the court below, and the declaration states a good cause of action. Upon the whole case we are of opinion that there is no error in the judgment complained of and appealed from here, and we are of opinion to affirm the same.

(86 Va. 177)

ROWE'S ADM'RS v. MARCHANT.

(*Supreme Court of Appeals of Virginia.* June 13, 1889.)

GIFT—ACKNOWLEDGMENT OF DEBT.

1. One R. took from plaintiff, his father-in-law, who was living with him, certain bonds which R. owed him, plaintiff being sick at the time, and destroyed them. On plaintiff's recovery he missed the bonds, and R. gave him a written acknowledgment of their destruction, and a statement of their amount, and that they were unpaid. Plaintiff gave R. a release of the interest due on the bonds to that date. *Held*, that there was no such possession of the bonds by R. as to constitute a gift, under Code Va. 1887, § 2414, providing that no gift of chattels shall be valid unless the chattels come to the actual possession of the donee, and, if the parties reside together, possession at the place of residence shall not be sufficient.

2. After the destruction of the bonds, which were at that time barred by the statute of limitations, R. wrote under a written statement of the date and amount of the bonds a statement that the above entries of the "amounts of money due by me" to plaintiff were correct, and that the bonds "were never paid by me." *Held*, to be a sufficient acknowledgment of the debt to take it from under the statute, under Code Va. 1878, c. 146, § 10, providing that the promise to pay the debt must be in writing, and that an acknowledgment in writing of the debt from which a "promise of payment may be implied shall be deemed to be such promise."

FAUNTLEROY, J., dissenting.

Donovan & Jones, for appellants. *H. R. Pollard*, for appellee.

LACY, J. This is an appeal from a decree of the circuit court of Gloucester county, rendered on the 11th day of March, 1887. The bill was filed in this suit by the appellee against the appellants as the administrators of Thomas B. Rowe, to collect certain debts claimed against the said estate by the plaintiff, and to have a settlement of the estate in their hands for the benefit of the plaintiff and all other creditors who should come in on the usual terms. The answer denied the existence of any debts, admitting that the debts claimed once existed, but only as advancements, and alleging that they were barred by the statute of limitations. The case appears to be as follows: Marchant held the bonds of Rowe as follows: Bond dated April 6, 1854, for the sum of $1,214.38; another bond of $500, dated October 2, 1854; $653.92, January 10, 1856; and $1,200, due by bond dated September 17, 1849; and $1,000, due by bond dated 24th of March, 1880, and payable on demand; and $1,000, due by bond dated 6th of October, 1880. Rowe was about 60 years of age and the son-in-law of Marchant, who was about 85 years of age. Rowe was an inmate of Marchant's family, and an intimate friend. Marchant was taken sick, and his disease developed until his life was despaired of, when Rowe, knowing of the whereabouts of these bonds, got them out from among Marchant's papers, and destroyed them, thinking Marchant would certainly die. But Marchant got well, and missed his bonds, and subsequently Rowe confessed the foregoing, and offered to renew them, and a difficulty grew up between them because of the destruction of these bonds by Rowe. Mr. W. W. Woodward, a lawyer and mutual friend, settled the difficulty as follows: Marchant had preserved in his memorandum book a list of these bonds in dispute, thus: "Amount of bond due 6th of April, 1854, $1,214.38; amount of bond due 2d of October, 1854, $500.00; amount of bond due 1st January, 1856, $653.92; amount of bond due 17th September, 1849, $1,200.00." Under this was written by Rowe: "June 14th, 1882. The four entries above written, of dates and amounts of money due by me to Thomas Marchant, are correct. These bonds were in my possession, and while in my possession destroyed by me without the knowledge of the said Thomas Marchant, but were never paid by me. T. B. ROWE. Witness: W. W WOODWARD." And then Thomas Marchant gave to Rowe the following paper: "June 14th, 1882. I, Thomas Marchant, of Gloucester county, in the state of Virginia, do hereby release and quitclaim to all interest due me by Thomas B. Rowe on four bonds, to-wit: A bond for $1,214.38, dated April 6th, 1854; a bond for $653.92, dated 1st of January, 1856; and a bond for $500.00, dated 2d October, 1854; and a bond for $1,200.00, dated September 7th, 1849,—it being my intention only to charge him with the principal sums of said bonds in my will. THOS. MARCHANT." These papers, constituting the settlement, being mutually exchanged, civil relations were restored between the parties. Rowe died, and in 1885 Marchant still living, this suit was brought by him as stated.

The defense is—*First*, that these bonds were given by Marchant to Rowe as advancements; *secondly*, that they are barred by the statute of limitations.

Digitized by Google

As to the first, it is not pretended that any possession of these bonds ever passed with the alleged promise to give them by charging them in the will. They were unlawfully taken by Rowe, while Marchant was lying helpless, and supposed to be dying; and Rowe excuses himself for this act, when admonished of its enormity, by saying that Mr. Marchant had promised to give him these bonds in his will, and he knew he did not have a will, and thought he was dying, and did not think it was wrong. This was condoned upon such restitution as has been mentioned. Whereupon Marchant gave him the accrued interest,—a large sum,—and announced his purpose of not charging him in his will with any interest,—"only with the principal of these bonds." This may have been intended by Marchant as a promise to give him by his will all interest which might accrue, but, however that was, the will was never made, and Marchant, living, demands payment of the bonds alleged to have been given to Rowe.

That there was no valid and binding gift is clear. Our statute provides that no gift of any goods and chattels shall be valid, unless actual possession shall come to and remain with the donee, or some person claiming under him. And, if the donor and donee reside together at the time of the gift, possession at the place of their residence shall not be sufficient possession within the meaning of this section. Code 1873, c. 112, § 1; Code Va. § 2414. As to what constitutes a sufficient delivery of possession, I refer to the opinion of LEWIS, P., in the late case of Yancey v. Field, reported in 8 S. E. Rep. 721, where the subject is fully treated. This case has been so recently decided here, the opinion having been rendered February 14th of the present year, that it is unnecessary again to discuss the question. In this case there was really no gift of these bonds, but a gift of accrued interest, and a distinct refusal to give the bonds. There was an intention expressed to give the interest in the will, but the will has not been made, and by the mutual understanding of the parties the whole subject was retained under the control of the supposed donor. There is no valid ground upon which Marchant can be claimed to have given these bonds to Rowe. Rowe took possession of them without authority, while Marchant was supposed to be dying, but this act Marchant repudiated when he got well, and compelled from Rowe all the restitution he desired.

As to the second contention, that the bonds are barred by the statute of limitation, we will observe that the acknowledgment of Rowe is claimed to have taken these bonds out of the bar of the statute. By the eighth section of chapter 146 of the Code of 1873, 20 years is the limitation prescribed as to these bonds, and this period has elapsed unless the statute is saved by the acknowledgment of June 14, 1882. As to this, the tenth section of the same chapter provides: "If any person, against whom the right shall have so accrued on an award, or on any such contract, (referring to the eighth section,) shall, by writing signed by him or his agent, promise payment of money on such award or contract, the person to whom the right shall have so accrued may maintain an action for the money so promised, within such number of years after the said promise as it might originally have been maintained within, upon the award or contract, and the plaintiff may either sue on such promise, or on the original cause of action; and in the latter case, in answer to a plea under the eighth section, may, by way of replication, state such promise, and that such action was brought within the said number of years thereafter; but no promise, except by writing as aforesaid, shall take any case out of the operation of the said eighth section, or deprive any party of the benefit thereof. An acknowledgment in writing as aforesaid, from which a promise of payment may be implied, shall be deemed to be such promise, in the meaning of this section."

The acknowledgment in this case is written under a statement of the bonds, dates, and amounts, and is that "the four entries above written, of dates and amounts of money due by me to Thomas Marchant, are correct," and that the bonds themselves by which this was evidenced had been destroyed by him without the knowledge of Thomas Marchant, and that the said amounts had never been paid. At the same time he received a gift of about $4,000 of interest from Marchant. That the intention of the parties was mutually to set up these lost bonds, and to promise to pay them, cannot be doubted. The actual writing is a statement of a particular debt, its date, and its amount, and an acknowledgment by Rowe that this particular amount of money is due by him to Marchant. This was such an acknowledgment as implies a promise to pay. There could have been no other object in the writing. It is a distinct and unequivocal acknowledgment of the debt as still subsisting as a personal obligation of the debtor. As was said by Judge PARKER in Aylett v. Robinson, 9 Leigh, 45: "The promise or acknowledgment to take the case out of the statute must be an express promise, or such an acknowledgment of a balance due, unaccompanied by reservations or conditions." By Chief Justice MARSHALL in Clementson v. Williams, 8 Cranch, 72: "The acknowledgment must go to the fact that it is still due." To revive a debt by a new promise the new promise may be either express or implied, and an implied promise is created by a clear and unqualified acknowledgment of the debt. Ang. Lim. 240.

This court in a late case, reported in 32 Grat. 807, (Dinguid v. Schoolfield,) said: "There is no doubt the plaintiff, to maintain the issue on his part, was bound to prove the promise alleged in his replication, (the new promise.) He was not required to prove an express promise. It was sufficient for him,

Digitized by Google

under the statute, to establish an acknowledgment in writing, from which a promise in writing might be implied. * * * Such acknowledgment, to be effectual, must not consist of equivocal, vague, and indeterminate expressions, but ought to contain an unqualified and direct admission of a previous subsistory debt, which the party is liable for and willing to pay." Bell v. Morrison, 1 Pet. 351, 362. As was said by TINDAL, C. J., in Linsell v. Bonsor, 2 Bing. N. C. 241, 29 E. C. L. 519: "A distinct and unqualified acknowledgment would have the same effect as a promise, because from such an acknowledgment the law implies a promise to pay." If there be an unequivocal admission that the debt is still due and unpaid, unaccompanied by any expression, declaration, or qualification indicative of an intention not to pay, the state of facts out of which the law implies a promise is then present, and the party is bound by it. JOHNSON, J., in Young v. Monpoey, 2 Bailey, 278. See Bangs v. Hall, 2 Pick. 368; Moore v. Bank, 6 Pet. 86; Bell v. Morrison, supra; Bell v. Crawford, 8 Grat. 110, and authorities there cited; Fort Scott v. Hickman, 112 U. S. 150, 5 Sup. Ct. Rep. 56; 1 Greenl. Ev. 286, 290; Walsh v. Mayer, 111 U. S. 31, 4 Sup. Ct. Rep. 260; Shepherd v. Thompson, 122 U. S. 231, 7 Sup. Ct. Rep. 1229; Bailey v. Crane, 21 Pick. 323; Russell v. Copp, 5 N. H. 154; Head v. Manner, 5 J J. Marsh. 255; Peebles v. Mason, 2 Dev 367; Sutton v. Burruss, 9 Leigh, 381.

The decree of the circuit court of Gloucester county, of March 11, 1887, is in accordance with the foregoing well-settled principles, and will be affirmed. There is no error in the assigned error of the counsel for the appellee, because of the failure of the court to include in its decree the $700.91 reported in the third alternate statement. This amount is reported in favor of J. R. Marchant, and not of Thomas Marchant, and was therefore properly excluded from the amount decreed in favor of the latter. Upon the whole case we think there is no error in the decree complained of, and the same must be affirmed.

FAUNTLEROY, J. I dissent from the opinion of the majority of the court in this case. The facts, as disclosed by the record, are as follows, viz.: Thomas Marchant, the appellee here, an old resident of Gloucester county, Va., over 83 years of age, had three children, viz., John H. Marchant, James R. Marchant, and Rosa Ellen Marchant; and he was the owner of a considerable estate, real and personal, and was free from debt. John H. Marchant died in 187–, leaving children. James R. Marchant is living, and Rosa Ellen Marchant married Thomas B. Rowe, appellants' intestate, June 4, 1850, and she died the 30th of January, 1867, leaving her said husband and two children, viz., a daughter, M. Ora, now the wife of W. D. Hudson, and a son, T. Walter Rowe, the appellants here. Thomas B. Rowe never married again after the death of his said wife, but continued to reside about four miles from his father-in-law, Thomas Marchant, with whom he continued a close, cordial, and kindly intimacy and constant intercourse from the day of his marriage with Rosa Ellen, the daughter of said Thomas Marchant, in 1850, up to the event of the death of the said Thomas B. Rowe, on the 15th of May, 1885, with one short suspension and slight interruption in 1882.

Thomas Marchant had held four bonds of his said son-in-law, Thomas B. Rowe, payable to him, viz.: One dated and due 17th September, 1849, for $1,200, one dated and due 6th April, 1854, for $1,214.38; one dated and due 2d October, 1854, for $500; and one dated and due 1st January, 1856, for $653.92, —aggregating $3,568.30. These said four bonds came into the possession of Thomas B. Rowe, who destroyed them without the knowledge of Marchant. In 1882, Marchant, being dissatisfied and displeased because of the destruction of the said four bonds, held a conference at his own house, on June 14, 1882, with the said Thomas B. Rowe, in the presence of a mutual friend, W. W. Woodward; at which conference the matter was satisfactorily explained, and was finally adjusted by two papers drawn up by Woodward, of the same time and date, one of which was signed by Rowe and delivered to Marchant, and the other was signed by Marchant and delivered to Rowe, Woodward witnessing both papers. The dates and amounts of the said four bonds were written in a memorandum book kept by Marchant, and the writing was made under the said memorandum, and was signed by Rowe, as follows, viz.: "June 14th, 1882. The four entries above written, of dates and amounts of money due by me to Thomas Marchant, are correct. The amounts were evidenced by bonds. These bonds were in my possession, and while in my possession destroyed by me without the knowledge of said Thomas Marchant, but were never paid by me. THOMAS B. ROWE." The paper signed by said Thomas Marchant is as follows, viz.: "June 14th, 1882. I, Thomas Marchant, of Gloucester county, in the state of Virginia, do hereby release and quitclaim to all interest due me by Thomas B. Rowe on four bonds, to-wit: A bond for $1,214.38, dated 6th April, 1854; a bond for $653.92, dated 1st January, 1856; a bond for $500.00, dated 2d October, 1854; and a bond for $1,200.00, dated 17th September, 1849,—it being my intention only to charge him with the principal in my will. THOMAS MARCHANT."

The *status quo* as to the pre-existence of the destroyed bonds being thus established, Marchant's displeasure was wholly allayed, and the cordial and affectionate relations between him and Rowe were fully restored, and continued to Rowe's death. They lived near to each other, and Rowe was often and much at Marchant's house, and the attachment between them was strong. Marchant

Digitized by Google

himself says in his statement in this suit that he always regarded Rowe as an "honest and excellent good man up to the time of his death; that there was a slight misunderstanding between him and Thomas B. Rowe in reference to the four bonds in controversy in this suit, but it was settled by the execution of two papers drawn by W. W. Woodward, Esq., and their former friendly relations entirely restored." After this Marchant loaned to Rowe large sums of money upon his own bonds, without security; upon which, however, the interest has been regularly paid by Rowe, and which are not in controversy in this suit.

It is in proof in the testimony in the record that at the conference on the 14th of June, 1882, Rowe said to Marchant that he took the bonds when he (Marchant) was very sick, and his family did not expect him to live; and that, "inasmuch as Capt. Marchant had told him that he [Marchant] intended to give him these bonds in his will, and knowing that he did not have a will at that time, he thought it would not be wrong for him to take the bonds, and destroy them; but that inasmuch as Capt. Marchant objected to what he had done, and still wanted him to pay the bonds, that he would make all the amends in his power, and renew the bonds, and pay them, if Capt. Marchant required him to do so." "That Capt. Marchant said he would release all interest to date." Mr. Rowe then requested W. W. Woodward to draw a paper renewing the bonds, and he would sign it. Woodward then wrote a renewal of said bonds in a memorandum book belonging to Capt. Marchant, just under a memorandum of the dates and amounts of the said bonds, and Mr. Rowe signed the same. Capt. Marchant then gave Mr. Rowe a release from all interest to date on said four bonds. Capt. Marchant told Woodward, before these papers were signed, that he intended to give Mr. Rowe these bonds in his will. Marchant told the witness Gisler, in 1876, that he had given to Rowe his bonds which he held; and had given up the bonds which he held against the estate of his deceased son, John H. Marchant; and James R. Marchant testifies that his father, Capt. Marchant, had taken up and held the bonds which his son John H. Marchant had given for land which he had bought. The witness Fletcher testifies that when he was at Marchant's house, in October, 1885, Marchant said to him that Rowe owed him $6,000, but he did not expect to recover $3,600 of this, as he had given up to Rowe his bonds for that amount. It is in proof that Marchant released, or thought that he had released, his claim against his son J. H. Marchant's estate for $9,000.

The appellee, Thomas Marchant, filed his bill in this suit at September rules, 1885, claiming that the estate of Thomas B. Rowe, deceased, is indebted to him in the several sums evidenced by the four said bonds; and also in the sums evidenced by two other bonds of the said Thomas B. Rowe for $1,000 each, on demand,—as to which there is no controversy, the said two $1,000 bonds being admitted to be just obligations, to be paid by the estate of Thomas B. Rowe, deceased. The defendants, appellants here, answered the bill, and pleaded the statute of limitations in bar of the said four bonds, and that the said amounts evidenced by the said four bonds were advancements made to Rowe by his father-in-law, Thomas Marchant. Accounts were ordered to be taken by a master, who returned a report disallowing the said four bonds in controversy, and also three alternate reports allowing them. Appellants excepted to the three alternate reports. The cause came on to be heard on the 11th of March, 1887, and the court overruled the appellants' exceptions to the alternate reports, and confirmed the third alternate report, and decreed that the administrator of Thomas B. Rowe, deceased, pay to the complainant, Marchant, *de bonis testatoris*, $6,502.75, with interest on $5,568.30 from 1st January, 1886, which included the said four bonds, with interest from June 14, 1882. From this decree this appeal has been allowed.

The question to be decided by this court is whether the estate of Thomas B. Rowe, deceased, is liable for the amounts evidenced by the aforesaid four bonds, of principal or interest. This question divides itself into two branches: (1) Whether these sums named in the said four bonds were advancements, made, and at any time perfected, by Thomas Marchant to his daughter Rosa Ellen's husband, Thomas B. Rowe, or whether they are debts of Rowe to said Marchant; and, (2) if debts, whether they were barred by statute, at the time suit began. An advancement is an absolute gift, which the donor cannot recall, but for which he may, in his will, abate *pro tanto* the share of his estate devised or bequeathed in it to the donee. A debt is an obligation of the debtor which the creditor retains the right to enforce. These sums, evidenced by the said four bonds, were, originally, debts of Rowe to Marchant, the property in which Marchant did not at first part with, and for which he took Rowe's bonds as evidences of debt. But Rowe being the husband of his daughter, and a man whom Marchant valued, respected, and loved, it is apparent that Marchant let him have the use of these sums, and never did require any interest on them, though he took Rowe's bonds and held them. That he considered the said sums as having been given by him to Rowe appears from the evidence in the record, but he had not perfected the gift or advancement until the conference with Rowe at his house, June 14, 1882. Rowe, in explaining why he had destroyed the bonds during Marchant's illness, said to Marchant that he had told him that he (Marchant) intended to give him the bonds in his will. Marchant did not gainsay this, and his conduct and statements show that he assented to it, and was entirely satisfied with the reasons given by Rowe for his having taken the bonds. Rowe offered

Digitized by Google

to renew the bonds, and pay them if Marchant ever demanded their payment. Marchant never did demand their payment from Rowe in his life-time, but was content with Rowe's acknowledgment in his memorandum book of the fact of the pre-existence of the bonds. It is evident that all Marchant desired or required was to have evidence of the pre-existence of these bonds for the justifying of his abating *pro tanto* the share of his daughter's husband in his distribution by will of his estate. By the paper signed by Rowe in his memorandum book, he was just *in statu quo* as to this, and that was all he wished or required. The destruction of the evidence of the existence of these bonds was the sole matter of complaint with him. He could not deliver up the bonds to Rowe then, as they had been destroyed; but he acquiesced and assented to their having been taken possession of by Rowe, and did not require their renewal, but he did release all interest upon them to date, and stated, in the writing which he then signed and delivered to Rowe, that it was his purpose only to charge him with the principal of the bonds in his will.

This transaction, and the words spoken and written, perfected the advancement of these sums as a gift to Rowe, as fully, effectually, and as manifestly as if Marchant had held possession of the bonds, and then and there had delivered them to Rowe, telling him that he would charge him in his will with the principal of the bonds as an advancement. Had Marchant not intended to perfect the advancement, but to still hold the obligation of Rowe as his debtor, he would have required duplicates of the four bonds to replace those which had been destroyed; and he would have made no mention of charging them in his will, as such a charge would be wholly needless to perpetuate and enforce the debt. We can rationally account in no other way for Marchant's words and acts, and for the paper which he signed then, and delivered to Rowe, which paper, together with the paper signed by Rowe and delivered by him to Marchant, is one transaction, as fully as if both were written on one piece of paper, and before the signing of either of them Marchant said to Rowe that he intended to give the bonds to Rowe in his will. That Marchant considered this transaction as a perfected gift of the bonds to Rowe is proved by his declaration to Fletcher in October, 1885, after he had brought this suit, in a deliberate conversation, at Marchant's house, about his suit against Rowe's estate, that "he had given up to Rowe his bonds," and therefore could not recover the $3,600 evidenced by them. The evidence of Fletcher and Gisler is unimpeached and uncontradicted. The evidence in the record brings the mind irresistibly to the conclusion that Marchant advanced these sums on his daughter's share of his estate, by his assent to the possession of the bonds by Rowe, and that he perfected the gift of these sums by the transaction and satisfactory adjustment made at the conference, June 14, 1882, as fully as if he had then and there held and handed over the bonds to Rowe.

With this view of the case, it is not necessary to inquire into the force of the plea of the statute of limitations. That the said four bonds in controversy would have been barred at the date of the institution of this suit is admitted by the complainant, but it is urged that the paper signed by Rowe on 14th June, 1882, was a new promise, taking the bonds out of the bar of the statute, under section 10, c. 146, Code 1873. Taking the two papers of the 14th of June, 1882, together, or taking the one signed by Rowe by itself, there is certainly no express promise of Rowe to pay the money on these four bonds, and, in fact, two of them were not then barred, and required no new promise, and Marchant could have sued on them as lost bonds. There is nothing in the writing, or in the circumstances attending its being written and signed, to imply a promise to pay. Rowe's verbal offer and declarations do not amount to a written promise. He said that he would pay the bonds if Marchant should demand him so to do, but Marchant did not demand it, and was fully satisfied with the acknowledgment of the pre-existence of the bonds, which would justify him in abating the distributive share of his daughter *pro tanto*. The paper signed by Rowe is simply an admission of the pre-existence of his said four bonds, their dates and amounts, and that he had not paid them; but he does not promise to pay them, and leaves them just as they would be had they not been destroyed, and were then lying on the table before Marchant. The implication of a new promise to pay must arise from the words of the paper itself. The state does not dispense with the requirement of a writing to create a new promise, either implied or express. I am of opinion that the plea of the statute of limitations should be sustained, and that the decree complained of is erroneous, and should be reversed, so far as it overrules the exception of appellants to the three alternate reports of the master, and so far as it allows the said four bonds in controversy as debts for which the estate of appellants' intestate, Rowe, is liable, and also so far as it decrees costs against the said intestate's estate.

(86 Va. 158)

BOARD OF SUPERVISORS v. CATLETT'S EX'RS.

(*Supreme Court of Appeals of Virginia.* June 13, 1889.)

WRIT OF ERROR—COUNTIES—BOARD OF SUPERVISORS—LIMITATIONS.

1. A controversy involving the right of the board of supervisors, as representatives of the county, to levy a tax to pay a claim, is a controversy about a franchise, within the meaning of Code Va. 1887, § 3455, prohibiting writs of error when the amount involved is less than $500, unless there is drawn in question a franchise.

2. The powers and duties of a board of supervisors in Virginia are not judicial in their character, but executive, and their allowance of a claim against the county is not an adjudication of the

Digitized by Google

merits of the claim, so as to estop them, on an application for a *mandamus* to compel its payment, from setting up the original invalidity of the claim or pleading the statute of limitations, or both.

3. A county court by order of November 4, 1863, appointed an agent to perform certain services, and fixed his compensation at $1,000. The agent presented his claim, December 14, 1871, and it was allowed, but no steps were taken for its payment, and in 1878 it was disallowed, and in 1887 an application was made for a *mandamus* to compel the levy of a tax for its payment. *Held* that, as the application for a *mandamus* was in the nature of an action to recover money founded upon a contract not under seal, the application, under the Virginia statute, should have been filed within five years after the date of the first order of the board allowing the claim.

4. A subsequent allowance of the claim, followed by a disallowance on the same day, does not affect the case, as the allowance was not an adjudication of the merits.

Error to circuit court, Gloucester county.

On the 6th of January, 1863, an order was entered by the county court of Gloucester county, appointing John W. C. Catlett an agent for the said county, to receive from the agents of the state the salt to which the county was entitled under the act of the general assembly passed May 9, 1862, (Acts 1861–62, p. 13,) the validity of which was affirmed by this court in Dinwiddie Co. v. Stuart, 28 Grat. 526. By the same order it was also directed that the bonds of the county be issued to the amount of $5,000, and delivered to the said Catlett, who was directed to borrow money upon them, and out of the moneys to be so raised to pay for the salt and all necessary expenses, and to retain in his hands a commission of 5 per centum upon the amount received by him on account of the bonds, as well as the money which he might receive from sales of the salt to the citizens of the county, in full compensation for his services as agent as aforesaid. On the 4th of November, 1863, the county court entered another order, pursuant to the act of the general assembly passed March 30, 1863, appointing the said Catlett an agent for the county to purchase from the superintendent of the salt-works the quota of salt to which the county was entitled under that act, and to make distribution thereof among the citizens of the county. The order also directed additional bonds of the county to be issued and delivered to the said Catlett, upon which to raise money to pay for the salt, and the necessary expenses attending the performance of his duties under the order; and further directed him to retain in his hands the sum of $1,000 in full compensation for his services. The order also contained a provision in these words: "And it is ordered that, in making distribution of the said salt, the agent shall not allow distribution to any person known to be disloyal to the Confederate government." And substantially the same provision is contained in two subsequent orders of the court,—one entered on the 19th May, 1864, the other on the 6th of February, 1865,—directing distribution of salt among the loyal citizens of the county, at certain mentioned prices. On the 14th of December, 1871, the said Catlett presented an account to the board of supervisors of Gloucester for $1,000 in Confederate money for services rendered by him as agent as aforesaid, which was scaled by the board, and its equivalent in currency ascertained to be $157.29, and as scaled the amount was, on the same day, allowed, with interest from the 15th of June, 1863. No steps, however, were taken for the payment of the claim, and on the 26th of May, 1873, an order was entered by the board disallowing it, and directing the clerk "to strike the same from the list of accounts audited against the county," etc. From this order no appeal was taken. It appears, however, that on the 4th of June, 1881, the said Catlett moved the board to issue a warrant in his favor on the order of the 14th of December, 1871, allowing the account; which motion, after being fully argued by counsel, was unanimously refused by the board.

On the 4th of August, 1887, the said Catlett having in the mean time died, the claim was again presented to the board by his executors, and was allowed. This action, however, was on the same day rescinded, and the matter deferred for consideration at the next meeting of the board, when, "after due consideration, the board unanimously refused to make a levy to pay the said claim." The executors thereupon applied by petition to the county court of the said county for a *mandamus* to compel the board of supervisors to make a levy for the payment of the claim, to which petition the board appeared by counsel, and filed its answer, setting up a number of defenses to the claim. One of these defenses was that the board had no authority to make the order of the 14th of December, 1871, allowing the claim, and that it has no power or authority to make a levy to pay the same, because it is for services rendered in aid of rebellion, and is therefore void, and its payment prohibited by the constitutions both of the state and of the United States. Another was that the orders of the county court, under which the services in question were rendered, provide on their face for the compensation to be paid the said Catlett, which he agreed to accept in full compensation for his services, and that his estate is therefore not entitled to recover anything against the county on account of the said services; and the statute of limitations was also pleaded. The executors demurred to the answer, and also replied, averring that the board "is estopped from saying, as it does, that it had no power to make the order of the 14th of December, 1871." When the case came on to be finally heard, the county court awarded a peremptory *mandamus*, as prayed in the petition, which action was afterwards affirmed by the circuit court of the said county; whereupon a writ of error was awarded by one of the judges of this court.

W. B. Taliaferro and *McCandlish & Taylor*, for plaintiffs in error. *Jones & Jackson*, for defendants in error.

Digitized by Google

LEWIS, P., (*after stating the facts as above.*) The defendants in error have moved to dismiss the writ of error as improvidentially awarded, because, they say, the amount involved is less than $500, and therefore that the case is not within the jurisdiction of this court. It is true the amount involved is less than $500, but inasmuch as there is drawn in question a franchise, *i. e.*, the right of the board, as the representatives of the county, to levy a tax to pay the claim in question, the court has jurisdiction of the case, and of the whole case. Const. art. 6, § 2; Code, § 3455; 4 Minor, Inst. 857.

The further objection, that the case cannot be considered on its merits because no exceptions were taken to the action of the county court awarding a *mandamus*, is also without merit. The case was presented to the county court upon the pleadings, and the exhibits therewith filed, and as it was presented there the record presents it here; the exhibits being, in effect, a part of the pleadings. Wright v. Smith, 81 Va. 777.

As to the merits, the principal point made by the defendants in error is that the allowance of the claim by the board on the 14th of December, 1871, was in its nature and effect an adjudication of the merits of the claim, which it was not competent for the board, at a subsequent meeting, to reverse or ignore. But we do not concur in this view. The powers and duties of a board of supervisors in Virginia are not judicial in their character, but are wholly executive or administrative. If it allows a claim not properly and legally chargeable on the county, or which it has not authority to allow, it exceeds its power, and its act is not binding on the county. Its allowance of a claim has no more effect than a settlement between individuals, and a warrant to pay a claim which has been allowed is nothing more than an order upon the county itself, the debtor. That the allowance of a claim by a board of supervisors does not partake of the nature of a judgment, which will estop the county, has been decided in many states and in numerous cases. In a recent case in the supreme court of North Carolina it was held that an allowance of a claim by a county board of commissioners is not final and conclusive, and may be re-examined by the board itself, and that it was error to instruct the jury that the allowance of a claim by the board was an adjudication as binding as the judgment of a court. Abernathy v. Phifer, 84 N. C. 711. So in Gurnee v. Brunswick Co., 1 Hughes, (U. S.) 270, Chief Justice WAITE, in considering the nature of the powers exercised by a board of supervisors, under the laws of this state, in passing upon claims against the county, said: "The board are the representatives of the people, elected to supervise the business of the county, which has been by law committed to their care. They constitute a branch of the executive department of the government, not of the judiciary. * * * When an account is presented to them, it is for allowance, not for adjudication. In settling and allowing they do not act judicially. * * * Their duties are purely administrative." To the same effect is the opinion of Judge DILLON in Shirk v. Pulaski Co., 4 Dill. 209, who cited the following authorities in support of his ruling that the allowance of a claim by a board of supervisors is not an adjudication which will estop the county from setting up a defense to the claim, when subsequently sued upon it, viz.: Webster Co. v. Taylor, 19 Iowa, 117; Clark v. Des Moines, Id. 199; Clark v. Polk Co., Id. 248; School-Dist. v. Lombard, 2 Dill. 493; Leavenworth Co. v. Keller, 6 Kan. 510; Goodnow v. Ramsey Co., 11 Minn. 31, (Gil. 12;) 1 Dill. Mun. Corp. § 412; Mayor v. Ray, 19 Wall. 468. See, also, High, Extr. Rem. § 354.

We have no doubt, therefore, that where, as in the present case, a board of supervisors is sought to be compelled by *mandamus* to make provision for the payment of a claim previously allowed, it is competent for the defendants, in answer to the application for the writ, to set up the invalidity of the claim originally, or to plead the statute of limitations, or both. Nor does *mandamus* lie to compel a board of supervisors to levy a tax for the payment of a claim which it has no authority to pay, even though the claim may have passed into judgment. In such a case there is no estoppel by the judgment, and *a fortiori* there is none where the claim is of a class payment of which is prohibited by law. The writ lies to compel that to be done which it is the defendant's duty to do without it, but it confers no new authority. Hence the party proceeded against must have the power to perform the act; otherwise the writ will be denied. Brownsville v. Loague, 129 U. S. 493, 9 Sup. Ct. Rep. 327.

In the present case, while the exact period during which the services were rendered for which claim is made does not appear, the fair inference from the record is that at least a part of the service was rendered under the appointment of the 4th of November, 1863, and subsequent orders of the county court, directing distribution of salt to be made among those citizens only who were loyal to the Confederate government. It is unnecessary, however, to decide the constitutional question raised in this connection by the respondents, because the claim is barred by the statute of limitations, and that is decisive of the case. A proceeding like the present is in the nature of an action to recover money founded upon a contract not under seal, and therefore, as the petition for the writ was not filed within five years after the date of the order of the board first allowing the claim, in December, 1871, the statute applies. The order of the 4th of August, 1887, which was rescinded the same day, does not affect the case. The allowance of the claim, so far as the question before us is concerned, had no more force and effect, as already said, than an ordinary settlement between indi-

Digitized by Google

viduals. It was not an adjudication; it was merely the recognition of the liability of the county upon a contract to pay money, not under seal, and as to which the doctrine of *res judicata* has no application. The judgment of the circuit court must therefore be reversed, and, this court proceeding to render such judgment as the said circuit court ought to have rendered, the order of the county court awarding the writ will also be reversed and annulled, and the petition dismissed.

BECKHAM *et al.* v. DUNCAN *et al.*

(*Supreme Court of Appeals of Virginia.* June 13, 1889.)

APPEAL—PREJUDICIAL ERROR—CREDITORS' BILL—PRACTICE.

1. Though a decree for the sale of land to pay judgments against a deceased owner decides him to have been a joint tenant, and awards a share of the proceeds when sale shall be made to certain defendants as his co-tenants, when in fact the debtor was seised in severalty, it is nevertheless prejudicial to defendants to whom the debtor has devised the land if it directs a sale without first exhausting the other assets.

2. While it is a general rule that creditors are under no obligation to first exhaust the estate of a principal debtor before proceeding against that of a surety, when the principal is one of the devisees of the surety's land, and a defendant to a bill to subject it to a judgment against both, equity will direct the principal's estate first applied to the judgment before permitting the sale of the surety's land.

3. The co-sureties of the deceased judgment debtor being also parties to the bill, the decree should provide for the apportionment of the judgment among them, after first exhausting the principal's estate, and the sale only of enough of the land of each to pay his part, unless the land of some one or more should prove insufficient, in which case the lands of the others should bear the deficiency equally.

4. Before a sale is decreed under such circumstances, the administration accounts should first be settled.

5. The executor of a co-obligee of the judgment plaintiffs, who died pending the action on the bond for the breach of which the judgment was recovered, is not a necessary party to such a bill.

On rehearing. For statement of facts, see former opinion, 5 S. E. Rep. 690.

J. C. Gibson, for appellants. *G. D. Gray* and *A. McD. Green*, for appellees.

LEWIS, P. This case is before us on a rehearing. The facts of the case are quite fully set out in the opinion of the court delivered at the first hearing, and which may be found in 5 S. E. Rep. 690. In the petition for appeal there are a number of assignments of error, but the court being of opinion, for reasons stated in its opinion, that there were no errors in the record to the prejudice of the appellants, affirmed the decrees complained of. The case was submitted on the record and the petition for appeal, without argument, oral or printed. The petition for rehearing is based upon several grounds, a careful consideration of which satisfies us that the conclusion reached on the first hearing, namely, that the appellants have not been prejudiced by the decrees of the circuit court, is not sustained by the record, which is certainly very meager and imperfect as it comes to us, and from which it is extremely difficult, if not impossible, to ascertain the rights of the parties with anything like absolute certainty.

There is no doubt that the point made by the appellants as to the interest of the late Coleman C. Beckham in the tract of land called "Ashland" is a good one; that is to say, according to the doctrine of Thornton v. Thornton, 3 Rand. (Va.) 179, decided in 1825, he became, at the death of his wife, the sole owner in fee-simple of the whole tract, and hence the children and heirs at law of his deceased wife took no interest therein whatever. The appellants are devisees under the will of the said Coleman C. Beckham, he having devised to them a certain designated portion of the Ashland farm, including the mansion-house and other buildings. And this land they are entitled to hold, if partition of the farm be practicable, until all the other estate of which the said Coleman C. Beckham died seised or possessed has been exhausted in the payment of his debts. The circuit court, however, apparently ignored the will, and directed a partition of the land to be made between the estate of the said Coleman C. Beckham and the heirs at law of his deceased wife. This was erroneous.

An account ought also to have been taken of the personal assets in the hands of the personal representative of the said Coleman C. Beckham, which does not appear from the record to have been done. The appellants have also the right to require the property of W. A. Beckham, for whom the said Coleman C. Beckham was surety, to be exhausted before the land devised to them is sold or taken to pay the debts asserted in this suit. And the judgment for the satisfaction of which the original bill was filed ought to be apportioned equally among the sureties of whom the said Coleman C. Beckham was one, and who were also made defendants to the bill, or such portion thereof as cannot be made out of the estate of the principal debtor, Charles Short; and, as was held in Horton v. Bond, 28 Grat. 815, "if either should make default in the payment of his part, and his lands when sold should prove insufficient to pay such part, the lands of the others should be subjected proportionately for such part unpaid, and so on proportionately upon further default of any party occurring, until the lands of all be sold, if the sale of all be necessary to the complete satisfaction of the judgment." It follows from what has been said that the demurrers to the amended and supplemental bills ought to have been sustained, with costs to the appellants, but the original bill should not, on that account, have been dismissed, as, under its allegations, the plaintiffs are entitled to subject the whole of the Ashland tract, if necessary, to the satisfaction of their judgment. The decrees complained of will therefore be reversed, in so far as they are in conflict with this opinion, and the cause will be remanded to the circuit

Digitized by Google

court of Culpeper county, with directions to cause the interest of the appellants in the Ashland tract of land to be set apart to them, if that be practicable, and, in any event, not to direct its sale, unless a sale thereof be necessary after all the other estate of which Coleman C. Beckham died seised or possessed shall have been subjected to the payment of the debts proven against him or his estate in this suit. As to the remaining points made in the petition for a rehearing, and not noticed in this opinion, the court adheres to its former opinion. There are no particular circumstances disclosed by the record which take the case out of the operation of the general rule that the creditor is under no obligation to look to the principal debtor or to his property, or to exhaust his remedies against the latter before resorting to the surety, any further than has been already indicated in respect to proceeding against the defendants Charles Short and William A. Beckman, who are before the court.

(86 Va. 232)

SHENANDOAH VAL. R. CO. v. ASHBY'S TRUSTEES.

(*Supreme Court of Appeals of Virginia.* June 27, 1889.)

WRITS—RETURN—AMENDMENT.

1. The return of a sheriff to a summons may be amended thirteen years after judgment by default has been rendered in the action, so as to show that the county in which service was had on the defendant corporation, by giving one of the directors a copy of the summons, was the county in which he resided, and the judgment will be validated by such amendment.

2. It is immaterial that subsequent mortgagees of the corporation may be injured by the amendment, it not being shown that they were aware of the irregularity in the judgment, which was duly docketed, when they took their mortgages, and if they were, they would nevertheless acquire their liens subject to the judgment plaintiff's right to have the record perfected.

W. H. Travers, for plaintiff in error. *John J. Williams*, for defendant in error.

LEWIS, P. This is a writ of error to the circuit court of Warren county, bringing under review an order of that court permitting an amendment of a return on a writ of summons. It appears from the record that on the 4th of September, 1874, Thomas N. Ashby instituted an action of debt in the said court against the Shenandoah Valley Railroad Company, for the sum of $5,231.90, and $11.90 costs, upon the transcript of a record of a judgment which he had previously recovered against the said company in one of the courts in West Virginia. On the original summons sued out in the action return was made by John T. Lovell, a deputy of L. Leach, sheriff of Warren county, as follows: "Executed the within summons in debt on September 5, 1874, upon M. B. Buck, one of the directors of the Shenandoah Valley Railroad Company, by delivering to him a copy thereof. JOHN T. LOVELL, D. S., for L. LEACH, S. W. C." At the ensuing October term a judgment by default was rendered for the plaintiff for the sum claimed in the declaration, which judgment was several years afterwards asserted by the trustees of the plaintiff, the defendants in error here, as a lien upon the property of the defendant company, in a certain chancery suit pending in the circuit court of Roanoke city, wherein the Fidelity Insurance, Trust & Safe-Deposit Company was plaintiff and the said railroad company was defendant. But the claim was rejected on the ground that the judgment was void, because there had been neither service of process upon, nor voluntary appearance by, the defendant in the action wherein the judgment was recovered. Subsequently the said trustees, after due notice, to-wit, on the 20th of October, 1887, moved the said circuit court of Warren county to permit the said return to be amended, which motion was granted, and the return was accordingly amended by the said Lovell so as to read as follows: "Executed the within summons in debt on September 5, 1874, upon M. B. Buck, one of the directors of the Shenandoah Valley Railroad Company, by delivering to him a copy hereof in the county of Warren, Virginia, in which county he resided at the time. JOHN T. LOVELL, D. S., for L. LEACH, S. W. C." The defendant company, the plaintiff in error here, complains of this action of the circuit court permitting the return to be amended, and the principal ground of its complaint is that, as the original return does not show that the summons was served in conformity with the provisions of the statute relating to the service of process in such cases upon the officers of a corporation, the service was without legal effect, and consequently the judgment founded upon it is void, and cannot be validated by amendment of the return.

There is no doubt that the original return is defective, and does not of itself show that the defendant company was legally brought before the court, since the statute expressly enacts that service of process in such a case upon an officer of a corporation shall be in the county or corporation in which he resides, and that "the return shall show this, and state on whom and when the service was; otherwise the service shall not be valid." Code 1873, c. 166, § 7; Code 1887, § 3227. It must therefore be conceded that, unless leave to amend the return was rightly granted, the judgment is void. Barksdale v. Neal, 16 Grat. 314; 4 Minor, Inst. 532. Without the amendment the record presents a case, not of a defective service merely, but of no service at all. In other words, it presents the case of a judgment rendered by a court without having acquired jurisdiction over the defendant, which is simply a nullity. The rule that a court of general jurisdiction, acting within the scope of its authority, is presumed to act rightly, and to have jurisdiction to render the judgment it pronounces, until the contrary appears, applies only as to those matters concerning which the record is silent; nor can it operate in a case like the present to supply jurisdictional facts which

Digitized by Google

the return, according to the statute, must show affirmatively. Harris v. Hardeman, 14 How. 334; Settlemier v. Sullivan, 97 U. S. 444; Richards v. Ladd, 6 Sawy. 40; Dorr v. Rohr, 82 Va. 359.

We are of opinion, however, that the circuit court did not err in permitting the return to be amended, and that, viewing the case in the light of the amended return, the judgment is valid and unassailable. The case is not within the principle that proceedings which are void *ab initio* cannot be rendered valid by amendment, for here the effect of the amendment was not to confer jurisdiction upon the circuit court, but only to perfect the proof of the jurisdiction which it had previously acquired, but of which the evidence prescribed by the statute was wanting. In other words, the amendment, by relating back to the original return, and becoming, in effect, a part of it, shows, in the prescribed form and manner, that the defendant company was duly served with process, and hence had notice and an opportunity to be heard, which are essential requisites to the jurisdiction of all courts. The extensive power with which every court is ordinarily clothed to permit an amendment of a return of its own process, whether original, mesne, or final, for the correction of a casual and honest mistake or omission, is not affected by the statute above referred to, and may be exercised in all cases, where it exists at all, as well after judgment as before. In some cases it has been exercised even to the extent of taking away altogether a cause of action growing out of the original return, and even though a suit or motion founded on the original return was pending at the time. And it makes no difference that the officer by whom the return was made has gone out of office or is dead. There is no specific limitation of time within which the power may be exercised, although after a considerable lapse of time it should be exercised with caution, and in no case ought it to be exercised, unless the court can see that it will be in furtherance of justice. In a proper case, however, leave to amend, so as to make the return speak the truth, ought to be, and usually is, liberally granted, and when the amendment is made the same effect is to be given to the return, as amended, as though it had at first been put in its present form. In other words, "the amendment takes effect by relation, and operates as if made at the same time as the original return." Freem. Ex'ns, §§ 359, 360; 4 Minor, Inst. 839; Stone v. Wilson, 10 Grat. 529; Walker v. Com., 18 Grat. 13, 51; Richards v. Ladd, 6 Sawy. 40; Stotz v. Collins, 83 Va. 423, 2 S. E. Rep. 737, and cases cited. This being so, it follows that the objection founded upon the form of the original return cannot be sustained.

Nor is the position maintainable that the amendment operates to the prejudice of certain creditors of the defendant company whose debts are secured by mortgages executed subsequent to the rendition of the judgment in October, 1874. There are cases which hold, and we do not question the doctrine, that an amendment of a return will not be permitted to affect injuriously the rights of third persons which have attached in the mean time, and which were acquired upon the faith of the verity of the original return. But the present is not a case of that class. The judgment was duly docketed, and there is nothing in the record to show that, when the mortgages were executed, the judgment was not supposed to be valid. At all events, the liens were acquired subject to the right of the plaintiff in the judgment to have the record perfected, as has been done. The order permitting the amendment must therefore be affirmed, with costs.

(86 Va. 195)

FRY v. COUNTY OF ALBEMARLE.

(*Supreme Court of Appeals of Virginia.* June 18, 1889.)

COUNTIES—ACTIONS—WHEN MAINTAINABLE.

An action cannot be maintained against a county for personal injuries, caused by the negligence of a convict of the state penitentiary, while working on a public road under direction of the county, because the county, being a part of the sovereign power, cannot be sued in the absence of a statute giving a right to sue in such cases.

Davis & Harman, for plaintiff in error. *M. Woods*, for defendant in error.

LACY, J. This is a writ of error to a judgment of the circuit court of Albemarle county, rendered on the 14th day of May, 1888. The plaintiff in error here filed her petition before the board of supervisors of Albemarle county on the 25th day of July, 1887, representing that she came to Charlottesville, in a buggy drawn by one horse, on the 21st day of April, 1887, from a point in the county of Albemarle, in company with another lady who was riding in the same buggy. In the afternoon, about 4:30 P. M., on their way home, they were driving along one of the public roads of Albemarle county, going cautiously and carefully down a hill, when they came to a point where the public road was being worked on by a chain-gang, composed of convicts out of the state-prison, or Penitentiary House at Richmond, organized by the county of Albemarle by authority of an act of assembly in that case made and provided; when, seeing a cart with a mule hitched to it moving up the hill with one of these convicts walking by the side of the cart, they turned out of the way on their right-hand side as far as they could, and stopped, and called out to the convict to look to the mule; that he was very slow to do this, and so slow and negligent about it that the cart collided with the buggy, and turned it, together with its occupants, into the ditch on the road-side, and hurt the petitioner very much, by which she had been caused suffering and loss in physician's fees, and other expenses, and that she believed herself to be permanently injured; that this convict was an employé of the county of Albemarle, and

Digitized by Google

that the county was therefore liable in damages for these personal injuries inflicted upon her by the county's servant, and she demanded $5,000 for the same. This claim the board of supervisors rejected, and she appealed to the county court, when her petition was again rejected, and thereupon she appealed to the circuit court for the said county, when the judgment of the county court was affirmed, whereupon she brought the case here by writ of error.

The petition was rejected in the county court upon demurrer; so all we have to consider here is the single question whether the petition presents a case for which the county of Albemarle is liable to answer in damages. The decision of the lower courts in this case is founded upon the principle that the sovereign cannot be sued except by its own consent, as may be provided by law; and that in the exercise of its sovereign power it is liable neither for misuser nor non-user; and that a county in this state is a political subdivision of the state for governmental purposes as prescribed by public law, and is no more than the state liable to be sued for its public acts, and that it cannot be held chargeable for the acts of an officer whose duties are fixed and prescribed by law. Suits against the state are allowed by law under certain regulations, and, in certain specified and enumerated cases, counties in this state are authorized to sue and are suable in the circuit court held for such county in their own names, but these are limited. The thirteenth section of chapter 45 of the Code of 1873 provides that "counties may sue in their own names for forfeitures, fines, or penalties given by law to such counties, or upon contracts made with them, and may be sued in their own names, in the circuit court of such county." The legislature has given a remedy in cases growing out of contracts with counties, but it has given no remedy against a county for the negligence of a public officer or servant appointed by law, and we may observe, as did Lord KENYON long ago, that the question here is "whether this body of men, who are sued in the present action, are a corporation, or *quà* a corporation, against whom such an action can be maintained. If it be reasonable that they should be by law liable to such an action, recourse must be had to the legislature for that purpose." Russell v. Men of Devon, 2 Term R. 671. "And even if we could exercise a legislative discretion in this case, there would be great reason for not giving this remedy."

The rules established by the courts concerning municipal corporations have but slight application to counties organized as ours are. Our counties are parts of the state; political subdivisions of the state; created by the sovereign power for the exercise of the functions of local government. As was said by a learned judge in a case not now modern, counties are "at most but local organizations, which, for purposes of civil administration, are invested with a few functions characteristic of a corporate existence. * * * They are local subdivisions of a state, created by the sovereign power of the state, of its own sovereign will, without the particular solicitation, consent, or concurrent action of the people who inhabit them." Board v. Mighels, 7 Ohio St. 109. A municipal corporation proper is created mainly for the interest, advantage, and convenience of its locality and its people. A county organization is created almost exclusively with a view to the policy of the state at large, for purposes of political organization and civil administration, in matters of finance, of education, of provision for the poor, of military organization, of the means of travel and of transport, and especially for the general administration of justice. With scarcely an exception, all the powers and functions of the county organization have a direct and exclusive reference to the general policy of the state, and are, in fact, but a branch of the general administration of that policy, (opinion of BRINKERHOFF, J., in same case.) In that case it was sought to make the county liable in damages to one who suffered a personal injury from the neglect of the commissioners of the county in the discharge of their official duties; and the court said: "But it is said the members of the board of county commissioners are chosen by the electors of the county, and hence the board is to be regarded as the agents of the county, for whose torts in the performance of official duties the county ought to be responsible. True, the people of the county elect the board of county commissioners, but they also elect the sheriff and treasurer of the county. Are the people of the county, therefore, responsible for the malfeasance in office of the sheriff, or for the official defalcations of the county treasurer? * * * We cannot but think that county commissioners are not agents or representatives of the county in any such sense or manner as to render the people of the county justly answerable for their neglect," even if the neglect be such as would create a civil liability against a natural person or a municipal or private corporation. "It is," he adds, "undoubtedly competent for the legislature to make the people of a county liable for the official delinquencies of the county commissioners; * * * but this has not yet been done, and we think that such liability cannot be derived from the relation of the parties either on the principles or the precedents of the common law." See, also, Jacobs v. Hamilton Co., 4 Fish. Pat. Cas. 81; Soper v. Henry Co., 26 Iowa, 264; Treadwell v. Commissioners, 11 Ohio St. 190; Ang. & A. Corp. §§ 14, 23–25; Dill. Mun. Corp. §§ 9, 32, 39, 761, 762.

In this case the county of Albemarle is sued to recover damages resulting from the alleged negligence of a state convict engaged in working on the public roads of the state,—the public highways in the county of Albemarle belong to the commonwealth, not to the county,—and of the alleged negligence of a superintendent who was appointed by the au-

Digitized by Google

thority of a state law. No suit can be maintained against the county of Albemarle upon the principle of *respondeat superior*, because the relation of master and servant did not exist. Such officers are *quasi* public officers of the state; for, although the officer in charge was appointed by the county, yet the office and duties incident to it were created by an act of the legislature, for the general public welfare; the public roads of Albemarle county being highways of the commonwealth for the common benefit of all the people of the state who have a right to use them. We have been referred to numerous decisions concerning the character of the duty required of these and other officials similarly situated, drawing a distinction where the duty is for the benefit of the general public and where it is for the benefit of a corporation, but we do not cite them. They are more distinctly applicable to municipal corporations proper than to such organizations as counties, which are rather political subdivisions of the state, or, as sometimes denominated, "*quasi* corporations." Upon reason, as well as upon authority, we are clearly of opinion that the judgment of the circuit court affirming the judgment of the county court of Albemarle was plainly right, and the same will be here affirmed.

(86 Va. 248)

MCCONNELL *et al.* *v.* NORFOLK & W. R. CO.

(*Supreme Court of Appeals of Virginia.* June 13, 1889.)

CARRIERS OF GOODS—LIABILITY.

In the absence of an agreement by a railway company to carry freight beyond the end of its route, its liability for injury thereto is ended by its prompt delivery in good order to the connecting carrier.

D. Trigg and *C. F. Trigg*, for plaintiffs in error. *Fulkerson & Page*, for defendant in error.

FAUNTLEROY, J. This is a writ of error to a judgment of the circuit court of Washington county, rendered on 21st day of May, 1889, in an action of trespass on the case, in which T. G. McConnell and R. A. McConnell, partners under the firm name and style of T. G. & R. A McConnell, are plaintiffs, and the Norfolk & Western Railroad Company is defendant. The material facts, as disclosed by the record, are as follows: The appellants, T. G. and R. A. McConnell, were shipping merchants, doing business at McConnell's Switch, a point upon the line of the Norfolk & Western Railroad, about a mile or more from Abingdon, in Washington county, Va. They were engaged in the course of their business in shipping car-loads of ivy roots; and had previous, and up to the 10th of June, 1885, loaded, at McConnell's Switch, and shipped as many as from 300 to 500 car-loads. Whenever they were ready to ship they notified the agent of the Norfolk & Western Railroad Company at Abingdon that they wanted a car placed upon their switch to be loaded by them; and, for their convenience, this was done by the said company. On the 10th day of June, 1885, the plaintiffs in error having notified the said agent of the said company at Abingdon that they wanted a car, and, having a car placed upon the said switch for their use, loaded the car with their own hands, and under their own instructions, with 42,566 pounds of ivy roots; closed and secured the doors of the car themselves; and reported to the agent at Abingdon that the car was loaded, and ready for shipment. It was the custom of the company not to issue a bill of lading for shipments from McConnell's Switch until the goods were actually in transit; and on the 11th of June the car, which had been loaded with ivy roots and reported ready for shipment by the plaintiffs in error, was taken into the train at McConnell's Switch by the conductor, and reported to the agent as having been actually shipped. Thereupon, the plaintiffs in error having complied with the customary requirement of the company for the prepayment of the freight upon 24,000 pounds of the shipment, a little over one-half of the whole freight, the excess to be paid and collected at the ultimate destination and delivery of the shipment, the company issued and delivered to the plaintiffs in error a regular bill of lading,—a printed form, with the blanks filled up with writing,—as follows: "Abingdon, June 11th, 1885. Received by Norfolk & Western Railroad Company of T. G. & R. A. McConnell, under the contract hereinafter contained, the property mentioned below, marked and numbered as per margin, (N. & W. 377. Rates from A. to New York, per 100 pounds, special, 29½ cts. Charges advanced, $70.80. Paid,) in apparent good order and condition, (contents and value unknown,) viz.: 1 car ivy roots, 24,000. To be weighed and excess charged ratably. Laden at McConnell's. Consigned to Frank & Weiss, at New York, to be transported by the Norfolk & Western R. R. to Norfolk, and there to be delivered to connecting railroad or water line, and so on by one connecting line to another, until they reach the station or wharf nearest to the ultimate destination. * * * It is mutually agreed that the liability of each carrier, as to goods destined beyond its own route, shall be terminated by proper delivery of them to the next succeeding carrier. * * * The acceptance of this bill of lading is an agreement on the part of the shipper, owner, and consignee of the goods to abide by all its stipulations, exceptions, and conditions as fully as if they were all signed by such shipper, owner, and consignee. * * * This bill of lading shall have the effect of a special contract, not liable to be modified by a receipt from or any act of an intermediate carrier," etc. This bill of lading was forwarded to the consignees, Frank & Weiss, in New York, by the plaintiffs in error on the 11th day of June, 1885, the day upon which they received it. The car loaded with the ivy roots was transported to Norfolk by the Norfolk & Western Railroad just as it was loaded and sealed by the

Digitized by Google

plaintiffs in error, June 10, 1885, at McConnell's Switch, and was delivered by them to the connecting line, the Old Dominion Steam-Ship Company, who received them and stored them in their warehouse in Norfolk on June 16, 1885, at the Old Dominion Steam-Ship Company's wharf, and the Norfolk & Western Railroad Company had no control over them after they were so delivered.

On the 15th of June, 1885, a representative of the firm of Frank & Weiss, the New York consignees, called at the office of the assistant general freight agent, and of the notice clerk, of the Old Dominion Steam-Ship Company, in New York, and stated that T. G. & R. A. McConnell had shipped to them a car-load of ivy roots, and that they would refuse to receive them; and immediately this information was conveyed to the agents of the Old Dominion Steam-Ship company at Norfolk, as follows: "New York, June 15th, 1885. Messrs. Culpeper & Turner, Agents, Norfolk, Va.—Dear Sirs: We are advised by Frank & Weiss, of New York, that T. G. & R. A. McConnell has shipped them a car-load of ivy roots, which they refuse to receive. Please notify the Norfolk & Western R. R. to that effect. Yours, truly, W. L. GILLANDEN, A. G. F. A." This was received and indorsed by Culpeper & Turner, as follows: "Norfolk, June 16th, '85. R. R. To Capt. J. F. Cecil, Agent: This from you, June 15th, N. & W. 377. Please advise disposition at once. CULPEPER & TURNER, Agents." Capt. J. F. Cecil was the transportation agent of the Norfolk & Western Railroad Company at Norfolk, Va., and he indorsed the paper: "R. R. W. F. Payne, Esq.: This shipment covered by McConnell's, W. B., No. 984, car N. & W. 377. Stamp date, June 15th, '85. Please get disposition as soon as possible. Res., J. F. CECIL, R." And on June 17, 1885, Capt. J. F. Cecil sent the following to the agent of the Norfolk & Western at McConnell's Switch: "June 17th, '85. R. R. Agent, McConnell's: Please note the attached is covered by your W. B. 984, June 11th. Give disposition at once. This the 2d trace. Res., J. F. CECIL, R."

It was the custom of the Old Dominion Steam-Ship Company to notify consignees in New York of the arrival in Norfolk of consignments, which must be received at once in New York, upon their arrival, as they had no accommodations to store and protect them in New York, and to ask for orders. Accordingly the following was sent to Frank & Weiss: "To Messers. Frank & Weiss, 339 B. Way, New York, June 17th, 1885—Dear Sir: We are advised that 1 car of ivy roots, consigned to you, has arrived at Norfolk. Please inform us when you will be ready to remove them from our wharf, that we may order them forward. We will endeavor to meet your wishes as far as it is possible for us to do so. (N. & W. 377.) Res., W. L. GILLANDER, A. G. F. A." This was indorsed: "Refuse to receive. FRANK & WEISS, R."

Mr. R. A. McConnell, one of the plaintiffs in error, was a witness, and in his testimony, on cross-examination, admitted that he was informed by E. S. Haney, the agent of the Norfolk & Western Railroad Company at Abingdon, about two weeks after the shipment, that the consignees refused to receive the roots, and that he had known from two to four weeks previous to the 4th of August, 1885, that the shipment had not gone to its destination. On the 4th of August, 1885, he received the following: "Abingdon, Va., August 4th, 1885. To T. G. & R. A. McConnell—Gents: I am instructed by W. T. Payne, agent claims and expenses, to notify you that, unless you make disposition, within three days from date of this letter, of the car-load of ivy roots, shipped by you to Frank & Weiss, at New York, June 11th, '85, the same will be sold for charges. Yours, etc., E. S. HANEY, Agent." He admitted that he had received notice from New York, and from Mr. Haney, agent at Abingdon, that the roots were in Norfolk; that he had looked and made diligent search for the "other notice, which he had received from Mr. Haney, but cannot find it." He allowed the roots to remain in Norfolk until about the 1st of September, and then ordered their direction to be changed to Philadelphia; whither they were accordingly sent and delivered by his direction to Bales & Co., who reported them as totally worthless. These are the material facts in the record.

The suit was brought to recover damages against the Norfolk & Western Railroad for breach of their alleged contract, and the jury found a verdict in favor of the defendant company; which, upon motion, the court refused to set aside, and entered judgment upon the verdict.

We are of opinion that the verdict of the jury is right, and that there is no error in the judgment complained of. The defendant in error, the Norfolk and Western Railroad Company, did not undertake to transport the ivy roots to their place of destination, New York; but to transport them to Norfolk, its terminus, and there to deliver them to the connecting carrier. They were carried promptly to Norfolk, and there delivered to the connecting carrier, the Old Dominion Steam-Ship line, in whose warehouse, upon their wharf, they were safely and properly stored. Frank & Weiss, to whom they had been consigned in New York, advised of the fact that they had been shipped to them, by receipt of the bill of lading, which the plaintiffs in error had sent to them on the 11th of June, 1885, as early as the 15th of June, 1885, gave notice of their positive refusal to receive the consignment. This was promptly conveyed to the Norfolk & Western Railroad Company, and by them to the shippers, T. G. & R. A. McConnell, who took no steps or gave no orders concerning the disposition of the roots until some time in September, when they had become worthless. Even without the bill of lading or contract of shipment, the duty and responsibility of the defendant in error ended

Digitized by Google

with the delivery of the roots to the connecting carrier. It is not contended by the plaintiffs in error that the delay and damage complained of occurred before the delivery by the defendant in error to the connecting carrier, in good order and in prompt time; and it is distinctly proved that the injury occurred while they were in the custody of the Old Dominion Steam-Ship Company, by the refusal of Frank & Weiss, the consignees, in New York, to receive them, and by the knowledge of the said refusal by and failure of the consignors, T. G. & R. A. McConnell, to give any direction or to make disposition of the roots until they were worthless.

The liability of a common carrier is restricted to its own route, unless it contracts to carry the goods to their ultimate point of destination; and such contract is not established by proof that the carrier accepted the goods with knowledge of their destination, and named the through rate for the same; and, in the absence of a special contract to deliver the goods at a point beyond its line, the receiving carrier is not liable for loss or damage occurring to the goods after their delivery to the connecting carrier. 3 Wood, Ry. Law, p. 1572, and note 3; Hadd v. Express Co., 36 Amer. Rep. 757; Railroad Co. v. Manufacturing Co., 16 Wall. 318; Insurance Co. v. Wheeler, 3 Amer. Ry. Rep. 390; Railroad Co. v. Pratt, 22 Wall. 123; Railroad Co. v. Androscoggin Mills, Id. 594.

The plaintiffs in error do not claim or pretend to have been ignorant of the limitations contained in the bill of lading which was issued to and received by them. On the contrary, they themselves prove that they shipped hundreds—from 300 to 500—car-loads of ivy roots, and had been engaged in that business at that place for many years; and the presumption is that they were well acquainted with the terms of the bills of lading issued by the defendants in error, and received by them in the conduct of this business of shipping ivy roots. But we have decided this case even without reference to the bill of lading, or the evidence of the contract containing express stipulations and limitations upon the liability of the defendant in error. There were instructions given and instructions refused by the court, and numerous exceptions taken to the rulings of the court; but we think those that were given properly expounded the law of the case, and that those refused by the court were properly refused, because the evidence did not support or justify them. We think the judgment in the case is right, and it must be affirmed.

MOORE *et al.* v. PEIRCE, Commissioner.

(*Supreme Court of Appeals of Virginia.* July 4, 1889.)

PLEA IN ABATEMENT.

1. In an action to subject the land of a debtor to the payment of a judgment, the land was rented by order of court to the debtor himself, and he executed to the commissioner five notes for the rent. Two of the notes were paid, and on default in the payment of the third proceedings were taken against the debtor and his sureties, which resulted in an order for the re-renting of the land for the term of one year, for enough to pay the amount due on the rent note. This judgment was suspended, but, instead of taking an appeal, the debtor obtained an injunction against the enforcement of the decree, and from the order dissolving the injunction, and from the order for re-renting, the debtor appealed. This appeal and *supersedeas* the debtor set up in a plea in abatement in an action against him on another of the rent notes. *Held*, that it was proper to overrule the plea, and enter judgment "subject to the control of the court," in the action on the first note.

2. As the judgment was entered "subject to the control of the court" in the former action, there was no occasion for a writ of error.

F. S. Blair, for plaintiffs in error. *D. S. Peirce, pro se.*

RICHARDSON, J. This is a writ of error to a judgment of the circuit court of Wythe county, rendered at the September term thereof, 1887, in an action at law wherein D. S. Peirce, commissioner, etc., was plaintiff, and R. R. Moore, Henry Simmerman, Samuel R. Sayers, and D. P. Graham and John W. Robinson, partners under the firm and style of Graham & Robinson, were defendants. The action was debt on a promissory note in writing, made by said defendants to said plaintiff on the 10th day of March, 1884, and payable to said plaintiff three years after the date thereof, for $1,400. In order to a proper understanding of the case, it will be necessary to refer briefly to two other suits, which have come to this court, and in which said R. R. Moore, as debtor, has been the principal actor:

(1) In November, 1883, Isaac J. Leftwich filed his bill in the circuit court of Wythe county against R. R. Moore, to enforce against the real estate of said Moore the lien of a judgment recovered against him by said Leftwich at the September term of said court, 1883, for $4,000, with interest at the rate of 12 per cent. per annum from the 11th day of September, 1871, till paid, and costs, which judgment was subject to certain credits therein specified. The bill charged that said Moore was seised in fee-simple of several tracts of land in said county, all of which were liable to the lien of said judgment, and that the plaintiff had the right to enforce the same by a sale or renting of said real estate. With his bill the plaintiff filed copies of three deeds, marked, respectively, "B," "C," and "D," evidencing the title in fee held by said Moore to the lands therein described, and above referred to as subject to the lien of the plaintiff's said judgment; and the bill alleged that the rents and profits of defendant's said land would not pay off said debt in five years; and prayed for a sale of said land to satisfy said judgment, and for general relief. The defendant, R. R. Moore, answered the bill, admitting the recovery by the plaintiff of the judgment mentioned in said bill; admitting that he is seised in fee of several tracts or parcels of land in said county; and says he is also seised of a life-estate in a very valu-

Digitized by Google

able tract in said county; but he denies that the rents and profits of his freehold lands will not pay off plaintiff's judgment in five years, but, on the contrary, he alleges that the rents and profits will pay off said judgment in five years; and asks that his lands be rented to pay it, and that, if necessary, an account be ordered and taken to show the real estate owned by him, and the rental value thereof. Such proceedings were had that at the December term of said court, 1883, a decree was rendered in the cause in favor of the plaintiff against the defendant for $4,000, the amount of said judgment, with interest at the rate of 12 per cent. per annum from the 11th day of September, 1871, till paid, and $11.36 costs, subject to certain credits therein specified, and further decreeing that the plaintiff was entitled to enforce said judgment against the real estate of the defendant mentioned in the bill; and that D. S. Peirce, who was thereby appointed a commissioner for the purpose, proceed to rent the real estate of the defendant, or so much thereof as might be necessary, for the period of five years, commencing on the day of renting, at public auction, etc., to pay said judgment and the costs of suit, unless the defendant, or some one for him, should, within 30 days from the date of the decree, pay off the said judgment and costs. The commissioner proceeded to execute the decree, and the defendant became the renter of his own land for the period of five years from the 10th day of March, 1884; and in obedience to the decree said commissioner took from the renter (the defendant) his five promissory notes, each for $1,400, and each dated March 10, 1884, and payable to said commissioner, respectively, in one, two, three, four, and five years,—they being for the deferred payments, and without interest,—with Henry Simmerman, S. R. Sayers, and Graham & Robinson as sureties, which notes amounted to a sum sufficient to discharge said decree. On the said 10th day of March, 1884, the date of said rent notes, R. R. Moore, the principal in said notes, conveyed to James A. Walker, trustee, his three tracts of land owned in fee, and of which he had that day become the renter, and executed the notes aforesaid, with sureties, in trust to secure—*First*, his sureties in said notes; and, *second*, to secure the same persons as his indorsers on a note for $5,000, dated 20th of February, 1884, and payable at the Farmers' Bank of South-West Virginia; and also to secure S. R. Sayers in the sum of $350, borrowed money.

Commissioner Peirce having reported the rental of the land as required by the previous decree of December, 1883, at the December term, 1884, the following decree was entered in the cause: "This cause coming on to be heard upon the papers formerly read therein, and upon the report of Commissioner D. S. Peirce, and it appearing from said report that the said commissioner has rented the land of the defendant for the period of five years, from the 10th day of March, 1884, and that he has taken 5 promissory notes, payable 1, 2, 3, 4, and 5 years, respectively, from that date, without interest, and that said R. R. Moore became the renter of his said lands, and that the notes were signed by said Moore, S. R. Sayers, Henry Simmerman, and Graham & Robinson, as sureties, and were for the sum of $1,400 each, and that they are sufficient to discharge and pay off the decree of the complainant against the defendant, it is adjudged, ordered, and decreed that said rental be confirmed, and that the said D. S. Peirce shall proceed as receiver to collect said notes when they mature, and pay over the proceeds of the same to the complainant, and report his proceeding to this court from time to time, and he is hereby required to execute his bond in the penalty of $15,000 for the faithful discharge of his duties as such receiver; and the cause is continued."

R. R. Moore paid the first two notes, but made default in payment of the third, that falling due in March, 1887. These facts were reported by the receiver to the court, and at the May term, 1887, the following decree was entered in the cause: "This cause came on this day to be heard upon a report of Commissioner D. S. Peirce, filed this day, and it appearing from said report that the rent note executed by R. R. Moore and his sureties, which was due on the 10th day of March, 1887, has not been paid. A rule is awarded, on the motion of the complainant, against R. R. Moore, D. P. Graham and John W. Robinson, partners under the firm and style of Graham & Robinson, Henry Simmerman, and S. R. Sayers, to show cause, if any they can, why a decree should not be entered directing Commissioner Peirce to re-rent the land of said R. R. Moore, for cash enough to pay off the note for $1,400, which is due and unpaid, and in default of rental to sell the same. The rule issued accordingly, and was duly served. In answer to the rule, R. R. Moore says: "There is now pending in the supreme court of appeals of Virginia a chancery cause of R. R. Moore, Complainant or Appellee, v. G. S. Bruce et al., on an appeal from this court, in which the very debt named in said rule is involved; it being embraced in the amount of liens on respondent's real estate now sought to be rented or sold, taken in this cause, and said debt of I. J. Leftwich, and the very real estate sought to be rented or sold is embraced in said account, and in said suit in court of appeals; and D. S. Peirce, commissioner, and I. J. Leftwich, are parties, appellees, to said suit, and a *supersedeas* has been executed upon them, and they, each and both, jointly are guilty of a contempt of said process of court of appeals, if they persist in enforcing said Leftwich debt in this court pending said appeal and *supersedeas;* and having answered," etc.

The rule having been answered at the same term, (March, 1887,) this cause of Leftwich v. Moore was brought on to be heard with the said cause of Bruce v. Moore, referred to

Digitized by Google

in the answer to said rule, upon the papers formerly read in the first-named cause; the report of Commissioner Peirce filed at that term; the rule awarded therein, duly served, upon the rent-bond; and upon the exhibits filed with the petition for said rule; and upon the answer of the defendant, R. R. Moore, to said rule; and the record of the court of appeals in the first-named cause; and the replication by said complainant to said answer, with the exhibits filed therewith; and was argued by counsel,—when a decree was entered in said two causes, in which we find this language: "Upon consideration whereof the court is of opinion that none of the land of defendant, Moore, embraced in the *supersedeas* of the court of appeals, granted in said second-named cause, has been rented in the first-named cause, or is sought to be rented under the rule aforesaid, doth adjudge, order, and decree that the commissioner, D. S. Peirce, who was duly appointed in said first-named cause, do re-rent the land of said defendant, of which he is seised in fee, and which was rented by a former decree in said first-mentioned cause, for a period of one year, for enough cash to pay off the balance due on the rent-bond due on the 10th March, 1887, unless," etc. And the decree then recites that, it having been reported to the court in the last mentioned cause, that James A. Walker, trustee of R. R. Moore, in a deed of trust therein set forth, had in his hands $450, belonging to the trust fund, it was further adjudged, ordered, and decreed in said last-named cause that said trustee pay over this sum to D. S. Peirce, commissioner, and that said commissioner enter a credit therefor upon the rent note aforesaid, as of the date of said decree. On the motion of the defendant, Moore, the execution of this decree was suspended upon the usual terms. But instead of appealing from this decree, as was indicated by said suspension order, the defendant, Moore, after waiting until the commissioner was proceeding to execute the same, filed an elaborate injunction bill. In the bill, after setting forth the facts connected with the debt due from him to Leftwich, and the litigation resulting in the renting of his said lands; and the execution of said five notes for the rent for the period of five years, as aforesaid; the number and amount of payments made by him to Leftwich on said $4,000, 12 per cent. debt, about which there is no controversy; that he had paid off the first and second of said rent notes, and that he had paid $450 through James A. Walker on the third note,—that which fell due on 10th March, 1887, and the same for which the decree for re-renting aforesaid had been made; that the remaining two rent notes remained unpaid, and would be enforced when due,—then assailed, in general and special terms, the whole transaction, especially the taking of said five rent notes, as usurious, and that the taking of said notes was a revocation of the contract between Leftwich and Moore, and disentitled the former to the 12 per cent. interest contended for, though the contract was lawful when made. And the bill sets forth various matters connected with, or sought to be connected with the Leftwich debt, which are of no importance, and need not be here referred to; and then prays that the court will decree that said transaction was tainted with usury; that said Leftwich can only recover the just principal of his debt without interest, and pay the costs; and that he (Moore) may have set off against said principal the amount of the payments collected and credited on said usurious notes, and a decree for the excess, if any; that said commissioner be enjoined from all further proceedings to sell or rent his real estate under said decree complained of, etc.; and for general relief. The injunction was awarded as prayed for.

D. S. Peirce, commissioner, answered, explaining his connection as counsel for Leftwich, and as commissioner of the court, with the $4,000, 12 per cent. debt due by Moore to Leftwich, and explaining that said Moore became the renter of his own land, mentioned in the bill of Leftwich against him, for the period of five years, and executed said five rent notes, with sureties as aforesaid; that said notes were prepared by Moore's counsel, each note being for $1,400, and all amounting to the sum necessary to discharge the decree in favor of Leftwich against Moore; and that the notes were hence taken without interest, and that the transaction was reported to and confirmed by the court. Leftwich also answered.

On the 10th day of June, 1887, the following decree in vacation was entered: "This cause came on to be heard in vacation upon motion of defendants to dissolve the injunction awarded in this cause on the 18th day of May, 1886; upon the bill of complaint; the copy of the record of the chancery cause of I. J. Leftwich v. R. R. Moore, filed as an exhibit therewith; the several answers of I. J. Leftwich and D. S. Peirce to said bill, with general replications thereto; the notice of the motion to dissolve, which appears to have been duly executed; and the arguments of counsel for the complainant and the defendant,—on consideration of all which it is adjudged, ordered, and decreed that said injunction be, and the same is hereby dissolved."

From this decree, and that of the March term, 1887, in said suit of Leftwich v. Moore, the two causes are here on appeal. Thus arose, in this court, the case of Moore v. Leftwich, which has been submitted, but not yet decided. See post, 1013.

(2) There is the case of Moore v. Bruce, which arose as follows: In April, 1886, and pending the said suit of Leftwich v. Moore in the circuit court, G. S. Bruce filed his bill in the circuit court of Wythe against said R. R. Moore, to enforce against the real estate of the latter two judgments theretofore recovered against him by said Bruce, one of which was recovered in said circuit court at the Septem-

Digitized by Google

ber term thereof, 1885, and was for $1,678.63, with interest and costs, and the other recovered therein at the March term, 1886, for $636.65, with interest and costs. The bill, after setting forth the said judgments, and charging that they are liens on the real estate of said Moore, proceeds to set forth his real estate as follows: A tract of 965½ acres on Reed creek, in said county of Wythe, in which said Moore has a life-estate,—it being the same conveyed in a deed of gift dated 7th of August, 1877, from J. P. M. Simmerman and wife to said R. R. Moore and wife; the bill alleging that the life-estate of said Moore in 160 acres of said tract had been conveyed by said Moore to his daughter, Mrs. Milo McBee, but that said Moore was still the owner of the life-estate in the residue of said tract; and that his wife Mrs. Margaret Moore, had been dead for several years, and left several children by her said husband. The bill then sets forth that the said R. R. Moore is the owner of several other tracts of land in said county, and describes them as the lands embraced in the trust-deed, before referred to, from said Moore to James A. Walker, trustee, a copy of which deed is exhibited with the bill, marked "D." And the bill alleges that, as the complainant, Bruce, is informed, a considerable portion of the debts secured by said trust-deed have been paid off, so that to that extent the land is released of that incumbrance; and, further, that the securities and indorsers sought to be saved harmless by said deed have not been called on to pay anything for said Moore.

Thus the complainant, Bruce, alleges in his bill that he is advised that there are no other liens prior to those of his said judgments, except those already provided for by the renting of said Moore's lands as aforesaid, and therefore he claims that he is entitled to subject to sale, for the satisfaction of his said two judgments, the life-estate of the said R. R. Moore in the 956½-acre tract, less the amount conveyed to Mrs. McBee, and also the fee-simple interest of said Moore in the other lands described and set out in the trust-deed aforesaid, subject to the lien of the said trust-deed. The bill then refers to the fact that certain lands of R. R. Moore had been rented out in the said suit of Leftwich v. Moore, and alleges that the rents and profits of said Moore's lands would not, therefore, be sufficient to pay off his (Bruce's) payments in five years. And the complainant, Bruce, waiving an answer on oath, prayed that R. R. Moore, James A. Walker, trustee, Henry Simmerman, S. R. Sayers, D. P. Graham and John W. Robinson, partners under the firm and style of Graham & Robinson, be made parties defendant to the bill, and be required to answer same, and that an account be ordered and taken to show the liens upon the real estate of said Moore, and also the amount of real estate owned by him, and the present *status* of same, and that the same be decreed to be sold, or enough thereof, to pay off complainant's (Bruce's) said judgment liens, together with costs of suit, etc., and for general relief.

The defendant, R. R. Moore, demurred to and answered the bill of the complainant, Bruce, and in his answer says "that by a lease dated 8th August, 1885, a copy of which is herewith filed, marked 'A,' and prayed to be considered a part of this answer, your respondent rented all of his lands in the bill mentioned to J. A. Davis, upon the terms set forth in said written lease; that respondent at once delivered possession of all of his lands to said Davis, who has since that time used, occupied, and held the same, and now holds them, under his said lease; that the said contract at first applied to the east end of the pond field, but the privilege was given to said Davis to take all of respondent's land, and said Davis elected to do so, and by respondent's consent he took possession of all of the same, paying respondent according to said contract for the lands cultivated, and a fair rental for others." For this remarkable averment in the answer of R. R. Moore he vouches the following very peculiar paper, which he exhibits with his answer, marked "A," and relies upon it alone to defeat the right of his acknowledged judgment creditor, Bruce, to proceed then to subject any portion of his (Moore's) lands to the satisfaction of said judgment liens. "I have this day swapped a black spotted yoke of oxen to Gus. Davis for a 4-year old gray mare. Davis gives me ($20) twenty dollars to boot, with the understanding that oxens is to doo said Moore's hauling from this till next spring," etc. "Said Davis has also rented the east end of Pond field to go in rye and wheat and corn, giving Moore one-third of the cropp. Davis to pay Moore part in granery," etc., "for him, with the refusal of what grounds said Davis may want, at reasonable terms," etc., "till end of Moore's rental, in 1889," etc. [Signed] "R. R. MOORE. J. A. DAVIS. 8th Aug., '85."

It is difficult to perceive how this contract about the exchange of the black spotted oxen for the gray mare, and the recital that the oxen were to continue to do Moore's hauling until the following spring, and that Davis had rented the east end of "Pond Field," to go in rye and wheat and corn, etc., could be tortured into a contract by which Moore leased all his real estate to Davis. There is not a word in the so-called "contract of lease" which even remotely indicates anything of the kind. As to the renting of the east end of "Pond Field," it would be impossible to tell what was referred to but for the words, "to go in rye, wheat, and corn." And if, therefore, it must be conceded that a portion of Moore's land was referred to by the words "Pond Field," we are left in the dark as to whether that field was a part of the tract aforesaid, in which he owned only a life-estate, or was part of one of the several tracts owned by him in fee. If the latter, then it is a matter wholly immaterial; for these lands had been rented out under a decree in said

Digitized by Google

suit of Leftwich v. Moore, long prior to said pretended contract of lease; and if any intelligent inference can be drawn from the closing words in said contract, "with the refusal of what grounds said Davis may want, at reasonable terms," etc., "till end of Moore's rental, in 1889," etc., it is that "Pond Field" is part of the land owned by Moore in fee; as the words, "till end of Moore's rental in 1889," etc., must refer to the fact that Moore had become the renter of his said fee-simple lands for a term of years, which term expires in 1889, as before stated. So that in no event is the contract of lease to Davis, thus attempted to be set up, worth, for the purpose for which it is relied upon, the paper upon which it is written.

Having thus attempted to set up the spotted oxen and gray mare paper as an impediment to the enforcement of the complainant's (Bruce's) judgment, Moore then proceeds to say: "Respondent avers that he considers said contract as valid and binding on him; and as it was made and executed 8th August, 1885, before complainant had any judgment lien on said land, it should expire before any sale can be made for the benefit of said Bruce. Respondent says that J. A. Davis, under his said written lease, expended large sums of money and much labor on said lands, and he has now many contracts for grazing the grass lands, and he is cultivating all the others. Respondent says said Davis is a proper party to this suit, and should be so made before any hearing thereof." The respondent, Moore, then proceeds in his answer to admit his ownership for life of the tract of 956⅓ acres of land conveyed to him and wife by J. P. M. Simmerman, as aforesaid. He also admits the existence of the deed of trust, and his ownership in fee of the lands embraced therein, but insists that said lands owned by him as aforesaid, are valuable, and that the same, by proper effort, with proceeds of a portion thereof recently sold by consent of said trustee, and other sales contemplated, would in five years pay the debts due; and he insists that under no circumstances should all of said lands be sold, but only so much as may be necessary to pay the debts due at the time of the sale. And it is further admitted as stated in the bill of complainant, Bruce, that a portion of said land is now rented under a decree in said suit of Leftwich against Moore, and that respondent himself is the renter thereof; and the record in said last-named suit is exhibited with and as part of respondent's answer, marked "B." Respondent then denies the power of the court to take charge of said rented lands, under a decree in another cause, unless that cause be consolidated with this, and all parties interested in said rented lands be brought before the court; and therefore the respondent insists that both I. J. Leftwich, the plaintiff in said cause of Leftwich against Moore, and D. S. Peirce, the commissioner therein, should be made parties to this suit of Bruce against Moore. The respondent, Moore, then concludes his answer to Bruce's bill by referring to the account taken in the cause by Commissioner Bolling under the vacation order for an account, of June 15, 1886, and returned August 9, 1886, prior to the answer of respondent, Moore, and says that the debts reported by Commissioner Bolling, to-wit, "the debt due Farmers' Bank of about $3,978, more or less," and "a portion of the debt due D. S. Peirce, commissioner, (for Leftwich debt,) of about $1,400, is not due, and will not be until 10th March, 1889, and no lands can be sold or rented for debts not due."

Such is the answer of the respondent, Moore, to the bill against him by G. S. Bruce, and it cannot be said that it suggests any valid defense whatever. The lands owned by Moore in fee having been rented to satisfy the complainant's debt in the said suit of Leftwich against Moore, and Moore himself having become the renter thereof for the term of five years, which term had not expired, it became necessary in this suit of Bruce against Moore to take an account of the liens on the lands of Moore and the lands owned by him subject thereto. The report of the commissioner showed that, in addition to said fee-simple lands, which had been rented as aforesaid, and which were incumbered by said trust deed, said Moore owned a life-estate in said 956⅓-acre tract conveyed to him and wife by said Simmerman, except a portion thereof conveyed by him to Mrs. McBee, as aforesaid. At the September term, 1886, it seems that J. A. Davis presented his petition, setting up his claim as lessee of all the lands of R. R. Moore under said pretended contract of lease of 8th August, 1885, referred to in the answer of R. R. Moore. The petition evidently proceeds upon the unwarranted assumption that the lands rented in the suit of Leftwich against Moore not only included the lands owned by Moore in fee, but also the 956⅓-acre tract in which he had only a life-estate, when the latter tract was not so rented. However, the cause then (September term, 1886) came on to be heard "upon the bill of the complainant and the exhibits filed therewith, and upon the orders entered in vacation, and upon the report of W. H. Bolling, commissioner, and upon the exceptions to said report, and upon the demurrer and exhibits and answer of R. R. Moore, and upon the petition and exhibits of J. A. Davis, and joinder in said demurrer and replication to said answer," when a decree was rendered in which the following language occurs: "It appearing to the court that the only unincumbered land belonging to the said defendant, R. R. Moore, which is subject to complainant's judgment liens in the bill and proceedings mentioned, and the other judgment liens in the said report mentioned, is the life-estate of said defendant, R. R. Moore, in the 956⅓-acre tract, less the amount conveyed to Mrs. McBee; and it also appearing that the rents and profits of said life-estate will not pay out the debts of com-

Digitized by Google

plainant in five years,—it is adjudged, ordered, and decreed that the same be sold at the front door of Wythe court-house, at public auction, on some court day, if the said defendant, Moore, or some one for him, does not pay off the said judgments within 30 days from this date; and D. S. Peirce is hereby appointed a commissioner for the purpose of making said sale," etc. From this decree both the defendant, R. R. Moore, and said petitioner, J. A. Davis, applied for and obtained appeals; and thus there came into existence in this court the two cases of Davis v. Bruce and Moore v. Bruce, which were heard together at the last term of this court, when a decree was rendered by this court reversing said decree of September term, 1886, in said cause of Bruce against Moore, in so far, and only in so far, as the same directed a sale of said life-estate "before and without ascertaining the extent of the rights of Davis as tenant in possession of the lands ordered to be sold, and not providing for his protection," but affirming said decree in all other respects. 7 S. E. Rep. 195.

It is now perfectly clear that the alleged contract of lease under which Davis claimed, conferred upon him no such rights as were attempted to be set up by him; that he was not a necessary or proper party; that all necessary and proper parties were before the court.

This brings us to the case in hand of R. R. Moore et al. v. D. S. Peirce, Com'r, etc. The case is as follows: To the August rules, 1887, of the circuit court of Wythe county, D. S. Peirce, commissioner in the aforesaid suit in chancery, of Leftwich v. Moore et al., brought an action of debt against said R. R. Moore, Henry Simmerman, Samuel R. Sayers, and D. P. Graham and John W. Robinson, partners under the firm and style of Graham Robinson, upon a rent-bond executed in said chancery cause to said Peirce, as commissioner, for $1,400. To this action the defendants appeared at rules, and filed their plea in abatement, to the effect that this action was superseded by the appeal and *supersedeas* in the said injunction suit of Moore against Leftwich. At the succeeding term of said court the said plea in abatement was objected to, and the court sustained the objection, rejected the plea, and gave judgment for the plaintiff, "subject to the control of the court in the chancery cause of Leftwich against Moore." Thereupon the defendants obtained from one of the judges of this court a writ of error to said judgment, but not to operate as a *supersedeas* thereto. It is abundantly clear that the circuit court did not err in rejecting the defendant's said plea in abatement, and giving judgment for the plaintiff in said action of debt. The plea in abatement was wholly inappropriate as a defense to said action, which was founded upon one of the rent notes executed to said commissioner, in the suit of Leftwich against Moore, by said Moore and others, his sureties, for the rent of his own lands; and the record shows that the judgment was entered "subject to the control of the court in the chancery cause of Leftwich against Moore." There was therefore no occasion for any writ of error to said judgment, as the appeal and *supersedeas* awarded in the previous injunction suit of Moore against Leftwich simply superseded the decree of March term, 1887, rendered in the said cause of Leftwich against Moore, and directing to be re-rented the lands of said Moore which had been rented under a former decree in the same cause. All this fully appears in the elaborate statement above of the several causes of Leftwich v. Moore, Bruce v. Moore, Moore v. Bruce et al., and the present case of Peirce, Com'r, v. Moore et al., and the several appeals in said causes respectively. A single glance at the statement of the proceedings had in said causes is sufficient to show, when all of them are looked at together, that no error was committed by the court below in either of the cases, and that the several appeals should have been refused. For these reasons we are of opinion to affirm the judgment of the court below in the present case of Moore et al. v. Peirce, Com'r.

Judgment affirmed.

MOORE v. LEFTWICH.

(*Supreme Court of Appeals of Virginia.* July 4, 1889.)

USURY.

In an action to subject the lands of a debtor to the payment of a judgment, a commissioner was ordered to rent the lands for a term of five years, for an amount sufficient to pay the judgment and costs, and the land was rented to the debtor himself, who executed five bonds, but instead of taking the bonds, with interest from date of renting, they were taken without interest for a sum sufficient in the aggregate to discharge the debt and interest, and were approved by the court. *Held*, that they were not usurious.

Appeal from circuit court, Wythe county. *F. S. Blair*, for appellant. *D. S. Peirce*, for appellee.

RICHARDSON, J. In the case, just decided, of Moore v. Peirce, ante, 1008, it became necessary to state in full the circumstances under which arose the several suits against R. R. Moore, the appellant here, and the several appeals therein to this court, and in the opinion in that case it has been stated that there was no error committed by the court below in either of them; and, this being one of those cases, but very little need be stated, as the decree in this case must also be affirmed. In the original suit of Leftwich v. Moore, as stated in the case aforesaid, of Moore v. Peirce, there was a decree to rent the lands of Moore, owned by him in fee, and the same were accordingly rented; the said Moore becoming the renter of his said lands for a term of five years, for an amount sufficient to pay said Leftwich debt of $4,000, bearing interest at 12 per cent., that being the rate allowed by law when the contract was made, subject to the several credits mentioned in

Digitized by Google

the bill of the complainant, Leftwich. Said Moore, with S. R. Sayers and others, his sureties, executed for said rent his five bonds for $1,400 each, payable in one, two, three, four, and five years, respectively, from the date of renting, without interest, the bonds together amounting to a sum sufficient to pay off said Leftwich debt. The bonds were given in this way, with the full concurrence of Moore, and were prepared by his counsel. The renting was reported by Commissioner Peirce to the court, and with the report he returned said bonds. As has been shown in said case of Moore v. Peirce, the report was fully confirmed, and said commissioner directed to withdraw said bonds, and collect them as they fell due; that Moore paid the two first bonds, but made default of payment of the third bond when it fell due; that such proceedings were had that said lands were decreed to be rented, and that a suspending order was asked for and obtained, but that no appeal was then applied for; that in the mean time G. S. Bruce filed his bill to enforce two judgments, which he had recovered against said Moore; that an account was ordered and taken showing that Moore, besides the fee-simple lands of Moore, of which he himself was the renter for a term then not expired, owned a life-estate in a certain other tract, and that, as the latter was the only land of Moore against which the Bruce judgments could then be enforced, it, as the life-estate therein, was decreed to be sold to satisfy said Bruce judgments; from which an appeal was taken to this court, which was disposed of at the last term of this court, at Wytheville, in the manner and under the circumstances stated in the said cause of Moore v. Peirce. When the decree was entered in the cause of Leftwich v. Moore, for re-renting the fee-simple lands of said Moore, instead of their appealing from said decree the defendant Moore and his said sureties filed an elaborate bill, assailing the rent notes in said suit of Leftwich v. Moore as usurious, and upon other grounds equally untenable, which need not be referred to. In that bill an injunction was prayed for and was allowed, restraining the commissioner from making sale of Moore's said life-estate in the one tract. At the hearing the injunction was dissolved, and then came the appeal, which was allowed, making in this court the present case of Moore v. Leftwich.

Numerous errors are assigned, all of which seem to revolve around the one erroneous idea, that the rent-bonds given by Moore in the suit of Leftwich v. Moore were usurious, and that the giving of said bonds was a revocation of the original 12 per cent. interest contract, though such contract was lawful when made. It surely cannot be necessary at this day to adduce arguments or cite authorities to refute any such contention. It is true that the rent-bonds were not strictly taken as directed by the decree, but the manner in which they were taken was a substantial compliance with the decree. Instead of taking the bonds with interest from the date of renting, they were taken without interest, for a sum sufficient in the aggregate to discharge the Leftwich debt, said Moore being himself the renter, and agreeing to this mode, —all of which was reported to and confirmed by the court, and was rightly so confirmed. There is no error in the said decree, and the same must be affirmed.

(86 Va. 234)

BROWN *v.* LAWSON *et al.*

(*Supreme Court of Appeals of Virginia.* July 4, 1889.)

JUDICIAL SALE—STAY.

Equity will not stay the sale of land under a decree on a petition by the judgment debtor alleging that one H. had taken possession of a portion of the land, and that an action of unlawful detainer was pending concerning it, and that such possession would cause the sale to be made at a sacrifice, where the suit seems to be a mere contrivance for delay; the petition also alleging that the debtor was in a position to effect a desirable private sale, in spite of the possession of H.

Mr. Peirce, for appellant. *Thomas Buford*, for appellees.

LEWIS, P. This was a suit in the circuit court of Wythe county, to subject the lands of the defendant, Brown, the appellant here, to the satisfaction of certain judgments which had been obtained against him by the complainants. These lands consisted of two tracts,—one "the home tract," containing about 450 acres, upon which there was a deed of trust to secure a debt of about $6,000, due by the defendant to one Leftwich; the other, a tract of mountain land, containing about 4,500 acres, upon which there are minerals and a coal mine. The cause was referred to a commissioner to take an account of liens binding these lands, whose report was duly returned and confirmed. The commissioner reported that the defendant was seised of the last-mentioned tract, and the liens thereon, and their respective priorities, were stated. To this report no exceptions were taken. Subsequently, when the cause was called for hearing, the defendant filed an answer, which was also treated as a petition, in which he averred that the mountain tract was very valuable for its coal and minerals, and ample to pay off all his debts; that one Heldreth had unlawfully entered upon the coal mine on the land, and was then in possession thereof; that the respondent had instituted an action of unlawful detainer to put him out of possession, which he had hoped would be speedily tried, but which had been continued for the defendant (Heldreth) to the then next term of the court, upon his application for an order of survey; that, although "there was nothing in the claim of Heldreth," it constituted "a cloud upon the coal mine," in consequence of which the land could not be sold without a sacrifice; and the prayer of the petition was that no sale be ordered until the action of unlawful detainer could be tried. The

Digitized by Google

prayer of the petition, however, was denied, and the land was ordered to be sold by the decree complained of. The contention of the appellant is, as it was in the court below, that the claim of Heldreth constitutes a cloud upon the title to a portion of the land, and therefore that no sale should have been ordered until the action of unlawful detainer, which was brought to remove this cloud, had been decided; and Rossett v. Fisher, 11 Grat. 492, and Horton v. Bond, 28 Grat. 815, are referred to. In those cases the doctrine was announced that neither a trustee in a deed of trust nor a court of chancery ought to make a sale of land to pay debts before the title is cleared up, as far as it is practicable to do so. But the present case is not affected by this rule; for independently of the principle that a judgment in an action of unlawful detainer settles nothing, even as between the parties, in regard to the title, the vague allegations of the petition filed in the court below show no ground for delaying a sale. There was no allegation as to when possession was taken by Heldreth, or what were the circumstances under which he took possession, nor is there any evidence upon these points, and the fair inference from the record is that his alleged possession and the institution of the action of unlawful detainer against him was a mere contrivance to secure delay. The petition alleged that the defendant had succeeded, through his attorney, in attracting the attention of capitalists to the land, on account of its minerals, and that he was then "in a position to realize a sale." But he does not explain how he was in a position to effect a sale, notwithstanding the Heldreth claim, if that claim is, in reality, an impediment to a fair sale under a decree of the court. And as there was no intimation of any such claim, either before the commissioner who reported the title to the land to be clear, except as to the judgment liens reported, or at any time before the case was called for hearing, the circuit court properly concluded that there was "nothing in the claim," in any point of view, and proceeded accordingly. Without, therefore, deciding that under no circumstances will the pendency of an action of unlawful detainer constitute a ground for postponing a judicial sale of land, we do hold that, under the circumstances of the present case, the decree of sale is right, and must be affirmed.

(86 Va. 270)

SOUTH-WEST VA. IMP. CO. v. ANDREW.

(*Supreme Court of Appeals of Virginia.* July 4, 1889.)

MASTER AND SERVANT — ASSUMPTION OF RISK — PLEADING.

1. Deceased, a sort of subchief employed in defendant's mine in laying tracks in the lateral tunnels called "entries," went into one of the entries where the miners were at work laying track, and was killed by falling slate and coal. In the roof of the entry was a large rock, and plaintiff's witness testified to seeing a large crack in the roof between the rock and the slate, but failed to report it, nor did he pay much attention to it, as a roof generally before it fell gave warnings by sound and small droppings of coal. An effort had been made several days before the accident, by deceased and others, to remove the rock, which was unsuccessful. No props were put under it before the accident, but it was propped afterwards. Defendant employed skilled operators, and the mines were carefully inspected every day before the miners were allowed to enter. In the early morning of the day of the accident, which occurred late in the afternoon, the inspector examined the entry in question, and reported it safe. The company's rules required the workmen whenever a roof appeared dangerous to take it down, and it appeared that the droppings were frequent, and when the miners were warned by the droppings they usually sprang out against the face of the walls, and escaped unhurt. *Held*, on a motion to set aside a verdict for plaintiff as being against the evidence, that the evidence failed to show negligence on the part of defendant, but that the injury resulted from a danger incident to the employment.

2. The declaration alleged that defendant, not regarding its duty, did not use proper care for the safety of deceased while he was engaged in working the said coal mines, and did not so operate the said mines as it reasonably might have done, so that deceased could safely work there, but wholly neglected so to do, and wrongfully and negligently permitted stones and slate and coal to hang loosely in and about the roof of the mines where deceased was at work for defendant, and where he was assigned to work by defendant, and negligently failed to provide said roof with sufficient props to keep the loose stones, etc., from falling on deceased. *Held*, that the negligence of defendant was sufficiently alleged.

3. It was not necessary for plaintiff to allege want of contributory negligence on the part of the deceased.

4. Under Code Va. 1887, § 3484, making the rules governing a demurrer to evidence applicable to a motion to set aside a verdict on the ground that it is against the evidence, in considering such a motion all the evidence on both sides is to be considered, and the moving party must be taken as admitting all that can reasonably be inferred from the evidence given by the other side, and as waiving all the evidence on his part which contradicts that of the other party, and all inferences from his own evidence, which do not necessarily flow from it.

May & May and *Mr. Fulton*, for plaintiff in error. *Blair, Henry & Graham*, for defendant in error.

LACY, J. This is a writ of error to a judgment of the circuit court of Tazewell county, rendered on the 11th day of June, 1888. The action was instituted against the plaintiff in error, the owner and proprietor of certain coal mines situated in the county of Tazewell, by the defendant in error for the negligent killing of his intestate while working as a laborer in said coal mines. Upon the trial in the court below the defendant demurred to the declaration, which demurrer the court overruled, and the defendant pleaded not guilty. Upon the trial instructions were asked for on both sides, but the court gave certain instructions asked for by the plaintiff, and rejected instructions asked for by the defendant, and the defendant duly excepted. The jury rendered a verdict for the plaintiff for $4,500, and the defendant moved the court to set aside the said verdict and grant it a new trial, but that motion the court also overruled, and rendered judgment in accordance with the said verdict, whereupon the case was brought here by writ of error.

Digitized by Google

The first error assigned here is the action of the court in overruling the demurrer to the declaration of the plaintiff, first, because the declaration does not allege negligence on the part of the defendant company. An inspection of the declaration shows a sufficient allegation of negligence. It says: "Yet the said defendant, not regarding its said duty, did not use the proper care for the safety of the said John Q. Andrew while he was so engaged in working the said coal mines, and did not so provide and operate said coal mines as it reasonably might have done, so that said John Q. Andrew could safely work therein while in the employment and service of the defendant, but wholly neglected so to do, and there and then wrongfully and negligently permitted stones, slate, and coal to hang loosely in and about the said coal mines, and in and about the roof of the divers entries in said coal mines, where the said John Q. Andrew was at work for the said defendant, and where he was assigned to work and service by the said defendant; and then and there negligently failed to provide the roofing of said coal mines with sufficient props and stays to keep the stones, slate, and coal that hung loosely in and about the said roofing from falling in upon said John Q. Andrew while he was at work for," etc. There can be no question that the negligence of the defendant is here fully set out and alleged.

The second ground of exception to the declaration is that it does not allege a want of contributory negligence on the part of the plaintiff. This is not necessary, nor proper. In an action for damages occasioned by the negligence or misconduct of the defendant it is not necessary for the plaintiff to allege and prove the existence of the care on his part to entitle him to recover. If the defendant relies upon contributory negligence of the plaintiff to defeat the action, he must prove it, unless, indeed, the fact is discovered by the evidence of the plaintiff, or may be fairly inferred from all the circumstances. As proof of due care is not a part of plaintiff's case, it is, of course, not necessary he should aver it in his declaration. Railroad Co. v. Whittington, 30 Grat. 809; Railroad Co. v. Gladmon, 15 Wall. 401; Shear & R. Neg. § 43. If the defendant relied on the contributory negligence of the plaintiff, it is matter of proof for him, either by testimony adduced by or as matter of inference deducible from the evidence of the plaintiff, but it is not the duty of the plaintiff to negative it by proof, and no part of his case to deny it in his declaration. In the case of Railroad Co. v. McKenzie, a late case in this court, reported in 81 Va. 78, LEWIS, P., delivering the unanimous opinion of this court, used the following emphatic language: "If the defendant relied on the defense of contributory negligence, it was incumbent on it to prove it, and in the absence of satisfactory proof to establish such defense, the plaintiff must be presumed to have been without fault. This, indeed, is not disputed." It is true that some of the courts in some of the states have thrown this subject into some obscurity by conflicting and evasive decisions, as they are termed by Shearman & Redfield, and an interesting discussion of the subject and comparison of these decisions may be found in their work on Negligence, § 43. But we do not consider it necessary to cite nor to discuss them. The subject is well settled here in this state upon what we consider the correct principle, that negligence on the part of the plaintiff is a mere matter of defense, to be proved affirmatively by the defendant, though it might, of course, be inferred from the circumstances proved by the plaintiff. This was the view held by DUER, J., in Johnson v. Railroad Co., 5 Duer, 21, where he pointed out that parties were never required to prove negative matters of this kind, and that it had never been held necessary in a complaint upon negligence to aver that the plaintiff had taken due care. We are, however, cited by the counsel for the plaintiff in error to the case in this court of Railroad Co. v. Jackson's Adm'r, on the rehearing here, which is reported in 8 S. E. Rep. 370, as an authority *per contra*. The opinion in that case sets forth that it is not the opinion of the court, a majority of the court not concurring therein. It was written as the expression of the views of only the writer; and, moreover, the general rule is thus stated to be as set forth above: "The general rule undoubtedly is that the plaintiff need not aver and prove that he was not guilty of contributory negligence; but such defense, when relied on, must be proved by the defendant." That case being regarded as exceptional in character, the rule was thought to be different. Opinion of LEWIS, P., 374. And so it is clear that this case is not ruled by that case otherwise than as we have held. We think the declaration is not defective, and that the demurrer thereto was properly overruled by the circuit court, and that there was no error in such action. See Improvement Co. v. Smith, 7 S. E. Rep. 365.

The next assignment of error here is as to the action of the court in instructing the jury as to the law of the case, upon the ground that the instructions ignore all evidence tending to show contributory negligence, and the law with respect thereto, and that they open the liability of the master without reference to modifying facts and circumstances showing the conduct of the servant which modifies the liability of the master. But while these instructions given to both sides are too voluminous to be inserted in an opinion, we will remark that the eighth instruction distinctly and very correctly meets this view. In part it is as follows: "If the jury shall believe from the evidence that the death of deceased was caused by the defendant company's negligence, and that John Q. Andrew, said deceased, by negligence on his part contributed to his death," etc. And in the eighth instruction, given upon the motion of the de-

Digitized by Google

fendant, which is as follows: "The court instructs the jury if they believe from the evidence that the roofing over the spot where John Q. Andrew was killed was unsafe and dangerous on Saturday next before he was killed, and that John Q. Andrew knew that said roofing was at the time aforesaid unsafe and dangerous, it was his duty to notify the defendant company, or its agents, of the condition of said roofing; and if they further believe from the evidence that said John Q. Andrew failed to notify the defendant company, or its agents, of the condition of said roof, and voluntarily went under said roof himself, and was killed by the falling thereof, the plaintiff cannot recover any damage for the death of said John Q. Andrew, unless they further believe from the evidence that the defendant company, or its agents, also knew that the said roofing was unsafe and dangerous on the said Saturday, or at some time previous to the death of said John Q. Andrew." The instructions, of which there are 18 in number, and covering many printed pages, are as favorable to the exceptant as could be asked. We perceive no error therein, and there is certainly no error as against the exceptant. Bank v. Waddill, 27 Grat. 448; Dun v. Railroad Co., 78 Va. 645.

The next assigment of error here is the action of the court in overruling the motion of the defendant to set aside the verdict and grant him a new trial, upon the ground that the verdict was unsupported by the evidence and against the evidence. In this case some of the facts are certified as such, and then the evidence is certified. In considering this motion we are to consider it according to the requirements of Code Va. § 3484, upon the principle of a demurrer to evidence by the party excepting. The rule in Virginia upon a demurrer to evidence is to put all the evidence on both sides into the demurrer, and then to consider the demurrer as if the demurrant had admitted all that could reasonably be inferred by a jury from the evidence given by the other party, and waived all the evidence on his part which contradicts that offered by the other party, or is impeached, and all inferences from his own evidence which do not necessarily flow from it. Railroad Co. v. Moore, 78 Va. 95, and cases cited. The evidence in this case, considered under the foregoing rule of decision, is that the plaintiff in error is the owner and occupier of a coal mine, and that the deceased was its employé, engaged in the work of laying underground tracks in the mine proper, and the lateral tunnels called "entries," and in leveling the floor for the tracks, smoothing off the ceiling, and doing whatever he was called upon to do in connection with this employment; that the ceiling of these entries, generally, and of this one in question, where the deceased met his death, called "No. 5," was six feet high. That deceased was a sort of subchief, with a relay of three or four hands working with him and under his orders. That at the point in No. 5, where Andrew was subsequently killed, there was a depression in the floor which had to be filled up in order to make the track level, and this could not be done by bringing material from other places, because if the floor should be raised without raising the ceiling, then the ceiling would be too low to work the mules and the cars under. That for this purpose the roof was blasted off on Friday. The roof at this point was left and dressed off with picks when the shooting ceased, and there were no props or supports; that at 1 o'clock, P. M. of Tuesday, the day Andrew was killed, some of Andrew's squad went in No. 5 track laying, and Andrew remained in No. 4 entry, finishing off. That as these members of Andrew's squad went in No. 5, at 1 P. M. that day, to work, one of them noticed a crack in the roof wide enough for a person to insert his hand between the slate and the sand rock. That this party, who was a witness, thought it was dangerous, but did not pay much attention to it himself, and did not call the attention of anybody else to it, because a roof generally, before it fell, by sound and small droppings of coal, gave warning. That Andrew was in this entry when they were blasting down the roof on Friday, and was not there afterwards until about 4 o'clock on Tuesday, the day of his death. That then he came in and said he wanted the truck they had, and in a few minutes, as he stood waiting for it to be emptied, some of the slate and coal of the roof fell upon him and killed him, without any previous warning whatever. In the entry No. 5, where Andrew was killed, there was a rock in the roof, and the crack in the roof before mentioned was between the sand rock and the slate above this rock in the roof. There were no props or collars supporting this roof at this point at the time Andrew was killed, but some were put up afterwards, and if the roof had been propped it would not have fallen. This rock had been the subject of some remark, and, as it protruded below the ceiling, and presented an awkward appearance,—might strike the mules as they passed,—efforts were made by Andrew and a number of men to take it down,—prize it out of the wall with iron rails and bars; but they were not able to move it, and it was left; and the mining boss came up and looked on and asked, "Is it loose?" and one of the men replied, "Quite a little bit," and the mining boss walked off and left; and the rock was not taken down because they had no powder, and it was getting late,—time to quit work. The coal and slate were sprung from the rock. The men were trying to pull it down for that reason. Jones, the mining boss, saw this. It is also proved on evidence under the foregoing rules that the plaintiff in error employs skilled and efficient employés, miners of long experience, and inspects these entries every day before the laborers are allowed to go in them, and that on the morning of the accident the inspector had been in entry No. 5, and left his inspector's mark and the date; that these mines were liable to droppings of

Digitized by Google

the ceiling, more or less dangerous, and that the miners were all instructed to look out for any disintegration, and if a roof appears to be dangerous that they must at once take it down; that is, punch or blast down what was loose; and that when these droppings were about to happen, the employés, being thus warned, sprang out against the face of the walls, and so escaped injury; and that while it was customary to prop up the ceilings in the rooms it was not usual to do this to the entries. The witness who testified that the crack was then as wide as his hand, and that the roof was dangerous, gave a written statement shortly after the occurrence, in which he said he did not consider this roof at all dangerous, and that he did not look at it; and this statement he signed, and in his evidence testified that he did do so. Under this evidence we are confronted with this statutory rule: we must admit as true the evidence of the plaintiff, and disregard the evidence of the defendant by which it is distinctly and flatly contradicted. Indeed, it contradicts itself. The same witness says he saw the cracks in the roof, and thought it dangerous; said also that he did not look at the roof at all, and did not consider it dangerous. Another witness, in his written statement, said he did not consider it dangerous to work there, and yet testified that he regarded it as a perfect death trap. If the company daily inspected these mines, and took every general precaution to prevent accident, and had the mines inspected that and every other day before a miner was allowed to enter them, the fact, to be admitted here as true, that by the light of two miner's hat-lamps, lined on every side by coal, 10 feet wide, 6 feet high, and 400 feet long, the witness did see, at 1 o'clock P. M. of the day of the accident, which was at 4 P. M., a crack as wide as his hand in this roof, cannot weigh against the company, as it had that day inspected this place, and the existence of the crack in question was neither communicated to the proper authorities, nor was the danger removed, as the orders of the company required, by this man. But how shall we consider the statement that, while these men were prizing and punching at this rock with heavy iron bars, Jones, the boss of the mines, looked on, and, being informed that this rock was loose, walked off and let it alone until Tuesday, three days after, when it fell, and soon after the coal and slate close to it? Are we required to consider this statement as true, although it is flatly contradicted by Jones and all others present, and although the witness himself leaves it altogether out of his written statement made at the time? The plaintiff in error, under section 3484 of the Code of Virginia, has waived all of his own evidence which contradicts that offered by the defendant in error, and all inferences from his own evidence which do not necesssarily flow from it, and is required to admit all that can reasonably be inferred by a jury from the evidence given by the defendant in error in the lower court. By it, says STANARD, J., in Ware v. Stephenson, 10 Leigh, 155, the demurrant allows full credit to the evidence offered by the demurree, and admits all the facts directly proved by or that a jury might fairly infer from the evidence.

Let us now inquire whether the jury could reasonably have inferred negligence from this fact, admitting it to be true. The evidence of the plaintiff in error, not contradicted by the defendant's evidence, is that this mining company employs skilled, prudent, and competent servants, experienced in the business by long service. That at 2:30 A. M., daily, a skilled inspector is sent into the mines to precede the laborers who come at 7 o'clock. That this inspector passes through all the entries and other parts of the mine with a corps of assistants, and makes a careful examination of the mine. That this official thought the rock in question was beneficial in holding the overhead cone, as it pushed back into a solid bed; that he and his corps report to Jones, the mine boss, every morning the condition of the mine, and he reports to the manager by 6 o'clock; and that on the morning of this accident the entry in question was inspected, and the mark of the inspector with the date made there. That the manager of the mine and the mine boss, on Monday after the Saturday when the alleged statement was made to Jones that the rock was loose a little bit, went to this entry No. 5, where they were about to lay the track, and went there for the purpose of inspecting it, and, from an experience of 23 years in such work, pronounced it safe. That, although the greatest care is exercised, there is danger all the time in any mine that air gets in. There is an expansion, and from this and many other causes, dangers follow which cannot be provided against. That there was no slip in the rock or roof on Monday, it being that day specially examined by the manager of the mine and the mine boss. That this, as has been stated, was inspected on the morning of the accident, and there was no slip or crack there then. That it was the coal out of the ceiling that killed the deceased. That he was 12 or 15 feet from the rock when killed, and that while this rock fell it was after he was killed. That the rock in question was examined with a lamp, and by all, including the deceased, who was present, pronounced safe. The rule is whenever a roof is considered unsafe to pull it down. Andrew and his assistants were always instructed to test the roof above them when they went to work under it, and, if it should be considered unsafe, to take it down. Andrew had spent 30 or 40 days taking down roofs; that while this place was not timbered with props it was not usual to timber entries; that new entries were never timbered; that the rooms are timbered, but not the entries. Under these circumstances, was there more which the company could have done to guard against injury to any of the employés by fall-

Digitized by Google

ing bodies of coal out of the roof? The defendant company was bound to use ordinary care; that is to say, such care as reasonable and prudent men use, under like circumstances, in selecting competent servants, and in supplying and maintaining suitable and safe appliances for the work so to be performed, and in providing generally for the safety of the servant in the course of the employment, regard being had to the work and to the difficulties and dangers attending it; for what would be ordinary care in one case may be gross negligence in another. Improvement Co. v. Smith, 7 S. E. Rep. 367, citing Beach, Contrib. Neg. 22; Thomp. Neg. 982. It is the duty of the master so far as he can, by the use of ordinary care, to avoid exposing his servant to extraordinary risks, but he is not bound to guaranty them against such risks. One who employs servants in a complex and dangerous business ought to prescribe rules sufficient for its orderly and safe management. His failure to do so is a personal negligence, for the consequences of which he is liable to his servants. Riley v. Baxendale, 6 Hurl. & N. 446; Vose v. Railroad Co., 2 Hurl. & N. 728; Shear. & R. Neg. 122. But when a servant enters upon an employment he accepts the service subject to the risks incident to it. An employé who contracts for the performance of hazardous duties assumes such risks as are incident to their discharge from causes open and obvious, the dangerous character of which causes he had opportunity to ascertain. If a man chooses to accept employment, and continue in it, with the knowledge of the danger, he must abide the consequences so far as any claim against the employé is concerned. Woodley v. Railway Co., L. R. 2 Exch. Div. 389; O'Connell's Case, 20 Md. 212; Scally's Case, 27 Md. 589; Wonder's Case, 32 Md. 419; Clark v. Railroad Co., 78 Va. 717. The evidence in this case shows that the danger to the employé in this as in every other coal mine is incident to the employment. This danger is well known and well understood. All such laborers look out for any signs or symptoms of danger in the overhead cone. All are instructed to listen for the premonitory sound and the warning droppings of coal in small particles, and all are instructed as to this danger, and required by the rules and orders of the master to take down all unsafe ceilings or roofs. They well understand how to avoid these dangers by springing close to the face of the entry or room or other place. But in this particular case there were no warning sounds, no symptoms of unrest, no droppings of coal. Without warning a quantity of coal and slate fell and killed the deceased as he stood waiting for a truck being used by two other persons. He was killed, they were unhurt. Was this the result of any negligence on the part of the company? What duty had they neglected? Was it their duty to remove a rock that by all the tests deemed suitable by those best qualified to judge was safe? If so, still the rock does not appear to have done any injury or to have caused any. Was it the duty of the company to take down this quantity of coal? If so, why? According to the best judgment of all who saw it, it was held to be safe; that is, as safe as any other quantity of coal in a place dangerous everywhere, all the time. These witnesses who say they thought it dangerous kept their opinions to themselves, and in no wise suggested this to the agents of their employers; and their conduct in going under it, and working there without demur, or any concern, as they themselves state, leads to a reasonable presumption that it was not regarded as uncommonly dangerous. We think the injury resulting here was one resulting from the ordinary business of the mine, and its hazards incident thereto; that there was no default, no negligence, on the part of the company; that the evidence discloses a management prudent and cautious, and one providing against danger to the lives and the limbs of the employés, as far as it is possible in this dangerous service; and that there is no just ground upon which the company can be required to respond in damages for an injury not caused by it, and as to which it is in no default. The judgment of the circuit court of Tazewell, in overruling the defendant's motion to set aside the verdict and grant a new trial, was therefore erroneous, and must be reversed and annulled, and the case will be remanded for a new trial to be had therein.

LEWIS, P. In the case of Railroad Co. v. Jackson's Adm'r, 8 S. E. Rep. 370, I was of opinion that the declaration in that case, which is similar to the declaration in the present case, was defective for the reasons I then gave. My view then and my view now is that for the servant to maintain an action against the master for injuries received in the course of the employment he must show that his case comes within an exception to the general rule which exempts the master from liability to the servant for injuries caused by the negligence of fellow-servants, etc., and therefore he must allege in the declaration enough to show, if true, that the master is necessarily liable to the plaintiff's demand. I am not aware that the precise question ever before arose in this court, but upon principle I am well satisfied that my view is correct. However, this court has ruled otherwise, and as upon the facts I do not think the verdict can stand, I will not dissent from the opinion just read.

(86 Va. 153)

ADAMS *et al.* v. HAYS *et al.*

(*Supreme Court of Appeals of Virginia.* June 13, 1889.)

APPEAL—DEMURRER TO EVIDENCE.

Plaintiffs orally agreed to sell defendants brick at the rate of $4.50 per 1,000, "kiln count." Witnesses for plaintiffs testified that, as between the maker of brick and a dealer, the term "kiln count" meant an estimated count of the brick while in the kiln. Defendants' witnesses stated that an actual count of the brick from the kiln was understood. *Held* that, under Code Va. 1887, § 3484, which pro-

Digitized by Google

vides that when a case at law, civil or criminal, is tried by a jury, and a party excepts to the granting or refusal to grant a new trial, on a motion to set aside the verdict as contrary to the evidence, and the evidence (not the facts) is certified, the rule of decision of the appellate court shall be as on a demurrer to the evidence by the party excepting, the demurrant must be regarded as having waived all his evidence which conflicted with that of the demurree, and the reasonable inferences deducible therefrom, and, defendants having excepted from a refusal to set aside the verdict as contrary to the evidence, and grant a new trial, the term "kiln count" must therefore be construed to mean a count by estimation, while the brick were in the kiln.

Error to corporation court of Roanoke.

Miller & Smith, for plaintiffs in error.

Penn & Cocke, for defendants in error.

HINTON, J. This is an action of *assumpsit*, brought by Hays & Angell to recover of Adams Bros. & Paynes the sum of $745.83, for several hundred thousand bricks made and furnished the defendants by the plaintiffs. The case was submitted to the jury without instructions being asked on either side, and they returned a verdict for $585, that being $160.83 less than the amount claimed in the plaintiffs' declaration. Whereupon the defendants moved the court to set aside the verdict and grant them a new trial, which the court refused to do; and this action of the court constitutes the only assignment of error in this court, the preliminary objections, made in the lower court, having been expressly withdrawn in this court. The case, therefore, comes before us under the rule prescribed in the Code section, (Code Va. 1887, § 3484, p. 829,[1]) as upon a demurrer to evidence. In such case the demurrant is regarded as waiving all of his evidence in conflict with that of the demurree, admitting the evidence of the demurree, and all reasonable inferences to be drawn therefrom, and as being entitled to only such evidence of his own as is not in conflict with that of the demurree, and such inferences as necessarily flow therefrom. Trout v. Railroad Co., 23 Grat. 619; Creekmur v. Creekmur, 75 Va. 432. Viewing this case in the light of this fixed rule of practice, it is perfectly apparent, from an inspection of the record, that the contention of the plaintiffs in error cannot be maintained.

By the terms of the contract, which was oral, the bricks were to be manufactured for Adams Bros. & Paynes at the rate of $4.50 per 1,000, "kiln count." As to meaning of these words, there is a conflict of testimony; the witnesses for the plaintiffs below testifying that, as between the manufacturer or maker of the bricks and a dealer in bricks, it means "the number of bricks in the kiln, estimated by counting the headers and stretchers of the middle course, and then counting the number of courses, and multiplying them together, deducting for the eyes;" while the witnesses for the defendants testify that the meaning of those words is, "an actual count of bricks from the kilns into wagons or other vehicles for transportation." That the estimate of the number of bricks furnished Adams Bros. & Paynes will be increased or diminished, according as one or the other of these methods of counting shall be adopted, seems perfectly obvious. But the advantage, under the rule in regard to a demurrer to evidence just stated, is all with the plaintiffs below in this court; for applying that rule, and rejecting the statements of the defendants' witnesses on this point, it is clear that the term "kiln count," as used in this contract, must be construed to mean a count by estimation while the bricks are in the kiln; and, so construing it, the claim of the plaintiffs that 337,000 were furnished the defendants, at $4.50 per thousand, as claimed in the first item of their bill of particulars, is fully established; for the witness Robert Angell distinctly testifies that "the several kilns are correctly charged in the account filed with the declaration." That this was the construction given to the contract by the jury cannot be doubted, for, in addition to the fact that several witnesses deposed that such was the meaning given to the phrase "kiln count," when used between a brick manufacturer and a dealer in bricks, it also distinctly appears from the testimony of at least one witness, Paris, that he had previously settled with Brumbaugh, agent for Adams Bros. & Paynes, for bricks sold them by this method of counting, and from the testimony of other witnesses that this same Brumbaugh had been seen with Hays making an estimate of the kilns before the bricks were removed, —testimony of a character that could not fail to have impressed the jury. This leaves but three items of the plaintiffs' bill of particulars challenged, namely, the seventh, ninth, and tenth; for as to the other items they are all admitted by J. G. Payne himself, one of the defendants.

The next item of difference is as to an amount of $60, paid a hand, at the rate of $1 per day, for loading the bricks in the vehicles for transportation, which the plaintiffs in error seek, by some sort of a mathematical calculation, to reduce to $33.70. But we do not think this can be done. One dollar a day was doubtless regarded by the jury as simply a just and reasonable compensation for the service rendered by this hand, and we see no reason for disagreeing with them in this particular, even if it could be shown, as it has not been, that the loading might have been completed in a shorter time if every wagon had been on hand to the minute, and each detail of the work had been carried out with absolute accuracy, and without the loss of a second of time.

[1] Code Va. 1887, § 3484, reads as follows: "When a case at law, civil or criminal, is tried by a jury, and a party excepts to the judgment or action of the court in granting or refusing to grant a new trial on a motion to set aside the verdict of a jury on the ground that it is contrary to the evidence, * * * and the evidence (not the facts) is certified, the rule of decision in the appellate court, in considering the evidence in the case, shall be as on a demurrer to the evidence by the party excepting."

Digitized by Google

The objection to the ninth item of the plaintiffs' account is also untenable. It is a charge of $302.50, for 55,000 brick, at $5.50 per thousand. As to this charge, the witness Angell testifies that these bricks "were from a kiln burned by the plaintiffs for the defendants under a special contract made after the fifth kiln had been burned;" and the price paid, $5.50, being in excess of that charged for the first three kilns, gives some countenance to the idea suggested in the record, that the price is greater when the bricks are furnished otherwise than by the kiln.

As to the last disputed item, the tenth, in the account, for 50,000 bricks left on the yard, we think the jury might well have found for the plaintiffs. It was the estimate of men engaged in the brick business, who were accustomed to make such estimates, but who had no right, after their contract relations had ceased, to go upon the premises for making a count. But even if there has been some trifling error in making this estimate, and, perhaps, in making some others, we feel satisfied that the plaintiffs in error have been fully compensated for such error, by the action of the jury in reducing the amount of the plaintiffs' claim by the sum of $160.83. Indeed, the inference is not unreasonable that the jury took these discrepancies in the estimates made of some of the smaller items in the account, and made the above-mentioned deduction expressly to cover them. But, if the case were not so clearly with the defendants in error upon the proofs, we would still be compelled to reach the same conclusion as to the result; for, as all the evidence is not set out, we are without a basis upon which to render a judgment of reversal. Indeed, we must presume there was some testimony, not set out in the record, which justified the verdict of the jury, the more especially as the verdict has been approved by the trial judge. McArter v. Grigsley, 4 S. E. Rep. 369; Telegraph Co. v. Hobson, 15 Grat. 149. After a careful examination of the case, we see no reason for questioning the judgment of the hustings court of Roanoke city, and it must be affirmed.

(86 Va. 212)

WARD v. WHITE *et al.*

(*Supreme Court of Appeals of Virginia.* June 13, 1889.)

ASSAULT—DAMAGES—RES GESTÆ—MITIGATION.

1. A verdict for $1,375 damages for an assault in which plaintiff was shot, and from which he suffered greatly for several months, but recovered without permanent injury, where neither the actual expense nor loss is shown, except in a general way, and no evidence of defendants' financial condition is given, will not be set aside for insufficiency; especially when plaintiff, being warned of the intended assault, did not exercise any care to avoid it, but relied on his own ability to cope with defendants.

2. Evidence that plaintiff had published in his newspaper a gross insult to one of the defendants on the day before the assault, which occurred at the first opportunity defendants had of meeting plaintiff, is admissible as part of the *res gestæ*.

3. Such testimony is also admissible in mitigation of damages.

F. S. Blair and *Mr. Williams*, for plaintiff in error. *C. F. Trigg* and *Mr. Walker*, for defendants in error.

LACY, J. This is a writ of error to a judgment of the circuit court of Washington county, rendered on the 20th day of January, 1888. The action was trespass for a personal assault, made by the defendants in error upon the plaintiff in error, shooting him down in the town of Abingdon on the 27th day of September, 1885. On the trial the verdict was for the plaintiff, and damages assessed against the defendants for the sum of $1,375, and judgment rendered by the court accordingly. The plaintiff took sundry bills of exception at the trial, and, after the verdict was rendered in his favor for the sum stated, he was dissatisfied with the amount, his action being for $25,000 damages; and moved the court to set aside the same, and grant him a new trial, which motion the court overruled, and certified the evidence; whereupon the case was brought to this court by writ of error.

The evidence, so far as we deem it necessary to be stated, is as follows: Ward, the plaintiff in error, and plaintiff in the court below, was the editor of a newspaper in the town of Abingdon, which had a general circulation throughout the state of about 1,000. In the issue of that paper which appeared on the 26th day of September, 1885, the following appeared, referring to the defendant William White, the party who did the shooting: "The man that goes into a convention, and seeks the support of a convention, and then runs, without any valid reason, against the nominee of the convention, would steal the coppers off the eyes of a dead negro." Also: "We propose, first, to ask these questions, namely: William White, why was he caucusing with the enemies of Democracy at Winston's warehouse? and how a man can honorably seek the nomination of the Democratic party, and, because he didn't get it, become a traitor?" etc. Before the issue in question appeared, Ward absented himself on business, and was detained by several railroad connections, so that he did not reach home until the day after the said publication. It was proved that, before the publication in question, Ward had threatened to attack White's private character, and been warned that if he did White would shoot him; and he had boasted, with an oath, that he was no coward. White was an independent candidate for the senate, and had thus incurred the enmity of some of his fellow-men. When the publication was made, people called White's attention to these insulting comments upon him, and he became furiously angry, and showed such violence of excitement as to make it evident that a conflict would occur when the two men met. But Ward was absent, as has been stated, and only returned the next day. Upon the train Ward was warned that White was looking for him, and he opened his valise, and trans-

Digitized by Google

ferred therefrom a revolver to his pocket. Riding up from the depot in the hotel omnibus, Ward passed White coming down on the sidewalk in an excited way, going towards the depot. White turned and followed the omnibus, which, however, left him, and went on to the hotel, and Ward alighted without injury, and went to his room, got his dinner, armed himself with another pistol, so that he had one in his hip-pocket and one in his coat-pocket. After moving about, going to his office and coming back, he returned to his room, and lay down on the bed, and then came out on the street, in the afternoon, and saw one of the defendants, N. Graham White, sitting on the hotel porch, who got up, and left as Ward came out, in a suspicious sort of way; but Ward, looking up and down the streets to see if the coast was clear, walked over to a drug-store, and bought a cigar, and chatted awhile with the druggist, who was his friend,—about 15 minutes,—and then walked along the street back to his hotel, smoking a cigar, holding that in one hand and his cane in the other hand. But just before he reached the hotel, without warning, he was shot down, and, falling, rolled over on his back, and saw, across the street, William White, gun in hand, on the curbstone, looking, as the evidence states, like one of the characters in Dante's Inferno. Ward was badly shot, but he crawled to the porch, and pulled himself up and over by the bannisters, into shooting position, as he says, and opened fire on Graham White, standing behind a tree. While Ward was crawling along to the porch White shot at him again, but his aim was impaired by some one seizing the gun, and Ward was not again struck, although he and Graham White exchanged several shots. Ward was very badly hurt, and for many months languished of wounds which were thought very dangerous, and likely to result most unfavorably; but he got well, and none of the unfavorable results followed.

The first exception taken, and the first assignment of error here, is that the court admitted in evidence the newspaper articles mentioned above. It is insisted by the counsel for the plaintiff in error that the newspaper insults were too remote to have had any effect on the matter; that White had a whole day and more to get cold in; and that the articles could neither have been admitted in evidence correctly, as matter in mitigation of damages, nor as part of the *res gestæ*, but should have been excluded altogether. On the other side it is insisted that they were properly admitted in evidence in mitigation of damages, and also as part of the *res gestæ;* and we are cited to the case of Davis v. Franke, 33 Grat. 416, (decided in this court in 1880.) In that case STAPLES, J., says: "The authorities are generally agreed that, in an action of trespass for an assault and battery, the defendant may, under the general issue, give in evidence matters which go merely to the *quantum* of damages, by way of palliating the offense. Where the defendant relies upon provocation, it must be so recent as to raise the presumption that the assault was committed in heat of blood, excited by the conduct or declarations of the plaintiff. The rule which confines the defendant to proof of recent provocations received from the plaintiff is subject to modifications which more or less qualify the rule, according to the particular circumstances of each case." Lord ABINGER said, in Fraser v. Berkeley, 32 E. C L. 791: "The law would be an unwise law if it did not make allowance for human infirmities, and, if a person commit violence at a time when he is smarting under immediate provocation, that is matter of mitigation. * * * It appears to me to be severe to say that you should not look at the cause which induced the assault." Judge STAPLES also says, in the case of Davis v. Franke, supra, concerning the *res gestæ:* "It has been justly said that the affairs of men consist of a complication of circumstances, so intimately interwoven as to be hardly separable from each other. Each owes its birth to some preceding circumstance, and in its turn becomes the prolific parent of others; and each, during its existence, has its inseparable attributes and its kindred facts, materially affecting its character, and essential to be known in order to a right understanding of its nature. These surrounding circumstances, constituting a part of the *res gestæ*, may always be shown to the jury in connection with the principal fact." Citing Mr. Justice PARK as saying in Rawson v. Haigh, 2 Bing. 104: "It is impossible to tie down to time the rule as to the declarations." The area of events covered by the term *res gestæ* depends upon the circumstances of each particular case. Whart. Ev. § 258.

When a business man, coolly and disengagedly, contemplates half a dozen distinct negotiations in the course of an hour, the sweep taken by the *res gestæ* in each case is limited to what is done in the time of the particular negotiation. Miles v. Knott, 12 Gill & J. 442. When, however, one man of high parts and great energy is employed in a single protracted negotiation of great importance, then we can conceive of his whole time for weeks being absorbed in the negotiation, and of its so tinging with its characteristics every thing that he does and says that for all this period the things that he does and says become rather the incidents of the negotiation than of himself. Fifield v. Richardson, 34 Vt. 410; Cunningham v. Parks, 97 Mass. 172; Railroad Co. v. Redd, 54 Ga. 33. So if in one of our streets there is an unexpected collision between two men, entire strangers to each other, then the *res gestæ* of the collision are confined within the few minutes that it occupies. When, again, there is a social feud in which two religious factions are arrayed against each other for weeks, and so much absorbed in the collision as to be conscious of little else, then all that such parties do and say, under such circumstances, is as much a part of the *res gestæ* as the blows

Digitized by Google

given in the homicides for which particular prosecutions may be brought. Whart. Ev. § 259; Com. v. Sherry and Com. v. Daley, reported in the appendix to Whart. Hom.; Rex v. Gordon, 21 How. State Tr. 542.

The *res gestæ* may be, therefore, defined as those circumstances which are the undesigned incidents of a particular litigated act, and which are admissible when illustrative of such act. Nutting v. Page, 4 Gray, 584. These incidents may be separated from the act by a lapse of time more or less appreciable. They must stand in immediate causal relation to the act,—a relation not broken by the interposition of voluntary individual wariness, seeking to manufacture evidence for itself. Incidents that are thus immediately and unconsciously associated with an act, whether such incidents are doings or declarations, become in this way evidence of the character of the act. And Lord DENMAN in Rouch v. Railway Co., 1 Q. B. 61, approving the saying of Baron PARK, above cited, "that it is impossible to tie down to time the rule as to the declarations" that may be made part of the *res gestæ*, said "that, if there be connecting circumstances, a declaration may, even at a month's interval, form part of the whole *res gestæ*." And Mr. Wharton says, upon the authority of numerous cases: "Therefore declarations which are the immediate accompaniments of an act are admissible as part of the *res gestæ*; remembering that immediateness is tested by closeness, not of time, but by causal relation." Whart. Ev. § 262. And what is done is part of the *res gestæ* as well as what is said. Mr. Field, in his admirable work on the Law of Damages, says: "In actions for willful injuries to the person, where vindictive damages are claimed, the defendant should not be restricted in proving matters which took place at the very time of the injury complained of. But he has a right to show the jury the true relations of the parties, and any facts and circumstances relating to the act, in order that they may determine how far it was wanton, malicious, vindictive, or unprovoked, or how far extenuated by the conduct, declarations, or provocations of the plaintiff." Section 118. Prentiss v. Shaw, 56 Me. 427. Cited approvingly in Davis v. Franke, supra.

Upon the foregoing principles we think the admission in evidence by the court of the newspaper articles was plainly right. They were the direct cause of the assault complained of. Without them, therefore, there would have been no assault committed. To have exhibited the defendant to the jury in the attitude of a wanton assassin, without cause or provocation, shooting down a fellow-man, who was guiltless of injury or offense towards him, would have been a mockery of justice. How far these stinging insults mitigated the evil of the attack in question was a matter for the jury to determine, but there can be no doubt—there can be no denial—that the insulting words stood close to the act in question in immediate causal relation thereto, and thus constituted part of the *res gestæ*, and as such were admissible in evidence.

But they were also admissible in mitigation of damages. They caused the assault, —provoked it; were of a character to greatly excite and inflame the passions of the defendant; and, while the time extended itself through the period during which the whereabouts of the plaintiff were unknown, the subsequent meeting brought the whole matter vividly before the mind, and again ignited the passions of a man thus put under the ban of a newspaper insult, which was at the very time of the assault under the eyes of thousands of his fellow-men, and which tended towards his utter degradation. He was taunted with the matter on every hand, and, so far from cooling, time—the lapse of time itself short, and enforced by the absence of the offender—had only more and more excited the outraged passions of the defendant, and caused him to do an act which it is unreasonable to suppose he would have committed without them. They were properly admitted in mitigation of damages, and were as essentially a part of the case as the assault itself.

We come now to consider briefly the motion to set aside the verdict because the damages assessed by the jury were insufficient and inadequate. In personal torts, and actions generally sounding in damages, it being within the strict province of the jury to estimate the injury, unless there be a manifest abuse the court will not interfere. In its general acceptation, this rule applies equally to an unjust lessening of the damages, as to an intemperate excess. Justice BULLER says, (Bull. N. P. 327:) "In actions founded upon torts, the jury are the sole judges of the damages, and therefore the court in such cases will not grant a new trial on account of the damages being trifling or excessive." This was the rule at common law, and was strictly followed in this state, until enlarged by statute, (1 Rev. Code, p. 510, §§ 96, 97; 1 Rob. Pr. 378;) and this court said in Rixey v. Ward, 3 Rand. (Va.) 52: "When a new trial is granted for such cause, it is not necessary to state on the record the ground for awarding it, since it will be presumed that the order of the court upon a subject which the statute has put within its jurisdiction was correct, unless the contrary appear." Chapter 173, § 15, Code 1873, and the numerous cases cited. But the question has nevertheless rested very largely in the discretion of the jury. It was said by this court in the late case of Daingerfield v. Thompson: "The question of what damages the plaintiff sustained was a question for the jury to determine. The appellate court will not interfere with such a verdict, unless it appears that the verdict is plainly extravagant and excessive." 33 Grat. 136. The reason for holding parties so tenaciously to the damages found by the jury in personal torts is that, in cases of this class, there is no scale by which the damages are to be graduated with

Digitized by Google

certainty. They admit of no other test than the intelligence of the jury, governed by a sense of justice. It is, indeed, one of the principal causes in which the trial by jury has originated. From the prolific fountain of litigation, numerous cases must daily spring up, calling for adjudication for alleged injuries, accompanied by facts and circumstances affording no definite standard by which these alleged wrongs can be measured, and which, from the necessity of the case, must be judged of and appreciated by the view that may be taken of them by impartial men. To the jury, therefore, as a favorite and almost sacred tribunal, is committed, by unanimous consent, the exclusive task of examining those facts and circumstances, and valuing the injury, and awarding compensation in the shape of damages. The law which confers on them this power, and exacts of them the performance of the solemn trust, favors the presumption that they are actuated by pure motives. It therefore makes every allowance for different dispositions, capacities, views, and even frailties in the examination of heterogeneous matters of fact, when no criterion can be supplied. And it is not until the result of the deliberations of the jury appears in a form calculated to shock the understanding, and impress no dubious conviction of their prejudice and passion, that courts have found themselves compelled to interpose. 1 Grah. & W New Trials, 452. In this case there has been no definite proof of any actual outlay, costs, and expenses, except generally, and the jury seems to have been to some degree impressed with the injuries to the plaintiff, and his pain and anguish, and loss of time, for which $1,375 does not seem to satisfy the plaintiff. It doubtless appears to be a large sum to the defendants, and may have been so regarded by the jury. We have no evidence of the financial situation of the defendants, but this sum, in this community, would not be regarded as insignificant; and especially in view of the fact that the plaintiff, though greatly injured at the time, has sustained no permanent bodily injury. The defendants in error submit without complaint to the verdict and judgment of the court below, and do not seek to have it disturbed here; but there is a principle of law not alluded to or relied on here which might have an important bearing on the case, under the circumstances. It is this: "It is the duty of a person to use ordinary and reasonable care and means to prevent an injury, and the consequences of it; and he can only recover damages for such losses as could not, by such care and means, be avoided." When a party, knowing he is to be attacked, arms himself with two pistols, and goes forth to fight, it can scarcely be said that he did all in his power to avoid the injury which he received. By such a course he attests his courage, but not so much that care and caution which is above suggested as essential to any recovery. Field, Dam. p. 29, § 32. Upon the whole case, however, considering all the errors assigned, we are of opinion to affirm the judgment of the court below. Judgment affirmed

---

(86 Va. 223)

HICKS v. COMMONWEALTH.

(*Supreme Court of Appeals of Virginia.* June 13, 1889.)

POISON—ATTEMPT TO ADMINISTER.

An indictment charging defendant with attempting to poison, with intent to kill, one A., by buying the poison and delivering it to one L., and soliciting her to administer it in coffee to A., but which fails to allege that L. consented to do so, or that anything else was done, does not charge an offense, under Code Va. 1887, § 3669, declaring it a felony to attempt to administer poison in food, drink, etc., with intent to kill. HINTON, J., dissenting.

Perkins, *Hoge & Hoge* and *Cassel*, for plaintiff in error. *The Attorney General*, for defendant in error.

LEWIS, P. This is a writ of error to a judgment of the circuit court of Pulaski county, affirming a judgment of the county court of that county, whereby the plaintiff in error was sentenced, in accordance with the verdict of the jury, to confinement in the penitentiary for a term of four years, for an attempt to administer poison to one James Anderson. The indictment charges, in substance, that George W Hicks, the plaintiff in error here, and Nancy Price, feloniously intending to kill the said James Anderson, did attempt to administer to him a quantity of poison, called "strychnine," by soliciting one Laura Long, for a promised reward, to administer the same; and that they, in furtherance of their design to kill as aforesaid, did deliver to the said Laura Long a quantity of the said poison, to be by her put into the coffee of the said Anderson, who at the time was boarding with her, etc. It is not charged, however, that she agreed to administer the poison, or that she did any act towards the commission of the crime.

There was a demurrer to the indictment, which was overruled, and the said Hicks, having been tried separately, pursuant to his election, was found guilty. He thereupon moved for a new trial, which motion was overruled, to which action of the court he excepted, and the facts are certified in the bill of exceptions.

The punishment for an attempt to administer poison is prescribed by section 3669 of the Code, which enacts as follows: "If any person administer, or attempt to administer, any poison or destructive thing, in food, drink, medicine, or otherwise, or poison any spring, well, or reservoir of water, with intent to kill or injure another person, he shall be confined in the penitentiary not less than three nor more than five years."

The principal witness for the commonwealth was Mrs. Laura Long, whose uncontradicted evidence is substantially as follows: That on several occasions, at the house of the witness, in Pulaski county, the first being on the 31st of August, 1888, the prisoner spoke

Digitized by Google

to her about poisoning "old man Anderson," and said he knew Mrs. Price would approve it, as she had proposed to him (Hicks) to poison him. On the 18th of September the prisoner passed the house of the witness, on his way to Central to get the poison, saying to her, as he passed, that Mrs. Price had given him the money to buy it with. On his return he stopped at the house of the witness, and showed her the poison he had purchased. It was wrapped up in a paper, which was inside of an envelope, "which had on it a skull and bones and reading." It was strychnine, and he said he had gotten it that day at a drug-store at Central. He told the witness he wanted her to go with him to the spring, near by, where Mrs. Price would meet them, and deliver the poison to her, and tell her all about it. The witness said she could not go then, but would meet them there that night, about 8 o'clock, if that would suit. To this the prisoner answered that it would suit a great deal better, and that he would be present to see the poison delivered, and to witness the agreement. He then went on his way. The witness went to the spring at the appointed hour, and, after waiting there a little while, Mrs. Price arrived. She had a small package in one hand, which she said contained strychnine, and an envelope in the other. The package she handed to the witness, saying, "Here it is." She then directed the witness to put the poison in the old man's coffee that night when she got home, and told her as soon as he got "past speaking and dropped" to give the alarm, and to say that the old man had fallen dead; for all which she offered to reward her liberally. She said George (the prisoner) was "right out there," pointing in the direction of the corn-field. The witness looked, and saw some one there, and called the prisoner, but he did not answer. Just then, at a signal from the witness, several men, in hiding near by, rushed up, and Mrs. Price ran away, and the witness delivered to one of these men (Mr. Brown) the package of poison she had just received from Mrs. Price. The witness also testified that she never agreed to administer the poison, and never intended to do so, and that she would not have done it for anything. "I wanted to fool Hicks," she said, "because I wanted to catch him, and to let other people know it."

The connection of the prisoner with the matter, as detailed by Mrs. Long, is fully established by the record; and the question, therefore, is whether these facts constitute an indictable attempt, within the meaning of the law. We are of opinion that they do not, and, as they substantially correspond with the allegations of the indictment, it follows that the demurrer to the indictment ought to have been sustained. It is an elementary rule of criminal pleading that an indictment, in a case like the present, must allege some act done by the defendant of such a nature as to constitute an attempt, in a legal sense, to commit the contemplated offense; otherwise the indictment will not be sufficient. Clark's Case, 6 Grat. 675; 1 Whart. Crim. Law, (9th Ed.) § 192. The question as to what is such an act is often a difficult one to determine, and no general rule, which can be readily applied as a test to all cases, can be laid down. It has been truly said by a philosophical writer that "the subject of criminal attempt, though it presses itself upon the attention wherever we walk through the fields of the criminal law, is very obscure in the books, and apparently not well understood either by the text-writers or the judges." And it may be added that it is more intricate and difficult of comprehension than any other branch of the criminal law. Each case must therefore be determined upon its own facts, in the light of certain principles which appear to be well settled. The difficulty generally is in determining the proximity of the act in question to the offense in contemplation.

An attempt to commit a crime is compounded of two elements: (1) The intent to commit it; and (2) a direct, ineffectual act done towards its commission, (Code, § 3888; 2 Bish. Crim. Proc. § 71;) or, as Wharton defines it, "An attempt is an intended, apparent, unfinished crime." Therefore the act must reach far enough towards the accomplishment of the desired result to amount to the commencement of the consummation. It must not be merely preparatory. In other words, while it need not be the last proximate act to the consummation of the offense attempted to be perpetrated, it must approach sufficiently near to it to stand either as the first or some subsequent step in a direct movement towards the commission of the offense after the preparations are made. Uhl's Case, 6 Grat. 706; McDade v. People, 29 Mich. 50; Bouv. Law Dict. "Attempt."

Thus it has been often held, under statutes similar to our own, that the purchase of a gun with intent to commit murder, or the purchase of poison with the same intent, does not constitute an indictable offense, because the act done in either case is considered as only in the nature of a preliminary preparation, and as not advancing the conduct of the accused beyond the sphere of mere intent. "To make the act an indictable attempt," says Wharton, "it must be a cause, as distinguished from a condition; and it must go so far that it would result in the crime, unless frustrated by extraneous circumstances." 1 Whart. Crim. Law, § 181. This is well illustrated by the case of People v. Murray, 14 Cal. 159. In that case the defendant was indicted for an attempt to contract an incestuous marriage with his niece. It was shown that, after declaring his intention to marry her, he actually eloped with her, and sent for a magistrate to perform the ceremony, and at the trial he was convicted. But on appeal the judgment was reversed, the appellate court holding that these were mere preparations, and did not constitute an attempt, within the meaning of the statute.

Digitized by Google

In delivering the unanimous opinion of the court, FIELD, C. J., said: The evidence "shows very clearly the intention of the defendant; but something more than mere intention is necessary to constitute the offense charged. Between preparation for the attempt and the attempt itself there is a wide difference. The preparation consists in devising or arranging the means or measures necessary for the commission of the offense; the attempt is the direct movement towards the commission after the preparations are made. To illustrate: A party may purchase and load a gun, with the declared intention to shoot his neighbor; but, until some movement is made to use the weapon upon the person of his intended victim, there is only preparation, and not an attempt. For the preparation he may be held to keep the peace, but he is not chargeable with any attempt to kill. So, in the present case, the declarations and elopement and request for a magistrate were preparatory to the marriage; but until the officer was engaged, and the parties stood before him, ready to take the vows appropriate to the contract of marriage, it cannot be said in strictness, [*i. e.*, in a legal sense,] that the attempt was made. The attempt contemplated by the statute must be manifested by acts which would end in the consummation of the particular offense, but for the intervention of circumstances independent of the will of the party."

The same principle was recognized by the supreme court of Pennsylvania in a recent case, and one which bears a striking resemblance to the case before us. There the defendant was indicted and convicted for an attempt to administer poison, under a statute the provisions of which are substantially the same as those of our own statute. It was proved at the trial that the defendant, in a conversation with the witness Neyer, stated his grievance against his intended victim, Waring, and his determination to be revenged, and then solicited Neyer to put poison in Waring's spring, so that he and his family would be poisoned, offering him a reward therefor. He also gave him directions how to administer the poison, and gave him the poison to be administered. But the witness refused to have anything to do with it, and handed it back to the defendant, and testified that he never intended to administer it. Upon these facts the supreme court held that all that occurred at the interview with the witness, and the legal inferences deducible therefrom, followed by no other act, were not sufficient to warrant a conviction for an attempt to commit the felony charged; that the act proved did not approximate sufficiently near to the commission of murder to establish an attempt to commit it, within the meaning of the statute; and the judgment was accordingly reversed. "Merely soliciting one to do an act," said the court, "is not an attempt to do that act. * * * 'In a high, moral sense, it may be true that solicitation is attempt; but in a legal sense it is not.'" Stabler v. Com., 95 Pa. St. 318. The court in its opinion also referred to the case of Reg. v. Williams, 1 Car. & K. 589, 1 Denison, Cr. Cas. 39, which was a prosecution under the third section of the act of 1 Vict., from which the Pennsylvania statute was substantially copied, and in that case it was held that the delivery of poison to an agent, with directions to him to cause it to be administered to another, was not sufficient to establish an attempt to murder. In that case the agent was actually given money for his services, and immediately proceeded with the poison to the house of the intended victims, but upon his arrival there he gave up the poison to them, and told them all about it. The prisoners were convicted, but at the ensuing term the case was considered by the 15 judges, who held the conviction wrong.

The application of these principles to the facts of the present case shows very clearly, we think, that the judgment is erroneous. Here, undoubtedly, there was an intent to commit murder, but the acts done do not amount to anything more than the mere arrangement of the proposed measures for its commission. They were nothing more than mere preparations, and even the intended preparations were not completed before the criminal design was frustrated. The means intended to be employed to consummate the offense were—*First*, the purchase of poison; and, *secondly*, the delivery of the poison to an agent, to be by her administered. But as the party to whom the poison was delivered refused to administer it, or to do any act in furtherance of the design, there has been no direct act done towards the commission of the offense, and, consequently, no attempt, in a legal sense, to commit the crime has been established. In other words, the acts proved, no matter how, in a moral point of view, they may be regarded, do not, in the eye of the law, approximate sufficiently near to the commission of murder to advance the conduct of the prisoner beyond the sphere of mere intent.

That the mere delivery of poison by one person to another, for the purpose disclosed by the record in the present case, does not constitute an attempt to administer poison, within the meaning of the statute, is clear, we think; because it is not such an act as is likely, in the natural course of events, to bring about the result desired. On the contrary, the presumption in such a case is the other way; since a criminal intent on the part of the person to whom the poison is delivered is not to be presumed, and hence, for this reason, if no other, the act of delivering the poison is not such a one as can be considered a judicial cause, or a direct step in the actual endeavor to commit a crime, without which there can be no attempt within the meaning of the statute. 1 Whart. Crim. Law. (9th Ed.) § 178. We are therefore constrained to hold that the conviction is wrong, and that the judgment must be reversed, and the demurrer to the indictment sustained. If the law be defective in not reaching a case

Digitized by Google

like the present, as it does not, the legislature, not the courts, can remedy the defect. We can only administer it as it is.

HINTON, J., (*dissenting.*) I am of opinion that the indictment, although inartificially drawn, is an indictment under section 3888 of the Code of 1887, and, so regarding it, that the crime imputed to the prisoner is fully established. And I am further of opinion that if it be regarded as an indictment under section 3669, that the prisoner should not be discharged, but be held to await an indictment to be preferred under section 3888 of said Code. See Bush's Case, 4 Hill, 133; Stabler's Case, 95 Pa. St. 318. The acquittal of one offense does not operate as a bar to a prosecution for another and distinct substantive offense. I am therefore constrained to dissent from the opinion of the majority of the court. See Page v. Com., 26 Grat. 943.

(31 S. C. 342)

STODDARD v. ROLAND.

(*Supreme Court of South Carolina.* July 16, 1889.)

MALICIOUS PROSECUTION—PROBABLE CAUSE.

1. In an action for malicious prosecution, a nonsuit for failure to prove want of probable cause was properly granted, where the evidence showed that a warrant issued against plaintiff for selling a mule upon which defendant held a mortgage without his written consent; that plaintiff recognized to appear before the trial justice, and meantime the parties made a settlement; and that the mortgage was overpaid, and defendant refunded the excess, and withdrew the prosecution; but plaintiff admitted that when he exchanged the mule a balance was still due on the mortgage debt, and that he had not paid the balance within 10 days after disposing of the mule, as provided by Gen. St. S. C. 1882, § 2515, that any person who disposes of personal property on which there is a mortgage, without the written consent of the mortgagee, and fails to pay the debt within 10 days thereafter, or to deposit the amount of the debt with the clerk of the court of common pleas of the county where the debtor resides, shall be guilty of a misdemeanor, etc.

2. The fact that the mortgage was paid before the warrant was issued cannot affect the question as to want of probable cause for the prosecution, though it might bear on that of malice.

Appeal from common pleas circuit court of Laurens county; KERSHAW, Judge.

MCIVER, J. The plaintiff brought an action for malicious prosecution against defendant, and at the close of the testimony adduced on the part of the plaintiff a nonsuit was moved for and granted, upon the ground that the plaintiff had failed to introduce any testimony whatever tending to show a want of probable cause for the prosecution. The sole question raised by the appeal is whether there was any error in granting the nonsuit; though the defendant has, according to the proper practice, given notice that he will endeavor to sustain the judgment below upon another ground, to-wit, that there was no evidence tending to show that the prosecution was ended when this action was commenced. There can be no doubt that, in order to maintain an action for malicious prosecution, it is incumbent upon the plaintiff to show three things: (1) That there was no probable cause for the prosecution; (2) that it was malicious; and (3) that it was ended before the action was commenced. There is little doubt, under the well-settled rule as to nonsuits, that if the plaintiff fails to offer any evidence tending to show either one of these essential facts a nonsuit is proper; otherwise it is not. So that the practical question raised by the plaintiff's appeal is whether he offered any evidence tending to show a want of probable cause for the prosecution. We have carefully examined the voluminous evidence set out in the "case," and we agree fully with the circuit judge that there was not a particle of testimony even tending to show a want of probable cause for the prosecution. On the contrary, the testimony of the plaintiff himself abundantly shows that he had violated the statute under which he was prosecuted, and we are unable to find a single fact or circumstance in his testimony, or in that of any of his witnesses, tending to show any want of probable cause for the prosecution. To make this plain, a brief statement of the origin and history of the controversy between these parties, derived solely from the plaintiff's own testimony and the papers introduced, will be made. On the 31st of January, 1888, the defendant took out a warrant from a trial justice, against the plaintiff, for a violation of section 2515 of General Statutes by selling a mule upon which defendant held a mortgage, without the written consent of the mortgagee. On the next day the plaintiff, having heard of the warrant, voluntarily appeared at the office of the trial justice, and entered into recognizance to appear before the trial justice on the 8th of February, 1888. In the mean time, however, the parties met, and had a settlement, in which it was ascertained that the mortgage debt had then been overpaid a few dollars, and the excess was refunded to the plaintiff, and the prosecution was "withdrawn by prosecutor," the defendant herein. It appeared, however, that when the mule covered by the mortgage was sold, or rather exchanged for another animal, there was then a balance still due on the mortgage debt, though there had been a large payment made thereon, during the previous fall, by the delivery of two bales of cotton. This, so far from being denied, was expressly admitted by the plaintiff in his testimony, and there was no pretense that such balance had been paid within 10 days after the mule was disposed of, or deposited with the clerk as provided for by the statute. On the contrary, the plaintiff expressly stated in his testimony that no such payment or deposit was made within the prescribed 10 days. But the plaintiff seems to rely entirely on the fact that the mortgage had been paid before the warrant was taken out. How this can affect the question as to the want of probable cause for the prosecution it is impossible for us to conceive, though it is not difficult to see its bearing upon the question of malice. But, while it is well settled that malice may be in-

Digitized by Google

ferred from a want of probable cause, (Bell v. Graham, 1 Nott & McC. 278; Campbell v. O'Bryan, 9 Rich. Law, 206,) it is also settled that a want of probable cause cannot be inferred from any degree of malice, (Horn v. Boon, 3 Strob. 307.) The reason for the distinction is obvious. Where a prosecution is instituted without probable cause, the natural inference is that such a groundless prosecution must have been prompted by malice. But no amount of malice affords any inference whatever for a want of probable cause, for all experience teaches that many of the best-founded prosecutions are prompted solely by malice. So that, even assuming that the fact that the mortgage debt had been paid before the warrant was taken out afforded evidence of malice, (though we are not prepared to say so,) this would afford no evidence whatever of a want of probable cause for the prosecution. It is quite certain that the mule was disposed of not later than the summer of 1885, even adopting the view most favorable to the plaintiff; and there is not a shadow of pretense that the mortgage debt was then paid, nor is there any pretense that this was done by the written consent of the mortgagee, the utmost claimed by the plaintiff being that he had his verbal consent, which does not satisfy the terms of the statute; nor is it pretended that the plaintiff complied with the other provisions of the statute as to the payment or deposit of the admitted balance within the prescribed 10 days. Now, it is quite clear that if all this be so, as it was expressly admitted to be by the plaintiff in his own testimony, the offense for which the plaintiff was prosecuted was committed in the summer of 1885; and anything that occurred afterwards, whatever may be its effect in other respects, certainly cannot have the slightest effect upon the question as to whether there was a want of probable cause for the prosecution. If a man steals money, and afterwards refunds every dollar of it, with interest, that certainly would constitute no bar to a subsequent prosecution; and if a warrant is taken out after the money has been refunded, it could not with any propriety be said that there was a want of probable cause for the prosecution. So here, even if it had been proved to a moral certainty that the defendant knew, when he took out the warrant, that the mortgage debt had been fully paid, that would afford no evidence whatever of a want of probable cause for the prosecution, however much it might tend to show that the prosecution was prompted by malice, or some other improper motive. It is due, however, to the defendant to say, though it has not had the slightest influence upon our minds in determining the question presented, that even the testimony of the plaintiff himself affords some reason to suppose that when the defendant took out the warrant he really did not believe that the debt had been fully paid, and did not become satisfied of that fact until the receipt for the proceeds of the two bales of cotton was produced, which was after the warrant had been taken out. We have looked in vain for the slightest evidence tending to show any want of probable cause for the prosecution, and in the absence of any such evidence we think the circuit judge was clearly right in granting the nonsuit. This being our conclusion, the point raised by respondent's counsel as to the want of any evidence that the prosecution had ended has not been considered. The judgment of this court is that the judgment of the circuit court be affirmed.

SIMPSON, C. J., and MCGOWAN, J., concur.

(31 S. C. 360)

NATIONAL EXCH. BANK *v.* STELLING *et al.* COMMERCIAL BANK *v.* SAME. AUGUSTA SAV. BANK *v.* SAME.

(*Supreme Court of South Carolina.* July 19, 1889.)

FRAUDULENT ASSIGNMENT — SERVICE BY PUBLICATION — ATTACHMENT — BOND.

1. Under Gen. St. S. C. § 2014, providing that any assignment for the benefit of creditors, made by an insolvent debtor, containing a preference of one creditor over another, shall be absolutely void, an assignment preferring creditors executed in and by a citizen of Georgia, conveying lands situated in South Carolina, is void, and a proceeding may be instituted in South Carolina to set it aside, though all the parties are non-residents. Sheldon v. Blanvelt, 7 S. E. Rep. 593, followed.

2. An affidavit in such action, alleging that a cause of action exists in favor of the plaintiffs against the defendants, stating the same in general terms, and referring to the complaint for a full statement, that defendants are non-residents of this state, but reside in Georgia, and cannot, after due diligence, be found herein, and that defendant assignor has property in this state, is sufficient to authorize service by publication or personal service out of the state, under Code, § 156, which provides that where it appears that a cause of action exists against a person who cannot, after due diligence, be found within the state, service by publication, or personal service out of the state, may be made where he is not a resident of this state, but has property herein, and the court has jurisdiction of the subject of the action.

3. Act 1884, (18 St. 745,) supplementing Code, § 159, in regard to the proof of service of a summons out of the state, requires the certificate of a clerk of a court of record that the notary public taking the affidavit of service was such notary, but does not require that the certificate shall be appended to the affidavit at the time it is taken. *Held*, that where such certificate is furnished the court upon a motion to set aside the service, and it appears that the moving defendant has admitted personal service under oath, and the case on appeal states as a fact that the defendants were served personally, an order overruling the motion will be affirmed.

4. Under section 248, authorizing an attachment in any action arising for the recovery of money or for the recovery of property, whether real or personal, or against a defendant who is a non-resident, an attachment may be issued in an action by a creditor to set aside an assignment by his non-resident debtor because of fraudulent preferences.

5. An affidavit alleging a cause of action on a plain money demand against the assignor is sufficient to sustain an attachment against his objections, though the facts stated are not sufficient to sustain an action to set aside the conveyance to his co-defendant, the assignee.

6. The words "on the part of the plaintiff," as used in section 251, which provides that the officer, before issuing the attachment, "shall require a written undertaking on the part of the plaintiff, with sufficient surety," mean an obligation exe-

Digitized by Google

cuted by the plaintiff or his authorized agent, and an undertaking by a third person that the plaintiff will pay, etc., is insufficient. McGOWAN, J., dissenting.

Appeals from common pleas circuit court of Aiken county; NORTON, Judge.

Wm. T. Gary, Aldrich & Ashley, and *M. P. Foster*, for appellants. *Henderson Bros.* and *Croft & Chaffee*, for respondents.

McIVER, J. These three cases, being practically identical in their facts and circumstances and in the legal principles applicable, were heard, and will be considered, together. In each of the cases the plaintiffs are foreign corporations, having their places of business in the state of Georgia, and the defendants are citizens of that state, but the actions were commenced in the court of common pleas for the county of Aiken in the state of South Carolina. The foundation of the actions in the two cases first named are unsatisfied judgments recovered in the state of Georgia by the plaintiffs therein against the defendant Stelling, and in the last-named case the action is based upon certain notes of the defendant Stelling in favor of the plaintiff therein. The complaints, after alleging these causes of action in the usual form, proceeded to allege that the defendant Stelling some time before the recovery of said judgments made an assignment of all of his property in the state of Georgia, preferring certain of his creditors other than these plaintiffs, whereby the plaintiffs have been unable to realize there anything upon their claims, the assigned estate being insufficient to reach the same; that on the 15th of February, 1884, the defendant Stelling, being then insolvent, and with intent to give preference to his co-defendant, Bredenberg, for money which he then owed said Bredenberg, in fraud of the rights of the plaintiff, and against the provisions of chapter 72 of the General Statutes of this state, conveyed to the said Bredenberg certain tracts of land, describing the same, situate in the counties of Edgefield and Aiken in this state, the same being all of the property in this state then owned by said Stelling; that the defendant Bredenberg, having reasonable cause to believe that said Stelling was insolvent, accepted the conveyance of said lands in payment of the debt then due him by said Stelling, thereby intending to be preferred as a creditor of said Stelling, and also to defraud the plaintiffs of their debts against said Stelling, in violation of the provisions of the seventy-second chapter of the General Statutes of this state; that the defendant Stelling owns no other property out of which the plaintiffs can recover their debts; that the said Stelling was insolvent, and that fact was well known to said Bredenberg at the time of the conveyance to him as aforesaid, which was made for the purpose of delaying, hindering, and defrauding the claims of these plaintiffs. Wherefore the plaintiffs demand judgment against the defendants as follows: (1) For judgment against Stelling for the amounts due by him to the plaintiffs, respectively. (2) That the conveyance to Bredenberg be declared fraudulent and set aside. (3) For such other relief as may be just and equitable. An order that the summons be served by publication was granted by the master upon an affidavit to the following effect: (1) That a cause of action exists in favor of the plaintiffs against the defendants, stating the same in general terms, and referring to the complaint for a more full statement. (2) That defendants are non-residents of this state, but reside in the city of Augusta, Georgia, and that they cannot, after due diligence, be found in this state. (3) That defendant Stelling has property in this state.

It is stated in the "case" "that no publication of the summons was actually made in a newspaper, but the summons in each case was actually served personally upon the defendants, F. H. Stelling and J. J. Bredenberg, in the city of Augusta, Georgia." It appears, however, that the proof of service of the summons was made by an affidavit taken before a person styling himself "Notary Public, Richmond County, Georgia," but there was no certificate then appended thereto from the clerk of a court of record that such person is such notary, as required by the act of 1884, (18 St. 745,) though such certificate has subsequently been obtained, since the service of the notice of motion to set aside the service of the summons, and is set out in the "case." It also appears in the "case," "that F. H. Stelling, in his sworn affidavits, used at the hearing before Judge NORTON, admitted that he had been personally served with the summons and complaint in each case at Augusta, Georgia, and that he was a resident of said city at time of service." At the same time warrants of attachment were applied for and obtained from the clerk in each of the three cases, based upon affidavits to the following effect: (1) That Stelling is indebted to the plaintiffs in the amounts stated on the several causes of action; (2) that Stelling is not a resident of this state; (3) that the plaintiffs have commenced action upon the several causes of action. The undertakings required by section 251 of the Code, copies of which are set out in the "case," are in the form of ordinary bonds, but are not signed by the plaintiffs in either case, though the copy in the case first named, as set out in the "case," does appear to be signed by "THE NATIONAL EXCHANGE BANK, by ALFRED BAKER, President," but it is conceded that this was written in pencil by one of the counsel, and is not claimed to be an execution of the bond by the bank. All these undertakings or bonds have been treated in the argument, and must be so regarded, as not executed by the plaintiffs themselves, or by any duly-authorized agent, but simply as bonds or undertakings executed by third persons, that the plaintiffs in each of the cases, respectively, "shall pay or cause to be paid to the said F. H. Stelling, his certain attorneys,

Digitized by Google

etc., * * * all costs that may be awarded to the said defendant, and all damages which the said defendant may sustain by reason of the attachment about to be issued," etc. These bonds, as set out in the case, contain no indorsement showing that they had been accepted and approved by the clerk and filed by him, but we find in the "case" a certificate of the clerk in the following words: "I hereby certify that I had approved of sufficiency of the bonds or undertakings in each of the foregoing cases before I issued the writs of attachment therein." The defendant Stelling, appearing for this purpose, only gave notice of two motions—(1) to set aside the service of the summons; (2) to discharge the attachments upon the several grounds stated in the notice. These motions not having been heard at the next succeeding term of the court, the plaintiffs applied for and obtained judgments by default against Stelling, (his co-defendant, Bredenberg, having put in an answer,) and, upon a return of *nulla bona* of the executions issued to enforce said judgments, gave notices of motions for leave to file supplemental complaints setting forth the recovery of such judgments, together with the executions returned *nulla bona* in addition to what appeared in the original complaints. Thereupon defendant Stelling gave notice of a motion to set aside the judgments obtained by default as improvidently granted. These four motions were heard by his honor Judge NORTON, who rendered judgment refusing the motions of Stelling to set aside the service of the summons and to discharge the attachments, granting his motion to set aside the judgments obtained against him by default, with leave to answer, and refusing the motion of plaintiffs for leave to file supplemental complaints. From this judgment the defendant Stelling alone appeals, imputing error to the circuit judge in refusing his motions to set aside the service of the summons and to discharge the attachments, upon the several grounds hereinafter considered. There being no appeal from any other portion of the judgment, it will, as a matter of course, stand affirmed in all other respects.

We will first consider his honor's ruling as to the sufficiency of the service of the summons. The Code, § 156, provides that where the person on whom the service of the summons is to be made cannot, after due diligence, be found within the state, and that fact appears by affidavit to the satisfaction of the master, or other officer therein named, and it in like manner appears that a cause of action exists against such person, or that he is a proper party to an action relating to real property in this state, such master or other officer may grant an order that service may be made by publication in either of the following cases: "(3) Where he is not a resident of this state, but has property therein, and the court has jurisdiction of the subject of the action." And it further provides that "where publication is ordered, personal service of the summons out of the state is equivalent to publication and deposit in the post-office." It seems to us quite clear that every fact required was made to appear by the affidavit submitted upon the application for the order of publication,—that the defendant is not a resident of this state, and cannot, after due diligence, be found therein; that a cause of action exists against him; and that he is a proper party to the action, which relates to real property in this state, —and it is equally clear that these are cases in which the service by publication is authorized, for the defendant is a non-resident, and if the allegations of the complaint are true, of which we must assume that the officer granting the order was satisfied, it is quite certain that defendant has property in this state, and that the court has jurisdiction of the subject of the action. It is contended, however, that as all the parties are non-residents, and it does not appear that any citizen of this state has any interest in the controversy, the court below had no jurisdiction of a proceeding to set aside an alleged fraudulent assignment made in another state, even though the real property conveyed was situate in this state; but this position is disposed of by the recent decision in the case of Sheldon v. Blanvelt, 7 S. E. Rep. 593.

It is also urged that the proof of personal service of the summons on the defendant in the state of Georgia was fatally defective in that the notary public before whom the affidavit of such service was made failed to append thereto the certificate of a clerk of a court of record that he was such notary, in accordance with the provisions of the act of 1884, (18 St. 745,) supplementing the provisions of section 159 of the Code, in regard to the proof of service of a summons. It will be observed that this act does not require that such certificate shall be appended to the affidavit at the time it is taken, and therefore when it is considered that the only purpose of such certificate is to authenticate the official character of the person before whom the affidavit is made; and when we find that such certificate has been furnished to the court called upon to pass upon the sufficiency of the service; and when, in addition to this, we find that the defendant who raises this question has admitted under oath the fact that he was personally served, and has applied for and obtained leave to come in and answer; and when it is stated in the "case," as one of the facts upon which this appeal is to be heard, that "the summons in each case was actually served personally upon the defendants F. H. Stelling and J. J. Bredenberg in the city of Augusta, Georgia,"—we cannot hold that the circuit judge committed any error of law in refusing to set aside the service of the summons upon the ground that the affidavit of such service did not have appended to it, at the time it was taken, the required certificate. We are therefore of opinion that there was no error in refusing the motion to set aside the service of the summons.

Digitized by Google

We are next to inquire whether there was any error in refusing the motion to discharge the attachments. First it is urged that an attachment cannot be obtained in cases like these because they are actions, not for the recovery of money only, but for the purpose of setting aside a fraudulent deed. In section 248 of the Code it is declared that the plaintiff, at the time of issuing his summons, or at any time afterwards, may have the property of the defendant attached "in any action arising for the recovery of money, or for the recovery of property, whether real or personal, * * * or against a defendant who is not a resident of this state," etc. So that it is not necessary that, in order to obtain an attachment, the action must be for the recovery of money only, but may be obtained in many other cases. Indeed the language of that section would seem to imply that where, as in this case, the defendant is a non-resident, the remedy by attachment is obtainable in an action for any purpose. But be that as it may, it is quite clear that so far as the appellant is concerned these actions are for the recovery of money, and hence the first position taken cannot be sustained.

Next it is contended that the affidavits upon which the warrants of attachment were obtained were insufficient, because it does not appear therein that the plaintiffs have any cause of action. So far as the appellant is concerned it is quite certain that a cause of action upon a plain money demand is alleged against him in each of the complaints, and therefore, even if it should be admitted that the facts stated are not sufficient to sustain an action to set aside the deed to his co-defendant Bredenberg, (which we by no means admit,) this would constitute no ground upon which the appeal of Stelling could be sustained. The objection to the want of jurisdiction has already been disposed of in considering the motion to set aside the service of the summons.

We come next to the objections raised to the undertakings—*First*, that they were not approved or filed by the clerk; *second*, that they were not executed by the plaintiffs, or by any authorized agent. The first objection is disposed of by the statement in the appendix to the "case" that they were marked "Filed" by the clerk, and by that officer's certificate set out in the "case" that he had approved the sufficiency of the several bonds or undertakings before the writs of attachment were issued. The second objection, however, to the undertakings presents a question of much greater difficulty, and is, in fact, the only serious question in this branch of the case. The Code, in section 251, requires, as a condition precedent to the issuing of a writ of attachment, that the officer issuing "shall require a written undertaking on the part of the plaintiff, with sufficient surety, to the effect that if the defendant recover judgment, or the attachment be set aside by order of the court, the plaintiff will pay all costs," etc. As the remedy by attachment is a summary and somewhat harsh proceeding, whereby a person may be deprived of the possession or control of his property before the claim upon which it is based has been adjudicated, the rule is well settled that one who seeks to avail himself of such a remedy must be careful to comply strictly with the conditions upon which it is allowed. The only condition with which we are at present concerned is the giving of the required undertaking, and that word, as used in the section above quoted from, manifestly means "engagement" or "obligation." It seems to us that the language used in that section plainly implies that to comply with the condition precedent required three things are necessary: (1) That the obligation or undertaking shall be in writing; (2) that it shall be on the part of the plaintiff; (3) that it shall be with sufficient surety; and if either one of these three things are lacking then it cannot be said that the condition precedent has been complied with. It may be true that a plaintiff, who procured the issue of a warrant of attachment illegally, under which the defendant's property was unlawfully seized, would be liable, even in the absence of any statutory provision, upon general principles of law, for all damages which the defendant might thereby sustain. But in such case it would be necessary to offer parol evidence, perhaps, to show that the plaintiff had procured the issuance of the warrant of attachment, which might lead to tedious and expensive litigation. Hence the statute very properly provides that the undertaking or obligation shall be in writing. The next essential very naturally is that this undertaking or obligation in writing shall be on the part of the plaintiff, as it is manifestly proper that he who seeks to avail himself of the remedy should assume in writing the liability for any damages sustained by reason of any illegality in obtaining it. And then the third and remaining essential is that this written obligation on the part of the plaintiff shall be "with sufficient surety." It is quite clear that the giving of an undertaking or obligation without any surety would not be a compliance with the statute, and it seems to us equally clear that where there is no written undertaking or obligation "on the part of the plaintiff" there is no compliance with the statute. What then do the words "on the part of the plaintiff," as used in this section, mean? Do they signify an obligation whereby a third person binds himself that the plaintiff will pay, or do they signify an obligation whereby the plaintiff, either in person or by his authorized agent, binds himself to pay? We are compelled to conclude that the latter is the proper signification. The statute unquestionably requires that the obligation shall be in writing, and we do not see how it is possible for such obligation to be "on the part of the plaintiff" where there is nothing in writing whereby the plaintiff binds himself to pay; and when to this is added the further requirement that the un

Digitized by Google

dertaking or obligation must be with sufficient surety, the necessary inference is that there must be some one else bound besides the surety, as otherwise it could not properly be said to be an obligation with sufficient surety.

It is urged, however, that the words "on the part of the plaintiff" simply mean an obligation on the side of the plaintiff, and this is the view taken by the circuit judge. Besides the objections above indicated to this view, it seems to us it disregards the plain meaning of the words used in the statute, for we cannot doubt that, where a written obligation on the part of a person is spoken of, every one at once understands that such person has, either in person or by his agent, bound himself in writing to perform the condition of such obligation. According to our construction of the statute it plainly provides that before a person can obtain a warrant of attachment he must, either in person or by his duly-authorized agent, enter into a written obligation, with sufficient surety, to pay all damages, not exceeding the amount specified, which may be sustained by the defendant by reason of any illegality in obtaining the attachment, so that the defendant may be afforded a speedy and easy means of enforcing against the plaintiff, as well as his sureties, his claim for damages. We do not undertake to say, as was intimated in one of the older cases, hereinafter referred to, that it would be necessary for the plaintiff to execute a formal power of attorney, authorizing his agent to execute the required undertaking; but we do think that the record should afford some evidence in writing that the agent had authority to sign the name of the plaintiff. This would be no burdensome requirement, for the plaintiff, when he lodges his claim for suit in the hands of an attorney, could very easily, at the same time, authorize him in writing to sign his name to any bond or other paper required in the prosecution of the suit, which being attached to the record would afford the defendant the ready means of prosecuting any claim for damages, as well against the plaintiff as his sureties, and surely it is nothing but right that the defendant should be afforded every facility for that purpose.

We are not aware of any case in this state which decides the point we have been considering, but the remarks of O'NEALL, J., in Myers v. Lewis, 1 McMul. 54, seem so pertinent to the view which we have taken that we have been induced to quote them at length. In that case the question was as to the sufficiency of a bond given by the plaintiff's son, though not in her name, and it arose under the act of 1799, which provided "that no writ of attachment shall issue before the plaintiff has given bond," etc., and the court held that "none but the plaintiff, or his attorney in fact acting in his name and stead, can execute the bond. We have no right to do more than to say '*ita lex scripta.*'" That distinguished judge proceeds to say: "If we were, however, at liberty to reason about it, we should arrive at the same conclusion. The plaintiff suing can just as easily constitute an attorney in fact to execute the bond, as he can appoint an attorney at law to sue. The defendant, too, is entitled to the security of the party professing to be his creditor to be answerable for all damages for any illegal conduct attending the suing out his attachment. If this were not so, persons absent from the state, and having property in it, might be harassed by attachments on unfounded claims, and the persons setting them on foot might shelter themselves behind the bond of irresponsible third persons. So, too, it is for the plaintiff's interest that he, in person or by attorney, should execute the bond. He might not be willing to incur the responsibilities of an attachment if informed that that was his mode of redress. It is the right and the duty of a party in court to be informed correctly of the consequences likely to result from the proceeding set on foot in his name. The attachment act, operating *in rem*, and divesting the alleged debtor of his power of controlling his own property before the debt is ascertained by the judgment of a court, ought to be strictly construed, and hence, therefore, we should not be at liberty to seek for an interpretation beyond the plain meaning of the words." It is true that in the subsequent cases of Dillon v. Watkins, 2 Speer, 445, and Byne v. Byne, 1 Rich. Law, 441, which arose under the act of 1839, it was held that the attachment bond might be given either by the plaintiff or by his agent; but those decisions rested upon the terms of that act, which required the clerk, before issuing the writ of attachment, "to take from the plaintiff, or his or her agent, a bond," etc.; and as this language was plainly alternative in its character,—"take from the plaintiff, or his or her agent, a bond,"—it was very properly held that if the bond in question was either a bond of the plaintiff or a bond of his agent the requirement of the statute was satisfied. But the language of the statute which we are called upon to construe is not alternative in its character, and hence the undertaking now required must be an undertaking on the part of the plaintiff, with sufficient surety, and nothing else will meet the requirements of the statute. The obligations in the cases now before us do not even purport to be obligations on the part of the plaintiffs, for there is not a word in them purporting to bind the plaintiffs, but they simply purport to bind the persons who signed them to see to it that the plaintiffs will pay the damages sustained by defendant by reason of any illegality in obtaining the attachments, and, therefore, while they might furnish grounds of action by the defendant against the persons who signed, they certainly do not furnish any ground for an action against the plaintiffs. But, in addition to this, as the undertakings in two of the cases are signed only by a single person, we do not see how it is possible to regard them as written un-

Digitized by Google

dertakings on the part of the plaintiffs, with sufficient surety, and it has been held, even under the act of 1839, in the case of Ford v. Rogers, 12 Rich. Law, 385, that the want of a surety on attachment bond is fatal. It is true that in the other case the so-called undertaking appears to be signed by two persons, but, so far as appears, they are entire strangers, who do not even profess to be the agents of the plaintiffs, and who have volunteered to guaranty that the plaintiffs will pay to the defendants such costs as may be awarded to them, and such damages as they may sustain by reason of the attachment, to the amount specified. This cannot be regarded as a compliance with the terms of the statute. It is simply an original obligation which, so far as appears, these two persons have voluntarily assumed, that the plaintiffs in that case will, under certain contingencies, pay a sum of money not exceeding the amount specified.

It seems to us, therefore, that the attachments in each of the three cases above stated should have been discharged upon the ground that the required undertakings had not been given before the warrants of attachment were issued. The judgment of this court is that the judgment of the circuit court, in so far as it refused to discharge the attachments on the ground indicated, be reversed, and that in all other respects it stand affirmed.

SIMPSON, C. J., concurs.

MCGOWAN, J., (*dissenting.*) I concur in this judgment, except in so far as it sets aside the attachments on the ground that the plaintiff did not sign the undertaking, either personally or through an agent regularly authorized to act for him. This is the first time this question has been made under our present law, and its practical importance requires that I should state my view of it. There is no doubt that attachment is a statutory proceeding, but it is quite as certain that it is highly remedial in character, and is made "demandable as of common right." It seems to me that, when the provisions of the law are substantially complied with, and its whole object secured, to subject it to the strictest technical criticism will more often defeat than promote the intent of the law. Besides, as it strikes me, the words "on the part of the plaintiff" were not intended to make the plaintiff himself execute the undertaking, on pain of having the whole process vacated, but, on the contrary, that something else was intended. If the purpose had been to require the plaintiff, under all circumstances, to execute the required undertaking, why was it not so said in plain words,—"by the plaintiff," instead of "on the part of the plaintiff?" The words in the old law were "by the plaintiff," and if the intention was that the meaning should remain precisely the same, why were they changed to "on the part of the plaintiff?" that is to say, as I understand it, on the plaintiff's "side," "party," "interest," "concern," "for," "in behalf of."

I concur with what was said by Mr. Justice WOODRUFF in the case of Leffingwell v. Chave, 19 How. Pr. 57. "The objection that the undertaking was not signed by the plaintiff or his agent, or by some person, who, in very terms, is described on the face of the undertaking as acting 'on the part of the plaintiff,' raises a question in regard to which there has been some conflict of opinion. The language * * *, is that 'the court or judge shall require a written undertaking on the part of the plaintiff, with or without sureties,' etc. In my opinion the just meaning of this language is satisfied, and all the proposed benefits to the defendant are secured by construing the words 'on the part of the plaintiff' as simply words of contrast or opposition to the part of his adversary; and that an approved undertaking, executed by any person of competent ability, agreeing that the plaintiff shall pay the defendant the damages which he may sustain, if it be procured and furnished by the plaintiff or his attorney for the security of the defendant, is an undertaking on the part of the plaintiff, within the meaning of this section. If this be not so, then on the part of the plaintiff can only mean 'executed by the plaintiff.' * * * Suits are often necessary when a plaintiff is out of the state, or sick, or under disability, or an infant, or otherwise incompetent, or unable to execute an undertaking, or to authorize an agent or attorney to do so. I cannot concede that it was intended that in such case no injunction should be issued. The words 'by the plaintiff, with or without sureties,' had they been used, would be plain, and would require the plaintiff to execute them; but the words 'on the part of the plaintiff, with or without sureties' are fully satisfied if any person or persons in aid of the prosecution, acting in furtherance of the action, at the instance of the plaintiff, will peremptorily and unqualifiedly undertake that the plaintiff shall pay to the defendant the damages which he may sustain," etc.

This is my view as to what was the intention of the legislature. It is the view which, after some discussion, has prevailed in New York, and is certainly the view which, while protecting all the substantial rights of the defendant, gives to all plaintiffs equal opportunities to secure the advantages of the law. See Leffingwell v. Chave, 19 How. Pr. 57; Howard v. Manderfield, 31 Minn. 337, 17 N. W. Rep. 946; Hadley v. Bryars, 58 Ala. 139; Chandler v. Smith, 14 Mass. 313; People v. Judges, 5 Cow. 34; 2 Waite, Pr. 151.

(31 S. C. 346)

BLAIR *et al.* v. BLACK *et al.*

COHEN *et al.* v. SAME.

(*Supreme Court of South Carolina.* July 16, 1889.)

ASSIGNMENT FOR BENEFIT OF CREDITORS—PREFERENCES—PARTNERSHIP.

1. B. and C., members of the firm of B. & C. and also of its successor, B., C. & D., made an assignment of both individual and partnership property.

Digitized by Google

The assignment provided that the property and assets of the individual members of the two firms should be first applied to pay individual debts, and the property and assets of the respective firms should be applied to pay the partnership debts, and the surplus, if any, after paying the debts of one class, should be applied to debts of the other class, and that if the funds were insufficient to pay all the debts the assignee should pay them ratably, or such as should, within 30 days from date of assignment, accept the terms thereof, and release the parties from all liability, etc. *Held*, that the assignment created preferences, and was void under Gen. St. S. C. § 2014, so providing.

2. The individual creditors of the members of an insolvent firm are not entitled to be first paid out of the individual property, but have only an equity to require the partnership creditors to first exhaust the partnership assets, and after that is applied they are then entitled, as to any balance due them, to share equally and ratably with the individual creditors in the individual assets.

Appeal from common pleas circuit court of York county; J. B. KERSHAW, Judge.

Actions by Lewis H. Blair, heretofore trading as L. H. Blair & Co., E. B. Springs, survivor of E. B. Springs and E. S. Burwell, traders as Springs & Burwell, and J. H. Hargrave, Sr., and J. H. Hargrave, Jr., traders as J. H. Hargrave & Son, against John G. Black, assignee of James W. Black and Jacob K. Carpenter, as individuals, and copartners as Black & Carpenter, and of James W. Black, Jacob K. Carpenter, and John L. Davis, as individuals, and copartners as Black, Carpenter & Davis, and by David Elias and Solomon A. Cohen, partners as Elias & Cohen, and C. E. Wingo, J. S. Ellett, and J. D. Crump, partners as Wingo, Ellett & Crump, against the same defendants, to set aside an assignment as void for preferences given. An order of reference was agreed to and made to the testimony. Afterwards the circuit court filed its decree in favor of plaintiffs, and defendants appeal.

C. E. Spencer and *W. B. McCarr*, for appellants. *Hart & Hart*, for appellees.

MCGOWAN, J. On January 29, 1889, James W. Black and Jacob K. Carpenter, of the old mercantile firm of Black & Carpenter, and also of its successor, Black, Carpenter & Davis, made an assignment of both their individual and partnership property for the payment of their debts to John G. Black, as assignee and trustee. J. L. Davis, one of the latter firm, did not sign the original deed of assignment, being absent at the time it was executed, but ratified it some days later, and indeed executed another deed, conforming substantially to the first. The assignment provided that the property and assets of the individual members of the respective firms should be first applied to the payment of the individual debts of the members of the firm, and that the property and assets of the firms, respectively, should be first applied to the debts of the partnership, and that if a surplus should remain after paying the debts of the one class, then such surplus should be applied to debts of the other class, and so reciprocally of the other class. The assignment also provided that, if there should not be sufficient funds to pay the debts, the assignee should pay them ratably, or such as should, within 30 days from the date of the assignment, agree to accept the terms of it, and to release the parties from all liability on their debts and claims, etc. The cases stated above were instituted by creditors of the respective firms for the purpose of setting aside the deed of assignment, and, being identical in object and purpose, were consolidated and heard together. Several grounds were urged sufficient, as alleged, to set aside the assignment, and subject the property to the claim of creditors according to law, but, from the view which the court takes, it will not be necessary to consider any of the objections except the one chiefly relied on by the assailing creditors, viz., that, in violation of section 2014 of the General Statutes, which denounces assignments giving preferences as "absolutely void," this assignment gives undue and illegal preference to individual over copartnership creditors, in excluding the partnership creditors, after exhausting the partnership assets, from coming in and participating with the individual creditors in the individual property of the members of the different firms; the proposition relied on being that, under the law of this state, the individual creditors are not entitled to be paid first out of the individual property, but have only an equity to require that the partnership creditors should exhaust the assets of the firm, and, after that is applied, they are then entitled, as to any balance due them, to share equally and ratably with the individual creditors in the individual assets, while, on the other hand, in support of the assignment, it is urged that the rule is that the joint debts are primarily payable out of the joint effects, and are entitled to a preference over separate debts; and so, in the converse case, the separate debts are primarily payable out of the separate effects, and as to that possess a like preference, and the surplus only, after satisfying such priorities, can be reached by the other class of creditors, so that really the only question involved is one purely of law. What was the law of this state upon the subject when the assignment was executed?

The cause came on to be heard by Judge KERSHAW, who, making a full and interesting review of the authorities both in the English and American courts, in law and in equity, held that the question as to the priority of the individual over the partnership creditors in the individual property of the members of the firm was still an open question in this state, and "furthermore that the departure from this settled rule of administration of partnership assets, where there are individual claims and individual property, is wholly founded upon the case of Wardlaw v. Gray, Dud. Eq. 110, and that wholly upon a total misconception of the English cases cited to support it. With great deference to the opinions of the eminent jurists whose decisions are here reviewed, I am impelled to the conclusion that in the case under consideration

Digitized by Google

the individual property is first applicable to the individual debts, and that the provisions upon that subject in the assignment are in strict conformity to the established rule, and therefore constitute no improper preference," —and dismissed the complaints. From this decree the plaintiff's partnership creditors appeal to this court upon the ground, *inter alia*, that it was error of law to hold "that, as between the partnership creditors of a firm and the individual creditors of its members, the individual assets are first liable to individual debts before any application thereof may be made to partnership debts, and for not holding that if, after applying partnership assets to partnership debts, any portion of such debts should remain unsatisfied, such portion should come in ratably with the individual debts of the several members as against their individual assets," etc.

The question is certainly an important one, which in the affairs of business life may arise daily, and it should be, if it has not already been, clearly and fully settled, so that all may know what the law is to which their actions should be conformed. It is true that there has been much discussion and some difference of opinion on the subject involved, not, as it seems to us, arising so much from the inherent difficulty of the subject, as from an artificial rule originally adopted in the English bankrupt courts, mainly, as it would seem, on account of its simplicity and convenience of application, viz., that partnership creditors are entitled to partnership property, and, *e converso*, individual creditors are entitled to individual property,—a rule of which Judge Story says: "It is not too much to say that it rests on a foundation as questionable and unsatisfactory as any rule in the whole system of our jurisprudence." Story, Partn. 577. As we understand it, no rule upon the subject has ever been declared by positive statute, either in England or America; but whatever rule there may be has grown up entirely from the *dicta* of elementary writers and adjudications of the courts supposed to be founded on some principle. But so far as concerns this "rule of reciprocity," as it is sometimes called, it does not seem to us to have been founded upon any principle or general equities of the parties. All agree that the partnership creditors have an equity to exhaust the partnership assets, for the double reason that they have two funds, and the individual members have no interest until the partnership is settled. But the same cannot be said of the individual creditors. They are not creditors of the firm at all, but only of their individual debtor, whose individual property, including his clear share of the firm, is liable for all his debts alike, both partnership and individual. It strikes us that there is nothing in the relations or the equities of the respective classes to authorize or justify the application of the convenient Procrustrean rule of "reciprocity." But it is argued that the circuit decree is in conformity with the English rule, and we should follow it, without regard to its reason or equity, and disregard our own cases, which have made a departure from it, for the sole reason that it was error to make that departure, and it should be corrected by returning to the rule. Without going back to ascertain what is the precise rule adopted in the English courts of bankruptcy and chancery, it is quite clear that, as far back as the case of Wardlaw v. Gray, (1837,) cited in the circuit decree, the doctrine was announced in this state "that a partnership creditor has the right to resort either to the partnership property or to the separate property of the parties; but, as a party having two funds, he may be compelled by the separate creditors of one of the partners to exhaust the partnership property before he proceeds against that of an individual partner," etc. Whether this decision did or did not run counter to what is said to be the English rule upon the subject, it is quite as clear that it has never been expressly overruled; but on the contrary has been recognized and followed, and at the time of the execution of the assignment under consideration was, as we think, the law of the state. In Gowan v. Tunno, Rich. Eq. Cas. 369, (1832,) it was held that, "though partnership effects should be first applied to partnership debts, yet, after these are exhausted, a judgment against the partners as such binds the separate estate of each partner from its date." In Fleming v. Billings, 9 Rich. Eq. 149, (1856,) it was held that "copartnership creditors are first to be paid out of the copartnership fund, and if that prove insufficient then they are to come in with the private creditors, [respect being had to liens,] as against the individual property of the copartners." In Gadsden v. Carson, Id. 252, (1857,) it was held that "the individual creditors of a partner have not such exclusive right to be paid out of his individual property as to render fraudulent an assignment of it for the benefit of the creditors of the firm. Partnership creditors having two funds to which they can resort, and individual creditors of the partners having but one,—the private property of the debtor, including any balance which may remain to him from the firm, after its affairs are settled, —such individual creditors have an equity to compel the partnership creditors to resort first to the partnership assets; but, after they are exhausted, the partnership creditors have as good right to be paid out of the private property of a partner as his individual creditors," etc. In this case Chancellor JOHNSTON remarked that it "was in conformity to Wardlaw v. Gray, with which we see no reason to be dissatisfied." In Wilson v. McConnell, 9 Rich. Eq. 500, (1857,) it was held that "where a copartner, having a separate estate, dies, the copartnership creditors have the right first to exhaust the copartnership estate, and, if that proves insufficient to pay their demands, then they are to be paid from the separate estate of the copartners, *pro rata* with his separate creditors." In Adickes v.

Digitized by Google

Lowry, 15 S. C. 128, (1880,) it is true that an intimation is given that the question might be still open, but that was not intended to decide anything. The remark was: "But, even if this were so, there would still remain the very important and interesting question whether the separate creditors of Bratton would not have in equity a preference over the partnership creditors to the separate assets of Bratton, etc. But inasmuch as this question was not raised in the court below, and has not been argued here, we do not propose to enter upon its consideration now," etc. In Hutzler v. Phillips, 26 S. C. 136, 1 S. E. Rep. 502, (1886,) it was held "that partnership creditors, after exhausting partnership assets, are entitled to share the separate property of the partners *pro rata* with unsecured individual creditors." The chief justice reviewed all the authorities, saying, among other things: "We think the true doctrine is as stated by the circuit judge with respect to the right of the separate creditors, if any equity exists in his behalf, such as two funds * * * to throw the copartnership creditors on the partnership assets in the first instance; but, after the partnership assets have been fully and fairly exhausted, to come in *pro rata* with the separate creditor. This seems to be the weight of authority with us. Besides a debt contracted by a copartnership is not only a debt of the firm but a debt, in substance, of each individual member of the firm, and the property of the firm and of each member is liable for it. But the property of the firm is not liable for the separate debt of a member; only the interest of the member is liable, which is nothing until the firm debts are paid," etc. We think this case finally settled the law in this state. But, as if to put the matter beyond all dispute, the very last work upon the subject of partnership, published this year, (1889) expressly approves and cites from this case, as containing the proper exposition of the law upon the subject, both on principle and authority. The author says: "The insolvent, by his inability to meet his liabilities, is not the less, but all the more, a debtor. He owes to his creditors, not the property itself, nor any asset, but merely the price of the property. The debt is personal, without any lien or preference for its payment out of the debtor's estate. The individual partner is, however, not less liable for a firm debt than is the firm itself. The several liability of the partners is no less a constituent of the partnership obligation than is their joint obligation. Both spring from the root of partnership. The joint creditors, therefore, are entitled at law to share the separate estate of a partner with his individual creditors," etc. See Pars. Partn. § 108; citing Hutzler v. Phillips, and other cases.

We have not the least idea that the parties intended to do anything wrong, but the assignment was not in conformity with the law as we understand it, and had the effect of creating preferences not allowed by law. The judgment of this court is that the judgment of the circuit court be reversed, and the cases remanded to the circuit court for such further proceedings as the parties may be advised, in accordance with the conclusions herein announced.

SIMPSON, C. J., and MCIVER, J., concur.

(31 S. C. 607)

MILLER *v.* KLUGH *et al.* RICHEY *v.* SAME. RICHEY *et al.* *v.* SAME.

(*Supreme Court of South Carolina.* July 17, 1889.)

APPEAL—REVIEW.

Where there is manifest conflict of testimony on the trial of a cause, and the same conclusion has been reached by a referee and the circuit court, the judgment rendered therein will not be disturbed on appeal.

Appeal from common pleas circuit court of Abbeville county; FRASER, Judge.

These actions were brought by John M. Miller and by William R. Richey individually, and by said Richey & Miller as partners, against J. C. Klugh and Cornelius McHugh, to enjoin the sale of certain real estate described in the complaints, under a judgment of foreclosure; the plaintiffs alleging that said judgment had been fully paid, and that the defendant McHugh had no property therein. These allegations the defendant McHugh denied. The judgment of foreclosure was originally in favor of A. J. Salinas & Son, and was afterwards assigned to Cornelius McHugh. Judge COTHRAN granted temporary restraining orders in all the cases. The issues having been joined, the cases were referred to W. C. Benet, Esq., as special master, who reported that the complaints did not state facts sufficient to constitute a cause of action, and recommended that the complaints be dismissed. This report came up on exceptions before Judge HUDSON at October, 1886, term of court for Abbeville county. Judge HUDSON held that the exceptions were well taken, overruled the master's report, and recommitted the cases. Thereupon the special master heard the cases on the evidence, and reported in favor of the defendants. The plaintiffs again excepted, and the cases came on to be tried October, 1887, term, before Judge PRESSLEY, who held that plaintiffs' allegation of payment involved the right to a specific performance of a contract of purchase of the lands in question claimed to have been made by defendant McHugh, which, under the pleadings, he could not consider. The court refused to allow an amendment, and dissolved the temporary injunctions, with leave to defendant to proceed with his sale under the judgment. An allowance made by the referee to defendant was reduced $100 by the court. From the judgment both parties appeal. Plaintiffs claimed that defendant McHugh had contracted to buy certain land belonging to Miller, enough of the purchase price to be paid at the time to satisfy the Salinas judgment, and the balance when title should be executed,

Digitized by Google

such payment to be secured by an assignment of the judgment to defendant McHugh. It was further claimed that said McHugh had refused to carry out his contract of purchase. Defendant claimed that the advance was made as a loan secured by the assignment, and that the sum had not been paid. For opinion of McIver, J., see 7 S. E. Rep. 67. On the second trial Judge Fraser filed a decree sustaining the report of the special master except as to $100, and dissolving the injunctions so far as to permit defendant McHugh to collect $377.79, with interest. From this decree plaintiffs appeal.

Johnson & Richey and *Carson & Bonham*, for appellants. *Eugene B. Gary* and *D. H. Magill*, for respondents.

McIver, J. These three cases, depending practically upon the same facts, were heard, and will be considered together. As this is the second appeal, a detailed statement will be unnecessary, as it may be found by reference to the former appeal as reported in 7 S. E. Rep. 67, and as it will hereafter be reported in 29 S. C. The present appeal turns solely upon a question of fact, and in such case the well-settled rule is that the burden is upon the appellant to satisfy this court, either that the judgment from which the appeal is taken is unsupported by any evidence, or is contrary to the manifest weight of the evidence. This, we think, the appellants in these cases have failed to show. While it is quite true that there are facts and circumstances developed by the testimony tending to support the conclusion contended for by the appellants, it is not and cannot be denied that there are other facts and circumstances in direct conflict with that view. Where there is a manifest conflict of testimony, this court will rarely, if ever, disturb the conclusion reached by the circuit judge, especially where, as in this case, the same conclusion has been reached by the referee, who had the advantage of hearing the testimony of the witnesses and observing their manner while on the stand. There being such conflict in the testimony, the conclusion reached below certainly cannot be said to be without any testimony to support, nor can we say that it is opposed to the manifest weight of the evidence. The judgment of this court is that the judgment of the circuit court in each of the cases above stated be affirmed.

Simpson, C. J., and McGowan, J., concur.

(31 S. C. 333)

Garlington v. Gilliam.

Same v. Gilliam *et al.*, (two cases.)

(*Supreme Court of South Carolina.* July 13, 1889.)

Liens on Crops—Procedure.

The right to vacate a warrant of seizure under a landlord's lien, on account of irregularities therein, is waived where defendants, having given the statutory notice to the sheriff, denying the claim, etc., have an issue made up and referred to a master to take testimony and report as to the rights of the parties.

Appeals from common pleas circuit court of Laurens county; Hudson, Judge.

Haskell & Dial, for appellants. *Ferguson & Featherstone*, for respondent.

Simpson, C. J. The respondent, Garlington, as agent, in June, 1881, obtained from the clerk of the court for Laurens county certain warrants of seizure, (lien warrants,) upon his affidavit that he was the landlord of the defendants, from whom certain rents, as a portion of the crop, were due for the current year, which crops the defendant Gilliam was about to dispose of in defeat of his lien. The crops seemed to have been seized by the sheriff and sold, but at what time is not stated. It appears, however, that the defendant Gilliam, on June 29, 1881, gave written notice, through his then attorneys, to the sheriff that he did not recognize the parties for whom the said Garlington was agent as his landlord, and that the rent claimed was not due, nor any rent whatever; and, further, that in case he sold any of the crops he hold the proceeds as required by law. This notice was founded upon affidavits by Gilliam, embracing the above denial. On the 11th of June, 1885, his honor, Judge Wallace, by consent of counsel of both plaintiff and defendants, ordered that it be referred to the master, to ascertain the value of the crop or crops grown on the tract of land in question for the years 1881 and 1882, stating the value of the crops for each year separately; that he ascertain the sum of money in the hands of the sheriff arising from the sale of the said crops; and that he report the facts to the next court with any special matter. In April, 1886, his honor, Judge Fraser, granted an order by consent, that $237.50 of the money in the hands of the sheriff be paid to Messrs. Haskell & Dial, defendants' attorneys, and that the rights of Henry Little, B. B. Gilliam, Hill & Bro., G. P. Copeland, and their respective assignees, if any, in the sum of $237.50, be referred to a referee, to decide to whom it belonged, his decision to be made in writing, to be filed with the clerk, and to be final; and that the sheriff do pay out the said sum of $184.50, in accordance with said decision, after first paying the referee $10, and that the balance of the fund be held subject to the further order of the court. It appears that matters continued in this condition, no reference being held until April, 1889, when his honor, Judge Hudson, at chambers, heard a motion from the defendants to set aside the warrants, on the alleged grounds of irregularity, and also because improvidently issued. This motion was refused, his honor stating "that he was satisfied that the affidavits upon which the warrants were issued were insufficient, but that the records of the court showed an order directing a reference before R. C. Watts, Esq., to ascertain the rights of the parties therein named to a portion of this fund, and directing further the balance of

Digitized by Google

the fund to be held subject to the further order of the court, and that under such a state of facts he was satisfied that he had no jurisdiction at chambers of the subject-matter." From this order the defendants have appealed, alleging error to his honor: (1) Because he held "that he had no jurisdiction at chambers to hear the motion to vacate the lien warrants herein; (2) in not holding that the warrants should be vacated, both because irregularly and improvidently issued; (3) because he erred in allowing plaintiff to submit evidence at the hearing. There were one or two other exceptions which, being incorporated substantially in those mentioned, need not be specially considered. As to the last exception hereinabove, we have only to say that the "case" does not show that his honor allowed the plaintiff to submit evidence at the hearing. We suppose that the error intended to be alleged was that his honor allowed at the hearing of the motion to vacate other evidence than that upon which the warrants were granted, but the case does not show this, as to the questions of improvidence and irregularity. But, even if this had been done, it certainly did not prejudice the defendants, because his honor held, or would have held, if he had had jurisdiction, as the defendants claimed, that the affidavits were not sufficient; in other words, that the warrants were obnoxious to irregularity. His honor, however, declined to exercise jurisdiction for the reason stated by him, that the records of the court showed that a reference had been ordered upon the matters involved, etc. If the exception above was intended to refer to this as the error alleged, we think it would be still untenable. The records of the court had no relevancy to the questions of irregularity or of an improvident issuance of the warrants, but it was pertinent only to the question of jurisdiction, which his honor was bound to decide, before considering even the other questions, and besides this record constituted a part of the proceeding of the case, and of its history up to the time of the motion.

The main question, however, in the case, is the question of jurisdiction. There is no doubt, since the act of 1882, in 19 St. 429, that, as a general rule, a circuit judge has jurisdiction in such cases, and upon such motions as made here. This act provides, in terms, that a motion to vacate warrants of seizure in cases like this may be made either before the clerk of the court, a trial justice by whom it may have been issued, or a circuit judge, for any of the causes which would have been sufficient to vacate a warrant of attachment issued under the Code of Procedure. We have no doubt that under this act a circuit judge has jurisdiction ordinarily to hear a motion like that here and at chambers. But we do not understand that his honor declined to hear this motion on the ground that circuit judges had no general jurisdiction in such cases, and upon such motions, but he declined it because of the action already had in the case by the court. The agricultural lien act provides that, in case the party receiving advances, etc., desires to contest the claim because not justly due, he may within 30 days after the sale of the property give notice in writing to the sheriff, accompanied by an affidavit, etc., who shall hold the proceeds subject to the decision of the court, upon an issue to be made up and set down for trial at the next succeeding term. This course was adopted here, and the issue, being made up, was referred to the master to have the testimony taken and a report made. At the time of this proceeding the act of 1882, supra, had not been enacted. No reference has been had, though it was ordered in 1886. Why and upon whose default, if any, it has not been held, is not stated. Nor has there been any complaint made in reference thereto. Nor was this delay one of the foundations of the motion to vacate. Under this state of facts, we think his honor's ruling may be sustained by the case of Johnstone v. Manigault, 13 S. C. 408. In fact it seems that the doctrine announced there required such a ruling here. In that case, after an issue had been made, as here, upon the call of the case for trial, a motion was made to strike the case from the docket, etc., on the ground of irregularity, insufficiency of the affidavit, etc. The circuit judge, as here, held the affidavit to be insufficient, but, the issue having been made up, he further held that the insufficiency had been waived, and ordered the trial to proceed. On appeal this court held that defendant, having elected his remedy, must be confined to it. While, then, the circuit judge no doubt had jurisdiction of the motion, yet he could not have granted the remedy sought as claimed in the second exception above. Upon the authority of this case the appeal here must therefore be dismissed, and for the reasons above stated. It is the judgment of this court that the judgment of the circuit court be affirmed.

McIVER and McGOWAN, JJ., concur.

(31 S. C. 608)

HODGES *et al.* v. TARRANT.

(*Supreme Court of South Carolina.* July 17, 1889.)

SECONDARY EVIDENCE—HARMLESS ERROR.

1. A person who is not a member of a partnership may testify as to who compose the firm.
2. Where a verbal order for goods is given to a traveling salesman, and a memorandum thereof is made by him, and a copy of such memorandum forwarded to his principal, the error, if any, in admitting the copy in an action for the price to prove the sale, is cured where the salesman, after refreshing his memory by his memorandum made at the time, testifies that he then sold the goods mentioned to defendant.
3. Parol evidence of such a sale is admissible.
4. As tending to prove an admission of indebtedness, it may be shown by parol that when the account sued on was presented to defendant he made some calculations in writing, and then stated what he regarded as the amount due.
5. The amount of credits being matter of defense, there is no error in permitting plaintiffs to give parol evidence thereof, without producing their books.

Digitized by Google

Appeal from common pleas circuit court of Newberry county; KERSHAW, Judge.

Johnstone & Cramer, for appellant. *Moorman & Simkins*, for respondents.

McIVER, J. This case was submitted without argument, either written or oral, and the "case" is so meager of details that we do not feel by any means sure that we have properly understood the facts of the case. There is nothing in the record as submitted to us but certain extracts from the testimony, interspersed with objections made while the testimony was being taken, and the rulings of the court thereon, together with defendant's exceptions for the purpose of this appeal. From this paper we infer that the action was brought by the plaintiffs, as survivors of the firm of Hodges & Bros., to recover the amount alleged to be due for certain goods, wares, and merchandise sold and delivered by that firm to the defendant, together with the interest thereon. Whether the plaintiffs recovered any judgment at all, and if so for what amount,—whether for the whole amount claimed or only a part thereof,—and whether any interest was included in the recovery, does not appear. All this is left to inference, and while we might be able to infer, from the fact that defendant has appealed, that some judgment was recovered against him, we are unable to discover anything in the "case" justifying any inference as to the amount recovered,—whether the whole or only a part thereof.

The following are the exceptions served: "(1) Because the court erred in permitting H. D. Smith to testify as to who constituted the firm of Hodges Brothers, and who were the survivors of said firm, though he was not a member of the firm. (2) Because the court erred in admitting in evidence a copy from the order-book of the salesman of the plaintiffs to prove the sale of the goods sued for herein, whereas it is submitted that the order-book itself is the highest evidence. (3) Because the court erred in permitting parol testimony as to the order for goods alleged to have been ordered by the defendant, when it is in evidence that the order for said goods was taken down in writing, and the order thus reduced to writing is the highest evidence. (4) Because the court erred in holding that a certain calculation alleged to have been made by defendant in writing, in connection with the account sued on herein, and which calculation was made the basis of an admission on the part of the defendant of the correctness of the account, could be proved by parol testimony. (5) Because the court erred in holding that the original entries of credits upon the books of the plaintiffs in favor of the defendant need not be produced by the plaintiffs when they attempted to prove the credits, and in admitting parol testimony to prove the same."

The first exception manifestly cannot be sustained. If the fact as to who composed the firm of Hodges Bros., and who were the survivors of that firm, was put in issue by the pleadings, which, however, does not appear in the "case," it was, of course, incumbent upon the plaintiffs to prove that fact; and this might be done by Smith or any other witness who knew the fact. We know of no rule which requires that the proof as to what persons compose a commercial firm must come from some member of the firm. But in addition to this it nowhere appears in the "case" that the witness Smith was not a member of the firm. True it is so stated in the first exception, but this court has so often ruled that no fact can be considered which appears only in the exceptions, that it surely cannot be necessary to say more on the subject.

The second exception is not well founded. We infer that the goods in question were sold to defendant by a traveling salesman of the plaintiffs, the order for the same having been taken down in writing at the time the order was given in the order-book of the salesman, and a copy thereof sent to the plaintiffs, and from that copy the goods were shipped to defendant. If this be so, then it seems to us that the copy upon which the plaintiffs acted in sending the goods was higher evidence of the sale than the memorandum made in the order-book of their agent. But, be this as it may, the point raised by the second exception is fully met by the further testimony of the salesman that, refreshing his memory by the written memorandum in his order-book, made at the time, he could say that he then sold the goods mentioned to the defendant.

The point raised by the third exception is very much the same, and need not further be considered, unless the object of that exception was to raise the point that, there being a written order for the goods, no parol testimony could be received as to such order. But this view cannot be sustained, for there is no evidence that defendant ever gave any written order, and hence there was no attempt to bind him by parol testimony as to what he had put in writing. As we understand it, the defendant's order was verbal, and, when given, the salesman made a memorandum in writing of such verbal order, and he was properly permitted to say, after refreshing his memory by reference to such memorandum, that he had sold the goods in question to defendant.

As to the fourth exception it seems that, when the salesman applied to defendant for a settlement of the account, the defendant, after making some calculation in writing, stated what was the sum due by him. Now as the point to be proved was the admission of the defendant as to the amount due, it certainly was entirely competent for the witness to prove what defendant said was the balance. The means by which he arrived at such balance (the calculation in writing) was not at all material, but his verbal admission made after such calculation was material and entirely competent.

Digitized by Google

We do not see how the fifth exception can be sustained. We infer from the testimony that a portion of the goods sold had been returned to the plaintiffs, and of course defendant was entitled to credit for the price of the goods so returned. This, however, constituted matter of defense and was no part of the plaintiffs' cause of action, and we do not see that the books of the plaintiffs were any better or higher evidence of the amount of such credits than that which was offered in the case. The judgment of this court is that the judgment of the circuit court be affirmed.

SIMPSON, C. J., and MCGOWAN, J., concur.

SAVANNAH, F. & W. RY. CO. v. HOLLAND.

(*Supreme Court of Georgia.* March 1, 1889.)

EVIDENCE—CROSS-EXAMINATION.

1. Statements of a passenger who was injured by a fall while leaving the train, made about half an hour afterwards, are no part of the *res gestæ*.
2. A witness who is interrogated as to a conversation with a view to impeaching him may give the whole conversation so far as it is pertinent.
3. Where it appears that the agent of one of the parties to a suit was sent to a witness with intent to corrupt or entrap him, a charge to the jury as to whether his authority was limited to proper means for the attainment of right ends, or extended to the illegal means used, was proper.

Error from superior court, Mitchell county; BOWER, Judge.

Chisolm & Erwin, for plaintiff in error. *W. M. Hammond* and *Spence & Twitty*, for defendant in error.

BLECKLEY, C. J. 1. The plaintiff, a passenger upon a railway, who left the train late at night, and in so doing (as he alleges) was injured by a fall which broke his leg, having pulled off his coat, detached his suspenders, bound up his broken limb, crawled through a culvert from one side of the railway to the other, seated himself on the cross-ties, and cried for help, his account of the manner of his leaving the train and receiving the injury, given to a person who reached him about half an hour after first hearing his cries, was no part of the *res gestæ*, and, being mere narrative of a past event, was not admissible evidence in his own behalf.

2. When, on cross-examination, a witness is interrogated as to a conversation, with a view to laying a foundation for impeaching him, he has a right to give the whole conversation, so far as it is pertinent, and this without reference to whether the other interlocutor was an agent of the cross-examining party or not.

3. When one, in the interest of a party to the cause, has maneuvered to entrap or corrupt an adverse witness, and the evidence suggests that he was sent on some mission to the witness by an attorney of the party whose interest he sought to promote, the court may charge the jury on the question whether his authority, if any he had, was pure or impure; whether it was limited to the use of proper means for the attainment of right ends, or extended to such means as were actually used, and to ends apparently improper and illegal. Both the fact and the nature of the agency are open to the jury, and the evidence warranted the consideration of both.

4. In order for the jury to assess punitive damages in an action for a tort, it is not necessary that they shall be claimed, *eo nomine*, in the declaration. It is enough that the facts alleged and proved be such as to warrant the assessment. Judgment reversed.

(82 Ga. 736)

TREADWELL *et al.* v. BEAUCHAMP.

(*Supreme Court of Georgia.* July 8, 1889.)

SHERIFFS—FAILURE TO REALISE ON EXECUTIONS.

The sheriff cannot justify his failure to raise the money on an execution in his hands by showing that the defendant filed with him an affidavit of illegality setting up deficiencies in the sheriff's advertisement, and in his description of the premises levied upon; nor will it avail the sheriff that the affidavit contained another ground, setting up that the judgment was against the defendants as partners, whereas the execution was against them as individuals, the execution itself showing on its face that it was against them both as a firm and as individuals. That the sheriff took counsel on his duty in regard to receiving the affidavit and returning it to court for trial will not protect him in so plain a matter.

(*Syllabus by the Court.*)

Error from superior court, Butts county; BOYNTON, Judge.

E. G. Reagan, for plaintiffs in error. *W. W. Anderson*, for defendant in error.

BLECKLEY, C. J. The sheriff was ruled for not making the money upon a justice's court *fieri facias* which had been levied upon land. His authority to make the levy was conferred by the act of October 17, 1885, (Acts 1884–85, p. 68.) He answered that one of the defendants had interposed an affidavit of illegality to the *fieri facias*, and that he (the sheriff) had consulted counsel, and was advised to return it to the justice's court for trial. This was his excuse for not raising the money. We think the excuse insufficient. He ought not to have received the affidavit of illegality. Two of the grounds go to his own acts. They allege that he did not describe the land fully, nor state in his advertisement that the tenant in possession had legal notice. If either of these grounds was good, it must have been because the sheriff failed to perform his duty, and of course he can take no advantage of a delay which was the result of his own fault. The other ground of illegality alleged in the affidavit was that the *fieri facias* issued against O. L. Welch and J. L. Fincher, when in fact the judgment is against them as partners. The truth is that the execution, as brought here in the record, is both against the firm of Welch & Fincher and against each member of that firm, and this the sheriff would have seen by merely reading the *fieri facias*. True, it does not name them expressly as partners,

Digitized by Google

but the use of the form "Welch & Fincher" implies that they were partners, and this is quite sufficient.

We have never seen a more frivolous affidavit than this. Surely the sheriff is bound to know some law. He says he took the advice of counsel. We suppose from the quality of the advice that he must have obtained it *gratis;* but, if he paid for it, he might be able to recover damages from his attorney for giving such advice, if any damages had been or should be sustained. We think that the plaintiffs in *fieri facias* were entitled to have the rule made absolute, and that it was a mistaken exercise of discretion to discharge the rule upon the showing made by the sheriff's answer. Tucker v. Respass, 28 Ga. 613; Wheeler v. Thomas, 57 Ga. 161; Morgan v. Spring, 72 Ga. 258; Gladden v. Cobb, 73 Ga. 235; Kite v. Lumpkin, 40 Ga. 506.

Judgment reversed.

(83 Ga. 297)

STEWART v. STISHER.

(*Supreme Court of Georgia.* July 8, 1889.)

HOMESTEAD—EXEMPTIONS—DESIGNATION OF CREDITORS—JUDGMENT.

1. Homestead or exemption is not available as against a creditor not designated in the list of creditors filed with the ordinary or notified. As against such creditor, the proceedings are void.

2. After judgment upon a promissory note bearing legal interest according to its face, (no plea of *non est factum* or of usury having been filed to the action,) it is not competent for the debtor or his wife to prove by extrinsic evidence, in order to avoid the effect of a waiver of homestead or exemption, that the note was altered by the creditor before suit was brought, from an usurious rate to a legal rate of interest. Such extrinsic evidence would be inconsistent with the judgment.

(*Syllabus by the Court.*)

Error from superior court, Douglas county; R. H. CLARK, Judge.

Reid & Grow and *R. A. Massey*, for plaintiff in error. *J. S. James*, *John V. Edge* and *Thomas W. Latham*, for defendant in error.

BLECKLEY, C. J. 1. The land levied upon by virtue of a *fieri facias* in favor of Stewart against Stisher was set apart as a homestead, upon the application of Mrs. Stisher, but Stewart was not notified as a creditor, nor was his name included in the list of creditors. For this reason the homestead proceedings were void as to him. Manufacturing Co. v. Christopher, 68 Ga. 635; Boroughs v. White, 69 Ga. 842. It was said in the argument that the wife of a debtor is not supposed to know all his creditors. But she must know them, if she wishes to bind them. In taking homestead she represents her husband. She has only his rights, and must comply with the law just as he would have to comply with it did he make the application in person.

2. The note on which the judgment was founded from which the *fieri facias* issued contained a waiver of homestead and exemption. This waiver is now resisted on the ground that the debt was usurious, and the court admitted evidence to show that such was the fact; but we think that the question was closed by the judgment. No usury appears upon the face of the note or the record. Hightower v. Beall, 66 Ga. 102; Owen v. Gibson, 74 Ga. 465; McLaws v. Moore, 9 S. E. Rep. 615, (this term.) The rate of interest expressed in the note is 8 per cent., and this is not usurious. It is said that the rate originally in it was 12 per cent., and that the creditor altered it before suit to 8 per cent., but this position is inconsistent with the judgment. The note was declared upon as it now is, and the judgment is an adjudication that it was genuine. The debtor acknowledged service of the petition waiving the process, and, if the note was not genuine, he should have defended upon a plea of *non est factum*. Thompson v. Gowen, 79 Ga. 70, 3 S. E. Rep. 910. The judgment is a solemn adjudication, binding upon the debtor and his privies, to the effect that the rate of interest appearing on the note at the time the judgment was rendered was the rate which was expressed in it at the time the note bore date, or, if afterwards altered, that it was with the maker's consent; the note thus becoming *pro tanto* a new contract, of which new contract the waiver was part and parcel, the same having been left standing in the instrument. Judgment reversed.

(83 Ga. 307)

LATHROP v. STANDARD OIL CO.

(*Supreme Court of Georgia.* July 8, 1889.)

ACTION FOR RENT.

An action for rent or for use and occupation will not lie where there is no contract relation or relation of landlord and tenant. Negotiations between the parties which have no result do not amount to a recognition of one as landlord under whom the entry was not made, and against whom the right of occupation is claimed adversely.

(*Syllabus by the Court.*)

Error from superior court, Pulaski county; KIBBEE, Judge.

W. L. Grice, for plaintiff in error. *Pate & Jordan*, for defendant in error.

BLECKLEY, C. J. The action in the county court was upon an account for rent, the declaration embracing also a special count for use and occupation, alleging that such use and occupation were at the request of the defendant, and by the sufferance and permission of the plaintiff. The judgment of the county court was in favor of the defendant, and the plaintiff petitioned for the writ of *certiorari*, which was denied. We think that, under the evidence contained in the record, the action rightly failed, for the reason that no contract relation or relation of landlord and tenant between the parties was established. That, to support an action for use and occupation, either an express or implied contract is necessary, admits of no question. Williams v. Hollis, 19 Ga. 313; Jackson v. Mowry, 30 Ga. 143; Littleton v. Wynn, 31 Ga.

Digitized by Google

563; McLendon v. Railroad Co., 54 Ga. 293; Fitzgerald v. Beebe, 46 Amer. Dec. notes 289, 290; Tayl. Landl. & Ten. § 636; 2 Saund. Pl. & Ev. 1169 et seq. True it is that where title is shown in the plaintiff, together with the fact of occupation by the defendant, without more, the relation of landlord and tenant is to be presumed, and a contract for rent implied. Mercer v. Mercer, 12 Ga. 421; Clark v. Green, 35 Ga. 92. But, reading these cases in connection with Jackson v. Mowry, supra, it will be seen that, where the entry of the defendant was not under the plaintiff, and his right to occupy was and is claimed adversely to the plaintiff, then the implication of tenancy or of contract will not arise, and the action must fail. The brief of counsel here for the plaintiff in error was rested chiefly on Richardson v. Harvey, 37 Ga. 224, and Godfrey v. Walker, 42 Ga. 562; but we think these cases do not apply to the facts before us.

The negotiations between the parties looking to the recognition of the plaintiff as landlord, and to the payment both of past and future rent, had no result. No terms were agreed upon, and there is nothing to indicate that the defendant or its agent intended to treat the plaintiff as landlord, or as entitled to claim any rent except as a result of negotiations. The entry was made under the authority of the railroad company or its representative, and the occupation during the whole period has been and still is by permission, express or implied, of that company. If this occupation is wrongful as against the plaintiff, he has his remedy by action of ejectment, and to that remedy he may resort, should he think proper. Judgment affirmed.

(82 Ga. 763)

CUMMINGS v. CLEGG.

(*Supreme Court of Georgia.* July 8, 1889.)

WRIT OF ERROR—SUPERSEDEAS—BOND.

Where litigation in the superior court involves resistance to a levy made upon property under execution, merely taking the case to the supreme court by writ of error after judgment or decree for the plaintiff, without giving bond or making affidavit, is no obstacle to proceeding with the levy while the case is pending in the supreme court, or before the *remittitur* is returned to the court below. A *supersedeas* does not result from the pendency of a writ of error alone, but from the bond or affidavit provided for by section 4263 of the Code.

(*Syllabus by the Court.*)

Error from superior court, Dooly county; KIBBEE, Judge.

G. W. Wooten and *Martin & Smith*, for plaintiff in error. *Duncan & Miller*, for defendant in error.

BLECKLEY, C. J. Referring to the official report for details, the material facts may be summarized as follows: A mortgage *fieri facias* was levied upon land, and a claim interposed, after which the claim case, it seems, was absorbed by a bill and cross-bill, to which the plaintiff in *fi. fa.* was a party on one side, and the claimant and the defendant in *fi. fa.* were parties on the other side. This equity cause was tried, adjudicated in favor of the plaintiff in *fi. fa.*, and thereupon was carried to the supreme court by the claimant and the defendant in *fi. fa.* The writ of error was dismissed, and the judgment below thereby affirmed. The plaintiff in *fi. fa.* attempting then to proceed with his levy and enforce the same, the defendant filed an affidavit of illegality, upon the grounds that the case was still pending in the supreme court; that no *remittitur* from that court had been filed below; that the judgment of the supreme court had not been made the judgment of the superior court; and "that, by reason of said cause having been carried to said supreme court by writ of error, said *fieri facias* was superseded, which *supersedeas* has remained and still remains in force, and will so remain until the judgment of said supreme court is made the judgment of said superior court of Dooly county." Before the affidavit of illegality was heard and determined, the *remittitur* from the supreme court was entered on the minutes of the superior court. Upon the hearing of the affidavit the presiding judge overruled and dismissed the same, and gave judgment for the costs against the affiant. The writ of error, and the pendency of the same in the supreme court, constituted no obstacle to proceeding with the levy, unless a *supersedeas* was duly obtained; and this could be done only by giving bond and security, or filing an affidavit in the terms of section 4263 of the Code. The affidavit of illegality sets up that, by reason of the cause having been carried to the supreme court by writ of error, the *fieri facias* was superseded; but the law is that the writ of error does not operate as a *supersedeas*, unless the statutory requirement as to bond and security or affidavit be complied with. Truluck v. Peeples, 1 Ga. 1; Allen v. Mayor, etc., 9 Ga. 286; Irwin v. Jackson, 34 Ga. 103, 104. In special applications for extraordinary remedies, such as injunctions, etc., other sections of the Code apply, (sections 3206, 3212, 3215, 3216, etc.) Notwithstanding the general language of the opinion in Railroad Co. v. State, 69 Ga. 524, it may well be doubted whether a writ of error or bill of exceptions, even in these extraordinary cases, or any of them, will operate as a *supersedeas*, without some special order in connection therewith. Citing this case in Howard v. Machine Co., 75 Ga. 328, it is said: "Had there been a case between these parties and the complainant, respecting the same subject-matter pending in this court, and had the decision excepted to been superseded, then it would have been taken from his cognizance, and any order modifying the decree, during the pendency of the writ of error, would have been *coram non judice*, and void." An important element in this extract consists of the words, "had the decision excepted to been superseded." How superseded? By the order of the judge and

Digitized by Google

compliance therewith as prescribed in section 3212, supra. It should be observed, further, that, did a writ of error without a *supersedeas* divest the court below of power to proceed judicially in the cause covered by such writ of error, it would not follow that a party might not, through the sheriff, proceed with ministerial acts to realize the money due upon a *fieri facias*. Surely, to hinder such acts, done, not by order of court, but at the instance of a party, a *supersedeas* regularly obtained would be necessary. The result is that the court below committed no error. Judgment affirmed.

(82 Ga. 354)

LAMAR *et al.* v. PEARRE.

(*Supreme Court of Georgia.* July 22, 1889.)

TRUSTS—CONVEYANCE BY TRUSTEE—LIMITATION.

1. A trust created by will being nominally for the testator's daughter and her children, born and to be born, but the daughter to have the possession, profits, use, enjoyment, and control of the property during her life, and at her death the same to be divided among her surviving children, and the children of her deceased children, the appointment of a new trustee for the daughter alone, made at chambers, under the act of February 20, 1854, upon the joint petition of her and the original trustee, without representation or consent of the children, did not invest the trustee so appointed with the legal fee, but only with a legal estate commensurate with the daughter's equitable estate for life. If the original trustee was clothed with an executory trust for the remainder-men, he continued clothed with it, notwithstanding his discharge as trustee for the beneficiary of the life-estate.

2. A sale and conveyance of the land afterwards made by her second trustee, as such, under an order granted in term upon his *ex parte* petition, to which only she assented, her children not being represented in the proceeding nor made parties thereto, passed an estate for her life only, although the deed purported to convey the fee, and the purchaser paid full value.

3. Until the death of the daughter, the statute of prescription did not begin to run in favor of the purchaser against the children and grandchildren; their estate in remainder, whether vested or contingent, legal or equitable, being attended with no right of entry or of action by themselves, or by any one for them, while she was in life.

(*Syllabus by the Court.*)

Error from superior court, Columbia county; RONEY, Judge.

Action of ejectment by John Doe *d.* Lamar and others, against Richard Roe, ejector, and B. E. Pearre. Judgment for defendant Pearre. From order denying a new trial plaintiffs bring error.

Dessau & Bartlett and *McNeill & Levy*, for plaintiffs in error. *W. M. & M. P. Reese*, for defendant in error.

BLECKLEY, C. J. The will of Gazaway Davis, (who died in 1845,) reciting that the testator was desirous to place his daughter, Mary Ann Lamar, wife of Henry G. Lamar, and the children she then had, and might thereafter have, free from the burden of want, by securing to her and them property, both real and personal, constituted Gazaway D. Lamar trustee for her and her children, "as herein provided." It then proceeded to give and devise to Gazaway D. Lamar, slaves, live-stock, household and kitchen furniture, farming utensils, corn, wheat, and other personalty, and the plantation in Columbia county now in dispute, together with other real estate; this clause of the will concluding as follows: "To have and to hold the aforesaid property as trustee for my aforesaid daughter, Mary Ann Lamar, and the children she now has, or may hereafter have, for and during her natural life; the same, together with the increase and profits, to remain in her possession, use, occupation, enjoyment, and control while living, and after her death the same to be equally divided, share and share alike, between her surviving children and her grandchild or children. Should any of her children have departed this life leaving a child or children, in such event said grandchild or children is or are to receive the respective portion which his, her, or their father or mother would have received were said father or mother still living, to have and to hold the same, to them and their heirs, forever." The will bore date in 1843. How many children Mrs. Lamar had at that time or at the death of her father does not appear. She died in May, 1882, leaving surviving her six children, nine having previously died, one of whom left a child. This action of ejectment was brought February 3, 1885, by John Doe, upon the demise of four of the surviving children, the grandchild left by a deceased son, and seven other grandchildren, the children of a daughter who died subsequently to the death of Mrs. Lamar; the defendants being Richard Roe as casual ejector, and B. E. Pearre as tenant in possession. The premises sought to be recovered are the plantation in Columbia county devised by the will. The defendant claimed title both by conveyance and by prescription. His muniments of title consisted of the following documents:

(1) A petition to Hon. HENRY G. LAMAR, judge of the superior court of the Macon circuit, exercising jurisdiction in chancery. It was signed by Mary Ann Lamar and Gazaway D. Lamar, and purports on its face to be the joint petition of her, and of him as her trustee. It represented that he was appointed her trustee by the last will and testament of Gazaway Davis, as well as by an order of the superior court of Bibb county, to both of which it asked leave to refer, without setting them forth. It represented that he had up to that time faithfully performed the duties of said trusteeship; that he had removed out of the county of Bibb, and could not, therefore, continue to perform such duties without great inconvenience to himself as well as to the *cestui que trust;* that he held lands in common with her, and wished to convey a more perfect title to her by way of trusteeship than she then had. For these reasons it prayed for an order changing the trusteeship held by him, and for the appointment of John Lamar, or some other fit and proper person, as trustee for her,

Digitized by Google

and in lieu and instead of Gazaway D., and that the latter be discharged from any further duty connected with said trusteeship. The petition is without date, and annexed to it is a certificate signed by John Lamar, that he was willing to receive the appointment of the trusteeship referred to in the petition, and would accept and faithfully perform the duties thereof if appointed. Then comes an order in chambers, dated July 12, 1858, signed by HENRY G. LAMAR, judge of the superior court of the Macon circuit, reciting that upon the petition of Mary N. Lamar and Gazaway D. Lamar, her trustee, it appeared that Gazaway D. had been appointed the trustee by the last will and testament of Gazaway Davis, as well as by an order from this court, and that it was for the best interest of the estate held by him in trust for her that said trusteeship should be changed, and some other fit and proper person appointed instead of him, and that it appeared from the certificate of John Lamar that he was willing to accept the appointment, and ordering that Gazaway D. Lamar be discharged from the duties of said trusteeship, and that John Lamar be appointed the trustee for her in his stead, and that this order be entered on the minutes of Bibb superior court.

(2) A petition signed "JOHN LAMAR, Trustee for Mary Ann Lamar," addressed the same as the preceding petition, and on its face purporting to be the petition of John Lamar, trustee for Mary Ann Lamar, and representing that on the 12th of July, 1858, he was appointed trustee for her in lieu and instead of Gazaway D. Lamar, who had been appointed to said trusteeship by the last will and testament of Gazaway Davis, and who resigned said trusteeship on the day aforesaid; that John Lamar now holds, as trustee aforesaid, a large tract of land in the county of Columbia, besides lands in the county of Baker, and a number of negroes; that by reason of the unproductiveness of the Columbia land, and the superior advantages and convenience of the Baker land, both to the trustee and the *cestui que trust*, it would be greatly to the benefit and interest of the trust-estate that the Columbia land should be sold, and the negroes thereon removed to the county of Baker; that the trust-estate is incumbered with a debt, to discharge which it will become necessary to sell some portion of said estate. Therefore he prays an order allowing him to sell said lands in Columbia county, and, after discharging the debt with the proceeds, that he may invest the balance in such property as to him may seem best for the interest of said trust-estate. This was followed by a certificate signed by Mrs. Lamar, in which she declares that she joins in the petition, and is willing that the prayer of the petitioner should be granted. Next comes an order headed, "Bibb Superior Court, November Term, 1858," dated at the bottom, "20th November, 1858," and signed officially by Judge LAMAR. The order is in these terms: "It appearing to the court, by the petition of John Lamar, that he is trustee for Mary Ann Lamar, and that he now holds, as trustee aforesaid, two large tracts of land,—one in the county of Columbia, and the other in the county of Baker, in the state of Georgia,—and a number of negroes, and that it is greatly to the interest of said trust-estate that said land in said county of Columbia and state of Georgia be sold, it is therefore ordered by the court that said John Lamar is hereby authorized and allowed to sell the said land in the county of Columbia, and that out of the proceeds thereof, after paying the debt alluded to in his petition, he purchase such other property as to him may seem best for the interest of said trust-estate. It is further ordered that this order be placed on the minutes of Bibb superior court."

(3) A deed from John Lamar, trustee for Mary Ann Lamar, to the defendant B. E. Pearre, dated December 9, 1858, and conveying the premises in fee-simple, with warranty of title; the consideration paid being $15,450.

There was evidence at the trial indicating that the defendant entered under this deed, claiming the land as his own, made improvements costing many thousand dollars, and has continued to hold and claim adversely ever since. As to the character, continuity, and length of his possession there was no dispute. Both trustees died before the action was brought. John died in the life-time of his mother; Gazaway D., after her death. Neither of them left issue. The presiding judge, to whom was referred the case as a whole,—the facts as well as the law,—construed the will of Gazaway Davis as conveying the legal title in fee to the trustee, and held that a good prescriptive title was shown in the defendant, and judgment for the defendant was rendered accordingly. After protracted and laborious study of the case, we have arrived at the conclusion that the nice and doubtful question as to whether Gazaway D. Lamar, the original trustee, took the legal estate in fee, or only an estate for and during the life of his mother, Mrs. Lamar, need not be decided.

1. Whether the court below was right or wrong in holding that the legal fee passed by the will to the first trustee, we are confident that it never passed to the second, the one to whom leave to sell was granted, and who executed the deed to the defendant. John Lamar was appointed by the order of July 12, 1858, trustee for Mrs. Lamar only. There is no hint or intimation in either of the petitions, in either of the orders, or in the deed, that he was or was to be trustee for the children, or that he acted, or was to act, in that capacity. Although Judge LAMAR was the father of both trustees, as well as the husband of the *cestui que trust* for life, he was perfectly competent, with the consent (Code, § 205) of these three persons, all of whom did consent, to substitute, by an order at chambers, one of the sons for the other as trustee for Mrs. Lamar; but without the ad-

Digitized by Google

ditional consent of all the other beneficiaries of the trust, given by themselves, if competent to consent, or by some proper representative, if they were not competent, he could not lawfully remove one trustee and appoint another as to the estate in remainder. Acts 1853–54, p. 59. Judged by its own terms, and restricted to what these terms express, the order in question was perfectly valid. To hold it free from legal infirmity, it is requisite either to construe the trust as limited by the will in duration to the life of Mrs. Lamar, or, if that cannot be done, to adhere to the terms of the order. Where two constructions are open to our choice, it is our duty, in favor of jurisdiction to pass the order and the proper exercise of the same, to adopt that construction which treats the order as completely legal, rather than that which would hold it partially illegal, and, to that extent, void or voidable. Were it conceded that the trustee himself could represent the remainder-men in procuring an order of sale, that concession would not involve the recognition of any power on his part to represent them in obtaining an order for his own abdication of the trust and to have a successor appointed. The act of 1854 provided for removal and appointment at chambers only in cases in which all parties in interest were represented and consenting. There can be no doubt that the terms "parties in interest" include living persons named as objects of the testator's bounty, though described as a class, and though the rights of individuals of the class might be only contingent. The record does not disclose how many of the children of Mrs. Lamar (in addition to the two trustees) had attained to years of discretion at the time the order was granted, but it is certain that one of them at least (the plaintiff Mrs. Thornton) had so done, for it appears that she was married in the year 1849. Had the proceeding been under the act of 1854 as modified by Code, § 2320, her consent would have been essential; but, as the law stood when this transaction took place, not only she, but all who had an interest, whether adults or minors, had to be represented and consenting. There is nothing to suggest that any one represented the remainder-men, unless the trustee did it, and surely there is no need for argument to show that a trustee, when in the act of surrendering his office to another, represents nobody but himself. Suppose he were called to account by the remainder-men for some omission of duty as their trustee occurring after this *ex parte* discharge, could he defend by setting up that discharge as terminating his trust relation to them? Certainly not. If he ever was their trustee with any active duty to perform in their behalf, he was none the less so after than before he resigned as trustee for Mrs. Lamar.

To hold, therefore, that Judge LAMAR intended the trust devolving on the new trustee to be broader than the order expresses, would be to impute to him the official oversight of granting at chambers the prayer of an *ex parte* petition without having all the parties at interest represented. Rather than make this imputation, we think it preferable, and much more safe, to confine the order as he himself confined it, and hold that the appointment of John Lamar was as trustee for Mrs. Lamar, and her only, leaving any trust title there may have been originally in Gazaway D. in behalf of children and grandchildren, to abide in him after the order as before. Supposing the trust of the will to have included both the life-estate and the remainder, it would have been competent for the testator to constitute by the will one trustee to take the former estate, and another the latter estate. Judge LAMAR, as chancellor, representing the testator, made this severance; and, after the severance was thus made, the two trustees occupied the position they would have occupied from the beginning had the testator done as we have suggested. It will be noticed that, as trustee for the children, Gazaway D. Lamar had no power of possession or management during the life-time of Mrs. Lamar, the will declaring that the property, "together with the increase and profits," was "to remain in her possession, use, occupation, enjoyment, and control while living." If he had anything whatever to do in behalf of the children, it was not until after her death, and then only to cause to be made a division in terms of the will. It is not quite certain that even this much devolved upon him. As the use, enjoyment, and profits were all given to Mrs. Lamar while she lived, the children had no share in them, except what she chose to allow. For any participation in these, the testator made the children dependent upon her bounty. He gave her the means to provide for them during her life, instead of directly making the provision himself.

2. If what we have said be sound, it is certain that the defendant acquired no title to the property by the deed (although it purports to convey in fee-simple) of John Lamar, as trustee of Mary Ann Lamar, for a longer period than the duration of her life. Being her trustee alone, and her interest being limited to a life-estate, he never had or acquired any larger interest so as to transmit the same. Furthermore, when the order of sale was obtained, the remainder-men were not parties to the proceeding, nor before the court, either by themselves or their trustee, John Lamar not being trustee for them.

3. With reference to prescription, the case is equally clear. Mrs. Lamar and her trustee could without, and certainly with, the order granted by Judge LAMAR in November, 1858, sell and convey the property during her life. As by the terms of the will she was entitled to the possession, use, occupation, enjoyment, and control of it, she and her trustee, the chancellor concurring, could undoubtedly substitute a purchaser in these same rights; and, as in Georgia no forfeiture attends a conveyance by a tenant for life of a larger estate than he owns, there could have

Digitized by Google

been no entry during the life-time of Mrs. Lamar upon the purchaser, either by the remainder-men, or by Gazaway D. Lamar as their trustee. Had he or they brought an action against this defendant to recover the possession of this property pending the life of Mrs. Lamar, there is no possible doubt that the action must have failed. Mr. Pearre could have defended the same as effectually as Mrs. Lamar could have defended a like action against her, had there been no sale and she had remained personally in possession. Statutory prescription proceeds upon the assumption that there is laches in not suing; but here there was no laches on the part of any one during the life-time of Mrs. Lamar, for any suit that could have been brought by any person whatsoever must have been utterly fruitless. It cannot be a sound theory of the law to treat the statutory prescription as running in favor of a possession which, for the time being, was secure against any action that could possibly have been brought; and such was the possession of Mr. Pearre up to the time of Mrs. Lamar's death, and this suit was brought in due time thereafter.

We confine our discussion and decision to matters which must have been considered by the court below in reaching the conclusion that the defendant had a good title by prescription. Other matters discussed in the briefs of counsel, but which the court below, under its ruling on prescription, had no occasion to adjudicate, we leave to be dealt with upon a new trial. It is best that these elements be canvassed over, with a clear understanding that the pressure of the case, as to the ultimate result, is upon them, with no complication with the element of prescription. There ought to be another trial, and it is so ordered. Judgment reversed.

(83 Ga. 417)

WILCOX *et al.* *v.* DUNLAP *et al.*

(*Supreme Court of Georgia.* April 29, 1889.)[1]

CREDITORS' BILL—TRADERS.

Code Ga. § 3149*a*, provides that, in case any trader shall fail to pay one or more debts at maturity, and shall be insolvent, a court of equity may, under a creditors' bill, proceed to collect the assets, real and personal, and appropriate the same to the creditors. *Held*, that the fact that the sheriff seized defendant's stock of goods under a mortgage *fi. fa.*, before daylight in the morning, five hours before the injunction was granted, did not deprive defendant of his character of trader, so as to preclude the filing of an application for injunction and receiver, under the above section.

Error from superior court, Pulaski county; ROBERTS, Judge.

Dunlap and Wortham and others filed their petition, alleging that they were creditors of L. B. Wilcox; that their demands against him were due, and since their demands had become due they had demanded payment from him personally; that at the time of contracting the debts Wilcox was, and is still, a trader, engaged in buying and selling buggies, etc.; that he contracted the debts in order to carry on said business; and that he is insolvent. The amount of the indebtedness to the various plaintiffs is set forth, and one of the plaintiffs alleges that suit on his claim has already been commenced against Wilcox. They allege, further, that Wilcox is largely indebted to others; that his commercial papers are dishonored; that his liabilities largely exceed his assets; and that he is daily disposing of his assets at prices below their worth, and yet that he is continuing to contract new indebtedness, and thus rendering the collection of plaintiffs' claims more hopeless day by day. Discovery is waived, and injunction, receiver, etc., prayed. On September 25, 1888, a temporary restraining order was granted, and J. H. Stetson appointed temporary receiver, with directions to take charge of and preserve all the assets of defendant until further ordered, etc., and said receiver was required to give bond.

Plaintiffs amended their petition, making the following allegations, in substance: On the night of the 24th of September, 1888, M. T. Hodge, as counsel for Lewis, Leonard & Co., went to the house of the clerk of the superior court of Pulaski county, aroused the clerk from sleep, and got him to issue a mortgage *fi. fa.* in favor of Lewis, Leonard & Co. against Wilcox for the sum of $300 principal, with interest, etc., from September 15, 1888. The *fi. fa.* to foreclose the mortgage was made before one as notary public of said county, who was not such notary, and the affidavit and other papers were not filed in the office of the clerk until some time during the day of September 25, 1888, and after the injunction had been granted and receiver appointed. The mortgage was dated September 24, 1888. On said 25th of September, after the granting of the injunction, Lewis, Leonard & Co. foreclosed against said Wilcox a mortgage for $10,020.50 principal, with interest and attorney's fees, dated September 18, 1888, to secure three notes,—one dated August 5, 1884, due October 15, 1884; one dated March 4, 1885, due on demand; and one for $6,389.73, dated September 13, 1888, and due on demand. Said mortgage is not under seal, and has never been marked "Filed in office," and in the affidavit of foreclosure there is no allegation of demand for the payment of the notes due on demand. It is further alleged that Hodge took the mortgage and the affidavit of foreclosure, and refused to deliver them to the clerk, of whom petitioners' attorney had demanded to see them, until late in the afternoon of September 25th. On that day W. G. Hunt, as sheriff of the county, levied the two mortgage *fi. fas.* on all the personal property of Wilcox. The two mortgages mentioned were never recorded until late in the afternoon of said day, and until after the granting of the injunction, etc. They are fraudulent mortgages, and made up of a pretended indebtedness. Lewis, Leonard & Co. have been otherwise amply secured by Wilcox with collaterals, such as notes and

[1] Publication delayed by failure to receive copy.

Digitized by Google

mortgages, and they are aiding Wilcox to defeat his honest creditors, and they have taken possession of the books and accounts of Wilcox in carrying out this scheme. The sheriff has seized all the visible personalty of Wilcox, and refuses to deliver it to the receiver. Lewis, Leonard & Co. knew that Wilcox had been insolvent for years; and had stated that he did not owe them exceeding $3,500 on mortgages. They have been dealing with Wilcox for years, charging usurious interest, and, on a fair settlement, Wilcox would owe them nothing, or a very small amount. They pray that the sheriff be made a party; be enjoined from proceeding with the *fi. fas.*; and be directed to turn over to the receiver the property seized by him; that Lewis, Leonard & Co. and R. G. Lewis, one of the firm, be made defendants; restrained from proceeding with the *fi. fas.*; required to bring into court the mortgages, *fi. fas.*, and all collaterals, etc., turned over to them by Wilcox; and that the mortgages and *fi. fas.* may be canceled and declared null. They further pray that the transactions between Wilcox, Lewis, Leonard & Co., and R. G. Lewis may be examined into, and a full and fair accounting had, etc. Certain interrogatories are addressed to Lewis, Leonard & Co. and R. G. Lewis, which it is not necessary to set forth here. This amendment was sworn to September 26, 1888, and filed in office October 1, 1888. Attached to it, as exhibits, are copies of the mortgages mentioned, and the affidavit made to foreclose them. The affidavit to foreclose the $300 mortgage bears date September 24, 1888, and the other bears date September 25, 1888. The latter alleges that the indebtedness secured by the mortgage to which it relates is due and unpaid, but does not allege a demand. It does not appear when these mortgages were recorded. The original petition is verified by the affidavit of H. M. Wortham, who swore that he is one of the firm of Dunlap & Wortham, and that the facts stated in the petition are true as therein stated. The amendment to the petition is verified by the affidavit of the same person, that the facts stated in the same are true to the best of his knowledge and belief.

On September 29, 1888, the judge ordered, among other things, that the amendment be allowed; that parties be made as prayed; that Stetson be removed, and D. C. Joiner appointed temporary receiver, upon giving bond; that the receiver take charge of the assets of Wilcox, make and file an inventory thereof, and, after advertisement, sell the personal property, etc.

The defendants demurred on the following grounds: (1) That before the petition was sanctioned, and before it was filed, the business of Wilcox as a trader or in other capacity had ceased; that all his stock in trade and all his facilities for carrying on his trade had been in possession and custody of the sheriff by virtue of the levy of a mortgage *fi. fa.* prior to the time when the petition was sanctioned and filed. (2) That it is not made to appear that the appointment of a receiver and the granting of injunction would be beneficial to petitioners, and not wrongfully injurious to the preferred creditors of Wilcox. (3) That the only remedy of petitioners is by attachment, under section 3297, or by illegality, under section 3979, of the Code. (4) That the court has no jurisdiction to grant the prayer of the petition, under the facts set out therein. (5) The petition shows no cause for equitable relief, nor for such extraordinary remedies as are prayed. (6) The petition and amendment are not legally verified.

Hunt, the sheriff, answered the petition as follows: About 3 o'clock on the morning of September 25, 1888, he levied a mortgage *fi. fa.* in favor of Lewis, Leonard & Co. on all the personal property of Wilcox, and closed and locked up his place of trade and business; that Wilcox had ceased to be a trader, and was not engaged in any vocation, when the petition was sanctioned and filed; and that all the personal property of Wilcox, together with his shops and place of trade, were in the custody of defendant, as sheriff, by virtue of two levies under two mortgage *fi. fas.*, before any demand had been made upon him by a receiver, and before he had any knowledge a receiver had been or would be appointed. Wilcox answered to the same effect. He denied the allegations in the petition that he had been selling off his stock below cost, and that the mortgages were fraudulent and did not represent his true indebtedness to Lewis, Leonard & Co.; that his indebtedness was made up largely of usury; and that Lewis, Leonard & Co. were aiding him to defend his creditors. He averred that the rate of interest charged him by Lewis, Leonard & Co. was about 8 per cent., certainly not as much as 9 per cent., per annum; denied that he was contracting new indebtedness; and averred that all the notes taken up by him from Lewis, Leonard & Co. and R. G. Lewis had been destroyed, except five small notes; and that up to the time he was closed out by the sheriff he was trying to carry on his business in a legitimate way.

Lewis, Leonard & Co. and R. G. Lewis filed an answer, by which, among other things, they admitted that the $300 mortgage *fi. fa.* was issued at night, but alleged that the mortgage, with the affidavit of foreclosure attached, was in the hands of the clerk before the *fi. fa.* was issued. They had large claims against Wilcox, and, hearing that other creditors were arranging to place the property in the hands of a receiver, had the *fi. fa.* issued and levied to protect themselves, and the levy was made at least five hours before a receiver was appointed. The affidavit to foreclose was made before one who was a notary public of the county, acting and recognized as such. The affidavit of foreclosure and other papers were filed before the appointment of a receiver, etc. The $10,000 mortgage was foreclosed and levy made before the receiver made a demand upon the sheriff, and said mortgage has been filed as required by law. The two

Digitized by Google

mortgages represent an actual indebtedness, and are not made up largely of usury. Lewis, Leonard & Co. have not been amply secured by collaterals; are not aiding Wilcox to defraud his creditors; have not taken possession of his books and accounts to carry out the scheme; did not know of his financial condition, and that he had been insolvent for years, or that he is insolvent now, and they deny that they have so stated. When they told certain parties that Wilcox only owed them about $3,500 on mortgages, he was also indebted to them several thousand dollars on open account. The indebtedness represented by the mortgages is just, due, and unpaid, and there is very little, if any, usury connected with it; and the plea of usury, being a personal privilege, cannot be taken advantage of by petitioners so as to drag into this litigation matters that occurred before the origin of the debts claimed by the petitioners, none of which were created before November, 1887. Lewis, Leonard & Co. have been doing business with Wilcox as a trader since January 1, 1886, and before that time had had transactions with a firm with which he was connected, and with him as an individual. Their dealings with him were large, embracing many items, many of them having no connection with the present indebtedness to Wilcox. They consisted almost entirely of cash deposits and collaterals, against which checks were drawn from time to time. In the course of dealings they took only a few notes, which have all been paid, in addition to the notes they now hold against him, which are referred to in the petition. They charged him no usury unless it were a dollar or two paid them by him seven or eight years ago on borrowed money. They set forth the amount of interest paid them by him from time to time, and state their willingness to submit their books, etc. They set forth the amount of indebtedness of Wilcox to them on and since January 6, 1887, and state a certain agreement which they made with Wilcox to charge him a usurious rate of interest on part of the indebtedness, but claimed that the usury was subsequently remitted on a settlement between them, and that a new agreement was substituted under which they would get about 8 per cent. per annum. They set forth circumstantially the consideration of the various notes they hold against Wilcox, and attach a list of the collaterals in their hands received from Wilcox, some of which they say they received from him on the night of September 24, 1888, but none since that time. They have tried to aid him in a legitimate way, and not otherwise, and they are trying in good faith to collect their debts. When they learned after dark of September 24, 1888, that an effort would be made to put the business of Wilcox into the hands of a receiver, they determined to foreclose their mortgages. The large mortgage was then in their safe under a time-lock, so the small one was secured and foreclosed that night. They acted as they did because they were anxious to avoid delay and the expense of a receivership, and to secure a speedy settlement of their debts.

At the hearing, the petition and amendment and the various answers were read, and in addition the following evidence was introduced for plaintiffs: Various affidavits tending to show that in July, 1888, R. G. Lewis stated that the amount of mortgages he had against Wilcox was $3,500, and that he thought Wilcox was doing better, and would be able to pull through; that the receiver sold the personal property of Wilcox at public outcry, and R. G. Lewis bought $350.56 worth; Hodge, $1,468.35 worth; J. N. V. Williams, $1,303.50 worth. Lewis paid, not only for the property bid off by himself, but also for that bid off by Hodge and Williams, and immediately after the sale Wilcox went back into possession of the property, and is still in possession; but how he went back into possession, or for whom he holds it, witness did not know. That one Rivers bid at the receiver's sale for a number of articles, but bought nothing. A few days after the sale he went to Wilcox, and asked him about a saddle, but Wilcox seemed to be offended with him, and said that Rivers seemed to be working against him the other day. Some time afterwards Wilcox came to Rivers, and begged his pardon, and said he had no right to be offended at anything Rivers did on the day of sale. It was admitted that the receiver had sold the personal property of Wilcox for about $3,600.

The testimony introduced for defendants tended to show that a number of persons who had been in the employment of Wilcox, and who claimed to be familiar with his business, made affidavit that Wilcox was not engaged in selling his property below cost, but was carrying on his business in a thoroughly legitimate way, and doing his best for his creditors, without any collusion or secrecy or design to defraud. Hunt, sheriff, made an affidavit which was substantially a repetition of his answer; and Hodge made affidavit that he did not take the mortgages or other papers from the clerk, or from the clerk's office, as alleged by plaintiffs, or refuse to deliver them when demanded; and that the entire business of Wilcox had ceased four or five hours before the petition was sanctioned or filed, and all his means of carrying on his business, and his place of business, was in the custody of the sheriff by the levies of the mortgage *fi. fas.*

The judge ordered (1) that the injunction issue as prayed for, and continue of force until the final disposition of the case; (2) that Joiner be made permanent receiver, and be authorized and directed to take possession of all the property of Wilcox, manage it under the direction and order of the court, collect the debts due Wilcox, rent his real estate, deposit the money received in bank subject to the order of the court, sell all personal property that might come into his possession, after advertisement, and that Wilcox should turn

Digitized by Google

over to the receiver all books, accounts, etc., belonging to him or in his power, etc., and all realty owned or controlled by him. Defendants except, and say the court erred (1) in overruling the demurrer; (2) in granting and continuing the injuntion; (3) in appointing the receiver; (4, 5) in the instruction and direction given by the order and decision.

Secion 3149*a* of the Code provides that, "in case any corporation not municipal, or any trader or firm of traders, shall fail to pay at maturity any one or more matured debts, payment of which has been properly demanded of such debtor, and by him refused, and shall be insolvent, it shall be in the power of a court of equity, under a creditors' bill, * * * to proceed to collect the assets, real and personal, including choses in action and money, and appropriate the same to the creditors of such trader, firm of traders, or corporation."

M. T. Hodge and *W. L. Grice*, for plaintiffs in error. *Pate & Jordan* and *Martin & Smith*, for defendants in error.

SIMMONS, J. The trial judge did not abuse his discretion in granting the injunction and appointing a receiver in this case. The fact that the sheriff seized the goods of the defendant by virtue of a mortgage *fi. fa.*, before daylight in the morning, five hours before the injunction was granted, did not deprive the defendant of his character of trader, so as to preclude the filing of the application for injunction and receiver, under section 3149*a* of the Code. Judgment affirmed.

(83 Ga. 70)

GEORGIA RAILROAD & BANKING CO. v. NELMS.

(*Supreme Court of Georgia.* July 31, 1889.)

MASTER AND SERVANT—INJURY TO SERVANT.

1. A railroad company is not liable to an employé for injuries resulting from the breaking of a hammer, apparently perfect, furnished to its laborers, unless knowledge of some latent defect is shown, and the fact that other hammers broke at the same work on the same day does not show negligence in selecting them.[1]

2. A hammer unconnected with mechanical appliances, and used directly by muscular strength, is not machinery, and hence the injury mentioned does not come within Code Ga. § 3033, creating the presumption of negligence on the part of a railroad company whenever any person shall be injured by the running of its cars or "other machinery," and the common-law rule imposing the burden of proving negligence on the servant applies.

[1] Concerning the duty of a master to furnish safe machinery and appliances with which his servants are to work, his duty to disclose defects, and the servant's assumption of risks, see Berger v. Railway Co., (Minn.) 38 N. W. Rep. 814, and note; Hull v. Hall, (Me.) 3 Atl. Rep. 88, and note; Robertson v. Cornelson, 34 Fed. Rep. 716, and note; Balle v. Leather Co., (Mich.) 41 N. W. Rep. 216, and note; Judkins v. Railroad Co., (Me.) 14 Atl. Rep. 735, and note; Railroad Co. v. Jackson's Adm'r, (Va.) 8 S. E. Rep. 370, and note; Crowley v. Pacific Mills, (Mass.) 19 N. E. Rep. 344, and note; Stephenson v. Duncan, (Wis.) 41 N. W. Rep. 337; Eicheler v. Furniture Co., (Minn.) Id. 975; Foley v. Machine Works, (Mass.) 21 N. E. Rep. 304.

Error from superior court, Rockdale county; BOYNTON, Judge.

J. B. Cumming, A. C. McCalla, and *Bryan Cumming*, for plaintiff in error. *J. N. Glenn* and *A. M. Speer*, for defendant in error.

SIMMONS, J. Nelms brought his action against the Georgia Railroad & Banking Company for damages, in which he alleged, in substance, that he was employed by said company to assist it in changing the gauge of its track, and that the company furnished him and other employés with certain tools and implements with which to take up the iron rails and refasten them to the cross-ties; that hammers of certain shapes, weights, purity of steel, and of the proper temper were required in order that such work should be done with safety and dispatch; that the petitioner was furnished with a hammer to drive spikes; that he believed he had been furnished with one of the proper temper, etc.; and that, knowing nothing to the contrary, he entered upon such work under the direction and control of said company's officers, and while so engaged in drawing spikes for said company he was hurt, wounded, and maimed by the breaking of the hammer so furnished him, said breaking causing pieces thereof to fly off with great force and violence, a piece striking the knee-joint of the petitioner, which penetrated and entered into said knee-joint, causing great pain, suffering, etc., and permanently injuring said knee, and a piece also striking him near the eye, imbedding itself deep in the flesh near the eye-ball, which also gave him great pain and uneasiness, and endangered the loss of the sight of said eye,—by reason whereof he was damaged, etc. On the trial of the case the jury returned a verdict of $2,000; a motion was made for a new trial, which was overruled, and the defendant excepted.

The only ground of the motion for a new trial which it is necessary to notice is the ground that the verdict was contrary to law and to the evidence. The evidence, as shown in the record, is, in substance, as follows: That the plaintiff was employed by the company to assist in changing the gauge of the railroad; that he worked under Brooks, who was the boss of the hands; that Brooks put him to work with a hammer to drive spikes, directing him to drive up the spikes where they were bent under the iron, and that he instructed him, where he found a spike that was not down and was bent, to turn the small face of the hammer down, and put it on the head of the spike and drive it up. Thus the hand with whom he was working driving spikes used his hammer as a punch, putting its small face on the head of the spike, while the plaintiff with his hammer struck the upturned large face of the hammer which was held on the spike, and the spike was in this way driven up. In doing this a piece of his hammer burst off, a part of it striking him on the knee, and another piece

Digitized by Google

on the right eye. All the other hands used their hammers in the same way. He was hurt about 9 o'clock in the morning, having commenced work about 5 o'clock. Other hammers broke besides his, but he did not know whether any broke before he was hurt or not. His hammer was a new one, and some of the others might have been old ones. He never had seen any hammers break before that time. He had worked on other railroads before, and had done this kind of work. He did not examine the hammer "any more than just going to take up a tool to work with." He did not see anything the matter with it. Two of the railroad hands who were at work on the same day, and at the same place with the plaintiff, testified for him. One of them testified as to pieces flying off of the hammer. He said they "got to flying like thunder." "They were flying with force. They could hear them whistling." That Brooks told them to "work up." Most of the hammers burst,—their faces split or shelled off. Some of them were old and some of them new hammers; nearly all of them broke. They battered on them "a right smart while" before they commenced bursting. The hammers looked to be all right when they picked them up, and looked to be first-class hammers, and "they" said they were first class. The other witness testified as to several of the hammers breaking. He said he thought his was the first to break; that he could not hit the spikes with his hammer, and he got a new hammer out of the car which did not break; that he paid no attention to the hammers to see whether they were breaking or not; that if two pieces of steel struck together, and they were very hard, they were likely to break.

This case seems to have been tried under section 3033 of the Code, which declares that "a railroad company shall be liable for any damage done to persons, stock, or other property by the running of the locomotives or cars or other machinery of such company, or for damage done by any person in the employment and service of such company, unless the company shall make it appear that their agents have exercised all ordinary and reasonable care and diligence; the presumption in all cases being against the company." The judge charged the jury, in substance, that when the injury was shown the presumption was against the railroad. The declaration alleges, and the evidence shows, that the injury sustained was caused by the breaking of a hammer in the hands of the plaintiff. We do not think that a hammer thus used comes under the term "machinery" used in the above section. The supreme court of Alabama, in the case of Railway Co. v. Brooks, 4 South. Rep. 289, in discussing the statute of that state, somewhat similar to our statute, says: "A hammer is a tool or instrument ordinarily used by one man in the performance of manual labor. It may be made an essential part of machinery when it is intended to be and is operated by means thereof, but when disconnected from any other mechanical appliances, and operated singly by muscular strength directly applied, such tool or instrument is not machinery in its most comprehensive signification, or in the meaning of the statute."

The plaintiff not being injured in any of the ways pointed out in the above section, either by the running of the cars or machinery, or by any other employé of the company, there was no presumption in his favor or against the railroad company, as set forth in the above section. This case, therefore, is not governed by that section, but falls under the general law of master and servant. Under that law the burden was upon the plaintiff to show negligence on the part of the defendant in supplying him with a defective hammer. Before he can recover, under the facts disclosed by this record, he must show that the hammer was defective, and that the company knew it, or could have ascertained it by the exercise of ordinary care and diligence. The mere fact that the hammer was defective, and that other hammers were defective, and that the injury resulted therefrom, is not sufficient to authorize the jury to infer negligence on the part of the company in the purchase or selection of these hammers. Wood, in his Law of Master and Servant, § 368, says: "From the mere fact that an injury results to a servant from a latent defect in machinery or appliances of the business, no presumption of negligence on the master's part is raised. There must be evidence of negligence connecting him with the injury. The fact that machinery has been previously protected, or that subsequent to the injury guards were provided for it, is not evidence from which negligence may be inferred. The mere fact that the machinery proves defective, and that an injury results therefrom, does not fix the master's liability. *Prima facie*, it is presumed that the master has discharged his duty to the servant, and that he was not at fault. Therefore the servant must overcome this presumption by proof of fault on the master's part, either by showing that he knew or ought to have known of the defects. * * * The burden of proving negligence upon the part of the master is upon the servant, and he is bound to show that the injury arose from defects known to the master, or which he would have known by the exercise of ordinary care, or that he has failed to observe precautions essential to the protection of the servants, which ordinary prudence would have suggested." The same work (section 382) says: "The servant seeking to recover for an injury takes the burden upon himself of establishing negligence on the part of the master, and due care on his own part, and he is met by two presumptions, both of which he must overcome in order to entitle him to a recovery: First, that the master has discharged his duty to him by providing suitable instrumentalities for the business, and in keeping them in condition, and this in-

Digitized by Google

volves proof of something more than the mere fact that the injury resulted from a defect in the machinery. It imposes upon him the burden of showing that the master had notice of the defect, or that, in the exercise of that ordinary care which he is bound to observe, he would have known of it. When this is established, he is met by another presumption, the force of which must be overcome by him, and that is that he assumed all the usual and ordinary hazards of the business." Mr. Thompson, in his work on Negligence, page 1058, § 48, uses the following language: "In an action by an employé against his employer for injuries sustained by the former in the course of his employment from defective appliances, the presumption is that the appliances were not defective; and when it is shown that they were, then there is a further presumption that the employer had no notice or knowledge of this fact, and was not negligently ignorant of it." See also Pierce, R. R. 382.

Applying these rules to the evidence, we do not think that the plaintiff was entitled to recover. There was no evidence in the record going to show any negligence whatever on the part of the company or its officers, unless it could be inferred from the fact that other hammers broke the same day; and, as we have seen from the above extracts, that is not sufficient proof of negligence. On the contrary, there is evidence to show that, as far as could be ascertained from an examination of the hammers, they are first class. Other witnesses said that they looked as if they were first class, and that "they" (meaning, we suppose, the officers of the company) said they were first class. We cannot hold —for in our opinion it is not the law—that an employer is liable to a servant when he furnishes him with an axe, a wagon, a saw, a hammer, or any other tool which appears to be first class, and which subsequently, by some latent defect, breaks and injures the servant. If such were the law, every farmer, contractor, or other employer would be liable to his employé when he furnished him tools and they broke and injured him on account of some latent defect which could not be ascertained by the exercise of ordinary care. For these reasons we hold that this verdict was contrary to law and to the evidence, and that the trial judge erred in refusing to grant a new trial upon this ground. See, also, Reid v. Railroad & Banking Co., (last term,) 8 S. E. Rep. 629. Judgment reversed.

(83 Ga. 378)

ISOM v. STATE.

(*Supreme Court of Georgia.* July 8, 1889.)

ASSAULT—VERDICT.

An indictment for assault with intent to murder by stabbing includes the minor offense of stabbing, and a verdict finding this minor offense need not negative the exception in the statute by setting out that the stabbing was not done by the prisoner "in his own defense, or other circumstances of justification;" the meaning of the verdict, construed in the light of the indictment, being that the accused was guilty of the offense, and not of the mere act of stabbing.

(*Syllabus by the Court.*)

Error from superior court, Dougherty county; BOWEN, Judge.

Indictment for assault with intent to murder. Defendant was convicted of stabbing, and from an order denying a motion in arrest of judgment he brings error.

D. H. Pope, for plaintiff in error. *W. N. Spence*, Sol. Gen., for the State.

BLECKLEY, C. J. The indictment had but a single count. It charged the offense of assault with intent to murder, by cutting and stabbing with a razor or other sharp instrument to the jurors unknown. The verdict was, "We, the jury, find the defendant guilty of stabbing." Should the motion in arrest of judgment have been sustained? Section 4369 of the Code reads as follows: "Any person who shall be guilty of the act of stabbing another, except in his own defense, or other circumstances of justification, with a sword, dirk, or knife, or other instrument of the like kind, shall, on conviction, be punished [as prescribed in section 4310 of this Code:] provided, always, that if such stabbing shall produce death, the offender shall be guilty of murder or manslaughter, according to the facts and circumstances of the case; or, if such stabbing shall not produce death, and the facts and circumstances show that it was the intention of the person stabbing to commit the crime of murder, then and in such case, the offender shall be guilty of the offense of an assault with intent to commit murder." Had the indictment charged the offense of stabbing only, it should by its terms have negatived the exception in the statute; that is, it should have alleged that the act of stabbing was not done by the accused "in his own defense, or other circumstances of justification." Elkins v. State, 13 Ga. 435. But as the offense charged was assault with intent to murder by stabbing, the exception was impliedly negatived by other terms found in the indictment, to-wit, "with intent then and there unlawfully, feloniously, and with malice aforethought to kill and murder." Arnold v. State, 51 Ga. 144. It follows that the kind of stabbing alleged in the indictment was criminal stabbing; and, as verdicts are to have a reasonable intendment, and are not to be set aside unless from necessity, (Code, § 3561,) the verdict should be construed as finding a criminal stabbing,—that is, such as the indictment alleges,—the meaning of the jury being that the offense committed, by reason of the intent to murder being absent, was not the major offense charged, but the minor offense included within it. The verdict is not in any sense a special verdict, but a general one finding the accused guilty of this minor offense. The distinction between a special verdict and a partial verdict will be seen by reference to 1 Bish. Crim. Proc. §§ 1006, 1009. A special verdict sets out the facts, and leaves

Digitized by Google

it to the court to form the conclusion of law. See McGuffie v. State, 17 Ga. 498. A partial verdict is one of conviction as to a portion of the charge, and acquittal or silence as to the residue. The whole of the charge in this bill of indictment was unlawful stabbing with intent to murder. The part found by the jury was the stabbing alleged, but without intent to murder. It may be that all the decisions heretofore made by this court upon analogous questions are not quite reconcilable. Most of them in which the verdicts were held incomplete were not cases of a major offense charged and a minor offense found, but cases in which the verdicts applied directly to the offenses directly charged, but stopped short in their finding of the requisite facts to constitute those offenses. Of this class are Couch v. State, 28 Ga. 367, and O'Connell v. State, 55 Ga. 191. In Thomas v. State, 38 Ga. 117, however, the case belonged to the same class as the one we are now considering. The indictment was for murder, and the verdict was "guilty of involuntary manslaughter." The judgment was arrested because there were two grades of involuntary manslaughter, one punishable as a felony, the other as a misdemeanor, and the judgment not showing which of these grades the jury intended. On the other hand, in Welch v. State, 50 Ga. 128, which was also an indictment for murder, the verdict was, "guilty of manslaughter;" and there it was held that by legal intendment the grade of manslaughter contemplated was the highest known to the law, to-wit, voluntary manslaughter. Whether these two cases are in harmony with each other we need not undertake to say, since the present case is distinguishable from them both. The offense of stabbing, as distinguished from assault with intent to murder and all other offenses, is always of the same grade, and amenable to the same measure of punishment. It was of this offense that the verdict intended to find the accused guilty, and not of a bare act of stabbing. In the light of common sense this is the only construction the verdict admits of. If the jury had thought the evidence showed the act of stabbing by the accused was innocent,—that is, done in self-defense, or other circumstances of justification,—they would have found him not guilty, because in that case he would not have been guilty of stabbing, as the verdict declared him to be. We are content to abide by and apply the principle enunciated in Arnold v. State, 51 Ga. supra, tested by which there was no error in denying the motion to arrest the judgment. Judgment affirmed.

(83 Ga. 223)

DE LACY *et al.* v. HURST *et al.*

(*Supreme Court of Georgia.* July 23, 1889.)

FRAUDULENT CONVEYANCES—ACTIONS TO ANNUL.

1. Under Acts Ga. 1887, p. 64, establishing a uniform procedure in actions legal and equitable, and conferring jurisdiction of both on the superior courts, an action can be maintained against a debtor and those to whom he has conveyed property to defraud his creditors, to annul such conveyances and to subject the property to the payment of the plaintiff's debt, though the latter has not recovered a judgment therefor, and exhausted his legal remedy.

2. A bill in chancery may be so amended by changing the address, the designation of the parties complainant, and the prayer for process as to render it a good petition in the superior court under the new procedure.

3. Code Ga. § 247, authorizing the hearing of demurrers in vacation, gives the judge power to allow proper amendments to the pleading to meet the grounds of demurrer.

4. An amendment to a bill attacking a fraudulent conveyance, consisting in the addition of a prayer asking that the price of the goods sold by complainants to the fraudulent grantor may be applied to their debt in preference to that of other creditors, does not amount to alleging a new cause of action.[1]

5. Under Const. Ga., (Code, § 5169,) making equity causes triable in the county wherein the defendant against whom substantial relief is prayed resides, a suit to annul a fraudulent conveyance may be brought in the county of the debtor's residence, though the alleged fraudulent grantees reside elsewhere.

Error from superior court, Meriwether county; HARRIS, Judge.

McNeill & Levy, for plaintiffs in error. *J. M. Terrell* and *T. A. Atkinson*, for defendants in error.

SIMMONS, J. The bill in this case is made returnable to the August term, 1888, of Meriwether superior court. It was addressed to the judge of the superior courts of the Coweta circuit, holding and exercising chancery jurisdiction therein. The complainants were Hurst, Purnell & Co. and others, styling themselves creditors of John M. De Lacy and De Lacy & Tallman. The bill was a general creditors' bill, in which John M. De Lacy, of the county of Meriwether, and the firm of Swift & Hamburger, of Muscogee county, were named as parties defendant. It alleged, in substance, that De Lacy was largely engaged in a general merchandise business in Alabama, and at the White Sulphur Springs, Ga., and in a like business with Tallman at Greenville, Ga.; that in November, 1887, Tallman sold his entire interest in the firm to De Lacy, De Lacy assuming all the liabilities of the firm, and Tallman being then and now insolvent; that De Lacy carried on the last-named business in his own name from the time of the sale to the 28th of December, 1887. The complainants set forth the large indebtedness which it was alleged was then due them severally by De Lacy for the goods furnished him at the store in Alabama and at White Sulphur Springs, Ga., and alleged for goods furnished De Lacy & Tallman at Greenville, Ga.; and that the goods furnished De Lacy constituted a considerable portion of the three stocks owned by De Lacy and afterwards sold by him to Swift & Hamburger; that during the summer of 1887 De Lacy and Swift & Hamburger entered into a fraudu-

---

[1] For a citation of Georgia cases where amendments have been resisted on the ground that they involved a new cause of action, see note to Barron v. Walker, 7 S. E. Rep. 272.

Digitized by Google

lent combination against the complainants and other creditors of De Lacy, and in pursuance thereof De Lacy and De Lacy & Tallman executed to Swift & Hamburger, at various times, mortgages, covering not only real, but fictitious and usurious, indebtedness on land and personalty in Georgia and Alabama; that these mortgages were never placed on record, but that just before the expiration of the time allowed for their record they were taken up and new ones executed in their stead; that this was repeatedly and secretly done up to December, 1887, when there were filed with the clerk for record two mortgages executed by De Lacy to Swift & Hamburger, —one to secure a debt of $34,358, and covering all the stock of goods at Greenville, the other to secure a debt of $6,350, and covering all the stock at White Sulphur Springs; that De Lacy and De Lacy & Tallman also secretly transferred and assigned to Swift & Hamburger all their merchandise, notes, accounts, and choses in action, amounting to $150,000, during the summer of 1887 The complainants alleged that, not knowing of these fraudulent transactions, and relying on the representations of De Lacy that he was solvent, and his property unincumbered, and that the firm of De Lacy & Tallman was solvent, and its property unincumbered, they sold the goods which formed the consideration of the indebtedness referred to; that Swift & Hamburger, not willing to rely upon the *bona fides* of their two mortgages, and the transfer and assignment of the goods, notes, accounts, etc., on the 28th of December, 1887, entered into a fraudulent agreement with De Lacy, by which he was to and did execute and deliver to them a deed and bill of sale of all of his property of every description in Alabama and Georgia, (said property amounting in the aggregate to $167,750,) to pay the nominal sum of $51,000. This deed and bill of sale were alleged to be fraudulent because the consideration was grossly inadequate, and because De Lacy had sufficient property not only to pay the just and legal claim of Swift & Hamburger, but to pay all his other indebtedness besides, and was made to hinder, delay, and defraud his creditors. It was alleged that by this sale he became utterly insolvent. It was also charged and alleged that there was a secret reservation in this sale for the benefit of himself; also that the debt of Swift & Hamburger against De Lacy was infected with usury to the extent of $10,000, or other large sum. The bill prayed for a receiver, injunction, and the setting aside of the conveyance or conveyances above mentioned, the purging of the claim of Swift & Hamburger of usury, and that their other claims should be decreed as paid to the extent of the value of the Alabama property received by them, before they should receive any of the proceeds of the property in Georgia. The complainants also prayed for a judgment for the amount of their claim, and an equitable division of the assets of De Lacy, and for general relief. The trial judge refused to grant the injunction or to appoint a receiver. At the appearance term of the case the defendants filed several demurrers, and an order was taken to hear the demurrers in vacation. When the demurrers came on to be heard in vacation the complainants amended their bill by striking out the address and inserting in lieu of the address, "to the superior court of said county;" also by striking out the word "orators" wherever it occurred, and inserting the word "petitioner;" and by striking out the word "subpœna" wherever it occurred and inserting the word "process." They also amended by charging that by reason of the fraudulent agreement entered into by the defendants, and also by the fraudulent conduct of De Lacy in concealing his insolvency from the petitioners, the title to the goods had never passed out of them; and they asked that the money received by the defendants from the sale of said goods stand in lieu of the goods. They alleged that Swift & Hamburger were cognizant of this illegal conduct on the part of De Lacy, and used their influence to make it effective. The defendants objected to these amendments, on the grounds (1) that they could not be made at chambers; (2) that the amendments proposed to change the proceeding from a bill in equity to a proceeding at law; and (3) that they set out a new and distinct cause of action. Other objections were made, which it is unnecessary to mention now. The objections were overruled, and the amendments allowed, to which rulings the defendant excepted. The defendants then renewed their demurrer to the bill or petition as amended, on the grounds, substantially, upon which they had originally demurred, and the additional grounds stated above as objections to the amendments. The demurrer was overruled, and the defendants excepted.

1. We do not think that the court erred in allowing the complainants to amend their petition in vacation. An order was taken in term-time for the demurrers to be heard in vacation; and, whether an order had been taken, or not, under section 247 of the Code the judge had jurisdiction to hear and determine these demurrers in vacation. The Code giving him this jurisdiction, we think it necessarily follows that he would have authority to allow amendments to the bill in order to perfect it, and to meet the grounds of demurrer. It would not do to hold that the judge had no authority to allow an amendment to the petition, and that he would be obliged to dismiss the action on account of some more formal defect therein, when by allowing the amendment this defect could be cured.

2. Nor do we think there is any merit in the contention of counsel for the plaintiff in error, that the defendant could not change by amendment an old bill in equity into the form of petition prescribed by the uniform procedure act of 1887. If the original bill or petition contains the necessary allegations to give the plaintiffs a cause of action, and it is

Digitized by Google

addressed to the chancellor instead of to the superior court, as the act prescribes, and prays for a subpoena instead of process as the act prescribes, we think the plaintiffs can by amendment make it comply with the terms of the act. Amendments of this character are within our statutory system of amendments. See Code, § 3479, and Acts 1884–85, p. 36.

3. Nor was there any error in allowing the amendment asking that the price of the goods these plaintiffs had sold the defendant be applied to their debts in preference to those of other creditors. When properly construed, in the light of the other allegations in the bill, this amendment did not amount to a new cause of action.

4. The demurrer which was most strongly insisted on before us (and the decision of which will control this case) was on the ground that "no equitable cause of action is set out in the plaintiffs' said petition as amended, because they do not show that they had reduced their debt to judgment and had execution issued thereon, and said execution returned *nulla bona*." Under the old rules of equity pleading and practice in this state, this demurrer would have been sustained. Under these rules courts of equity would not entertain a bill so long as the complainant had a common-law remedy. Whenever he applied to a court of equity in such a case as this, it was incumbent on him to show that he had exhausted all his common-law remedies. He must allege and prove that he had sued his his claim to judgment; that he had had an execution issued thereon, and that a return of *nulla bona* had been made thereon by the sheriff. When this was alleged in the bill, equity took jurisdiction, and would aid him by setting aside fraudulent conveyances in order that the cloud might be removed from the title of the property, and the property bring its full value. Cubbedge v. Adams, 42 Ga. 124, and other cases which might be cited. We think these rules have been abolished in Georgia since the passage of the uniform procedure act of 1887, (Acts 1887, p. 64.) That act conferred upon the superior courts jurisdiction to hear and determine all causes of action, whether legal or equitable, or both. If the plaintiff has a purely legal action, he can bring it in that court; if he has a purely equitable action, he must bring it in that court; if he has an action both legal and equitable, he must bring it in that court. If it is a purely legal action, then it is tried upon legal principles; if a purely equitable action, equitable principles are applied on the trial of it; if it is partly legal and partly equitable, both legal and equitable principles are applied. This being true, we cannot see the reason for compelling a plaintiff in a case like the one under consideration, to apply first to the superior court and obtain a judgment and have an execution issued and returned *nulla bona*, and then apply to the same court to aid him in enforcing the judgment which that court had previously granted. As said before, the reason that a court of equity would not aid the plaintiff was because he had a complete and adequate remedy at law, and had not exhausted this remedy. If he did not have a complete and adequate remedy at law, a court of equity would then take jurisdiction. There being now but one court,—the court of equity being abolished,—the reason of that rule falls, and therefore the rule falls. There is no reason now why the court should not give complete and ample relief to all of its suitors, either plaintiffs or defendants, in the same action. It has jurisdiction of the parties and the subject-matter; and in a case such as the case at bar can grant to the plaintiffs judgment on their claims, if it is proper to do so, and at the same time, if proper parties be made, set aside fraudulent conveyances which are in the way of the execution of that judgment. This may seem strange to old practitioners who were born and bred under the old forms and technical rules of procedure. It is difficult for us to give up the forms and technicalities in the study and application of which we have spent the greater portion of our lives. For myself, I can say that I am glad that the legislature had the wisdom to sweep away by one act all these forms and technicalities, and to provide for the trial and determination of all the plaintiff's or defendant's rights in one action. We are not alone in our construction of this law. The supreme court of North Carolina, in a case like the present, placed the same construction upon a similar act of the legislature of that state. The facts in that case were very much like the facts in this, and one of the demurrers was the same as the one we are now considering; and the reasoning of Chief Justice SMITH in that case is so applicable to the facts and the demurrer before us that I have taken the liberty of copying it here: "When, under our former system, the law was administered by two separate and distinct tribunals, of which each had its own rules of practice, the court of equity would lend its aid to a creditor in enforcing a legal demand when he had none or an inadequate remedy at law. Hence it became an established doctrine in that court to refuse its assistance unless the creditor had ascertained the amount of his debt by reducing it to judgment, and sued out execution when the property of the debtor pursued could be seized and sold thereunder, as in case of a fraudulent and ineffective assignment, in order that a lien might attach, although this was not required when the estate and interest to be appropriated was purely equitable, or such as was not accessible to legal process, and in both cases it must be shown (and commonly this was done by the return of *nulla bona* to the execution) that the debtor had no property from which the debt could be satisfied by such legal process. * * * It is obvious that, as this rule grew out of the relations of the two courts under the former system, one acting in aid of the other, and was essential to the harmony of their action in the exercise of their separate

Digitized by Google

functions in the administration of the law, so it must of necessity cease to have any force when the powers of both and the functions of each are committed to a single tribunal substituted in place of both. Why should a plaintiff be compelled to sue for and recover his debt, and then to bring a new action to enforce payment out of his debtor's property in the very court that ordered the judgment? Why should not full relief be had in one action when the same court is to be called on to afford it in the second? The policy of the new practice, and one of its best features, is to furnish a complete and final remedy for an aggrieved party in a single court, and without needless debt or expense. The demurrer admits the debt, the insolvency of the debtor, his fraudulent contrivances, with the help of others, to place his property beyond the reach of creditors and secure it for the enjoyment of himself and wife, his large indebtedness still subsisting, and, by a fair implication, the want of other property which a creditor can reach. These facts would seem to remove all obstacles in the way of the relief demanded." Bank v. Harris, 84 N. C. 209. This decision has been referred to and approved by the same court in several later cases. As to the construction placed upon acts of a similar character by courts of other states and by text-writers, see 1 Pom. Eq. Jur. § 40, and note; Id. §§ 84, 116, 183, 358; 6 Amer. & Eng. Cyclop. Law, 702, and notes; Phillips v. Gorham, 17 N. Y. 270; Lattin v. McCarty, 41 N. Y. 107; Frank v. Robinson, 96 N. C. 33, 1 S. E. Rep. 781; Pendleton v. Dalton, 92 N. C. 186; White v. Lyons, 42 Cal. 279; Bliss, Code Pl. §§ 4–6 et seq., and 114 et seq. The allegations in this petition are, in substance, that De Lacy was largely indebted to these plaintiffs for goods purchased by him of them; that De Lacy and Swift & Hamburger had conspired together to hinder, delay, and defraud the plaintiffs by a sale by De Lacy to Swift & Hamburger of property of the value of $167,750 in payment of a debt of $51,000; that De Lacy is utterly insolvent, and that $10,000 of the debt claimed by Swift & Hamburger against him is usurious; that secret mortgages were given and renewed from time to time to prevent their being recorded. They pray for a judgment against De Lacy, and that the sale made by him to Swift & Hamburger be set aside. If these facts are true, why should they not be allowed to have full relief in one action? Why should they be compelled to sue and obtain judgments and have execution issued, and a return of *nulla bona*, and then apply to the same court to assist them to set aside the fraudulent sale? Under the act of 1887, we think it can be done, and there is no reason why it should not be. See, also, Acts 1884–85, p. 36.

5. The next ground of demurrer insisted upon was that the complainants had a complete and adequate remedy at law. We think that what we have said above covers this point. Of course, if what we have said is sound, there can be no such demurrer as this now upheld to a suit brought under the act of 1887, or put under it by amendment. 1 Pom. Eq. Jur. § 858.

6. The next demurrer insisted on was that the court in Meriwether county had no jurisdiction of the defendants Swift & Hamburger, because it appeared from the allegations in the petition that they resided in Muscogee county. We do not think there was any error in overruling this ground of the demurrer. This was an action containing both legal and equitable rights. The legal right was to have judgment against De Lacy on his indebtedness to the plaintiffs; the equitable right was to have an alleged fraudulent sale set aside. In order to do this De Lacy was a necessary party, because he made and executed the conveyance. Swift & Hamburger were also necessary parties, because they received the deed, and the property under it. Substantial relief was prayed against De Lacy; and the constitution (Code, § 5169) says: "Equity cases shall be tried in the county where the defendant resides against whom substantial relief is prayed." See, also, Code, § 4183. We therefore think that the superior court of Meriwether county, under the allegations in the petition, had jurisdiction, and the court below did not err in so holding. Acts 1884–85, p. 36.

7. There were other demurrers filed, alleging that the requirement of the act of 1881 as to what should be alleged in the petition under that act had not been complied with. In answer, it is sufficient to say that this petition was not filed under that act.

8. As some of the claims mentioned in the petition are against De Lacy & Tallman, perhaps it will be necessary to make Tallman a party defendant to the bill. If so, it can be done by amendment. Judgment affirmed.

(31 S. C. 375)

WAGENER *et al.* *v.* BOOKER.

WATKINS *et al.* *v.* SAME.

(*Supreme Court of South Carolina.* July 20, 1889.)

ATTACHMENT—JURISDICTION.

Where the undertaking required by statute to be filed before the issuance of a warrant of attachment is fatally defective as filed, the court is without jurisdiction, and cannot amend the undertaking after the issuance of the warrant.

Appeals from common pleas circuit court of Abbeville county; NORTON, Judge.

Parker & McGowan, for appellants. *Graydon & Graydon*, for respondent.

SIMPSON, C. J. This appeal is before us from orders of his honor, Judge NORTON, refusing to vacate and dissolve certain attachments issued by the clerk of the court in the cases above. It appears that the original affidavits upon which the attachments were issued were not filed in the clerk's office within the 10 days required by the act, though it seems that copies had been filed. It also appears that the undertaking furnished by the

Digitized by Google

attaching creditor in each of the cases had been executed by a third party alone,—we suppose as surety,—the plaintiffs in each of the cases having failed to sign, either in person or by agent. The defendant contends that these were fatal defects, and that on account thereof the attachments should have been dissolved. He further contends that said attachments were both irregularly and improvidently issued. The circuit judge held the filing of copies of the affidavits sufficient, and allowed the undertakings to be amended, upon one day's notice of a motion to that end. He also held that the warrants were not obnoxious to the charge of being either irregularly or improvidently issued. The appeal alleges error to these rulings, and also error in some other particulars, not necessary to be mentioned here. Attachments are expeditious and summary remedies intended to protect creditors, under sudden emergencies endangering their claims. They are, however, statutory, and, like most statutory remedies, must be pursued according to the express terms and provisions of the act allowing them. Now, our attachment act expressly provides (1) that the affidavits upon which the attachment is granted shall be filed in the office of the clerk of the court of the county within 10 days from the issuing thereof, and although no penalty is prescribed in the act for a failure in this respect, yet the sixty-ninth rule of the circuit court provides that such failure will authorize the defendant to move the court to vacate the proceeding for irregularity, with costs; and section 251 of the General Statutes further provides that, before issuing the warrant, the judge, clerk, or trial justice shall require a written undertaking on the part of the plaintiffs, with sufficient surety, to the effect that, if the defendant shall recover, etc. It is admitted that neither of these requirements was complied with. Such being the fact, under rule 69 of the circuit court above, certainly the defendant had the right to move for a dissolution, because of this irregularity in not filing the affidavits; but it is said that while the original affidavits were not filed copies were, and this was a substantial compliance with the act. Admitting this to be so,—about which, however, there is room for a difference of opinion,—can that save the attachments in face of the defects in the undertakings? We think not. Under the act, the undertaking must be filed before the warrant is issued. It precedes the warrant, and is the foundation for its issue. It is therefore jurisdictional, and in its absence the warrant is illegal and void, and, being so, it is incapable of amendment. The question below, before his honor, was whether the attachments had been legally issued at the time of their issuance,—whether the clerk then had jurisdiction. That he did not have seems to have been admitted, and the effort of the plaintiffs was to cure this defect, which they attempted upon one day's notice, by moving to amend the undertakings. No doubt amendments may be had in many particulars in cases over which the court or other authority has already obtained jurisdiction, but we know of no principle allowing amendments so as to give jurisdiction reaching back, and legalizing acts done without jurisdiction, and which, when done being *ultra vires*, are absolutely void. Here the attachments, in the absence of a legal undertaking, had nothing to stand upon. They were attacked by the motion of the defendant, while in that condition; and we do not know by what authority the circuit judge could relieve them from the consequences of that attack, by allowing them to do a jurisdictional act *nunc pro tunc*. We think the defendant was entitled to four days' notice of the motion of the plaintiffs to amend. That, however, is not at all important, under the view which we have taken of the case. The undertaking was fatally defective, because it was not executed by the plaintiffs with surety, as required by the act, and this defect we think demanded a dissolution of the attachments. It is not necessary to discuss the other questions raised, to-wit, as to the irregularity or improvidence of their issue. These questions are really not involved, as the jurisdiction question meets us at the threshold, and demands a reversal of the judgment below before said questions are reached. It is the judgment of this court that the judgment of the circuit court be reversed, and that the attachments mentioned be dissolved on the grounds stated herein.

MCIVER, J., concurs.

MCGOWAN, J. I concur in the result, upon authority of Bank v. Stelling, ante, 1028, (just decided.)

(31 S. C. 608)

WYLIE *et al.* *v.* LIPSEY *et al.*

(*Supreme Court of South Carolina.* July 20, 1889.)

MORTGAGES—FORECLOSURE.

In an action merely for the foreclosure of a mortgage covering an undivided interest in land, the nature and extent of such interest are not matters pertinent to the question whether plaintiffs are entitled to a judgment of foreclosure.

Appeal from common pleas circuit court of Chester county; HUDSON, Judge.

Henry & Gage, for appellants. *S. P. Hamilton*, for respondents.

MCIVER, A. J. In the year 1863 Timothy Lipsey, being seised of 750 acres of land, conveyed 400 acres thereof to his children, Martha J., John A., Robert W., and Thomas A. Lipsey, as tenants in common. By the death of the said Thomas A., and by a purchase of the interest of the said John A., the defendant Martha J. became the absolute owner of two undivided thirds of the land, the said Robert W. being the owner of the remaining one undivided third. On the ——— day of November, 1877, the said Timothy Lipsey conveyed the remaining 350 acres to the defendant Martha J. Lipsey by a deed, the terms of which give rise to the

Digitized by Google

main controversy in the case, and which will hereinafter be more fully stated. Subsequent to the execution of these conveyances Martha J. Lipsey mortgaged the land embraced in the two deeds referred to above to sundry persons, the three senior mortgages being now held by the defendant Samuel W. Mobley, and the junior mortgage by the plaintiffs. The action below was brought by plaintiffs against Martha J. Lipsey to foreclose their mortgage, the senior mortgagee, Mobley, being made a party defendant. After the action was commenced John A. Lipsey and Robert W Lipsey, together with the children of the latter, (the former having no children, as we infer,) were permitted to come in as defendants, and they filed answers setting up the claim that under the deed for the 350 acres of land Martha J. Lipsey held the same as trustee for the benefit of herself and her two brothers during her life, and after her death for the benefit of the children of Robert W. Lipsey, and as such trustee she had no power to mortgage the land thus conveyed to her. The deed under which this claim is made is set out in the "case," and, after conveying the land in the usual form to the said Martha J., in terms that would import a fee, contains the following words, immediately after the *habendum* clause: "It is understood, however, that my two sons, Robert and John Lipsey, are to have the equal use and enjoyment of said property with my said daughter during her life, but, in case any creditor of the said Robert Lipsey shall at any time attempt to subject his interest in said premises to the payment of his or her debt, then, and in that event, the interest of the said Robert shall instantly determine, and he shall have no further interest in the same, [then follows a precisely similar provision with respect to the interest of John Lipsey;] and the said tract of land shall be the absolute property of the said Martha Jane for her life, and at her decease shall become the property of such person or persons as she shall direct or appoint, and, in case of failure to make such appointment, to such children as she may leave living, and, in case she dies without leaving children living, to the children of the said Robert and John Lipsey, *per capita*, who may be then living." Then follows a clause of warranty against grantor and his heirs.

The case came on to be heard by his honor, Judge HUDSON, who rendered a decree in which, after confirming the report of the referee ascertaining the amounts due on the several mortgages, and after stating that there was no contest as to the interest of Martha J. in the 400 acres, proceeded to consider the matter really in dispute,—as to her interest in the 350 acres. On this subject he held that, under the terms of the deed above set out, the defendant Martha "holds the fee in trust for the joint use and enjoyment of the premises by herself and two brothers, John and Robert, during her natural life, remainder to her appointee. In default of appointment by her, then remainder to her surviving children, if she leaves any; and, if not, then remainder to the surviving children of John and Robert *per capita*, should they leave any. Her life-time enjoyment of one-third of the premises may become enlarged to the sole enjoyment of the premises during her life," by the action of the creditors of John and Robert, "but, at all events, after her death, the estate goes over to those who are then the remainder-men under the will." He also held that this interest of Martha J. could be mortgaged, but "her mortgage cannot affect the fee, nor can it disturb the trusts. All these must remain intact, and must remain in and be preserved through her, and her beneficial interest, present and contingent, is all that can be or is pledged or mortgaged; and it is so adjudged and decreed." But he held that "there can be no partition of the three hundred and fifty acre tract, as the only interest in that which the mortgagees can sell is the beneficial interest of Martha Jane." And as it was important to the interest of all parties that the interest of Robert in the 400 acres be severed from that of Martha J., and both parties desired it, a writ of partition to divide that tract was ordered to issue, and, until the coming in of the return to that writ, final judgment of foreclosure and sale was suspended, though directions were given as to the preparation of such final judgment "according to the principles herein set forth," and as to the disposition of the proceeds of the sale.

From this judgment plaintiffs appeal upon the following grounds: "(1) Because his honor held that the interest of Martha J. Lipsey in the 350-acre tract was such an interest as cannot be partitioned. (2) Because his honor held that Martha J. Lipsey holds a two-thirds interest in the three hundred and fifty acre tract in trust for Robert W. and John A. Lipsey during her life, when he should have held that the use was executed by the statute in Robert W. and John A. Lipsey. (3) Because his honor did not hold that the mortgages made by Martha J. Lipsey were an execution of the power to appoint, vested in her by the deed of Timothy Lipsey, and thus operated to alienate the fee. (4) Because his honor did not hold that Martha J. Lipsey is the owner of the fee of the 350-acre tract."

In view of the fact that no final judgment has been rendered in this case, we have felt no little embarrassment in considering this appeal. It may be that, before any final judgment is reached, the relations of the parties will be so changed as to render any decision now made nugatory. Still, as the appellants claim that the circuit judge has erroneously decided certain points prejudicially to their interests, we may perhaps be justified in considering such. It will be observed that so much of the decree below as holds that the interest of the defendant Martha J., as therein ascertained, can be the sub-

Digitized by Google

ject of mortgage, has not been excepted to; as the defendants do not appeal, and the plaintiffs, certainly, cannot and do not object to that ruling, that question is not, therefore, before us, and we do not desire to be understood as either indorsing or repudiating that proposition. It will also be observed that this is an action simply for the foreclosure of a mortgage of real estate, and, so far as we can discover from the "case," the complaint, though not there set out, was not so framed as to call for or warrant any adjudication of the nature or extent of the interest of the mortgagor in the land embraced in the several mortgages. It is true that the defendants by their answers claimed that the mortgagor, holding the land as trustee, had no power to mortgage the same, and hence it became necessary for the circuit judge to determine that question; but having determined it in favor of the plaintiffs, and there being no exception to such determination, it is somewhat difficult to understand how the nature and extent of the interest of the mortgagor is material to any issue raised in the case. Whether her interest was several or joint, and, if the latter, whether it is susceptible of separation, does not appear to be material to any issue necessary to be decided in order to reach the judgment demanded. Assuming, for the purposes of this inquiry, that Martha J. Lipsey has a mortgageable interest in the 350-acre tract, as we must assume, in the absence of any exception to that portion of the circuit decree so holding, it is quite certain that she could only mortgage such interest, and that alone could be sold under a judgment of foreclosure. The nature and extent of that interest may become a very interesting question to the purchaser at such sale, but how it is pertinent to the question whether the plaintiffs are entitled to a judgment of foreclosure, which seems to be all that was asked for, is not so readily perceived. The fact that the circuit judge has undertaken to order a writ of partition to issue for the purpose of separating the interest of the mortgagor in the 400-acre tract from that of her co-tenant therein, which was doubtless done in conformity to the wishes of the parties interested, and to which no exception has been taken, certainly does not justify or even call for any adjudication of a disputed right of partition in another tract, under proceedings to foreclose a mortgage. It may be possible that a complaint to foreclose a mortgage on an undivided or unascertained interest in real estate could be so framed as to warrant the court in proceeding to adjudicate the nature and extent of such interest, and determine whether the same is separable, but we do not understand that the complaint in this case is so framed. It seems to us, therefore, premature to consider any of the questions raised by the grounds of appeal, and therefore that the appeal must be dismissed, but without prejudice. The judgment of this court is that the appeal be dismissed, without prejudice to the right of any of the parties to this action, or their privies hereafter, at the proper time and in the proper way to raise any of the questions presented by the grounds of appeal herein.

SIMPSON, C. J., and MCGOWAN, J., concur.

(31 S. C. 389)

SIMMONS v. REID.

(*Supreme Court of South Carolina.* July 26, 1889.)

SET-OFF OF JUDGMENTS.

Where a judgment recovered by plaintiff against defendant was assigned to plaintiff's attorney in good faith, in payment for his services in the action, the trial court did not err in refusing to set off against such judgment a judgment recovered by defendant against plaintiff prior to the assignment, but of which the attorney had then no notice.

Appeal from common pleas circuit court of Newberry county; FRASER, Judge.

O. L. Schumpert, for appellant.

MCIVER, J. Simmons having recovered a judgment in a trial justice court for the delivery of a horse and $10 damages, or $80, if the horse be not delivered, and costs, Reid appealed therefrom to the circuit court. The appeal was heard during the regular term for November, 1886, and on the 6th of December, 1886, Judge FRASER delivered his judgment, modifying the judgment appealed from, by reducing the alternative judgment from $80 to $60. It having been discovered that the official term of Judge FRASER had expired before the 6th of December, 1886, and he having been re-elected in the mean time, an extra term of the court was held on the 31st of December, 1886, for the purpose of resigning judgments rendered after his former commission had expired. At the extra term, upon notice, Reid applied to the circuit judge for an order to set off a judgment by confession before a trial justice, entered 24th September, 1883, in favor of Reid v. Simmons, a transcript whereof was filed and entered in the clerk's office on the 28th of December, 1886; but the circuit judge, holding that he could not hear an original motion at an extra term, declined to consider it. At the next regular term, in February, 1887, the application was renewed on notice. In response to this application, Simmons, the plaintiff herein, showed cause (1) that on the 6th of December, 1886, in consideration of professional services rendered herein, the said plaintiff assigned this judgment to his attorney, in pursuance of a prior parol agreement made and entered into at the time of the commencement of the suit in the trial justice court; (2) that subsequently, to-wit, on the 24th of December, 1886, the said attorney, for valuable consideration, assigned said judgment to one Pool, who is now the legal owner thereof, and is not a party to these proceedings; (3) that said assignment was filed with the judgment roll, and lodged with the execution herein, on the 24th of December, 1886; (4) that the judgment by confession before the trial justice now sought to be set off against the

Digitized by Google

judgment herein is not a valid judgment, and, even if so, it cannot be set off as against third parties purchasing for valuable consideration without notice. The circuit judge refused the motion on the sole ground that the assignment of the judgment herein was sufficient to bar the appellant's right of set-off. From this order the defendant, Reid, appeals, alleging, in general terms, error in such refusal. Strictly speaking, we might decline to hear this appeal, as there are no specific errors pointed out, nor are there any indications as to where the error alleged lies. But, waiving this, we will proceed to consider the points made in the argument submitted in behalf of appellant. There can be no doubt that the court of common pleas has jurisdiction, in a proper case, and upon a proper showing, to require a judgment previously obtained by a defendant against a plaintiff to be set off, *pro tanto*, against a judgment subsequently obtained by the plaintiff against the defendant, and there is as little doubt that this may be done by motion or a rule to show cause. Williams v. Evans, 2 McCord, 203; Duncan v. Bloomstock, Id. 318. But it is equally well settled that this is a common-law power, not derived from or regulated by the statutes of set-off or discount. The jurisdiction for this purpose is equitable in its nature, and the application is addressed to the sound judicial discretion of the court. In addition to the cases above cited, see Tobbert v. Harrison, 1 Bailey, 599; Low v. Duncan, 3 Strob. 195; and Meador v. Rhyne, 11 Rich. Law, 631, in which last-cited case it is said that the court, in exercising this jurisdiction, will always regard the equitable rights of persons not parties to the suit. It is therefore obvious that section 133 of the Code, relied on by counsel for appellant, has no application.

We see no reason to doubt that the circuit judge, in refusing this motion, proceeded upon the principle which, as we have seen, regulates the exercise of this jurisdiction, and certainly we cannot say that there was any abuse of his discretion in refusing the motion. On the contrary, we think it was properly exercised. Here the attorney for the plaintiff, in good faith, as we must assume, in the absence of any evidence to the contrary, with a view to secure compensation for his services, which had proved to be effective, took an assignment of the judgment,—the fruits of his services,—when, so far as appears, he had no notice, either actual or constructive, of the judgment previously obtained by confession in the trial justice court by Reid against Simmons; for the transcript of that judgment was not filed in the clerk's office until after the assignment was executed, and then afterwards assigned the judgment for value to a third person, who was alike without notice. Under these circumstances, it seems to us to have been a very proper exercise of discretion on the part of the circuit judge to refuse to require one judgment to be set off against the other, as he could not have done so without disregarding the equitable rights of persons not parties to these proceedings.

It may be quite true that an attorney has no lien on a judgment recovered by him for his fee, (Scharlock v. Oland, 1 Rich. Law, 207,) and it may also be true, under the case of Miller v. Newell, 20 S. C. 123, that a chose in action arising out of a tort strictly personal is not assignable, though in this case the tort upon which the action was founded was a wrong done to property, and not to the person, as in Miller v. Newell; yet it is undoubtedly true that an attorney has an equitable claim to be paid for his services out of the judgment which he has recovered for his client, and the court, in a proper case, especially in a matter addressed to its discretion, will always recognize such a claim. As is said in the case of Puett v. Beard, 86 Ind. 172: "The right to set off one judgment against another is purely equitable, and allowed only where good conscience requires it, and good conscience is far from requiring that an attorney's claim for services in securing the judgment should yield to the claim of those holding rights adverse to their clients. * * *" It is true that in Duncan v. Bloomstock, supra, the court did order one judgment set off against the other, notwithstanding an assignment of one of them to a third person; but that decision manifestly proceeded upon the ground that the assignment was not made in good faith, but simply for the purpose of defeating the motion to set off one judgment against the other, for the court used this language: "The court will, nevertheless, respect such an assignment, where it appears calculated to promote the ends of justice, but not where it has a contrary tendency." The circuit judge evidently supposed that by respecting the assignment in this case the ends of justice would be promoted, and we agree with him. It appears to have been made in pursuance of an agreement entered into at the time the action was commenced, and was doubtless the means, and possibly the only means, by which the plaintiff obtained the services of an attorney, which have proved effective. The counsel for respondent, in his argument, has raised a question as to the validity of the confession of judgment before the trial justice, but, as that question was not passed upon by the circuit judge, his decision being rested solely on the ground of the assignment, we are not at liberty to consider it. The judgment of this court is that the order appealed from be affirmed.

SIMPSON, C. J., and MCGOWAN, J., concur.

(31 S. C. 378)

ROGERS v. FLORENCE R. CO.

WHITTINGTON v. SAME.

(*Supreme Court of South Carolina.* July 23, 1889.)

MASTER AND SERVANT—INDEPENDENT CONTRACTOR.

Gen. St. S. C. § 1511, provides that every railroad corporation shall be liable for damages caused by fire from its engines, "or originating within the

Digitized by Google

limits of the right of way of said road, in consequence of the act of any of its authorized agents or employés." Defendant made a contract with H., a railroad contractor, for the grading of a section of its road, by the terms of which H. was to employ and pay the laborers, and do the work subject to the approval of defendant's engineer; to increase the force of laborers whenever required by the engineer; to discharge any laborer who might be offensive to defendant. If he failed to complete the work within the time stipulated, defendant was authorized to employ laborers, and complete it at his expense. He agreed to remove or burn up all trees, logs, and other perishable material along the line of the road, and to be responsible for damages as between himself and defendant. Defendant's assistant engineer was to personally direct the execution of the work. *Held*, that H. was an independent contractor, and not an "authorized agent or employé" of defendant, within the meaning of the above statute.

Appeals from common pleas circuit court of Marion county; ALDRICH, Judge.

Actions to recover damages caused by fire, brought by Lot B. Rogers and C. C. Whittington, respectively, against the Florence Railroad Company. There was a verdict and judgment in each case for the plaintiff, and defendant appeals. The substance of the contract referred to in the opinion is so accurately stated therein that it becomes unnecessary to insert it here. The testimony of the witnesses Page and Bethea, referred to in the opinion, the admission of which constitutes appellant's third and fourth grounds of exception, is stated in the "case" as follows: "Aaron Page, being sworn, testified: Witness did not go to where the fire is said to have originated, but helped to put it out on Sunday evening. That same fire kept burning all the week. Somebody—don't know who it was—took scoops and shovels, so as to cut it off. There were two railroad hands at the fire on Sunday. Witness did not know who they were. Witness went to them and said: 'It looks like, friends, that you have got into trouble.' They said: 'Yes.' Defendant's counsel objects to the declarations of these two men. Plaintiffs' counsel announces that he proposes to bring out the declarations, at the time, of these parties, because they were the agents of the railroad company, and any declarations they made are binding on the company, and competent to bring out against them. The presiding judge ruled: 'I think that it has not been shown yet that there was an agency. It has been shown that they were railroad hands; that is all. I am rather inclined to think that any declarations on the part of the employés of the railroad company as to how the fire originated, and how the damage occurred, will be admissible.' The objection was therefore overruled. The defendant excepted to the ruling. Witness asked those two hands how the fire occurred. They said: 'From carelessness; that some one had been there cooking, and left fire, and it got out from that.' *Cross-Examination.* Witness did not know the parties that told him how the fire got out. Had never seen them before that he knew of. Witness did not know that they were working on the railroad. They were fighting the fire on Sunday. * * * John Bethea, being sworn, testified: Witness went to the fire with two men, who told him if he would help them put it out they would pay him. George Wingate was one of them; witness did not know the other. (Defendant's counsel objects to the introduction of the declarations of George Wingate and the other man with him. Objection overruled. Defendant excepts.) Those men told Mr. Trimble that witness helped them, and he paid witness. *Cross-Examination.* That was on Sunday evening. Mr. Trimble had charge of these hands on the work. Doesn't know that he was Mr. Hardin's foreman, but he had charge of the hands."

J. T. Barron and *Johnson & Johnson*, for appellant. *C. A. Woods* and *W. J. Montgomery*, for respondents.

SIMPSON, C. J. These two cases were heard together below, and they were also heard together on appeal here. The defendant is a railroad corporation, having obtained a charter to construct a railroad through Marion county. The gradation of the road, or a portion of it, was let out under contract to Mr. James D. Hardin. This contract will be found in the "case." In the progress of the work a fire, which had been kindled within the right of way of the defendant, escaped from said right of way, and ran over certain adjoining lands of the plaintiffs, doing considerable damage thereto and to timber thereon, as alleged, and these actions were brought to recover the damages sustained. The jury rendered a verdict for the plaintiff in each case, to-wit, in the first case for $900, and in the second for $600. The defendant in each case has appealed.

We suppose that these actions were instituted under section 1511 of the General Statutes, which provides that "every railroad corporation shall be responsible in damages to any person or corporation whose buildings or other property may be injured by fire communicated by its locomotive engines, or originating within the limits of the right of way of said road, in consequence of the act of any of its authorized agents or employés, except," etc. It will be observed that the question of negligence cannot arise under this act, because the company is to be held liable where the fire originates within its right of way, in consequence of the act of any of its authorized agents or employés, without regard to the fact of negligence one way or the other. Now, it is conceded that the fire here did originate within the right of way of the defendant. Was this, however, in consequence of an act of any of its authorized agents or employés? was the main question in the case. His honor held that Mr. Hardin, though a contractor, was an employé of the company, and he ruled, and so charged the jury in terms as matter of law, that the defendant was liable. There are several exceptions in the case, but the vital one, and the one upon which the appeal mainly turns,

Digitized by Google

is whether his honor erred in charging as above. It is conceded upon both sides that as a general rule, where a contractor is an independent contractor as to any work, the employer is not responsible for injuries occasioned by his negligence, or that of his servants or employés; or, to use the language of one of the counsel of the respondents, the general rule is "that, when a person lets work to be done by another independent of any control of the employer, furnishing his own material and labor, the relation of master and servant is not created, and the employer is not liable for the negligence or improper execution of the work, nor responsible for the negligence or carelessness of the contractor in its performance; in short, employers are not generally liable for the acts of contractors." The correctness of this principle was not contested below by the counsel on either side, nor by his honor, the circuit judge. On the contrary, his honor held that Hardin was not an independent contractor, but was an employé of the company; and, it being conceded that the fire in question originated within the right of way of the company while Hardin's work was in progress, in consequence of an act of his employés, the company was responsible, under the express terms of the act supra.

Ordinarily, or at least under some circumstances, the question whether one is the employé or agent of another, or an independent contractor, might be a question of fact, and in such case it would be error for the trial judge to undertake to determine it. It should be left to the jury. In the case before us, however, the relation in which Mr. Hardin stood to the defendant depended upon the contract under which Mr. Hardin was building and constructing defendant's road, and, that contract being in writing, it was doubtless within the province of his honor to consider this question, as embraced in his power and duty to construe said written contract, so that the last point is, did he construe it correctly? Is it a fair and legitimate deduction, from the terms and provisions of that instrument, that Mr. Hardin was an authorized agent or employé of the defendant, in the sense of the act, instead of being an independent contractor? And that his agency or employment brought his servants and employès, from whose act the fire originated, into the same relation as that of himself to the defendant? Before this instrument could thus be construed it should appear from its terms, either express or implied, that the defendant itself was executing the work through Hardin and other servants and laborers, all in its employment, under its control, and subject to its power and management. Here the contract was between Mr. Hardin of the first part, and the defendant of the second,—no other parties. There were various stipulations and specifications as to the character of the work to be done. It was no doubt well known and understood that Mr. Hardin could not and was not to do the work or any portion of it personally and individually. On the contrary, he was a contractor for the whole work, to be done by servants and laborers employed by himself. The corporation had the right, no doubt, to undertake this work itself, hiring its own servants and laborers, but it certainly did not do so. It let the whole contract out to Mr. Hardin, and it looked to him for its completion. Thus far it would seem if there could be an independent contractor it was here. It is urged, however, that there were terms in the instrument which reserved control to the defendant, so far as to make Hardin a mere employè, and also his laborers; and, instead of the work being done by Hardin, through his employès, it was actually done by the defendant, through its employès, including Hardin, who employed the laborers for the company, and not for himself. The terms relied on for this view may be grouped together as follows: "The work was to be done subject to the approval of the chief engineer. The company shall retain regularly in its service an assisting engineer, to direct the execution of the work. Hardin shall increase the force whenever required by the chief engineer. That if he fails to complete the work within the time stipulated, the company may hire hands to complete it at his expense. That he shall discharge any employé who shall, in the judgment of the chief engineer, or assistant in charge of the work, be unfaithful, unskillful, or remiss in the performance of the work, or guilty of riotous, disrespectful, or other improper conduct. That Hardin was to be responsible for damages as between himself and the company. * * * All trees, logs, bushes, and other perishable material will be removed to the outer limits of the clearing, or burned up." These were the prominent conditions and limitations under which Hardin was to have the work done. The work itself was a different thing. This was described in other specifications contained in the contract, prescribing, not what the company was to have done, but what Mr. Hardin was to have done. Now, we suppose, if the contract had not contained the conditions and limitations above, that it could hardly be contended that Hardin was not an independent contractor. Do these conditions destroy and negative that feature? We think not, for the reason that they do not apply to the mode and manner of having the work done, nor do they in any way take said work out of the hands of Hardin. They are nothing more than certain rules under which the work was to be done by Hardin, and intended to guaranty the faithful execution of the specified work. We do not see why one working under specified rules may not be an independent contractor, as without such rules. One contracting to build a house according to specifications and plans drawn by an architect, and under the inspection of the architect, which is usually the case, would none the less be an independent contractor,

Digitized by Google

because of the presence and inspection of the architect. The point is, who is doing the work? Is the company doing it by its employés, or is the contractor by his? The company certainly had the right to see that the contractor was doing the work according to the contract, and that he employed skillful and proper laborers; and the regulations above were, as it appears to us, intended to accomplish this end,—nothing more.

We have examined the numerous cases referred to by the counsel, and while there are expressions in many of them and decisions which seem to sustain respondents' view of this contract, yet we think at last each case must rest on its own facts, with the conceded doctrine overhanging all the cases that the question of liability depends on the fact whether the company is doing the work, or whether it is being done by an independent contractor. Here we think in this case that Mr. Hardin was an independent contractor. It is said, however, that there are certain exceptions to the rule above, under one of which the case may be brought.

The first exception to the rule claimed in the argument is expressed therein as follows, to-wit: "When the employer as a corporation is charged with certain obligations reciprocal to the privileges and franchises granted, it cannot shift the responsibility from itself by employing a contractor to do the work for it." This is very general, and we do not know that we fully comprehend it. If it means that a railroad corporation, on account of the large powers generally granted to them,—eminent domain, etc.,—cannot be allowed to construct their track, etc., through an independent contractor, but must do such work through their own servants and employés, we have only to say that we have found no authority for such a position. On the contrary, numerous cases from different states, many of them cited in the argument here, have reached the courts, where the right to have such work done by independent contractors was distinctly recognized; said cases turning upon the question whether, in fact, the relation of independent contractor existed. If it means that where certain obligations exist, growing out of the privileges and franchises granted to the corporation, which would be inconsistent with the right of the company to employ an independent contractor to meet said obligations, from public policy or otherwise, then the principle may be conceded; but the propriety of its application must be shown. No obligation of the defendant has been pointed out here inconsistent with having its road graded by an independent contractor.

The second exception claimed to the general rule above is "that the employer is liable where he does not release the entire charge of the work to the contractor, but retains supervision of its construction." This is nothing more than saying that, where the contractor is not an independent contractor, but is under the control of his employer, the employer is liable. In other words, instead of its being an exception to the admitted doctrine above, it seems to be nothing more than stating it in different phraseology; or, rather, while recognizing the doctrine, it states a certain condition where the employé would not be an independent contractor, to-wit, where the employer had not released the entire charge of the work to him, etc. In Railroad Co. v. Hanning, 15 Wall. 649, this matter is fully discussed, both in the opinion by Mr. Justice HUNT, and in a note attached; and, without incumbering this opinion with a discussion of the character of the control reserved, which will hold the employer responsible, we may say that no such control was reserved here. See the case of Railroad Co., v. Hanning, supra, the numerous cases there cited in the opinion, and the notes. The reserved control, to have that effect, must be both general and special, and not only as to what work shall be done, but also how it shall be done. See Hughes v. Railroad Co., 15 Amer. & Eng. R. Cas. 101, and notes attached. See, also, Lesher v. Navigation Co., 56 Amer. Dec. 495; Bailey v. Mayor, etc., 38 Amer. Dec. 669; Hilliard v. Richardson, 63 Amer. Dec. 743, and the notes. Nice shades exist, and many of the cases are hard to reconcile; but all seem to recognize the common rule that liability is to be determined upon the fact whether the party doing the work is an independent contractor or an agent and servant of the company, which must be ascertained from the facts of each case.

Thus far the case has been discussed under the supposition that the action below was brought under section 1511 of the General Statutes, which, as we have held, would make the corporation liable under the facts therein specified, without regard to the fact of negligence. The complaints, however, allege negligence on the part of the defendant, and, if that is relied on as the gist of the actions, then we think his honor was in error in taking the cases from the jury, and in holding that the company was liable in both of them. The existence of negligence is a question of fact, and is for the jury.

We think the objections made to the testimony of Page and Bethea should have been sustained on the ground of hearsay. The other exceptions seem to be immaterial, and need not be considered. It is the judgment of this court that the judgment of the circuit court be reversed, and that the case be remanded.

McIVER and McGOWAN, JJ., concur.

(82 Ga. 392)

GRIGGS v. SWIFT.

(*Supreme Court of Georgia.* July 31, 1889.)

CONTRACT OF HIRING.

A contract by a partnership with an employé for personal services in the current business of the firm for one year, at a given rate per month, is dissolved by a dissolution of the firm within the

Digitized by Google

year by the act of God. There can be no recovery on such contract for services never in fact rendered, but which the employé would have rendered had the surviving partner not discharged him after the dissolution.

(*Syllabus by the Court.*)

Error from superior court, Muscogee county; SMITH, Judge.

Thomas W. Grimes and *Peabody, Brannon & Hatcher*, for plaintiff in error. *McNeill & Levy*, for defendant in error.

BLECKLEY, C. J. The hiring was by the partnership, for the term of one year from September 1, 1886, at $50 per month, besides board. One of the two partners of which the firm consisted died in November, and the survivor discharged the plaintiff on the 1st of January. The plaintiff could obtain no other employment until the following July; and, after the year expired for which he was hired by the partnership, he brought this action, claiming the agreed compensation from the 1st of January, the time of his discharge, up to the date in July when he procured other employment, and his expenses for board during the same period. As there is no trace in the evidence that the partnership was, by the terms of its creation, to subsist or continue after the death of one of its members, such death wrought a dissolution, and forever terminated the partnership. Code, §§ 1892, 1894. One of the parties, therefore, to the contract of hiring, became extinct by the act of God. The Code declares (section 2871) that if performance is impossible and becomes so by the act of God, such impossibility is itself equivalent to performance. There being no one, after the partnership went out of existence, to receive the personal services which the plaintiff had contracted to render as inspector of farms and collector for the partnership, the further execution of the contract was as much impossible as if the plaintiff himself had died before or after a dissolution of the firm had taken place. The survivor transacted no new business on the partnership account, but confined operations to closing up the firm affairs. The classification of every contract must depend upon a rational interpretation of the intention of the parties. Code, § 2721. From the very nature of a contract for the rendition of personal services to a partnership in its current business, where nothing is expressed to the contrary, both parties should be regarded as having by implication intended a condition dependent, on the one hand, upon the life of the employé, and, on the other, upon the life of the partnership, provided the death in either case was not voluntary. To this effect is the text of Wood, Mast. & Serv. § 163: "Where a servant is employed by a firm, a dissolution of the firm dissolves the contract, so that the servant is absolved therefrom; but if the dissolution results from the act of the parties, they are liable to the servant for his loss therefrom; but if the dissolution results from the death of a member of the firm, the dissolution resulting by operation of law, and not from the act of the parties, no action for damages will lie. * * * So if a firm consists of two or more persons, and one or more of them dies, but the firm is not thereby dissolved, the contract still subsists, because one or more of his partners is still in the firm, and this is so even though other persons are taken into the firm. The test is whether the firm is dissolved. So long as it exists, the contract is in force, but when it is dissolved, the contract is dissolved with it, and the question as to whether damages can be recovered therefor will depend upon the question whether the dissolution resulted from the act of God, the operation of law, or the act of the parties." Mr. Wood's reference is to two Scotch cases, which we have not seen, but the rule he deduces from them is so reasonable that we feel warranted in accepting it as law. See, also, Tasker v. Shepherd, 6 Hurl. & N. 575. As to death of a person not a partner, but a sole employer, see Yerrington v. Greene, 7 R. I. 589; Wood, Mast. & Serv. §§ 95, 158. The case of Fereira v. Sayres, 5 Watts & S. 210, is apparently in conflict with the text of Wood as above quoted, but we are satisfied to abide by the rule laid down in Wood, though it be at the expense of differing with the learned court of Pennsylvania, by whom the last-named case was decided. The contract upon which the plaintiff's suit was founded having become impossible of performance by reason of death, he had no right to recover upon the same against the surviving partner for services never actually rendered, and there was no error in granting a nonsuit. Of course, the claim for board was on the same footing as that for wages. Judgment affirmed.

(83 Ga. 372)

TRAVIS v. STATE.

(*Supreme Court of Georgia.* July 8, 1889.)

FORGERY.

Under section 4451 of the Code the forging of any writing not otherwise provided for, with intent to defraud any person or persons, is made penal, and it need not appear on the face of the indictment in what manner or by what means the consummation of fraud would be possible. It is enough if the writing might defraud, or might be used to defraud. At least this is so where the indictment is not demurred to, and the question arises upon a motion in arrest of judgment.

(*Syllabus by the Court.*)

Error from superior court, Decatur county; BOWER, Judge.

The indictment against Travis charged him with forgery, "for that the said Tom Travis, in the county aforesaid, [Decatur county,] on the 1st day of August, in the year of our Lord 1887, with force and arms did wrongfully and fraudulently make, sign, and forge the following writing, to-wit: 'Savannah, Florida & Western Railway. July, 1887. Mr. A. A. Anerleabe, C. R.:

Digitized by Google

There is due John Banister, engaged as track hand on Sect. No. 31½, in the month of July, as per check-roll. H. D. HAYWOOD, Foreman Sect. No. 31½. This certificate is not transferable,'—with intent to defraud one John Banister and the Savannah, Florida & Western Railway Company, contrary to the laws of said state," etc. Travis was found guilty, and at the same term moved in arrest of judgment on the following grounds; (1) Because there is no allegation in the indictment of the forgery of any paper by which any person could be defrauded. (2) Because it is not alleged that said writing is of any value, nor does it appear from the allegations in the indictment that it is of any value. (3) Because it would require the aid of another paper, to-wit, the check-roll, to enable the court to determine whether or not the writing was of any value, and whether or not any one could be defrauded by the paper. (4) Because there is no allegation in the indictment that A. A. Anerleabe has any connection with the Savannah, Florida & Western Railway, or that he has any authority to pay such papers, or any other papers, for said railway, or that there is such a person. (5) Because there is no allegation in the indictment that H. D. Haywood is foreman of section No. 31½, nor that he has authority to draw such papers, nor that he has any connection whatever with said railway, nor that there is such a person. (6) Because there is no allegation in the indictment what railroad John Banister was engaged upon, nor who is owing John Banister anything, nor what year the July mentioned in said writing was, nor that there is such a person. (7) Because there is no allegation in the indictment that section No. 31½ belongs to the Savannah, Florida & Western Railway, or that it had any control over said section, or that John Banister was ever engaged as a track hand on said section. (8) Because there is no allegation in the indictment that the Savannah, Florida & Western Railway Company was indebted to John Banister in any amount whatever, or that any other person was so indebted to him. (9) Because there is no allegation in the indictment that said railway company is a corporation or a simple partnership. (10) Because, if the paper alleged in the indictment had been signed by Haywood and the representations therein had been untrue, Haywood would not have been liable to the Savannah, Florida & Western Railway Company, or to A. A. Anerleabe, C. R., because said paper could not have been paid without reference to the check-roll, which would have shown the falsity of the representation in the paper contained, and thereby rendered it impossible to have defrauded either the company or Anerleabe. (11) Because said railway company could not have been defrauded by the paper. It was not addressed to said company, nor to any one connected with it, so far as the allegations show; and if Anerleabe had paid it he would have been responsible to the company therefor, provided he had been authorized to pay genuine papers of that character. (12) Because John Banister could not have been defrauded even if it had been paid, because the company would have still been liable to him for the money, provided they owed him anything. (13) Because A. A. Anerleabe is the only person mentioned in the paper alleged to have been forged who could have been defrauded, and there is no allegation in the indictment of any intention to defraud him. (14) Because the paper alleged to have been forged is void without the aid of extrinsic facts to support it, and no one could be defrauded thereby, and the extrinsic facts necessary to support it are not alleged in the indictment, and therefore no harm could have come to any person because of that paper. No suit could have been maintained by John Banister upon the paper without the averment and proof of extrinsic facts to support it; therefore the paper upon its face is utterly harmless, the paper being not positive, but conditional only. (15) Because the allegations in the indictment are so vague, uncertain and indefinite that no legal judgment could be rendered thereon. The motion was overruled, and defendant brings error.

Donalson & Harris, for plaintiff in error.
W. N. Spence, Sol. Gen., for the State.

BLECKLEY, C. J. In strong contrast to the length and verbosity of the motion in arrest of judgment, which is expanded into 15 grounds, (see the official report prefixed to this opinion,) is the brief of counsel for the plaintiff in error, which is as follows: "This prosecution can only be sustained, if at all, under section 4451 of the Code. Under that section an intent to defraud must be alleged. If the alleged intention appears from the forged instrument to be impossible of execution, the indictment is defective; and the defect is not merely formal, it affects the real merits of the offense." Code, § 4629. The brief is correct in the suggestion that the indictment is founded on section 4451 of the Code, which declares that, "if any person shall fraudulently make, sign, forge, counterfeit, or alter, or be concerned in the fraudulent making, signing, forging, counterfeiting, or altering, any other writing not herein provided for, with intent to defraud any person or persons, bank, or other corporate body, or shall fraudulently cause or procure the same to be done, such person so offending shall, on conviction, be punished," etc. The writing set forth in the indictment, and copied at length in the official report, falls within the terms of this section, because it is not elsewhere in the Code provided for. The intention of the legislature was evidently to embrace every species of writing that could be used to defraud another. Berrisford v. State, 66 Ga. 53; Burke v. State, Id. 157; Johnson v. State, 62 Ga. 299; 2 Bish. Crim. Law, § 523 et seq. No doubt in some jurisdictions any extrinsic facts requisite to render a doubtful, obscure, or incomplete instrument efficient in the con-

Digitized by Google

summation of fraud would have to be alleged, (2 Bish. Crim. Law, § 545; Rembert v. State, 53 Ala. 467;) but this rule does not prevail in Georgia, the Code declaring, in section 4628, that an indictment which states the offense in the terms and language of the Code, or so plainly that the nature of the offense charged may be easily understood by the jury, shall be sufficiently technical and correct. The next section provides that exceptions which go merely to the form of an indictment shall be made before trial, and no motion in arrest of judgment shall be sustained for any matter not affecting the real merits of the offense charged. Here the forged writing is fully set out, and all averments in relation to it are in the terms and language of the Code. If, as the indictment alleges, the forgery was committed with intent to defraud either the railroad company or John Banister, the accused was guilty. That such intent existed, and the mode by which it could have been accomplished, were matters of evidence; and, after verdict, it is to be presumed that they were established by evidence to the satisfaction of the jury. Rataree v. State, 62 Ga. 245. There might have been several ways in which the forged instrument could be used by the forger, or some accomplice employed by him, to defraud the company or the individual mentioned in the indictment, one or both of them. As the writing mentions a "check-roll" for July, it is fair to presume, after verdict, that it existed, and that it was a check-roll of the company; also that Banister's name was thereon, and that the roll showed some amount of money due him. The forged certificate on its face not being transferable, the holder of the same, whether the forger or his accomplice, might be enabled thereby to personate Banister successfully in drawing the money indicated as due him by the check-roll. The accomplishment of this fraud, it may be, could be prevented only by the precautionary measure of having the holder of the certificate otherwise identified. This precaution might be omitted, and, if so, it can be easily seen how the forged instrument might be used to accomplish the fraud. Other methods of its accomplishment might be possible, and might have appeared to the jury with sufficient certainty through the medium of the evidence. We need not attempt to point out more than one possibility. We are sure, at all events, that the intimation of counsel that it was impossible for the alleged fraudulent intention to be consummated is not correct. The most that can be said is that the writing is ambiguous; and under our system (both civil and criminal) ambiguities are referred to the jury for interpretation in the light of the extrinsic evidence, and certainly there is no requirement in our law to set out in an indictment the extrinsic evidence which is intended to be adduced in support of it. The court committed no error in refusing to arrest the judgment on the motion submitted. Judgment affirmed.

(83 Ga. 270)

PULASKI COUNTY v. POLLOCK *et al.*, (THOMPSON *et al.*, Intervenors.)

SAME v. SAME, (VAUGHN, Intervenor.)

(*Supreme Court of Georgia.* July 8, 1889.)

COUNTY COMMISSIONERS—CONSTITUTIONAL LAW.

1. Acts Ga. 1886, p. 261, creating the board of county commissioners of Pulaski county, declares that the commissioners "shall have exclusive jurisdiction in said county in examining and auditing the accounts of all officers collecting or disbursing the money of the county, and in bringing said officers to a speedy settlement." *Held*, that this act, construed in connection with the general law of the state, authorizing officers having control of taxes to issue executions against defaulting collectors, gave the county commissioners exclusive jurisdiction to issue an execution against the delinquent tax collector of Pulaski county in order to bring him to a "speedy settlement."

2. Where an execution, issued by the county commissioners against a delinquent tax collector, has been signed by the commissioners, the signature of the clerk is not necessary to its validity.

3. Const. Ga. art. 6, § 19, provides that the legislature shall have power to provide for the creation of county commissioners in such counties as may require them, and to define their duties. Article 11, § 3, provides that whatever tribunal or officers may hereafter be created by the legislature, for the transaction of county matters, shall be uniform throughout the state, and of the same jurisdiction and remedies. *Held*, that these provisions authorize the legislature to pass separate and distinct acts for any counties requiring county commissioners, and that it is not necessary that these acts shall be alike or uniform in their operation in all the counties requiring county commissioners.

4. On the return of a *fieri facias* a motion to quash the writ cannot be made by claimants to the property levied on who were not parties to the original proceeding, as their remedy is against the levy, by motion to dismiss, and not against the writ itself.

Error from superior court, Pulaski county; ROBERTS, Judge.

Jordan & Watson, for plaintiff in error.
Martin & Smith, for defendants in error.

SIMMONS, J. The same questions were made in both of these cases, and they were argued together, and this decision and judgment will apply to both. The commissioners of roads and revenues of Pulaski county issued an execution against Pollock, the tax-collector of the county, and the sureties on his bond, for the sum of $2,512, with 20 per cent. per annum penalty, from the 21st of May, 1888. The execution recited that it was issued because Pollock, as tax-collector for the year 1887, failed to make a settlement of taxes due the county, and pay into the treasury of the county the amount of said taxes due. The execution was signed by the five persons constituting the board of commissioners. It was levied, among other things, on certain land in the town of Cochran, and also on a horse and buggy, all of said property being levied on as the property of Pollock. A. J. Thompson, and others, claimed the land, and Vaughn claimed the horse and buggy. When the issue thus made came on for a hearing, the plaintiffs in execution tendered in evidence the *fi. fa.* The claimants in each of the cases made objection to it, and moved that it be quashed, on the grounds (1) because the commissioners have and had no

Digitized by Google

power, under the act approved December 20, 1886, creating said tribunal, to issue *fi. fas.* summarily against the defaulting tax collector and his sureties, said act failing to prescribe any mode for compelling payment by the officers of the county of money collected by them; and (2) because the *fi. fa.* was not signed by the clerk of said board of commissioners, but was signed by the commissioners themselves, when it should have been signed by said clerk and borne teste in the name of said commissioners. The court sustained the motion, and ordered the *fi. fa.* quashed on both of said grounds, to which decision the plaintiff in execution excepted in each case.

1. We think the court erred in sustaining these demurrers. Claimants have no right to move to quash a *fi. fa.* which has been levied on property claimed by them. It is no concern of theirs whether the *fi. fa.* is good or bad. Their proper motion would have been to dismiss the levy. If that motion had been granted, it would have released their property from seizure by the sheriff. As the validity of these executions was argued at great length before us, we will not put our judgment on this technical ground, but will consider the real merits of the case.

2. The main question argued before us was, as to whether the commissioners had power and authority to issue these executions against the tax collector and his sureties. The trial judge decided that they had no such power. We think he erred in this ruling. The act creating this board of commissioners, (Acts 1886, p. 261,) declares that they shall have exclusive jurisdiction in said county over the following matters. Among them, in the fifth subdivision of section 5, is the following: "In examining and auditing the accounts of all officers having the care, management, collecting, or disbursing of the money of the county, and in bringing said officers to a speedy settlement." Under this section they had the power to audit and examine the accounts of this officer, and if, in the examination of these accounts, they ascertained that he was indebted to the county for taxes that he had collected and not paid over to the treasurer, power was given them to bring him to a speedy settlement. While there is no express provision authorizing them to issue an execution against him and his sureties, it is difficult to see how they could bring him to a speedy settlement in case he refused to pay over the money, unless they issued an execution against him. The power to audit and examine, and to bring him to a speedy settlement, would be useless unless they had the means of enforcing the examination and settlement. It will be remembered that the act gave the commissioners exclusive jurisdiction over this matter. They have an exclusive jurisdiction, and no other tribunal would have a right to issue this execution and bring this officer to a speedy settlement. The legislature certainly did not intend to compel this county to resort to a long and tedious suit in the courts for the collection of its money. This act is to be construed with reference to the general law of the state in connection with such matters, as found in the Code. The general law gives to officers having the control of state or county taxes the power to issue executions against defaulting tax collectors in the summary manner pursued by the county commissioners in this case. We think, therefore, that this power to issue execution is implied in the authority given to the commissioners to bring him to a speedy settlement, and that this was the intention of the legislature when it passed the act. Otherwise the power given would be nugatory.

3. It was argued by the defendants in error that, if the commissioners did have this power to issue execution, the execution was not properly issued in this case because not signed by the clerk. We do not think it matters whether the commissioners signed the execution or their clerk. If the clerk had signed it, it would have been by order of the commissioners. The signing by the commissioners of their own names to the execution did not, in our opinion, make it invalid. Besides, the only duty required of the clerk in the act is the keeping of a book in which he shall record the proceedings of the board.

4. It was argued by the able counsel who represented the defendants in error that admitting that under this act the commissioners were authorized to issue the execution, and that it was properly issued, still it was void, because the act itself was unconstitutional and void under article 11, § 3 of the constitution, (Code, § 5228,) which is as follows: "Whatever tribunal or officers may hereafter be created by the general assembly for the transaction of county matters shall be uniform throughout the state, and of the same name, jurisdiction, and remedies, except that the general assembly may provide for the appointment of commissioners of roads and revenue in any county." It was claimed that this act was not uniform with others passed for other counties of the state having boards of commissioners. We do not agree with this construction of the constitution. Construing this section of the constitution together with section 19, art. 6, (Code, § 5177,) which is as follows: "The general assembly shall have power to provide for the creation of county commissioners in such counties as may require them, and to define their duties,"—our opinion is that the legislature has the power to pass separate and distinct acts for any counties of the state which may require county commissioners; nor is it necessary that these acts shall be alike or uniform in their operation in all counties which have or may require county commissioners therein. These sections do not require the legislature to pass a general law defining the duties and powers of county commissioners. Section 5228 seems to contemplate that all tribunals or officers which may be created by the legislature for the transaction of county

Digitized by Google

matters shall be uniform throughout the state except where county commissioners are required by any county. When commissioners are required by a county, we think that the constitution does not require that the acts creating them shall be uniform. In order to make the acts uniform the legislature would have to pass a general law, applicable to all counties which require county commissioners, and this, we have seen, the constitution does not require; or the legislature would have to pass the same act for every county which it passed for the first county applying for the same under the constitution of 1877. We are strengthened in this view by the contemporaneous construction placed upon these sections by the legislature, commencing with the first session of the legislature after the adoption of this constitution. Each and every legislature which has met since that time has passed acts of this character, creating county commissioners, and very few, if any, of these acts are alike in their provisions. There is a difference in the power given to the commissioners, the manner of their election, their number, and their compensation, and other differences which it is unnecessary to mention. This shows the construction placed upon these sections of the constitution by the members of the legislature from the adoption of the constitution to the last session of that body, and we know of our own knowledge that there were many able lawyers in the successive legislatures whose opinions on questions of this sort have great weight with us. It is true that in the case of Conley v. Poole, 67 Ga. 254, JACKSON, C. J., intimates that these acts should be uniform in operation in those counties which shall require them; but that, in our opinion, was *obiter*, as it was not necessary to decide that question in the case which he had under consideration. For these reasons we hold that it is not necessary for these acts creating county commissioners in different counties to have a uniform operation in every county that requires them. Therefore the act under consideration is constitutional.

Judgment reversed.

(83 Ga. 14)

STULTZ *et al.* *v.* FLEMING *et al.*

(*Supreme Court of Georgia.* July 23, 1889.)

ASSIGNMENT FOR BENEFIT OF CREDITORS — COMPENSATION OF ASSIGNEE.

1. An assignment by an insolvent debtor need not state that the assignor is "failing or insolvent," nor is it necessary that it should describe the nature and character of his debts, as the law only requires the schedule to give the names and residences of the creditors, and the amount due each.

2. An assignment is not invalid because it does not include in the assets of the insolvent the unexpired lease of a store-house which cannot be relet without consent of the owner; nor because no account is given of money in the bank for which checks to creditors had been drawn prior to assignment.

3. There is no error in refusing to set aside an assignment because it names the compensation of the assignee, as the law allows a reasonable compensation, and if the amount named is unreasonable it can be reduced by the court; but if this fact is relied on to prove fraud, it can be considered by the jury as a circumstance tending to show the intent of the assignor.

Appeal from superior court, Richmond county; RONEY, Judge.

The plaintiffs in error, Stultz & Blair and others, moved to set aside an assignment made by the defendants, Fleming & Bussey, for insufficiency and fraud. The motion was overruled, and from the order denying the motion plaintiffs appeal.

W. K. Miller, J. S. & W. T. Davison, C. H. Cohen, Harper & Bro., Chas. Z. McCord, and *H. Phinizy*, for plaintiffs in error. *Foster & Lamar, Twiggs & Verdery,* and *W. H. Fleming, contra.*

SIMMONS, J. The court did not err in refusing to set aside the assignment in this case upon the grounds set out in the bill of exceptions. Most of the grounds are mixed questions of law and fact, which it will be necessary for a jury to pass upon under proper instructions from the court before the assignment can be declared invalid. Upon the questions of pure law made in the record the court did not err, in our opinion, in refusing to set aside the assignment on these grounds.

1. It is unnecessary, in our opinion, for the assignors to state in the deed of assignment that they are "failing or insolvent debtors." There is nothing in the act which requires them so to state.

2. Nor does it render an assignment invalid if the assignors provide therein for a fixed compensation for the assignee. Whether that provision is in the deed of assignment or not, the law will allow a reasonable compensation; and the fact that the law allows such compensation without this provision in the assignment does not render the assignment invalid when it is provided for in the assignment. If the provision for compensation is unreasonable, it can be reduced by the court on its settlement with the assignee. If relied upon as a circumstance to prove fraud, it can be submitted to the jury on the trial of that issue.

3. Nor is it necessary, in our opinion, for the assignors, in their schedule of creditors, which schedule they are required by law to file, to describe the nature and character of the debts, and to state therein whether they consist of "notes or accounts, whether barred or not, whether secured or unsecured." The act requires that the "schedule shall set forth in detail the name of, the amount due to, and the residence of, each of the creditors of the assignor." It does not require any further description of the debts.

4. Nor did the court err in refusing to set aside the assignment "because the assignors failed to include in their schedule of assets the term they owned under the lease from Mrs. Horton, administratrix, of the store they occupied, from December 31, 1888, the date of their failure, to October 1, 1889, the date of the expiration of the lease." It appears

Digitized by Google

that the renting of the store-house was by the year. If it was, the tenant could not sublet the premises without the consent of the landlord. If they had assigned this unexpired term, the landlady might not have agreed to it. She might not have desired the assignee as a tenant. If the renting was by the year, the tenant had no estate in it, and therefore it could not have been a part of the tenant's assets. The landlord could have ejected the tenant at any time when the rent was due and unpaid. We therefore do not think the assignment was invalid because the assignors failed to put this in their schedule.

5. The assignors had a certain amount of money deposited in bank to their credit. Two days before they failed and made this assignment they drew checks on the bank for this money in favor of some of their creditors. It appears that these checks had not been presented and paid when the assignment was made, and that the assignors did not know that they had not been paid. It is contended that the assignment was void because the money was not placed in the schedule as assets. We do not think the failure to place this money in the schedule of assets renders the assignments void *per se*, under the circumstances. Courts differ as to whether, after checks have been drawn against money in bank, the money belongs to the holders of the checks or to the drawers of the checks. These assignors seem to have taken the former view, and we cannot hold that their deed of assignment is void because of a mistaken view of the law, if their view is wrong. Where able and learned judges, who have devoted their lives to the study of the law, differ upon this question, certainly the act and opinion of unprofessional men cannot be held to be fraudulent when they follow one line of decisions. Of course if this was done for the purpose of defrauding, hindering, or delaying the creditors, it would void the assignment. Of this and kindred questions in this case, the jury must be the judges, under the evidence and proper instructions from the court. The other questions made in the record were questions of mixed law and fact, and it is unnecessary to decide them now, as they can be determined on the final trial before the jury.

6. Upon a review of the whole case, we think the trial judge made a wise disposition of it. The bulk of the property had been sold prior to the hearing, under interlocutory orders passed before the hearing. In his order disposing of the case, the judge directed that the proceeds of the sale should be placed in bank by the assignee, and not paid out to any one except by order of the court, and that all of the proceeds be held up except $500, which he directed paid as compensation to the assignee, and certain other amounts, the salaries of the employés in the store, until the final trial before the jury. This virtually made the assignee the receiver of the court. The court took possession of the whole property or its proceeds, and will retain it until the final trial. We cannot see that the plaintiffs in error are in any way injured by this action of the court, and we see no ground for their complaint of the refusal of the court to appoint a receiver. Judgment affirmed.

(82 Ga. 364)

PARROTT v. BAKER.

(*Supreme Court of Georgia.* July 31, 1889.)

COMPETENCY OF WITNESS—EVIDENCE—SALE UNDER EXECUTION.

1. According to Powell v. Watts, 72 Ga. 770, in a statutory claim case the claimant is a competent witness in his own behalf to prove transactions between himself and the defendant in *fi. fa.*, though the latter be dead.

2. Declarations and tax returns made by the vendee, when out of possession, and not in the presence of the vendor, are inadmissible at the instance of the vendee's creditor, as evidence to subject the land to the payment of his debt.

3. Land held by absolute deed as security for a debt still unpaid, is subject to levy and sale as the property of the vendee, under a judgment against him, no matter whether the judgment creditor gave credit on the faith of the property so held or not. The purchaser at sheriff's sale would acquire the right to receive the money due on the secured debt, as in the ordinary case of purchase money, where bond for titles is outstanding. Redemption of the land would be accomplished by paying to him what would otherwise be payable to the original vendee. If the deed was made to defraud the vendor's creditors, as well as to secure a debt, the land to the extent of its whole value would be subject to judgments against the vendee, as against a statutory claim interposed by the vendor himself.

4. An absolute deed of conveyance containing a warranty of title, and purporting to be made on a valuable consideration, is valid and binding between the parties, though made for the purpose of defrauding creditors. The parties being *in pari delicto*, and the conveyance being an executed contract, the vendor cannot impeach it as a muniment of title in the vendee, whether possession of the land has been delivered under it or not, nor whether the vendee really paid the recited purchase money or not. The vendor is estopped. But an executory contract by the vendee—such as a bond for titles to reconvey to the vendor—may, when sought to be enforced, be impeached by the vendee, or even by his creditors, if shown to be directly connected with the fraudulent scheme in which the deed originated. For the purpose of resisting the enforcement of an executory part of the fraudulent scheme the whole scheme is open to inquiry.

5. Delivery of a deed is sufficiently proved by being recorded, and by the maker of it being in possession of a written contract, signed by the vendee, stipulating for a reconveyance of the premises to the vendor.

(*Syllabus by the Court.*)

Error from superior court, Barton county; FAIN, Judge.

Action by one Baker against Mrs. Parrott, plaintiff in *fieri facias* issued upon a judgment recovered by her against the executrix of the estate of one Johnson, deceased, and levied upon certain land conveyed by said Baker to said Johnson, deceased. After verdict found for plaintiff, Baker, defendant, moved for a new trial. The motion was overruled, and Mrs. Parrott brings error.

R. B. Trippe and *A. S. Johnson*, for plaintiff in error. *Baker & Heyward*, for defendant in error.

BLECKLEY, C. J. It seems from the record that Baker made to Johnson three deeds,—

Digitized by Google

two dated the 10th, and one the 11th, of April, 1879. One of the former date embraced certain premises which may be briefly designated as the "Irick Farm." It was a regular conveyance in fee-simple; the expressed consideration being $7,500 in hand paid, the receipt whereof was acknowledged. It warranted the title to Johnson, his heirs, etc., against the claims of all persons whatsoever, and was recorded on the 7th of April, 1880. The other two deeds were of like character, but embraced other and different premises. Johnson died. Mrs. Parrott obtained a money judgment against his executrix, as such, in May, 1884; and in February, 1886, the *fieri facias* issued upon this judgment was levied upon the Irick farm as the property of Johnson's estate. Baker interposed a claim. The claim case was tried, and a verdict rendered for the claimant. A motion for a new trial was made and overruled.

1. Was Baker a competent witness in his own behalf as to anything that transpired between himself and Johnson, the latter being dead? According to Powell v. Watts, 72 Ga. 770, he was. That case is a direct ruling upon the question; and, while it is in apparent conflict with Bothwell v. Dobbs, 59 Ga. 787, the two cases may possibly be reconcilable, because the latter was not only an effort to prove by the claimant a gift from the deceased debtor, but to prove a gift by parol, although the subject-matter was land. The judgment in this statutory claim case, should it be in favor of the claimant, will not affect Johnson's estate; his executrix, as defendant in *fi. fa.*, not being a party to the present litigation between the plaintiff in *fi. fa.* and the claimant. The land in controversy will still be the property of the estate as fully and amply after it is determined not to be subject to this *fi. fa.* as it was before. Should it be found subject, the estate will get the benefit in so far as its proceeds may pay off this execution. If it is not found subject, the estate will still have the land, and will suffer no prejudice by the result of the claim case. Possibly, therefore, the rule laid down in Powell v. Watts, supra, may be correct. At all events, as the judge below followed that case, we shall not now reverse his ruling. Were a suit brought against Baker by the executrix for the recovery of these premises, he would clearly be an incompetent witness in his own behalf. Code, § 3854, exception 1.

2. There was no error in excluding the declarations of Johnson, made when Baker was not present, as to his (Johnson's) rights in this land; nor in excluding the tax-books showing that he returned the same as his property for taxation. Johnson never entered into possession of the land, and his declarations and tax return must therefore have been made when out of possession, and, consequently, when of no value to characterize possession, or show an adverse holding.

3. The claimant introduced in evidence two writings bearing Johnson's signature, one of them dated April 11, 1879; the other, April 7, 1880. Neither of them was under seal. The first was in these terms: "Georgia, Bartow County. Upon prompt payment to me, my heirs, executors, or administrators, by Thomas H. Baker, his heirs, assigns, administrators, or executors, the sum of $150, I hereby bind myself, my heirs, administrators, executors, in the sum of $10,000, firmly by these presents, to make and execute unto Thomas H. Baker, his heirs, assigns, administrators, and executors, a good and sufficient title to all the property enumerated in two deeds made by said Baker to me, bearing date April 10, 1879, and all that property enumerated in a deed made by said Baker to me, bearing date April 11, 1879, said deeds having been made by said Baker to me to secure the payment of said Baker of such sum of $150." The second was in these terms: "Georgia, Bartow County. Whereas, Thomas H. Baker has executed to me two deeds, one dated April 10, 1879, and the other dated April 11, 1879, to certain lands therein mentioned, now, I hereby agree to reconvey to him said lands whenever called on by him. April 7, 1880."

It will be seen that all three of the deeds were included in the first of these documents; and, supposing the object of the conveyances to be fully and truly stated in this writing, the question arises whether the land levied on, if it was conveyed as security only, is subject to the plaintiff's execution to the extent of Johnson's interest therein, to-wit, $150. The court below was of opinion that this question turned on a second question, namely, whether the plaintiff in *fi. fa.* gave Johnson credit upon the faith of this property. The motion for a new trial in one of its grounds complains that the court erred in charging the jury, in substance and effect, that she must have credited Johnson on the faith of the property levied upon, or it could not be subjected to her *fi. fa.* We think this was error. The legal title being in Johnson by an absolute deed to secure payment of a debt, Johnson had an interest in the land commensurate with the amount of that debt. The rule is that the lien of a judgment against the holder of the legal title binds the property to the extent of the beneficial interest which such holder has in the property. Freem. Judgm. §§ 356, 357; Ware v. Jackson, 19 Ga. 452; Corbally v. Hughes, 59 Ga. 493. Even if the case falls under the provisions of section 1969 of the Code, we think such title as a debtor has in land is subject to levy and sale by virtue of any judgment rendered against him or his representatives; the Code (section 3580) declaring that judgments bind all the property of the defendant, both real and personal, from their date, except as otherwise provided in the Code itself. The general rule with respect to a bond for titles is that until the money is paid in full the property is subject to judgment liens, and to sale thereunder as the property of the vendor.

Digitized by Google

(the maker of the bond,) and the purchaser acquires the right to receive the unpaid purchase money in lieu of the vendor. So here, we think, no matter when the debt of the plaintiff in *fi. fa.* was created, the lien of her judgment attached upon this land, unless the money which it was conveyed to secure has been paid. It could not have been the intention of the legislature that a debtor might convey his land to his creditor for an express consideration of $7,500 in hand paid, and then set up as against his creditor's creditors that he acquired no interest whatever in the land. True, section 1971 declares: "The vendor's right to a reconveyance of the property, upon his complying with the contract, shall not be affected by any liens, incumbrances, or rights which would otherwise attach to the property by virtue of the title being in the vendee; but the right of the vendor to a reconveyance shall be absolute and permanent upon his complying with his contract with the vendee according to the terms." This is not inconsistent with selling the land as the property of the vendee, since the sale would only substitute the purchaser in his place to receive the unpaid purchase money, as it does in other cases of sale where bond for titles is outstanding. But we think where a deed given for security is intended to fall under section 1969 of the Code, it ought to contain some reference to the statute, or indicate in some other way the purpose for which it is executed. Why should the false and fictitious statement that the consideration of the deed is money in hand paid be introduced where no such consideration exists? A deed can be made absolute and convey title under the statute quite as well by speaking the truth as by speaking a falsehood. Roland v. Coleman, 76 Ga. 652. Recovery can be had in ejectment upon a deed given for security merely. Oellrich v. Railroad, 73 Ga. 889, and cases cited. The holder of the bond for titles might never pay the debt and redeem the land. In that case, to whom would the land belong? The maker of the bond may collect his money as provided in section 1970 of the Code, but he is not confined to that remedy. Dykes v. McVay, 67 Ga. 502. Doubtless *obiter dicta* may be found in some of the cases, suggesting or implying that liens will not attach while land is held, under section 1969, as security; but there is no direct decision to that effect that we are aware of.

The second instrument above recited, considered as an agreement, is *nudum pactum*, no consideration being expressed or indicated for its execution. Nor do we think it fairly imports the payment by Baker to Johnson of any part of the debt referred to in the former instrument. What it does signify in this respect, or as tending to show a rescission touching two of the three deeds, is a question for the jury, in the light of all the circumstances. It seems to indicate a purpose to release from Johnson's claim of title the premises embraced in two of the deeds, but, even as such release, it has, taken alone, no force, for lack of a consideration. Foster v. Rutherford, 20 Ga. 676; Lowe v. Bryant, 32 Ga. 235. Besides, standing alone, it is wholly wanting in certainty with respect to which of the deeds dated April 10th it refers to. The only certainty is that it does not embrace both, and we can see no reason for applying it to the deed conveying the Irick land, rather than to the other deed of the same date.

4. But the plaintiff claimed a wider and more comprehensive lien for her judgment, upon the ground that Johnson's undertaking to reconvey, as embodied in the first instrument above recited, being an executory contract, was not obligatory, because, as the plaintiff sought to prove, it was the offspring of a fraudulent scheme, shared in by both Baker and Johnson, to hinder, delay, and defraud Baker's creditors. The theory advanced was that all three of the deeds from Baker to Johnson were executed for that purpose, in whole or in part; that Baker carried out his part of the scheme by conveying title to Johnson; and that Johnson undertook to execute his part by reconveying to Baker upon the payment of a real or pretended debt of $150. Though the position of counsel before us was not formulated in these terms, its legal import, as we understood it, was substantially as now stated. On this line of attack the plaintiff tendered in evidence at the trial in the court below the two deeds additional to that embracing the Irick farm, so as to have all three deeds before the jury upon the question of fraud. She also offered to prove certain admissions of Baker that the Irick farm, as well as the other property, was conveyed to Johnson simply and solely in order to give Baker time to beat off or compromise with his creditors, and that Johnson never paid him one cent. The court ruled out the two deeds and these admissions. We think this also was error. There is evidence in the record tending to show that at the time these conveyances were executed Baker owed outstanding debts; indeed, was heavily involved. If he conveyed the Irick farm to Johnson for the purpose specified in his imputed admissions, although an additional object might have been to secure a debt which he owed to Johnson, the consideration of the conveyance was infected with fraud, and, being illegal in part, if not in whole, the conveyance was utterly void as against creditors, but, being an executed contract, was good and valid as between the parties, and passed to Johnson a title upon which he could recover the premises from Baker in ejectment, (Doe v. Roberts, 2 Barn. & Ald. 367; Jackson v. Garnsey, 16 Johns. 189; Broughton v. Broughton, 4 Rich. Law, 491; McCleskey v. Leadbetter, 1 Ga. 551; Adams v. Barrett, 5 Ga. 404;) and the land would be subject to levy and sale for Johnson's debts, (Hartley v. McAnulty, 4 Yeates, 95.) On the other hand, Johnson's contract to reconvey, not being executed, but executory, would be one on which neither courts of law nor equity would af-

Digitized by Google

ford any remedy, the parties thereto being *in pari delicto*. Howell v. Fountain, 3 Ga. 176; Peacock v. Terry, 9 Ga. 137; Galt v. Jackson, Id. 151; Heineman v. Newman, 55 Ga. 262. The distinction to which we have referred between executed and executory contracts (as to which see Code, § 2715) is widely, we may say, almost universally, recognized. Bump, Fraud. Conv. (3d Ed.) 444, 446, and authorities cited; Wait, Fraud. Conv. §§ 395, 397, 398; Bish. Cont. § 1203; Herm. Estop. §§ 577, 599. One case in our Reports, (Harrison v. Hatcher, 44 Ga. 638,) decided by two judges, overlooking this distinction, holds that courts will not aid the grantee in a fraudulent deed to get possession. In not one of the authorities which that case cites was any deed made by the defendant to the plaintiff in the action; and the ruling of the case is in conflict as well with the decision in McCleskey v Leadbetter and the doctrine of Adams v. Barrett, supra, as with the general current of authorities. If that ruling is not clearly wrong it must be by reason of some peculiar facts in the terms of the deed or otherwise, not reported. The deed before us expresses a substantial money consideration as paid, whereas the deed involved in Harrison v. Hatcher may have appeared, on its face, voluntary. A distinction turning on actual payment of some consideration by the fraudulent purchaser, though doubtless unsound, unless properly restricted, is suggested by what was said in Goodwyn v. Goodwyn, 20 Ga. 600, in which case there was no deed at all; and it is also mentioned in Bush v. Rogan, 65 Ga. 320. Other cases, (such as Tufts v. Du Bignon, 61 Ga. 322, and Palmer v. Melson, 76 Ga. 803,) in which the relation of landlord and tenant was involved, stress the fact of possession having changed in pursuance of the alleged fraudulent deeds. We think, however, that both upon principle and authority the fraudulent maker of such instruments is bound by them according to their terms, irrespective both of any actual payment of a consideration, or any contemporary or subsequent change of possession. A deed signed, sealed, and delivered, and expressing a valuable consideration on its face, imports a legal consideration, and the maker is estopped from alleging or proving the contrary to defeat the deed as title, if to do so involves setting up his own turpitude, and convicting himself of a deliberate intent to defraud his creditors. While the recital in a deed of the payment of the purchase money is not conclusive, and while the consideration may always be inquired into when the principles of justice may require it, (Code, §§ 2690, 2698,) yet the principles of justice neither require nor allow the inquiry at the instance of the fraudulent grantor. Were such indulgence accorded him, the rule of public policy sought to be subserved by visiting loss upon the contrivors and perpetrators of fraud, and thereby discouraging attempts at fraud, would in a great degree be nugatory. Nor is any change of possession requisite to completely and effectually pass the title to land by deed. The title passes as completely, so far as the parties to the conveyance are concerned, where the possession is retained, as where it is delivered. Especially must this be so where the vendor accepts from his vendee a bond for titles, or an obligation to reconvey. Gibson v. Hough, 60 Ga. 588. The holder of a bond for titles, with the purchase money unpaid, is, legally speaking, never in adverse possession as to the maker of the bond, but is a *quasi* tenant under him. Stamper v. Griffin, 12 Ga. 457; Beverly v. Burke, 14 Ga. 73. It is a mistake—a wide mistake—to regard an action of ejectment or complaint for land as a call upon the court to enforce the fraudulent deed as a contract. The law, taking the parties at their word, and acting upon the deed as pure, has already executed it as a contract, and transmuted it into title. The court is called upon to do nothing in behalf of the plaintiff in a suit to recover the land but that which it does for every plaintiff who comes armed with complete title to recover possession of his property. On the question of title or no title the rules of law exclude inquiry into any fraud out of which the deed sprang. The court, when adjudicating upon the instrument as title, is not at liberty to know or ascertain that it originated in the mutual fraud or collusion of the parties. Where the application before the court is to take the fruits of some executory element of the deed, such as the covenant of warranty, then its origin in mutual fraud is open to investigation, and the maker of the deed can successfully defend upon that ground an action for a breach of the covenant. Either of the parties *in pari delicto* may avoid executory undertakings in or out of the deed, provided they are connected with, and constitute a part of, the fraudulent scheme or conspiracy. It is for this reason that the evidence offered and rejected was admissible. It is not admissible to make the deed better for Johnson, his estate, or his creditors, than it would be as the parties left it. The deed has no need of being made better; for, as we have seen, whether the fraud be exposed or not, the conveyance is completely valid and operative as a muniment of title in favor of Johnson against Baker. The evidence is admissible alone for the purpose of manifesting the imputed vice in the executory contract of Johnson to reconvey to Baker, and to outlaw it. If that contract should be found tainted with the fraud imputed to it, we think Johnson's creditors may take advantage of its infirmity, so long as the contract remains executory, and that in their behalf the property embraced in the deed, to the extent of its whole value, will be treated as assets belonging to Johnson's estate, and subject to the payment in full of judgments legally rendered against the representatives of that estate.

5. The delivery of the deed, whether Johnson ever had manual possession of it or not,

Digitized by Google

we consider established by its being one of the deeds embraced in the executory contract for a reconveyance, and by its being recorded. These two facts, taken together, leave no room for doubt. Indeed, the former, standing alone, would seem to be conclusive. Raley v. Ross, 59 Ga. 862. Judgment reversed.

(80 Ga. 359)

BAILEY v. STATE.

(*Supreme Court of Georgia.* October 28, 1887.)[1]

CONFESSIONS AS EVIDENCE.

In a trial for larceny, a policeman, who arrested defendant and one H., testified that when defendant and H. were disputing over the matter he said to them that whichever one stole this vest should confess it, and defendant said, "I took the vest;" that he released H., and no inducement or threat was made to procure the confession. He was corroborated by another policeman. H., as a witness for defendant, stated that the policeman said to him: "If you committed this larceny it would be best for you to confess it. You will get a lighter fine." At a former trial, H., as a witness for the state, had testified that the confession was not freely and voluntarily made, and the court excluded it. *Held*, that it was not error, on the second trial, to admit the testimony of the officers as to the confession without calling H. as a witness for the state, and to submit the question to the jury as to whether the confession was freely and voluntarily made, and a motion for a new trial was properly denied.[2]

Error from city court of Atlanta; VAN EPPS, Judge.

Defendant, Bailey, was tried in the city court of Atlanta on an accusation of larceny from the house. The evidence showed that he and one Harris went into a store, and, while the latter was being waited on, defendant went back to a pile of clothing,—vests, etc.,—and commenced looking at them. A clerk waited on Harris, and then turned to defendant, who walked out. He carried a basket, through a hole in the top of which the clerk saw a vest, which he identified as belonging to the store. He took hold of the basket, charging defendant with having stolen the vest. Defendant pulled away, and ran off. The police officer who arrested defendant testified that when he was carried to the station-house, he was confronted with Harris, and the two had a dispute about the matter; that the officer said to them: "Now, whichever one of you stole this vest, confess it, and let me turn the other loose, for there is no use in locking you both up;" that at length defendant said. "I took the vest;" that Harris was then released; and that there was no inducement held out or threats made to procure the confession. Another officer corroborated this. Harris testified, for defendant, that the policeman said to him: "If you committed this larceny, it would be best for you to confess it; you will get a lighter fine." The remainder of his testimony did not conflict with that of the state. After verdict of guilty the defendant moved for a new trial on the grounds that the verdict was contrary to law and evidence, and because of the admission of the testimony for the state as to the confession. It appeared that at a former trial Harris had been introduced as a witness for the state, and, his testimony being that the confession was not freely and voluntarily made, the evidence to show such confession was excluded by the court. On the present trial the state solicitor stated that he would not introduce Harris, but would rely on the testimony of the police officers as to the confession. The court admitted this testimony, and submitted to the jury whether the confession was freely and voluntarily made, in view of the conflict of evidence on this point. The new trial was refused, and the defendant brings error.

Wimbish & Walker, for plaintiff in error. *H. C. Glenn*, Sol. Gen., for the State.

SIMMONS, J. 1. There was no error in overruling the motion for new trial in this case.

2. There was no error in admitting the confessions of Bailey to go to the jury, the court instructing the jury to determine for themselves whether the confessions were freely and voluntarily made or not. Judgment affirmed.

(80 Ga. 327)

ATLANTA NAT. BANK v. FLETCHER *et al.*

(*Supreme Court of Georgia.* March 2, 1888.)[3]

INJUNCTION—PLEADING.

Where a bill, filed by a creditor of a firm against the members thereof, individually and as partners, and others, to restrain the foreclosing of a chattel mortgage upon the property of defendant F. and the collection of a debt owed by him to a certain bank, which was secured by a deed from defendants F. and B. as partners, alleges fraud and conspiracy on the part of the defendants to defeat the claims of the general creditors of the defendant firm, which is denied in their answer, but fails to allege the insolvency of either the mortgagee or the bank, an injunction will not be granted.

Error from superior court, Cobb county; BROWN, Judge.

Bill in equity by the Atlanta National Bank, as a general creditor on an open account, against A. A. Fletcher and C. R. Boyd individually, and as copartners as A. A. Fletcher & Co., G. C. Burnap, the Merchants' Bank and others, to restrain Burnap from foreclosing a chattel mortgage upon the property of A. A. Fletcher, and the collection of a debt by the Merchants' Bank owed it by said Fletcher and secured by a deed to certain real estate from Fletcher & Co., for which they had received a bond of titles back. Fraud against Burnap, the Merchants' Bank, and other defendants, and conspiracies between the defendants to defeat the claims of

[1] Publication delayed through failure to receive copy.

[2] As to when confessions are admissible in evidence, see Territory v. Underwood, (Mont.) 19 Pac. Rep. 898, and note; Anderson v. State, (Neb.) 41 N. W. Rep. 857, and note; Long v. State, (Ala.) 5 South. Rep. 448; Neeley v. State, (Tex.) 11 S. W. Rep. 876, and cases cited; Rizzolo v. Com., (Pa.) 17 Atl. Rep. 520.

[3] Publication delayed through failure to receive copy.

Digitized by Google

the general creditors of Fletcher & Co. were alleged in the bill, but were denied by the answers filed in the case. The writ of injunction as prayed for was denied, and complainant brings error.

Abbott & Smith and *Phillips & Foster*, for plaintiff in error. *G. A. Howell* and *Clay & Blair*, for defendants in error.

BLANDFORD, J. The plaintiff in error filed his bill against A. A. Fletcher and C. R. Boyd individually, and as partners under the name of A. A. Fletcher & Co., and against G. C. Burnap, the Merchants' Bank, and others, praying an injunction to restrain Burnap from proceeding to foreclose a mortgage upon personal property which he held against A. A. Fletcher, and to restrain the Merchants' Bank from proceeding to collect a debt which Fletcher owed it, and for which the bank was secured by a deed of conveyance from Fletcher & Co. to certain real property, the bank having given Fletcher & Co. a bond for titles back.

In this case there does not appear from the record to be any necessity for an injunction. There is no allegation as to the insolvency of the bank or as to the insolvency of Burnap. For aught that appears, the plaintiff in error is in as good condition without the injunction as it would be with it. An injunction does not issue as a matter of course, but as a matter of necessity, either to restrain a meditated wrong or in a case where no adequate compensation in damages could be obtained. So we think that the court was right in refusing to grant the injunction. Judgment affirmed.

(80 Ga. 357)

WILSON v. STATE.

(*Supreme Court of Georgia.* Oct. 28, 1887.)[1]

ASSAULT WITH INTENT TO KILL.

1. On a trial for assault with intent to murder, the evidence showed that prosecutor was snowballed by boys as he was going home, and went in among them. As defendant approached, he continued homeward. She overtook him near her house, and asked him who the boys in the crowd were, and he replied that he did not know. Shortly after defendant stopped him near her house as he came from home, asked him if he had had her "arrested yet," and accused him with having a pistol. Upon his denial of both she and her sister cut prosecutor with a razor, cursed him, and threatened to cut his throat. He threw a rock at her, and the other woman struck him with a pair of tongs, when a third person interfered. Defendant testified that prosecutor snowballed her, cursed her, and cut her hand with a knife, at the same time hitting her sister with a rock; that she did not use a razor; and that prosecutor was cut by the person who stopped the difficulty, and "tried to cut around the boy's shoulder and cut his overcoat." *Held* sufficient to justify conviction.

2. It is no error in such a case to admit testimony in rebuttal of defendant's statement, after the evidence on both sides had closed.

3. Newly-discovered evidence that prosecutor first accosted and assaulted defendant with a rock; that other boys then threw rocks at her and her sister, the largest of whom cut her hand with a large knife "over the shoulder" of prosecutor; that that was the only cutting done; that she had no knife or razor, and was only trying to defend herself from the assaults of the boys,—is not sufficient to authorize the granting of a new trial, and would not probably change the verdict.

Error from superior court, Fulton county; R. H. CLARK, Judge.

Indictment for assault with intent to murder. The evidence showed that as Allen, the prosecutor, was going home, he encountered some boys, who threw snowballs at him as he approached. He went among them, and saw the defendant (who had probably been pelted by snowballs before his arrival) approaching. He pursued his way homeward, and was overtaken by her near her house. She asked him who the boys in the crowd were. He replied that he did not know. Coming from his home shortly afterwards, he met the defendant near her house. She stopped him, asked if he had had her "arrested yet," accused him of having a pistol, (both of which he denied,) and then called another woman from the house, and cut Allen in the shoulder with a razor, cursing him, and saying she would cut his throat. He threw a rock at her, and the other woman ran up and struck him with a pair of tongs. The difficulty was then stopped by a man, who testified as a witness for the state. Two witnesses were introduced by the defendant, but their testimony was incompetent, as neither saw the difficulty. Defendant claimed that Allen hit her with snowballs, cursed her, and cut her hand with a knife, at the same time hitting her sister with a rock. In explanation of how Allen was cut, she stated that the man who came to stop the difficulty "tried to cut around the boy's shoulder and cut his overcoat." She denied ever having used a razor. In rebuttal of her statement the state was allowed, over objection, to introduce testimony of one Eubanks, tending to contradict it, and to support the evidence for the state already in. After verdict of guilty, the defendant moved for a new trial on the grounds that the verdict was contrary to law and evidence, because of the admission of the testimony of Eubanks after the evidence for both sides had closed, and because of the newly-discovered evidence of two witnesses, to the effect that Allen first accosted defendant, and assaulted her with the rock before she said or did anything to him; that other boys in the crowd then threw rocks at her and her sister, the largest one cutting her hand with a large pocket-knife "over the shoulder" of Allen; and that this was the only cutting that was done, defendant having no razor or knife, and only trying to defend herself from the assaults of the boys. The new trial was refused, and she brings error.

Wimbish & Walker, for plaintiff in error. *C. D. Hill*, Sol. Gen., for the State.

SIMMONS, J. 1. There was no error in overruling the motion for new trial in this case. The evidence demanded the verdict.

2. There was no error in admitting the testimony of Eubanks after the state and the

[1] Publication delayed through failure to receive copy at the time of delivery.

Digitized by Google

defendant had closed their testimony. Eubank's testimony was in rebuttal of the defendant's statement.

3. The newly-discovered evidence would not probably change the verdict on a new trial. Judgment affirmed.

(80 Ga. 360)

RYALS *v.* BAGGS *et al.*

(*Supreme Court of Georgia.* Nov. 8, 1887.)[1]

CONFLICTING LAND GRANTS.

In an action for the recovery of certain land containing 350 acres under an original survey made in 1813, and embraced in an old mill-seat, defendant claimed title under a deed conveying three tracts containing 726 acres included in grants dated May 29, 1813, and August 13, 1877, respectively. A surveyor testified for plaintiffs that he made a plat of the property, which contained only 256 acres, the original survey of the grant of 1813 being incorrect, and he could locate it only by surrounding tracts; that in his opinion the 256-acre tract included all the mill-dam, dwelling-house, and improvements, which were also included in the grant to one T., in 1877; that there was no other mill-seat near; that the old surveys were carelessly made and incorrect. T., under whom defendant claimed, and who owned 126 acres under a grant in 1877, bounded by plaintiff's land and that of another, testified that he found the land in dispute seemed to be vacant, and had it run up as granted to himself; that he was present when the surveyor surveyed the land in question, and was satisfied that if the survey of 1813 was correct it covered the land in dispute, and it was not vacant. *Held*, that a verdict for plaintiff is sustained by the evidence, and the motion for a new trial was properly denied.

Error from superior court, Tatnall county; HINES, Judge.

Action by Columbus A., Archibald, David, and John B. Baggs, against one Ryals, for "a tract of land containing 350 acres, agreeably to an original survey, lying on the waters of Battle creek," in the Fortieth district, G. M., of Tatnall county, "embraced in what is known as the 'Michael Mattox Old Mill-Seat,' bounded on the north by land of Martha Mints; east, C. Tootle and J. J. Easterly; south, Henry Ryals, Jr.; west, Henry Ryals, Jr., and Millard Rogers." They claimed under a deed dated July 15, 1867, from David S. Baggs to David J. Baggs, in consideration of love and affection for his grandchildren, and conveying to David J., in trust for his children, (the plaintiffs,) the land in dispute, with other lands. They also introduced a deed dated November 26, 1863, from Michael M. Mattox to David S. Baggs, covering the property in dispute. Also a grant from the state to John Mattox, covering the same property. Also testimony to the following effect: The county surveyor made a plat of the property, and found that it contained only 256 acres, the original survey of the grant being incorrect, and he could locate it only by the surrounding tracts. He detailed the method of his survey. In his opinion the 256-acre tract included all the mill-dam, dwelling-house, and improvements. They are also included in the Columbus Tootle grant. He could not identify the line of the property according to the degrees laid down in the original plat, except one. He knew of no other mill-seat near the place. Many of the old surveys were carelessly made, and incorrect. John Mattox died in 1846 or 1847. His son, Michael M. Mattox, took possession of the place as his heir, and held for some years. David S. Baggs took possession in his life-time. The defendant introduced a grant from the state to John Mattox, dated 1813, to a square of 600 acres, bounded on all sides by vacant land, with Battle creek running through it. Also a grant from the state to Columbus Tootle, dated August 13, 1877, covering 126 acres in Tatnall county, bounded by Baggs' and Rogers' land. Also a deed dated March 26, 1878, from Columbus Tootle to Columbus A. Baggs, for himself, and as trustee for John B. Baggs, Archibald Baggs, and David Baggs, minor heirs of David J. Baggs, deceased, conveying 49 acres in the Fortieth district, G. M., of Tatnall county, granted by the state to Tootle August 13, 1877. Also a deed dated November 15, 1878, between Columbus A. Baggs and John M. Baggs to William W. Rogers, conveying two-thirds of the land comprised in the grant to Columbus Tootle, "known as the 'Mattox Old Mill.'" Also a deed dated February 15, 1881, from C. A. Baggs, administrator of "Archey Baggs," to C. P. Rogers, conveying 600 acres, "known as the 'Mattox survey,'" etc. The ordinary's order for the sale of this land, and Baggs' letters of administration, were also introduced. Also a deed dated 1879, from W. W. Rogers to C. P. Rogers, conveying 196 acres, granted to Columbus Tootle on August 13, 1877, known as the "Mattox Old Mill," etc. Also a deed from C. P. Rogers to defendant, dated April, 1881, conveying three tracts "containing 726 acres, of which 600 acres were granted to John Mattox, grant bearing date 29th of May, 1813, and two other tracts granted to Columbus Tootle, grant bearing date August 13, 1877. Also a deed dated July 15, 1877, from David S. Baggs to David J. Baggs, in trust for the use of Columbus Baggs, John A. Baggs, and Archibald Baggs, minor grandsons of the vendor, and sons of the vendee, conveying 1,530 acres, including "600 acres agreeably to original survey, and granted to John Mattox, bearing date 29th of November, 1815, and of said tracts containing 650 acres agreeable to original survey, and granted to John Mattox; said grant bearing date of the 26th of November, 1835; said tract being where a mill is located." Columbus Tootle testified that he found that the land in dispute seemed to be vacant, and had it run up as granted to himself; that there was another old mill on some of the Baggs land, but none on the land of any of the surveys adjoining the land in dispute; that he was present when the county surveyor surveyed the land in dispute, and was satisfied that if the Mattox grant of 1813 was correctly surveyed it

[1] Publication delayed through failure to receive copy.

Digitized by Google

covered the land in dispute, and it was not vacant. The jury found for the plaintiffs. Defendant moved for a new trial upon the ground that the verdict was contrary to law and evidence. The motion was denied, and he brings error.

T. H. Potter and *H. J. McGee*, for plaintiff in error. *Isaiah Beazley*, for defendants in error.

SIMMONS, J. There was no error in refusing the motion for new trial in this case. The verdict is sustained by the evidence. The judge below was satisfied with it, and this court will not interfere with his discretion. Judgment affirmed.

(80 Ga. 338)

NELSON v. COMMERCIAL BANK.

(*Supreme Court of Georgia.* Nov. 10, 1887.)[1]

LOSS OF HOMESTEAD.

Where the head of a family, as such, secured a homestead for his minor children, named and described in the application, then married and had another child, his wife and his child by her became members of the same family of which he was head when the homestead was taken, and that family was not dissolved, nor the homestead right terminated, when the children for whose benefit the homestead was originally secured attained majority and withdrew from the family. The homestead continued to exist by operation of law, with the wife and her child as beneficiaries.

(*Syllabus by the Court.*)

Error from superior court, Richmond county; RONEY, Judge.

Fieri facias by the Commercial Bank upon a judgment rendered against the defendant, Nelson, to subject the homestead of defendant to levy thereunder. From a judgment in favor of plaintiff, defendant brings error.

M. P. Carroll and *Charles P. Pressly*, for plaintiff in error. *William H. Flemming*, for defendant in error.

BLECKLEY, C. J. The homestead was levied upon in 1887 by virtue of a judgment rendered in 1886. The debt was probably contracted since the constitution of 1877 was adopted, but this does not appear with certainty. The homestead was secured in 1871, under the constitution of 1868, and was up to the full value of $2,000, besides personalty. The application specified three children, but no wife. The youngest child became of age in 1886, but before that time, to-wit, in 1881, the father married. A child was born of this marriage, whether before or after 1886 is not certain. The homestead was continuously occupied from the time it was secured up to the making of the levy. The court below held it subject to sale under the levy. We think this holding was erroneous. As the earth is for the use of the family of man, with its membership by marriage and by birth constantly changing, so is the homestead for the use of the family to whose head it is set apart, no matter what changes may occur in the membership thereof, provided there be at all times one or more persons of the class recognized by law as proper beneficiaries. Exemption or homestead may be waived or renounced, but the right to increase the family, whether by marriage or birth, is not the subject-matter of waiver. When there is no wife at the time the homestead is applied for and secured, no person extending credit afterwards has any right to assume that there will not be one in the future. Increase of the family by marriage is as much to be anticipated in such a case, as increase by birth in other cases. After a homestead has been set apart, whether under the constitution of 1868 or that of 1877, it is withdrawn from trade and business as a basis of credit. No creditor has a right to contract with the head of the family on the faith of that homestead, unless it be for the benefit of the homestead interest, and then the property is made subject by the constitution and the law to pay the debt. The creditor, therefore, is not disappointed by the marriage of the homestead occupant, or by the birth of another child in his family. It is no injury to him for the marriage to take place, or for a birth to occur; but it would be a great injury to the wife, who comes into the family with a homestead secured, to be turned out of it by a creditor who had no right to trust to it when the debt was contracted. All that a man has to do after securing his homestead as the head of a family is to keep on being the head of a family without break or interval. The head-note completes the opinion. Judgment reversed.

(80 Ga. 364)

ANDERSON v. FREEMAN.

(*Supreme Court of Georgia.* Nov. 12, 1887.)[2]

CONTRACT OF HIRING.

Defendant employed plaintiff as clerk, and before his term of service expired formed a partnership in the same business, paying plaintiff in full up to that time, and plaintiff entered the employ of the firm without any new contract, and paid himself double the wages he received from defendant for one month out of the firm funds, without their knowledge or consent, and was discharged on refusing to remain on the same wages previously received. *Held*, that his contract with defendant individually terminated upon his entering into the service of the firm, and, having been paid his wages up to that time, he could not recover from defendant.

Error from city court of Richmond; EVE, Judge.

Action by one Freeman against one Anderson upon a contract for wages. Anderson formed a partnership with one Fuller before the term of Freeman's service expired, paying him in full up to that time at the contract price of $75 per month. Freeman entered the employ of the firm of Anderson & Fuller, and charged up to them $150 for one month's wages, and paid himself out of the firm funds, without their knowledge

[1] Publication delayed through failure to receive copy.

[2] Publication delayed through failure to receive copy.

Digitized by Google

or consent, although no new contract had been made with the firm. Anderson offered him $75, the amount he had given him before, but Freeman declined it on the ground that it was double labor to keep both the firm books and those of Anderson, and was discharged. The jury found for the plaintiff, Freeman. Defendant moved for a new trial, which was overruled, but the judgment was reversed on appeal. 75 Ga. 93. On the second trial, a verdict was again rendered for plaintiff, and defendant's motion for a new trial overruled. From the order denying a new trial defendant brings error.

Harper & Bro., for plaintiff in error. *S. F. Webb*, for defendant in error.

SIMMONS, J. The facts in this case are substantially what they were in the case when it was here before, (75 Ga. 93,) and the ruling in that case governs this. Under the facts of this case, as disclosed in the record, the plaintiff is not entitled to recover against the defendant, and a new trial should have been granted. Judgment reversed.

(82 Ga. 386)

WILSON v. ATLANTA & C. RY. CO.

(*Supreme Court of Georgia.* July 31, 1889.)

LOSS OF GOODS BY CARRIER—MEASURE OF DAMAGES—INSTRUCTIONS.

1. Delivery of goods to a common carrier for transportation, whether actual or constructive, being a bailment, involves exclusive possession in the carrier, and this involves a surrender of custody and control for the time being by the consignor.
2. When the charge of the court affirms as a fact that there was no contention of the kind stated, this means that there was no such contention at the trial, and the statement will be taken in the supreme court as true, unless the contrary be certified in the bill of the exceptions, or elsewhere in the record.
3. When the measure of damages given by the court to the jury is more favorable to the plaintiff than the one prescribed by law, the plaintiff has no cause to be dissatisfied therewith.
4. Requests for instructions to the jury, which are inaccurate, inapplicable, or immaterial, should be declined.

(*Syllabus by the Court.*)

Error from city court of Atlanta; VAN EPPS, Judge.

Action by one Wilson against the Atlanta & Charlotte Railway Company for damages resulting from the delayed transportation and delivery of 200 cords of wood, and the failure to deliver 158 cords. Verdict was rendered for defendant. Plaintiff moved for a new trial, but the motion was denied, and he brings error.

Frank A. Arnold, for plaintiff in error. *John L. Hopkins & Son*, for defendant in error.

BLECKLEY, C. J. In the fall of 1880, certain persons had about 1,200 cords of wood piled along the line of this railway company, between the eighth and tenth mile-posts from Atlanta. The plaintiff, Wilson, desiring to purchase the same if he could have it transported by the company to Atlanta, consulted with the master of trains, and ascertained from him that the company contemplated clearing the road in a short time of all the wood along the line; that a train would be put on for that purpose, etc. Wilson, acting upon this information and assurance, made the purchase. At that time it was the custom of the company to supply cars upon application, when it could do so, and for the owners of wood to employ hands and load the same. Sometimes, upon special request, the company would employ the hands and charge extra on that account, but it was not the custom to do this without special request. As to about 300 cords of the wood purchased by the plaintiff, there is no complaint of delay in the transportation. About 200 cords have never been carried to Atlanta at all, or the residue, after long delay, was carried and delivered during the year 1881 and the spring of 1882. The present action was brought for damages resulting from this delay, and from the loss of 158 cords not carried and delivered at all. The declaration alleges, in substance, that, relying upon the custom of the defendant, and the assurance of its officer, the plaintiff bought the wood, and delivered it to the defendant, and offered it for shipment on the line of the road between the eighth and tenth mile-posts, and the defendant undertook and promised to haul it to Atlanta promptly, and made no objection to the time, place, or manner of delivery for shipment; and as to 158 cords there was no carriage and delivery at Atlanta, but the same was wholly lost to the plaintiff, and converted by the defendant to its own use; and as to 866 cords there was unreasonable delay in carrying and delivering, to the plaintiff's damage, etc. The declaration alleged nothing of any application for cars, or of any offer by the plaintiff to furnish hands to load them, or of any request made of the company to furnish such hands; nor was there any allegation of refusal by the company to receive any wood offered it for transportation, or to furnish cars in which to load it for shipment. The evidence showed that frequent applications had been made for cars, and that the company failed to furnish them, giving as a reason that the company did not have them to spare. On one or more occasions, when the plaintiff suggested that he could obtain cars elsewhere, the officer answered that he did not have a locomotive to spare. The value of the wood at the point of shipment was proved, and also the value in Atlanta in the winter of 1880, in the year 1881, and in the spring of 1882. There was other evidence, but the foregoing facts, though a very meager synopsis, will serve for an understanding of the rulings made in this opinion. Nothing was proved as to tender or payment of freight, or as to the time and place at which, according to custom, the freight was payable. The jury found for the defendant, and a motion was made for a new trial, on the general grounds, and on certain charges of the court and refusals to charge as requested.

Digitized by Google

1. The great and controlling question in the case was as to whether the wood was delivered to the company, and accepted by it for shipment. The court charged the jury, in substance, that delivery is complete when, actually or in legal effect, the possession is surrendered to the carrier, and the owner abandons all control over the goods until the carriage is completed, and that not until this has been done does the responsibility of the carrier commence, either for loss or detention. Also, that if deposit along the line was made for the convenience of the owner in delivering at some future time, and if the carrier did not assume possession and custody to the exclusion of the owner, the wood was not accepted for shipment, and the carrier's responsibility would not begin until something more was done to accomplish the bailment. Also, that if plaintiff's vendors deposited the wood in this way, and continued to exercise acts inconsistent with its exclusive possession and custody by the company as a common carrier, the bailment would not begin until there was a complete surrender by the plaintiff to the carrier for shipment. Under the facts in evidence, and according to the authorities, these instructions were correct. Hutch. Carr. §§ 82-99, inclusive; 2 Ror. R. R. 1279 et seq. We think it clearly appears that under the system which both parties had in contemplation it was expected that before delivery was consummated, the owner would either load the cars himself, or have it done by the company at his expense, after special request. Delivery on board the cars, according to that system, would terminate the plaintiff's possession, and be the inception of possession by the carrier. Wells v. Railroad Co., 6 Jones, (N. C.) 47. Should it be thought that Railroad Co. v. Hines, 19 Ga. 208, or Fleming v. Hammond, Id. 145, militates with this view, the circumstances of difference is that in these cases the shipper had done all that the prevailing system required of him. He neither had to supply labor for altering the situation of the goods, nor to make any special request that the carrier would supply it at his expense. Moreover, there is a high degree of improbability that a railroad company or its patrons would ever consider that wood which was scattered along several miles of the line of railway, awaiting future transportation, was in the possession of the company as a common carrier. If in the company's possession, it would be at the company's risk, and loss of the same by fire, theft, etc., would be chargeable to the company. Perhaps it might be reasonable, in the absence of custom to the contrary, to consider the wood as delivered in this way if immediate transportation of the whole was expected; but in this case it was unknown to any of the parties when the company would be ready to effect the transportation. No definite time was ever fixed, and according to the evidence several trains of cars would be required to move such a quantity of wood, a train-load being about 100 cords. The plaintiff, under the evidence, might have had a cause of action against the company for not receiving the wood, or for not furnishing cars in which to load it for delivery to the company, but this action has no such scope.

2. The court charged: "There is no contention in this case that the defendant was bound by any custom to accept delivery of wood delivered along its route between stations, and forward the same in due course as in case of goods actually received and receipted for transmission to its regular depot or station." This is complained of. The court, we take it, meant that there was no such contention at the trial, and, if this was true, it was the right of the court to state it to the jury. We are nowhere certified that it was not true. Brantly v. Huff, 62 Ga. 532 (7). Besides, correctly understood, this instruction means simply, as we conjecture, that the plaintiff relied on a constructive, rather than an actual, delivery to the company, and in truth the latter species of delivery is all of which the evidence affords any glimpse.

3. Passing over the fifth ground of the motion, which we do not understand, the next topic of the charge is as to damages, touching which, with reference to the wood wholly lost, the court indicated as the measure of damages the value at the place of destination, and at the time when delivery ought to have been made, less the freight; and, as to the wood delayed but finally delivered, the difference between the value at the point of shipment and the point of destination after the lapse of a reasonable time for effecting the carriage, less the freight. The first measure was undoubtedly correct, and the second was incorrect only in that it was more favorable to the plaintiff than the measure prescribed by law. As at any and all times the wood was worth more at Atlanta than at the point of shipment, the difference between the two values at Atlanta would be less than the difference between the higher of these and the value at the point of shipment. It is plain that of any three values the difference between the highest and the lowest is more than the difference between the highest and the one immediately below it. As to deducting freight, this would have been wrong if the freight had been paid, as to which there was no evidence.

4. The request to charge that if the wood was delivered to the company the company would be estopped to deny that there was custom to ship it, was not applicable, because the whole pressure was upon the question of delivery, and, if there was delivery, whether there was a custom to ship or not would be immaterial. The request to charge that the company would be bound to ship the wood in its turn did not state the law correctly. The plaintiff would have no right of action if the wood was shipped in a reasonable time, whether in its turn or not. The request to charge the general proposition that the railroad was a common carrier, bound to act with fairness, etc., was a barren generality, and

Digitized by Google

therefore not needed for the case. The request to charge that the defendant was bound to furnish sufficient rolling stock to haul the ordinary business offered it, would have been appropriate had the action been for refusing to receive, and not for failure to carry after receiving. The general grounds that the verdict was contrary to law, evidence, etc., were correctly overruled with the rest, and there was no error in refusing a new trial. Judgment affirmed.

(82 Ga. 320)

CAMPBELL v. METROPOLITAN ST. R. CO.

(*Supreme Court of Georgia.* July 22, 1889.)

HORSE RAILROADS—DAMAGE TO PROPERTY.

1. The constitution of Georgia adopted in 1877 provides that private property shall not be taken or damaged for public use without just compensation. *Held*, that the owner of property which is damaged by the construction or operation of a street railway has a right of recovery though his property is not taken.

2. The lawful construction and operation of a horse railway in the streets of a city does not entitle the owner of property which is damaged thereby to compensation unless special damage is alleged and shown; and for this purpose evidence is admissible to prove that the damage was caused by noise, smoke, dust, and the like; but these must have resulted in actual damage, and not merely in annoyance or inconvenience.

3. Defendant could lay its track in the street wherever it was for its best interest; and that portion of the complaint which alleged that the track was ordered to be laid as close as could be to plaintiff's premises was demurrable, as was also the allegation that the defendant drove its horses under the lash, causing them to rear and pitch upon the sidewalk in front of plaintiff's property, to the annoyance of plaintiff and his family; as this was not an allegation of damage to plaintiff's property.

Error from city court of Atlanta; VAN EPPS, Judge.

Geo. T. Fry and *F. A. Arnold*, for plaintiff in error. *Haygood & Douglass* and *E. W. Martin*, *contra.*

SIMMONS, J. Campbell brought his action for damages against the defendant in the city court of Atlanta, and alleged in his declaration, in substance, that he was the owner of a certain house and lot on Fraser street, in the city of Atlanta, which house had been occupied by him for five years past as a residence; that the defendant, within the present year, had constructed and was operating a street railroad on said street; that the western rail of the track of said railroad was laid within 13 inches of the curb-stone on the petitioner's side of the street, and in front of his lot; that the location of said railroad so near the curb-stone and sidewalk in front of the petitioner's property had totally destroyed the comfortable and safe occupancy of said property as a family residence; that the cars on this road are drawn by animal power, and begin running daily at 6 o'clock A. M., and continue to run until 10 o'clock P. M.; that the cars pass the house going to and from the city every five minutes between the hours aforesaid, and often as many as four, five, or six cars follow in trains, one immediately after the other. This unceasing passage of cars so near the entire front of the petitioner's property effectually cuts off all safe entrance to or exit from the front of said property to any kind of vehicle. Before the locating of said track the petitioner could always have his family supplies delivered in wagons in front of his door, or through the front of his lot in his premises; but since said track was located he has been at great inconvenience and great danger to life and limb to himself, his wife and children and servants, and has been compelled to have all such articles delivered on the opposite side of the street, and has been compelled to cross said street and receive from the delivery wagons the articles aforesaid. For the same reasons he cannot safely stop a buggy or carriage at the curb-stone in front of his house for the purpose of receiving or discharging the members of his family or his friends, but is compelled to stop such vehicles on the opposite side, where they must cross the railroad track to enter or leave his premises, and thus expose them to the danger of being run over by said cars, and to the heat, cold, or rain. The petitioner further alleges that to each street-car there are attached two horses or mules, with bells suspended from their harness, which are constantly ringing; that this, together with the clatter of the animals' feet on the stone pavement between the rails, and the clatter and rattle of the car-wheels, creates such a noise and confusion as to take from him and his family every pleasure and comfort of their home, and that there is no rest or sleep for either the sick or well members of his family between the hours aforesaid. He further shows that the rush of all these cars and animals passing his door often produces a blinding cloud of dust, greatly to the discomfort of his family, and that the dust and dirt settles upon the floor, walls, windows, and door, outside and inside of his house, and upon the carpets, curtains, beds, and clothing of his family, greatly to his and their annoyance and discomfort and his injury and damage; that all of said discomforts and annoyances, injuries and damages to health and property, and dangers to life and limb, are actually in existence, and are tangible, real, and permanent in their character, and are occasioned solely by the defendant's having constructed said railroad in the manner and at the place it did, and the operating of said road as herein set forth. The defendant demurred to this declaration, whereupon the plaintiff amended as follows: "The plaintiff amends his petition, and says (1) that the street on which said street-car line is located is a very narrow street, not more than 19 feet between the curb-stones on the sidewalk, and was unsuited to the purpose for which the defendants have appropriated it; (2) the defendants moved their street-car track from a broader street, only one block away, to its present location; (3) when the defendants were preparing to lay down their track on said street, the plaintiff protested

Digitized by Google

against the track being laid down so near his premises, whereupon the president of said defendant company ordered the track to be laid as close as it could be laid to plaintiff's property, in order that the plaintiff might be taught that he was not the boss in that case; (4) plaintiff shows that his property is damaged in the sum of two thousand dollars, by reason of the laying down and operating of said street railway in the manner specified in the original declaration, and that this injury is special to the plaintiff, the public at large not participating in said injury; (5) that, in bringing their cars into the center of the city, the defendants often double their teams in front of Campbell's property, the same being on an up grade, and often drive their horses and mules under the lash, causing the animals and mules to plunge, rear, pitch, and jump upon the sidewalk along and in front of the plaintiff's property and house, greatly to the annoyance and disturbance of plaintiff and his family." The defendant demurred specially to this amendment, on the grounds that the amendment set up a new cause of action, and that it set out no ground for recovery in law; and demurred to the declaration as amended, as not sufficient in law. The court sustained the special demurrers to the third and fifth amendments, and overruled the special demurrers as to the first, second, and fourth amendments, and then sustained the general demurrer to the declaration as amended; to which ruling the plaintiff excepted, and assigned error thereon.

The main point argued before us in this case was whether the plaintiff, under the facts alleged in his declaration, had a right to recover damages from the defendant. It was insisted by counsel for the defendant in error that he could not recover damages because the legislature had granted a charter to the defendant, which charter authorized the defendant to construct and operate a street railroad, by and with the consent of the mayor and council, in and upon any of the streets in said city, and because the constructing and operating of a street railroad, the cars of the said railroad being drawn by horses, was not a new use or burden upon the streets of said city; that, having the legislative permission, and being no new use or burden, although the plaintiff's property may have been damaged by the construction and operation of said railroad, he could not recover. We cannot agree with counsel for the defendant in error in this view of the law as it now stands. Their construction of the law would have been correct before the adoption of the new constitution in 1877. That constitution prescribed a new rule on this subject. The rule under the old constitution was that private property should not be "taken" for public use without just compensation. The new rule, under the present constitution, is that private property shall not be "taken or damaged." Under the old rule, unless the property was taken, the individual could not recover, however much the property may have been damaged. Under the new rule, whether the property is taken or not, if it has been damaged by reason of the construction or operation of any improvements made for the use of the public, the owner can recover whatever damage the property has actually sustained. So we think it does not matter whether the construction and operation of the street railroad is a new use or burden on the street or not. If, by reason of such construction or operation, the private property of an individual is damaged, he is entitled to recover therefor. Before the adoption of this new rule, municipal corporations could change the grade of the streets, and thereby damage the property of individuals, and they had no recourse; but since the adoption of the new rule, this court has decided that if a municipal corporation changes the grade of a street so as to damage the property of an individual, he has a right to recover. Atlanta v. Green, 67 Ga. 386. And this has been held by the courts of other states, which have a similar constitutional provision on this subject. If these decisions are correct, (and we have no doubt of it,) we do not see why an individual who has been damaged by reason of improvements put on the street in the shape of a street railroad cannot recover therefor, as well as an individual who has been damaged by improvements being made in the grade of the street. After much reflection, and a review of all the authorities we can find upon the subject, we think the following propositions will be found to be the true law of the case in this state, under the new rule above alluded to:

1. The construction and operation of a horse railway in the public streets of a city, by authority of the legislature and the consent of the city government, whether it be or not a new burden imposed upon the streets, does not entitle a private individual to compensation therefor unless the construction or operation of such railway works special damage to his property. If special damage is caused to property along the line of such railway by the construction or operation thereof, in our opinion the owner of the property is entitled to recover the amount of the damages which his property has actually sustained. Applying this rule to the case at bar, we find that the declaration asserts, in substance, that the plaintiff, by reason of the construction and operation of this railroad, was virtually deprived of ingress and egress to and from his property, and that his property, for the reason aforesaid, was damaged to the extent of $2,000. If these allegations are true, (and the demurrer admits them to be true for the purposes of this case,) we do not see why the plaintiff would not be entitled to recover. The supreme court of Ohio, in the case of Railway Co. v. Cumminsville, 14 Ohio St. 523, in discussing this subject uses the following language: "There exists in the owners of adjoining lots a private right to free access to their lands and buildings from the street, as the same was and would have continued to be according to the mode of its orig-

Digitized by Google

inal use and appropriation by the public, and there can be no change of such mode and adaptation of the street to new vehicles and methods of carriage and transportation which shall materially impair or destroy such right, unless by the consent of the owners, or upon the payment of due compensation to them." The supreme court of Wisconsin, in the case of Hobart v. Railroad Co., 27 Wis. 200, after copying the above extract, approves it as follows: "It is a doctrine which imposes no unreasonable restriction upon the rights of the public in the use of its streets and highways, and which at the same time affords that protection to private or individual rights which the spirit and principles of our constitution and form of government require. It is possible, as has been suggested, that it may sometimes prove embarrassing in practice to determine when and to what extent the private rights of adjoining owners have been infringed, but such embarrassments are inseparable from the consideration and determination of all similar questions. The difficulties in the way of ascertaining and determining them by no means disprove their existence or show that they ought not to be recognized and enforced." We quote these extracts with approval, and think they are even more applicable in this state than in those states, because the new rule as to damage to private property is not expressly embraced in the constitutions of those states.

2. We think any evidence would be admissible that would tend to show damage to the property. If noise, smoke, dust, cinders, or things of that sort could be shown to have damaged the property itself, then they should be considered by the jury in arriving at the amount of the recovery. If, however, they amount simply to an inconvenience or discomfort to the occupants of the property, they would not be an element of damages, and should not be considered by the jury.

3. There was no error in sustaining the special demurrer to the third and fifth grounds of the amendment to the declaration. The third ground alleges, in substance, that the plaintiff protested against the track being laid too near his premises, and that the defendant ordered the track to be laid as close as could be to this property. We think that if the railroad company had permission from the legislature and the city council, it could lay its track in the street wherever in its opinion it was for the best interest of the company to lay it. At the same time, if laying it near the sidewalk of one of the abutting owners should cause special damage to his property, the company would be liable for the damage.

The fifth amendment alleges that the defendant often doubled its teams it front of the plaintiff's property, and, the street being an up grade, often drove its horses and mules under the lash, causing them to rear, plunge, pitch, and jump upon the sidewalk in front of the plaintiff's property, greatly to the annoyance and disturbance of himself and his family. There was no error in sustaining the special demurrer to this amendment. It does not allege that this damaged the property, but simply alleges that it was an annoyance to the occupants of the property; and, as before said, this is not an element of damage to the owners of the property. For the plaintiff to recover, the damage must be to the property, and not merely an inconvenience or annoyance to himself. If the matters complained of in this amendment damaged the property, the jury might consider them. If they simply annoyed or inconvenienced the persons occupying the property, they should not be considered in estimating the damages to the property.

Judgment reversed.

(82 Ga. 397)

MIZE v. SPEIGHT.

(*Supreme Court of Georgia.* July 8, 1889.)

FENCES—ADOPTION OF STOCK LAW.

1. Where defendant, in an action of replevin, justified under Rev. Code Ga. § 1451, authorizing the impounding of strays until the damages are paid by the owner under the stock law, and plaintiff, to show that the law was not lawfully adopted, introduced the petition of freeholders for an election for "stock law" under Code Ga. § 1455, providing that whenever 15 freeholders or a majority of freeholders in any militia district petition for the benefits of fence or stock law, the ordinary shall hold an election, etc., and also the tax-digest of that county, to show that only 13 freeholders signed said petition, the judgment will not be reversed on *certiorari* when the record shows that the petition was signed by 21 persons, but does not contain any extract from the tax-digest, or the names of the freeholders in that district taken therefrom, or show that none of the petitioners had become freeholders since the closing of the last tax returns.

2. Rev. Code Ga. § 1455, provides that whenever 15 or a majority of freeholders in any militia district shall petition the ordinary of the county in which said district is located for the benefit of the fence law, he shall give notice of said petition by publication for 20 days, and designate a day to hold an election, etc. *Held*, that an order for an election, given on the same day that the petition was filed, is irregular, but not illegal, when notice of both the petition and election was published and no complaint was made that any voter in the district failed to receive such notice.

Error from superior court, Sumter county; FORT, Judge.

Replevin by one Mize against Speight for certain cattle impounded by him under Code Ga. § 1451, providing that if any horse, mule, cow, etc., "shall commit any trespass or damage, or shall be found going at large on the premises of any other person than the owner of such animals or stock, * * * it shall be lawful for the owner of such premises to impound such animals, and retain them until the owner thereof shall make full satisfaction or reparation for the damages committed by such animals, including all costs and expenses," etc. Plaintiff claimed that the stock law was not legally in force in the district where the parties resided, under Code Ga. § 1455, which provides that "whenever so many as fifteen freeholders or a majority of freeholders in any militia district of this state shall petition the ordinary of any county in which said district is located for

Digitized by Google

the benefits of the provision of the foregoing sections, [1449–1454,] said ordinary shall give notice of said petition by advertising the same in the public gazette, * * * and by notices at all election precincts and public places in said district, which said notice shall be published for twenty days, and said ordinary shall at once proceed to have an election held in said militia district at as early a day as practicable, to be designated by him after said notices have been given," etc. Judgment was given for defendant, and plaintiff brought *certiorari* to the superior court, where the judgment below was affirmed. From the judgment of the superior court plaintiff brings this writ of error.

L. J. Blalock, for plaintiff in error. *E. F. Hinton*, for defendant in error.

SIMMONS, J. Mize sued out a possessory warrant against Speight, to recover certain cattle. On the hearing it appeared that Speight found the cattle on his land, put them in his inclosure, and demanded of the plaintiff damages before he would deliver the cattle to him. He introduced an order of the ordinary declaring that the stock law was of force in that militia district. The plaintiff introduced the original petition of the freeholders, asking for an election, which petition he alleged, in connection with the tax-digest of said county, which was introduced in evidence, showed that only 13 freeholders signed the petition; the petition not containing 15, or a majority of the freeholders of the district, as the law requires. The court awarded possession of the cattle to the defendant. The plaintiff carried the case by *certiorari* to the superior court, and assigned error as follows: (1) "The ordering of the election by the ordinary was illegal; the petition therefor not containing the names of fifteen, or a majority, of the freeholders." (The copy of the petition in the record appears to be signed by 21 persons, and no extract from the tax-digest said to be introduced appears.) (2) "The order for the election was passed on the same day the petition therefor was filed, when the law requires that the petition shall be published twenty days before the election was ordered." Other exceptions were also taken in the petition for *certiorari*, but, as they were not argued or relied upon here, it is unnecessary to mention them.

1. The plaintiff in error relied principally upon the ground that 15, or a majority, of the freeholders of the district not having signed the petition for the election, the order of the ordinary ordering the election upon the question of fence or stock law was illegal. Without deciding the question whether the plaintiff could go behind the judgment of the ordinary, and show that 15, or a majority, of the freeholders had not signed such petition, or without deciding the question made by the defendant in error, that the judgment of the ordinary cannot be collaterally attacked in this proceeding, we affirm the judgment of the trial judge, upon the ground that the plaintiff did not show, so far as this record discloses, on the trial in the court below, that 15 freeholders did not sign said petition for said election. He says in his petition for *certiorari*, that the petition to the ordinary, in connection with the tax-digest of said county, shows that only 13 freeholders signed said petition. There is no extract from said tax-digest in this record, and we cannot say whether there were only 13 freeholders to said petition or not. Even had the tax-books shown that only 13 of the persons who signed the petition were freeholders, that would not have been conclusive. Under the laws of this state, tax returns are made between the 1st day of April and the 1st day of July of each year. This trial was had in November. It may have been true that, according to the tax-digest, only 13 of the persons who signed the petition for an election were freeholders of that district between the 1st of April and July, but it does not follow that some of the persons who signed this petition did not become freeholders in that district after the 1st day of July, and were not in fact freeholders in that district at the time this petition was signed in November. The plaintiff should have shown on the trial below who the freeholders were in that district, according to the tax-digest, and put their names in the record, and should have gone further, and proved that none of the persons whose names were attached to the petition, and who were not on the tax-digest, had become freeholders since the closing of the tax-digest in July.

2. It is insisted by counsel for the plaintiff in error that the election was illegal, because the ordinary issued the second order for the election the same day that the petition was filed, and that he could not legally order an election until he had given notice of the petition by advertising the same for 20 days. While this may be true under a strict construction of the act, we do not think the failure to advertise the notice for 20 days vitiates the election. The notice of the petition was given, and notice of the election was also given at the same time. There is no complaint that any voter in the district did not have notice that the petition for the election had been filed, or that any voter did not have notice that an election was ordered. It was a mere irregularity, and did not render the result of the election void. Judgment affirmed.

(80 Ga. 264)

CHATTANOOGA, R. & C. R. CO. v. JONES.

(*Supreme Court of Georgia.* Feb. 18, 1888.)[1]

EMINENT DOMAIN—COMPENSATION.

1. In an action to restrain a railroad company from building its railway on complainant's land without his consent, or payment of the damages occasioned thereby, a bill alleged ownership of the land, and that defendant entered thereon and forcibly proceeded to construct its road-bed, though notified to desist; that a jury, in proceedings to condemn the right of way, had assessed the dam-

[1] Publication delayed through failure to receive copy.

Digitized by Google

ages to complainant at $800, after petition made by defendant to the sheriff, as provided in its charter, but that, while the proceedings were pending, defendant continued the work of building its road-bed upon complainant's land, without his consent, and refused to pay the amount so assessed, although demanded. *Held*, that an injunction was properly granted.

2. Defendant answered that the award of the jury was grossly excessive, and that it had appealed therefrom, and offered to pay the amount so awarded into court, subject to the order of the court after the appeal should be heard, and prayed that complainant give a bond to protect defendant in case the award should be reduced on appeal. *Held*, that an order dissolving the injunction on payment of $800 by defendant into court, subject to the event of the appeal, and directing the clerk of court to pay said sum to complainant upon his filing a bond payable to defendant, and conditioned to repay it, or any part thereof that should be found due upon determination of the appeal, was proper.

Error from superior court, Polk county; MADDOX, Judge.

John B. Jones filed his bill in the superior court of Polk county against the Chattanooga, Rome & Columbus Railroad Company, alleging that he was owner of certain land in Polk county, Ga.; that defendant entered on his land, and began to construct its road-bed thereon, and forcibly proceeded with such construction in spite of the notice which he gave it to desist; that it then petitioned the sheriff of said county, stating that it and complainant could not agree upon the price to be paid for the right of way through his land, and asking that the sheriff summon a jury of freeholders to assess the damages to complainant, under the provisions of its charter; that the damages were assessed at $800; and in the mean time defendant had continued its work upon his land without his consent, etc., and that it is still continuing such work, and refuses to pay him the amount assessed by the jury, though he has frequently demanded the same; and praying for a writ of injunction. Defendant demurred to the bill on the grounds that its office and place of business were in Floyd county, Ga.; that the court had no jurisdiction; that complainant had an adequate and complete remedy at law; and that there was no equity in complainant's bill; and also answered the bill, claiming that, being unable to agree with complainant upon the price to be paid him for right of way, it began proceedings to condemn the right of way, as set forth in the bill; that complainant became a party to said proceedings, and while they were pending defendant continued its work upon his land, in his presence, and with his knowledge, and he took no steps to prevent by law the progress of the work; that the award of the jury was grossly excessive, and defendant had appealed therefrom; that it had expended much money in building its line of road, and, if compelled to divert it and go around the land of complainant, would incur great loss; that it was willing to pay just compensation, and, if the court was of opinion that it must actually pay the amount of the award before it can proceed further, asked leave to pay into court the amount of the award, subject to the order of the court after the appeal shall have been heard; and, if the court decreed that it was bound to pay the amount of the award over to complainant, prayed that complainant be required to give such bond and security as would protect it in the event of a reduction in the amount of the award being made on the trial of the appeal. The chancellor ordered that, upon payment by defendant of $800 into the superior court of Polk county, subject to the event of the appeal case, the restraining order theretofore granted should be dissolved, but until said payment to remain of full force and effect; and that the clerk of the superior court of said county should pay over said sum to complainant upon his filing a bond with good security in the sum of $800, payable to defendant, and conditioned to refund to it any part of said sum that might be found due to it upon the determination of the appeal. Both parties bring error.

W. C. Bunn and *I. F. Thompson*, for complainant. *Dabney & Fouche*, for defendant.

SIMMONS, J. The court below did not abuse its discretion in granting the injunction in this case upon the terms set out in the order. We think, under the facts and circumstances alleged in the bill and answer, that the terms imposed on the complainant below and on the respondent were proper and wise; and the judgment is affirmed, both as to the original bill of exceptions and as to the cross-bill. Judgment affirmed.

(83 Ga. 343)

WHITE v. KENNON *et al.*

(*Supreme Court of Georgia.* July 8, 1889.)

NEGLIGENCE OF SERVANT.

1. In an action for damages for injuries sustained by the negligence of defendants the complaint alleged that plaintiff had charge of the track of defendants' tram-road, which it was his duty to repair; that it was in a "fearfully bad condition;" that he could not repair all the road within the time he worked, but had improved it so as to be safe; that on resuming work after a week's illness he was employed near the saw-mill, and had not been over the entire track for two weeks or more; that when going out on a load of ties the train ran into a bad place in the track, jolted the ties, threw him from the cars, and severely injured him; that the engineer, whose duty and habit it was to inform him of bad places in the track, knew of this one, and that plaintiff was ignorant of it, but did not inform him thereof until just as the accident occurred, and too late for him to avoid injury. *Held*, that a demurrer was properly sustained in that plaintiff knew or ought to have known the condition of the track.

2. The engineer being a fellow-servant with plaintiff in defendants' employ, defendants are not liable for injuries sustained by reason of any negligence on the engineer's part.[1]

---

[1] That, in the absence of statute, the negligence of a fellow-servant is one of the risks assumed by an employé for which the master is not liable, see Shea v. Railroad Co., (Pa.) 13 Atl. Rep. 193, and note; Railroad Co. v. McMannon, (Ky.) 8 S. W. Rep. 18, and note; Keith v. Coal Co., (Ga.) 7 S. E. Rep. 166, and note. See, also, exhaustive note to Farmer v. Railway Co., (Iowa,) 24 N. W. Rep. 895; Anderson v. Bennett, (Or.) 19 Pac. Rep. 765.

Digitized by Google

Error from superior court, Pierce county; ATKINSON, Judge.

J. C. Nicholls and *J. L. Sweat*, for plaintiff in error. *F. H. Harris*, for defendants in error.

SIMMONS, J. White sued Kennon & Co. for damages. In his declaration he alleged, in substance, that said firm had a steam saw-mill at Hoboken, and a tram-road running a distance of 12 miles into the country, on which engines and truck-cars were run to haul logs to the mill; that Walter Kennon was employed by said company as engineer in charge of the train; and by the failure and neglect of said firm to keep their said tram-road in good and safe condition, and by the wanton, reckless, and careless running of said train by said engineer, the petitioner was damaged $5,000, said petitioner being free from fault. He alleges that he was employed to take charge of a gang of hands and keep up the track of said tram-road; that said road was in "a fearfully bad condition;" and that he could not, within the time he worked, put the road in good condition, but had so improved it that it was considered safe; that he was taken sick in June, and was kept at home a week, but the gang continued at work during his absence, under a foreman; that after he returned to the mill, and resumed his work, he was kept employed on the track nearest the mill, and had not been over all the road for two weeks or more, and was not informed by the engineer of the bad place in the track, where the accident occurred; that it was the duty and the habit of said engineer to keep him informed about the bad places in the road in order that he might have them repaired; that he was required to go out on a train with a load of ties, and had to ride on the ties; and, while on this journey, the train ran into a bad place in the track, mashed down the track, jolted the ties and caused them to fall off, thus throwing him from the car, and injuring him severely; that the engineer knew of this bad place in the road, and knew that the petitioner was ignorant of it, and gave him no notice of it until just as the accident was about to occur, when he called to him to look out for a bad place, but that it was impossible for him, on account of the noise of the train, to understand what the engineer said, so as to avoid being injured. This declaration was demurred to on the grounds (1) that no cause of action was set forth therein; and (2) that there was nothing in the declaration which clearly and distinctly set forth the plaintiff's demand against the defendants, or put the defendants on notice wherein they were to defend, or that they were in any way liable to the plaintiff. The demurrer was sustained, and the plaintiff excepted. There was no error in sustaining this demurrer to the declaration. The plaintiff shows by the declaration that he had charge of the track, and that it was his duty to keep it in repair. He further shows that it was in a "fearfully bad condition," all of which was as well known to him as it was to the engineer or the defendants. The law of this state concerning actions of this sort against railroad companies is not applicable to the present case, but it is controlled by the principles of the general law between master and servant. The allegations made by the plaintiff in this declaration show that he either knew or ought to have known the danger of riding on this track on top of a load of cross-ties, it being his duty, according to the allegations in the declaration, to repair the track of said road. This being true, we think, under the law, he is not entitled to recover. The general rule is that an employé cannot recover for an injury caused by the use of defective machinery, defective appliances or tools, when he has knowledge of such defects, and especially when his knowledge is equal to or better than that of his employer. Nor do we think he was entitled to recover on account of the alleged negligence of the engineer. According to the facts alleged in the petition the engineer was a co-employé or fellow-servant of the plaintiff. Being a co-employé or fellow-servant, he cannot recover against the defendants for the negligence of his co-employé or fellow-servant. Judgment affirmed.

(83 Ga. 301)

MITCHELL *et al. v.* FULLINGTON.

(*Supreme Court of Georgia.* July 8, 1889.)

PAROL EVIDENCE TO EXPLAIN DEED—AMENDMENT OF PLEADING.

1. Plaintiffs sought to recover land in possession of defendant, which they alleged had been set apart to them as a homestead. They offered to prove that the deed of defendant was given by them as security for a debt which had been paid before suit brought. The declaration did not allege fraud in procuring the deed. *Held*, that plaintiffs, as parties to the deed, were estopped to deny it under Code Ga. § 3809, which provides that a deed absolute on its face, and accompanied with possession, shall not be proved (at the instance of the parties) by parol evidence to be a mortgage only, unless fraud in its procurement is the issue to be tried.

2. In such action, where defendant sets up plaintiffs' deed, an offer to amend the declaration with a prayer for the cancellation of the deed, without describing the deed and stating fully the grounds of the prayer, is insufficient.

Error from superior court, Dooly county; ROBERTS, Judge.

Duncan & Miller, for plaintiffs in error. *Martin & Smith* and *John B. Holmes*, for defendant in error.

SIMMONS, J. Mitchell and his wife, Rebecca, in their own right, and Mitchell as trustee under the homestead laws for his wife and minor children, all constituting his family, brought complaint against Fullington for a tract of land, claiming the land as part of a homestead set apart to them on January 12, 1870. On the trial the original homestead papers were offered in evidence, and were objected to by the defendant upon several grounds. The court sustained the objection.

Digitized by Google

The plaintiffs then offered to amend by striking the names of all the beneficiaries under the homestead except Mitchell and his wife. Whether this amendment was allowed or not does not appear from the record. If it was disallowed, the record does not show that any exception was taken to its rejection. He offered to show by proof that the deed held by Fullington had been made to him by the plaintiff and his wife as security for a debt, and that the debt had been paid before the commencement of the suit. He further offered to amend his declaration and pray for a cancellation of the deed made to Fullington before the commencement of the suit. The court rejected the evidence, and refused to allow the amendment; to which ruling the plaintiffs excepted. The court then granted a nonsuit.

1. The only grounds of error assigned in the bill of exceptions are the rejection of the evidence offered to show that the deed was made as security for a debt, and that the debt had been paid, and the refusal to allow the amendment praying for cancellation. There was no error in rejecting the evidence offered, under the facts disclosed in the record. The record does not show whether the deed made by Mitchell and his wife to Fullington was made under section 1969 of the Code or not. If made under that section, Fullington should have executed a bond for titles to Mitchell and his wife. The record does not show that such a bond for titles was given by Fullington. Nor does it show that the plaintiffs tendered the deed to Fullington in evidence so as to inform the court of the terms of the deed. Nor does it show whether the evidence offered was parol or documentary. Nor does it show whether or not the plaintiffs retained possession of the land when they made the deed to Fullington. Judging from the facts disclosed in the record, the deed was not made under section 1969 of the Code. If not made under that section, but made for the purpose of securing a debt, it would be what was known before the passage of the act embodied in section 1969 as an equitable mortgage, conveying the title of the land to Fullington, with the equitable right of redemption on the part of Mitchell and his wife when they paid the debt to Fullington. From what we can gather from this meager record, the deed to Fullington was absolute on its face, and accompanied with possession of the property by Fullington. If it was an absolute deed, and Fullington had possession of the land, then, under section 3809 of the Code, it could not, under the state of the pleadings in this case, be "proved by parol evidence to be a mortgage only." And, as said before, this record does not show whether the evidence offered was parol or not.

2. Nor was there any error in refusing the amendment offered, praying for a cancellation of the deed. This prayer was the only amendment proposed which was disallowed, according to the record. A simple prayer for cancellation, without showing the grounds upon which the prayer is predicated, is not sufficient. The amendment should have described the deed, when the deed was made, by whom it was made, the terms thereof, and the consideration. It should have shown that the deed was made as a security for a debt, and that the debt had been paid. It was not sufficient simply to pray for a cancellation without describing the deed or giving any reason in the amendment for its cancellation. In affirming this judgment, we do not intend to intimate that the plaintiffs have no right of recovery if the deed was made as security for a debt and they have paid off the debt. If these facts are true, and if they commence the proper action, they would be entitled to recover the land. Judgment affirmed.

(82 Ga. 730)

CLOUD v. KENDRICK.

(*Supreme Court of Georgia.* July 8, 1889.)

APPLICATION OF PAYMENTS.

Where a judgment debtor voluntarily pays money to the sheriff with an order to credit it on the execution, and a proceeding is instituted by another judgment creditor to have the money applied on his judgment, the debtor cannot, as against the first creditor, claim the money on the ground that it is the proceeds of cotton raised on his homestead, as title to the money passed by delivery to the sheriff, who was the collecting agent of the creditor to whose judgment it was ordered to be applied.

Error from superior court, Macon county; FORT, Judge.

John W. Haygood, by *Harrison & Peeples*, for plaintiff in error. *F. T. Snead, contra.*

SIMMONS, J. In 1868, Cloud took out a homestead in certain land, and an exemption in certain personal property. The land was afterwards sold by order of court, and the proceeds reinvested in other land. The personal property had been used, and some of the horses and mules exchanged for others. In 1886, Kendrick obtained a judgment against Cloud and others. Execution was issued thereon, and placed in the hands of the sheriff. Subsequent to this, Cloud voluntarily paid the sheriff $45 in money, and ordered him to credit it on the *fi. fa.* of Kendrick, which the sheriff did. It appears that one Smith also had a judgment against Cloud, and that he placed his execution in the hands of the sheriff, and claimed the money paid over by Cloud. The sheriff refusing to pay the same to him, Smith brought a rule against him. After the rule was brought, Cloud had himself made a party thereto, and claimed the money as the head of a family, alleging that it was the proceeds of two bales of cotton which had been raised upon the homestead land. It appears that the main issue in the court below was whether Cloud was entitled to the money, or whether Kendrick was entitled to it. The court decided that Kendrick was entitled to it, and ordered it paid over to him by the sheriff; to which ruling Cloud excepted, and brought the case here. We think

Digitized by Google

the court decided right. Cloud voluntarily paid over to the sheriff the money, and directed him to credit it on the *fi. fa.* of Kendrick, which was done in accordance with his orders. It was an appropriation of the money made by Cloud. It is true, it did not pass into the hands of Kendrick, but it was held up under the claim of another creditor of Cloud; but, as far as Cloud was concerned, we think that when he paid the money to the sheriff, and directed him to pay it to Kendrick and credit it on Kendrick's *fi. fa.*, it was then too late for him to reclaim it. The sheriff was Kendrick's agent, made so by law, for the collection of this money, and he had no notice of want of title to the same in Cloud, the same being money, to which title passes by delivery. Judgment affirmed.

(82 Ga. 727)

DUPREE v. MAYOR, ETC., OF BRUNSWICK.

(*Supreme Court of Georgia.* July 8, 1889.)

REMOVAL OF DANGEROUS BUILDINGS BY CITY.

A city charter, which authorizes the mayor and council "to remove any forge, smith-shop, or other structure within the city, when in their opinion it shall be necessary to insure against fire," confers a power which can only be used in case of absolute necessity or grave emergency; and it authorizes the mayor and council to remove a dangerous forge, but not the building in which it is situated, unless it appears that the building is of itself dangerous, or that the owner persists in using it as a blacksmith shop.

Error from superior court, Glynn county; ATKINSON, Judge.

F. H. Harris, for plaintiff in error. *Crovatt & Whitfield* and *Courtland Symmes*, by *J. H. Lumpkin*, for defendants in error.

SIMMONS, J. It appears from the record that Dupree was a blacksmith in the city of Brunswick, and that for the purpose of carrying on his business he erected within the city limits, but not within the fire limits, a blacksmith shop, and placed a forge therein. It was erected between a steam laundry and a grocery store. Before the building was completed, and the forge erected, it appears that Dupree received notice from some of the officers of the corporation not to erect said blacksmith shop at that place, on account of the danger of fire to the adjacent buildings. It seems that he paid no attention to this notice, but continued his work upon the building and forge; whereupon the mayor and council ordered the town marshal to remove the building and forge, because in their opinion it would greatly increase the risk of fire to the adjacent buildings. Dupree filed his petition to the superior court, and asked that the officers of the city government be enjoined from removing this building and forge, insisting that they had no power or authority in this summary manner to pass upon his rights, and destroy his property, without a judicial investigation. The trial judge refused the injunction, and the plaintiff excepted. The mayor and council claim that they have the right to remove this building and forge, under section 51 of their charter, which is as follows: "The said mayor and council shall have the authority and power to remove any forge, smith-shop, or other structure within the city, where in their opinion it shall be necessary to insure against fire; and shall have the power to cause any stove-pipe, or any other thing or matter that will endanger the city as to fire, to be removed or remedied, as their prudence shall dictate." Without deciding whether the mayor and council have this great power conferred on them which they claim, or whether the legislature has power to confer it, we hold that if they have such power and can remove any building in the city when "in their opinion it shall be necessary to insure against fire, "they can only do so in cases of absolute necessity, or in grave emergencies when the removal is necessary to prevent fires and destruction of other property by fire. Under the facts of this case as disclosed by the record we think the order of the mayor and council to remove not only the forge, but the building, went too far; that it was too sweeping in its terms. There was no necessity, as far as we can see, to remove the building at all. As far as it was necessary for them to go, even under the power which they claim, was to remove the forge. The building itself, so far as we can see from the record, was harmless. It was the sparks emitted from the forge which were dangerous to other buildings. If the forge were removed, there would be no such danger from fire. What, then, was the necessity of removing the building? What was the necessity for destroying this plaintiff's property, which he alleges cost him $300? None that we can see. We think, therefore, that the trial judge should have granted a part of the prayer of the petitioner, and should have enjoined the mayor and council from removing the building, on condition that the plaintiff would not use the same for a blacksmith shop, and would not run his forge therein. We therefore direct that the injunction be granted restraining them from removing this building, on condition that the plaintiff will not use the same for a blacksmith shop, and that if he should do so, the injunction be dissolved *instanter*. Judgment reversed.

(83 Ga. 275)

BRIDGES *et al.* v. DOOLY COUNTY.

(*Supreme Court of Georgia.* July 8, 1889.)

TAX COLLECTOR — EFFECT OF JUDGMENT — REINSTATEMENT OF CASE.

If, in resistance to an execution issued against him for county taxes, the tax collector denies on oath that he owes the money, or any part of it, the issue thus formed should be tried in the superior court, even though no counsel should appear in behalf of the county. The execution itself makes a *prima facie* case for the plaintiff, and it is for the tax-collector to show that the amount, or some part thereof, is not due. The court, having erroneously dismissed the case on account of the absence of counsel without excuse, committed no error in reinstating it at the next term on the docket upon motion of attorneys representing the county.

(*Syllabus by the Court.*)

Digitized by Google

Error from superior court, Dooly county; KIBBEE, Judge.

Buzbee & Brunson, J. H. Martin, and *Duncan & Miller,* for plaintiffs in error. *J. H. Hall,* for defendant in error.

BLECKLEY, C. J. An execution in favor of Dooly county against the tax collector and the securities on his official bond, issued for the county taxes, was met by an affidavit under section 525 of the Code, which section declares: "If such execution shall issue for too much, or if defendant denies on oath owing any part thereof, he may, by filing an affidavit of illegality, according to the rules governing other illegalities, cause an issue to be formed thereon, which shall be tried by a special jury at the first term of the superior court thereafter." The case was continued at the first term (September, 1887) under an agreement of counsel that it should be finally disposed of at the next term. At the second term (March, 1888) the court, on motion of defendants' counsel, ordered that said case be dismissed, with the right of plaintiff to move by the first day of the next term to have it reinstated, such motion to be allowed, provided it was shown to the court that J. H. Hall, counsel for the plaintiff, had a legal excuse for his absence, and not otherwise. At the following term (September, 1888) a motion was made by the county through J. H. Hall and J. B. Holmes, its attorneys, to reinstate the case, upon the ground that the order of dismissal was improvidently granted, and was void on its face, the court having no jurisdiction to pass it. To this motion the tax collector made an answer in writing, setting up, among other things, that the order of dismissal was granted by agreement of both parties on the terms specified in the order, and that Mr. Hall now stated that he had no legal excuse for his absence at the previous term.

As the court granted the order to reinstate the case, notwithstanding this answer, we assume that the judge knew and remembered that the order to dismiss was not passed upon agreement of both parties. Indeed, the order shows upon its face that it was granted on motion of one of the parties, and it makes no reference to any agreement or consent whatsoever. The final action of the court in reinstating the case is altogether inconsistent with the statement in the answer that the dismissal was with the consent of the county; for how could the order of dismissal be improvident, void on its face, or without jurisdiction to pass it, if the county consented? Surely a court can turn any case out, or dismiss the same from its docket, if both parties legally consent thereto. As to who would have authority to represent the county in giving such consent in a case like this we need not inquire. The statute directs that the issue formed on such affidavit of illegality shall be tried by a special jury; and, the public revenue being involved, we think that, in the absence of legal consent to dismiss, the only proper disposition of the case was to so try it. If counsel on behalf of the county did not appear, that would make no difference, since the case on the side of the county was made out by the execution itself. *Prima facie* such an execution is to be taken as expressing and representing a real debt for the county taxes, and it is not for the county to support it by evidence, but for the defendant or defendants to meet and overcome it by evidence. The trial is accorded, not to give efficacy to the execution, but to allow opportunity for showing it invalid or inoperative in whole or in part. It seems to us that the dismissal of such a case would leave the controversy undisposed of, or, if disposed of, that it would leave the execution to be enforced by further ministerial proceedings, and that it would be, not the execution, but the defense to it, which would be defeated by the order of dismissal, supposing the order to have any finality at all. We think the court committed no error in reinstating the case, or, at least, that none appears from the record and bill of exceptions before us. Judgment affirmed.

(83 Ga. 257)

OLIVER *v.* UNION POINT & W. P. R. CO.

(*Supreme Court of Georgia.* July 22, 1889.)

EMINENT DOMAIN — COMPENSATION — TENDER — INJUNCTION.

1. The constitutional provision that private property is not to be taken for public purposes without just and adequate compensation being first paid, is too plain to be misunderstood, and is not to be violated or evaded by the legislature or the courts.

2. The method of ascertaining what is just and adequate compensation is matter for adoption and regulation by the legislature. Inasmuch as trial by jury is not a constitutional right in cases involving the power of eminent domain, a statutory appeal given in such cases from the award of assessors is subject to legislative discretion, both in its allowance and in the consequences of its allowance, the latter being in the nature of terms and conditions of the appeal system.

3. A railroad corporation created under the general law of 1881 may, after having paid or tendered to the land-owner the compensation awarded by the assessors, prosecute the work of construction pending an appeal from the award to the superior court, the statute allowing the appeal providing expressly that the same shall not hinder or delay the progress of the work.

4. Tender of the sum assessed and awarded, duly made and continued, but refused, is the equivalent of actual payment of the award, in its effects on the right of the corporation to enter upon the land and prosecute the work of construction.

5. Although the tender was imperfectly pleaded, especially in not making it continuous, yet the impending damage not being irreparable, the fact of tender not being disputed, and no lack of solvency of the corporation being alleged, the discretion of the judge in denying the injunction upon the condition prescribed in his order will not be controlled. Injunction before decree is discretionary in all cases.

(*Syllabus by the Court.*)

Error from superior court, Greene county; JENKINS, Judge.

Bill in equity by one Oliver to restrain the defendant, the Union Point & White Plains Railroad Company, from entering upon his land to grade the same for the road-bed of its railway, pending an appeal from the

Digitized by Google

amount of damages assessed in condemnation proceedings for the taking and injuriously affecting complainant's land, and payment of the same. From an order refusing a writ of injunction, plaintiff brings error.

Columbus Heard, for plaintiff in error. *H. T. Lewis* and *John C. Hart*, for defendant in error.

BLECKLEY, C. J. This company was chartered under the general railroad law, the act of 1881, found in the Code, § 1689*a* et seq., its route being located in part upon lands occupied and claimed by Oliver. Before any entry was made upon said lands, the parties proceeded to have the value and the damages assessed by assessors, as provided in section 1689*l*. The assessors fixed the compensation at $225, and both parties appealed from the assessment to the superior court, the company giving bond as required by that section. When the work of grading the road approached very near to Oliver's premises, he gave notice not to enter upon the same. The president of the company announced his determination to enter and continue the work as soon as the place was reached in the progress of grading the line. Thereupon Oliver brought his petition for an injunction, praying that an entry upon the land, for the purpose of grading the railroad, or for any other purpose, might be restrained until the damage to the same should be ascertained and paid. The answer, which was sworn to positively by the president of the company, set up, among other things, that before the company offered to construct the road-bed upon the land, or to do any work thereon, it tendered to the plaintiff the amount of the assessment, which he refused to take or to name any amount he thought adequate compensation. The answer also brought in question the plaintiff's title to the premises, and at the hearing evidence was submitted tending to show that the legal title was outstanding in another person, not a party to the proceeding. At the hearing an order was passed declaring that the injunction prayed for be refused, provided the defendant, within 10 days, would enter into bond with good security to pay all the damages that might be eventually recovered on the final trial of the case, but that on failure to give such bond the writ of injunction issue. To this order Oliver, the plaintiff, excepted.

The right of the company to enter and prosecute the work of construction on or through the plaintiff's land is rested upon the general railroad law, (Code, § 1689*l*) which declares that the entering of an appeal and the proceedings thereon shall not hinder or in any way delay the work, or the progress thereof, but the same may proceed, without let or hindrance, from the time said condemnation proceedings are begun. The case of Chambers v. Railroad, 69 Ga. 320, is a virtual adjudication that this provision of the law is incompatible with the constitution if it is to be construed as attempting to confer the right of proceeding with the work pending an appeal by the company without first complying with the constitutional requirement of paying just and adequate compensation. The method for assessing value and damages prescribed by the charter of the Cincinnati & Georgia Railroad, (section 11, Acts 1880–81, pp. 254–256,) was in all respects substantially identical with that laid down in the general railroad law; and the provision for prosecuting the work pending an appeal was the same. We consider the decision in that case (there being neither payment nor tender) completely sound, and it is our purpose to adhere to it firmly and faithfully. In the language of Mr. Justice SCHOLFIELD, in Mitchell v. Railroad & Coal Co., 68 Ill. 289: "However important and sacred may be the chartered rights of a corporation, they cannot be more so than is the right of the humblest individual to be protected in the enjoyment of his or her property. The right to take private property without the consent of the owner, for public use, after making due compensation as required by the constitution, even under the most favorable circumstances, savors of hardship and oppression. Nothing but public necessity can justify it, and the welfare of the citizen imperatively demands that it shall never be asserted except in strict conformity with the law of the land." Nothing can be plainer or more explicit than the terms of our constitution. "Private property shall not be taken or damaged for public purposes without just and adequate compensation being first paid." Code, § 5024. Adjudications in other states upon cognate terms, such "as first or previously made, deposited," etc., are numerous. Browning v. Transportation Co., 4 N. J. Eq. 47; Mettler v. Railroad Co., 25 N. J. Eq. 214; Redman v. Railroad Co., 33 N. J. Eq. 165; Eidemiller v. Wyandotte, 2 Dill. 376; Walther v. Warner, 25 Mo. 277; Ring v. Bridge Co., 57 Mo. 496; Henry v. Railroad Co., 10 Iowa, 540; Cox v. Railroad Co., 48 Ind. 178; Mitchell v. Railroad & Coal Co., 68 Ill. 286; Railroad Co. v. Callender, 13 Kan. 496; Ray v. Railroad Co., 4 Neb. 439; Bohlman v. Railroad Co., 30 Wis. 105; Dimmick v. Brodhead, 75 Pa. St. 464; Railroad Co. v. Piel, 8 S. W. Rep. 449; Asher v. Railroad Co., Id. 854. "Several state constitutions provide that private property shall not be taken for public use without compensation being first made, or contain similar terms. The effect of this provision is to require the payment or tender of the compensation to precede an entry for the construction of the railroad." Pierce, R. R. (Ed. of 1881,) p. 166. And see 2 Wood, Ry. Law, § 246. No constitution has or can have a plainer provision on this subject than our own, and the provision is one not to be violated or evaded either by the legislature or the courts.

The method of ascertaining what is just and adequate compensation is subject, within certain limits, to legislative discretion. To such proceedings, in the exercise of the

Digitized by Google

power of eminent domain the constitutional guaranty of trial by jury does not extend, there being in our constitution no express provision so extending it. Mills, Em. Dom. § 91, and cases cited; Proff. Jury, § 104; Cooley, Const. Lim. (5th Ed.) 697. The supreme court of Kansas, in Railroad Co. v. Railroad Co., 28 Kan. 453, held that it was optional with the legislature to make assessment by commissioners final, or to allow an appeal therefrom to a jury, and a statute of that state was sustained which provided that on compliance by the corporation with the constitutional requirement touching payment or deposit of the compensation money as fixed by assessment of the statutory commissioners, the corporation might enter and prosecute its work pending an appeal from the assessment, the appeal in the case being taken by the land-owner. Payment or deposit of the compensation assessed in the first instance was treated as satisfying the constitutional requirement, inasmuch as the legislature might, if it had so chosen, have made that assessment final. Instead of doing this, it had allowed an appeal upon terms, and the land-owner having availed himself of the appeal, it was said that he was to be treated as accepting the terms on which the appeal was granted.

The legislative intent as expressed in our statute, that is, in the twelfth section of the act of 1881, (Code, § 1689*l*, supra,) is somewhat doubtful, but the doubt is to be solved in the light of the constitution, and in favor of the constitutionality of so much of the legislative scheme as can be harmonized with the organic law. The section declares: "It shall be lawful for said corporation to construct its railroad over any lands belonging to other persons, * * * upon paying or tendering to the owner thereof, * * * just and reasonable compensation for the right of way, which compensation, when not otherwise agreed upon, shall be assessed and determined in the following manner." It then goes on to provide that the corporation shall choose one assessor, the owner another, and the two a third, the choice for the owner, in case of his refusal, to be made by the ordinary. The three assessors are to be sworn, hear evidence, and then, by the concurrence of a majority, assess the value and damages. Their award in writing is to be filed in the office of the clerk of the superior court, and be by him recorded, after which it has the force and effect of a judgment or decree of the superior court. Either party dissatisfied with the award "shall have the right, by giving written notice to the other party, within ten days from the time said award is filed as aforesaid in the clerk's office, to enter an appeal in writing from said award to the superior court, * * * and at the next term of said court, unless continued for legal cause, it shall be the duty of the judge presiding in said cause to cause an issue to be made up as to the damage or valuation of said land, * * * and the same to be tried with all the rights for hearing and trying said cause in the superior court and in the supreme court, as provided for cases at common law. The entering of said appeal, and the proceedings thereon, shall not hinder or in any way delay the said corporation's work or the progress thereof, but the same may proceed without let or hindrance from the time said condemnation proceedings are begun; that if said corporation should enter said appeal it shall give bond and security for the payment of the amount rendered upon the final hearing of said cause. Should no appeal be entered from said award in said time, and should said corporation fail to pay the same, it shall be the duty of the clerk of the superior court, upon the request of any person interested, to issue execution upon such award as in other cases of judgments of the superior court, and said execution may be levied upon any of the property of such corporation, as in cases of other executions."

The doubt which arises is whether in case of appeal the legislature intended the corporation to pay or tender the sum found due by the award of the assessors, as a condition precedent to the right of entering for exclusive occupation, or, which is the same thing, for beginning the active work of construction. We think such must have been the intent—*First*, for the reason that a contrary intent would be violative of the constitution; and, *secondly*, because the condition on which the right to construct is expressly put in the previous part of the section is tender or payment of just and reasonable compensation. *Prima facie* the measure of this compensation is the award of the assessors provided for. That amount being paid or tendered, the appeal and the proceedings thereon are not to delay the work or its progress, but the same may proceed without let or hindrance. The added phrase "from the time said condemnation proceedings are begun" is all that militates against our construction; and this phrase may or may not be reconcilable with it. If not, all we can say is that it conflicts with the constitution in so far as it contemplates authorizing or legalizing work done before payment is either made or tendered. The provision for issuing execution in case no appeal is taken does not dispense with payment, voluntary or compulsory, before entry for permanent occupation, but, on the contrary, it affords the means of enforcing payment as of an ordinary judgment, although the corporation might not wish to enter, and might prefer to let the matter drop forever. After procuring condemnation the corporation must pay, whether it completes the appropriation of the land or not.

Our minds have reached a fixed conclusion that the true and only construction of the section we have discussed is that, with or without appeal, there must be payment or tender upon the basis of the award of the assessors before the corporation can lawfully begin the work of construction against the

Digitized by Google

will of the land-owner; and such payment or tender may be made without prejudice to the appeal, or the right of appeal, of either party. Railroad Co. v. Brower, 12 Ind. 374; Railroad Co. v. Phelps, (Ill.) 17 N. E. Rep. 769. We cite the latter case on this point without approving its doctrine on the nature of an entry for construction or use. The land-owner, no matter which party appeals, may accept the tender at the peril of having to refund in case the award is reduced on the trial of the appeal, and the corporation may pay later, and go to work at the peril of having its provisional title defeated as by a condition subsequent, if it should fail to pay any additional amount recovered against it by final judgment on the appeal. In this way the statutory right of appeal can be enjoyed by either party or by both, without infringing the constitution, or necessarily thwarting the legislative intention of allowing the work to proceed pending the appeal, but in no other way apparent to us can both these objects be accomplished.

It was competent for the legislature, as it has done, to declare tender a substitute for actual payment where the tender is declined. If the land-owner will not receive the money awarded him by the assessors, he has no one to blame but himself. Creanor v. Nelson, 23 Cal. 464; Browning v. Transportation Co., 4 N. J. Eq. 47; Mettler v. Railroad Co., 25 N. J. Eq. 214; Redman v. Railroad Co., 33 N. J. Eq. 165; Railroad Co. v. Railroad Co., 26 N. J. Eq. 464; Johnson v. Railroad Co., 17 Atl. Rep. 574. According to some of these cases the time of tender, that is, whether before or after the appeal is entered, is material; but we think, under our statute, the time is immaterial, for though the award may be considered as vacated by the appeal for most purposes, the statute restricts the tender to no particular time, and the amount of the award itself is no less certain after appeal than before, nor is its force as *prima facie* evidence of value and damages impaired by the appeal. Of course, should tender be delayed until after the appeal be tried, the amount requisite to tender is to be measured then, not by the award, but by the verdict or the judgment rendered in the appeal proceedings.

In the present case the bill was silent as to tender, and the answer does not disclose the date of it, nor say whether it was before or after one or both appeals were taken, but only that it was before the company went to work upon the land. Neither is the tender repeated or made continuous by the answer. The pleading is altogether too loose and incomplete; but no point, so far as appears, was made before the judge on these minor matters, nor was the fact of actual tender denied. The judge could have required the tender to be repeated and made continuous, in the usual manner of pleading tender, and probably would have done so had the plaintiff objected to the sufficiency of the answer or the tender on that ground. Moreover, the bill seeks only an injunction, and avers nothing as to irreparable damage, and sets out no specific facts from which a court may see for itself that the damage impending will be irreparable. What mischief will be done to the land by grading the railway over or upon it is not stated. Nothing is alleged as to cuts, fills, or embankments, the destruction of timber, or other specific injury. Nor is there any hint or intimation that the railroad company is insolvent or unable to respond for all damages that may be occasioned by the alleged wrong. The company had already given bond and security for the payment of the amount recovered against it in the appeal proceedings, and it was required by the judge, as a condition of denying the injunction, to give another bond with security to pay all the damages eventually recovered in this case. Under these circumstances, while we hold that the tender should have been pleaded more strictly and made continuous, we cannot interfere with the discretion of the judge in denying the injunction on the terms prescribed in his order. Code, §§ 3219, 3220. Judgment affirmed.

(82 Ga. 329)

BROOKS v. FOWLER.

(*Supreme Court of Georgia.* July 31, 1889.)

IMPLIED TRUSTS—PARTITION—STATUTE OF LIMITATIONS.

1. Where a husband puts his wife's money into the purchase of land, with the knowledge of the vendor, the money being neither a loan nor a gift, and the land is subsequently levied on to satisfy a judgment in favor of the vendor for a balance of the purchase price, a trust will be implied under Code Ga. § 2316, which provides that a trust is implied "whenever the legal title is in one person, but the beneficial interest, either from the payment of the purchase money or other circumstances, is either wholly or partially in another."[1]

2. The wife is not entitled to a money verdict against the vendor where the land is levied on to satisfy his judgment against the husband, but she is entitled to an equitable interest in the proceeds of the sale, or to have the land partitioned, so as to give her the proper proportion.

3. The time of defendant's absence from the state, and until he returned for the purpose of residing, was properly deducted from the time during which limitation had run against plaintiff's right of action, as by Code Ga. § 2929, it is provided that "if the defendant * * * shall remove from this state, the time of his absence from the state, and until he returns to reside, shall not be counted or estimated in his favor."

Error from superior court, Taylor county; SMITH, Judge.

O. M. Colbert and *C. J. Thornton*, for plaintiff in error. *W. S. Wallace*, for defendant in error.

JENKINS, J. On the 30th day of November, 1872, Julius Turner executed and delivered to B. C. M. Brooks a deed to 528¾ acres

[1] That a trust results when a conveyance is made to one person, the consideration for which moves from another, see Hellman v. Messmer, (Cal.) 16 Pac. Rep. 766, and note; Burns v. Ross, (Tex.) 9 S. W. Rep. 468, and note; Blum v. Rogers, Id. 595, and note; Reynolds v. Sumner, (Ill.) 18 N. E. Rep. 334.

Digitized by Google

of land lying in Taylor and Macon counties. The consideration of the conveyance was $500 paid in cash, and two notes for 15 bales of cotton each, made by the grantee, and B. C. Brooks, his son, as security. Turner afterwards sued out an attachment for the purchase money owing on the notes, and on the 8th day of April, 1879, obtained judgment for the sum of $1,678.39, besides interest. On this judgment execution was issued, which was by the sheriff of Taylor county levied upon that portion of the land purchased lying in that county. On March 2, 1880, Mrs. Caroline S. Brooks, wife of B. C. M. Brooks, filed her bill in Taylor superior court against Turner, the sheriff, and her husband. The purpose of this bill seems to have been to enjoin the levy referred to until certain equities set up by the bill were adjusted. The bill set up a claim on the part of the complainant against Turner for money due her from the estate of her father, of which Turner was the administrator. It alleged that he (Turner) resided in Texas, was insolvent, and owned no property in Georgia, except the judgment against Brooks. On November 27, 1885, Mrs. Brooks filed a second bill. This bill recited the pending of the first, and set up substantially the same equities. It further alleged that the $500 paid by B. C. M. Brooks to Turner on the purchase of the land in 1872 was the money of complainant, derived from her father's estate, and that at the time of its payment by Brooks to Turner the latter knew that it belonged to her. She prayed that the sale of the land bought by Brooks from Turner be enjoined until the equities set up could be adjusted by final decree, and that of the value of the land, should it be finally sold, the sum of $500, and interest from November 30, 1872, be paid to her from the proceeds. The bill was finally amended by striking therefrom all reference to the equities set up except the claim to the $500 and interest. Turner, by answer, denied all knowledge that the $500 belonged to the complainant, and alleged that, if such was the case, it was concealed from him. He also filed demurrer and plea of the statute of limitations, claiming that the cause of action originated, if at any time, more than four years before the bringing of the suit. On the trial of the case the following questions were submitted to the jury, which were answered as indicated: "(1) What amount of money, if any, of the complainant, went into the purchase of the land by B. C. M. Brooks from defendant, and when was it paid? *Answer.* $500; November 30, 1872. (2) If B. C. M. Brooks used the money of complainant to pay defendant, did defendant know that the money so received by him was the separate estate of complainant, or did he have reasonable notice, if such was the fact? *A.* He was reasonably notified. (3) Is B. C. M. Brooks insolvent? *A.* We believe he is not. (4) Where does Julius Turner now reside, and where has he resided continually since last of 1872 or first of 1873? *A.* In Texas. (5) Has he any property in this state other than this judgment against Brooks? If so, what, and where located? *A.* No other property." Whereupon the defendant moved the court to grant a decree that the bill be dismissed at complainant's cost. The foregoing motion being overruled, the defendant moved the court to grant a decree that the land be sold, and from the proceeds the *fi. fa.* of Turner be first paid in full, and from the balance the complainant be paid $500, and the remainder, if any, be paid to Brooks. The court overruled the second motion also, and, instead, decreed that the land be sold, and from the proceeds the complainant be first paid $500, with interest thereon from the 30th day of November, 1872, and the balance be paid on Turner's *fi. fa.*, or as much thereof as might be necessary to extinguish it. The defendant moved for a new trial (1–3) on the grounds that the verdict was contrary to law and evidence; (4, 5) because the court refused to render the decrees requested by him; (6) because the court rendered the decree which was rendered; (7) because the defendant filed a plea of the statute of limitations, and that issue was not submitted to a jury, and they did not pass on same; and (8) because the second issue submitted to the jury was indefinite, meager, and uncertain, and no decree could be rendered under the finding on that issue. The court granted a new trial, and complainant excepted, and assigns error thereon. The defendant filed a cross-bill of exceptions assigning error as set forth in his motion for new trial.

On the trial, the complainant, Mrs. Brooks, testified that the $500 cash payment belonged to her; that it came from her father's estate; that at the time Turner received it she was present, and heard her husband tell Turner that it belonged to her; that was the identical money that Turner paid to her husband from her father's estate. She was corroborated by her husband and by B. C. Brooks; the former testifying that while he and Turner were walking over the land, pending the negotiation for its sale, he told Turner that he had not money to pay for it, and Turner replied that he had his wife's money, and, on being told that Brooks did not care to take that, Turner replied that it did not make any difference. Brooks admitted that his wife knew that the money was paid to Turner, and that she made no objection to it then. From these facts it may be fairly inferred that it was the intention of all the parties that the husband and wife should become the joint purchasers of the property, each to own an interest in proportion to the amounts paid by them respectively. If such was their intention, the mere fact that the legal title was made by Turner to the husband will not operate to defeat the wife's equitable title. As between the parties, a trust will be implied in her favor. Code, § 2316 (3.) The inference of an intention by the parties that the husband and wife should become joint purchasers is strengthened by the fact that

Digitized by Google

in the partial payment of the purchase price of the land with the wife's money none of the elements of a gift appear. There was no intention on the part of the wife to give her separate estate to the husband, and none on the part of the husband to accept same as a gift. While a wife may legally give her property to her husband, a gift will never be presumed. The evidence to support it must be clear and unequivocal, and the intention of the parties free of doubt. "Gifts from the wife to the husband are to be scrutinized with great jealousy." Sasser v. Sasser, 73 Ga. 282. Nor does it appear that it was made the purpose of Mrs. Brooks to lend her money to her husband, nor his to borrow. No evidence of indebtedness was taken, no time for payment agreed upon, no word or act indicating a purpose to create the relation of debtor and creditor. No effort on the part of the wife to collect the money is disclosed by the evidence, nor any act showing that the parties ever treated the transaction as one creating a debt. On the contrary, the time for a recovery at law by Mrs. Brooks from her husband had elapsed long before the buying of Turner's *fi. fa.* If, however, there was no intention that the husband and wife should jointly own the land, still, if $500 of her money was in fact paid upon its purchase by the husband, and Turner knew such to be the case at the time of the transaction, a trust will likewise be implied in the wife's favor to the extent that her money paid for the land, as against both Brooks and Turner; and upon her election to treat an interest in the land as hers the title to such interest should be protected and set up by appropriate decree. A trust will be implied whenever the legal title is in one person, but the beneficial interest, either from the payment of the purchase money or other circumstances, is either wholly or partially in another. Code, § 2316. "A husband cannot use his wife's separate money to buy property for himself; and, if he invests her funds in real estate in his own name, equity will fix a trust upon the land, and, having jurisdiction for one purpose, it will do complete justice, and give full relief between the parties." 73 Ga. 275.

It is clear that Turner parted with both title and possession of the land under his deed to Brooks made in 1872, and the complainant and her husband occupied it. The presumption is that she has received whatever of income from the land to which she was entitled by reason of any interest she may have had in the same, and that no one is accountable to her on that score. If, however, she and her husband jointly owned the land, and her husband has received all of its income, he, and not Turner, should account therefor. Under the facts, as they appear in this record, we do not think that Mrs. Brooks was entitled to a money verdict. The most that she was entitled to was to have the land sold, and to share in the distribution of the proceeds, her interest in the same being in the proportion of the purchase money paid by her to the principal of Turner's debt for the balance; or the land might be partitioned so as to give her that proportion in the land itself. Cheatham v. Lord, 79 Ga. 770, 4 S. E. Rep. 162.

The complainant's cause of action clearly was not barred. The defendant, Turner, removed from this state to Texas within less than one year after the purchase of the land in 1872, and resided there continuously up to the bringing of this suit. The time of his absence from the state, and until he returns to reside, is not to be counted or estimated in his favor. Code, § 2929. The contrary rulings of this court, cited by counsel, were made upon the law as it stood prior to the act of 1855. That act (section 2929, Code) changed the law. Langston v. Aderhold, 60 Ga. 376, reviewed and affirmed. The second issue submitted to the jury was sufficiently full, certain, and definite to base a decree upon. If counsel desire to make it more so on the next trial the court will doubtless amend. It follows from what has been said that the court did not err in refusing to render either of the decrees moved for by the defendant, nor in granting a new trial. Judgment affirmed in both cases.

BLANDFORD, J., being disqualified, Judge JENKINS, of the Ocmulgee circuit, was designated in his stead.

(81 Ga. 164)

McKINNE v. STATE.

(*Supreme Court of Georgia.* July 11, 1889.)

CRUELTY TO ANIMALS—EVIDENCE—PUNISHMENT.

1. The act of October 12, 1879, as embodied in the Code, § 4612*a*, makes it a misdemeanor to engage in any act of cruelty to any domestic animal; and to "cruelly drive and cruelly treat" one or more horses is an offense under the act.

2. The value of the horses before the alleged cruel treatment, together with the extent to which their value was impaired by the same, may be received in evidence to throw light upon the nature of the treatment, and upon the question of whether it did or did not cause unjustifiable physical pain or suffering, and amount to cruelty as defined by the statute.

3. The state may contradict matter in the prisoner's statement by a witness already examined, though to do so involves a repetition by the witness of some of his former testimony.

4. The verdict is consistent with law and supported by the evidence.

5. The sixth section of the act of 1879, read in connection with the title of the act, imports a total repeal of the acts both of 1875 and 1876, touching cruelty to animals. The act of September 21, 1881, however, reinstates section 4310 of the Code as the measure of punishment.

(*Syllabus by the Court.*)

Error from city court of Savannah; HARDEN, Judge.

Indictment under Penal Code Ga. § 4612*a*, for cruelty to animals. Verdict of guilty, and defendant brings error.

J. R. Saussy, for plaintiff in error. *F. G. Du Bignon*, Sol. Gen., by *R. G. Erwin*, for the State.

BLECKLEY, C. J. 1. The statute on which the indictment is founded is the act of October 12, 1879, (Code, § 4612*a*,) which reads as

Digitized by Google

follows: "Every person who shall set on foot, or instigate, or promote, or engage in, or do anything in furtherance of, any act of cruelty to any domestic animal shall be guilty of a misdemeanor," etc. We find, on examination, that this enactment was suggested by a statute of New York; but there it was but part of a system, while here it is the whole system, adopted for the prevention of cruelty to animals, so far as range of indictable conduct is concerned. The learned counsel who argued the case for the plaintiff in error made a grammatical point, and elaborated it with an ingenuity that, though not convincing, was highly entertaining. His point was that no single, direct, and immediate act of cruelty is made penal, but only anything done in furtherance of such an act. He who commits the main act, the last in the series, the one that excites the pain and suffering in the animal, is not within the purview of the statute; but those only who set on foot, or instigate, or promote, or engage in, or do something in furtherance of, the main or ultimate act. In other words, to pass at once to the legal result of this construction, the chief offender, the principal in the business, is not dealt with by the law, but his aiders and abettors, those who bear to him a relation analogous to that of principals in the second degree or accessories before the fact in felony, are alone denounced as criminals. Such, in substance, was the contention of counsel, and the outcome of his nice and accurate grammatical argument. Perhaps if he had been discussing the statute of New York, from which ours was taken, we could have agreed with him that, in connection with the other provisions of that statute, these particular provisions might be restricted to aiding and abetting; but we are satisfied they are not so restricted in our system, for they constitute the system and the whole of it. Besides, it is no strain upon language to hold that he who inflicts an act of cruelty promotes, engages in, or does something in furtherance of such act, though it be his own. The very doing of the act is engaging in or doing something that furthers it. All that is done while the act is in progress furthers it and promotes its accomplishment. To cruelly drive and cruelly treat any domestic animals, such as horses, is an offense under the words of the act of 1879, above recited, as well as to aid or abet another in so doing.

2. Evidence as to the value of the mares before the injury and of the extent to which their value was diminished by the injury was not irrelevant, as it would throw some light on the nature and severity of the treatment to which the animals were subjected. The statute declares that "the word 'cruelty' shall be held to include every willful act, omission, or neglect whereby unjustifiable pain, suffering, or death is caused or permitted." If, in going a distance of 12 miles, one of the mares lost value to the extent of $100, being one-third, and the other to the extent of $25, being one-twelfth of her whole value at starting, who would not conclude that the former was worse treated than the latter, and that both were more severely treated than if they had lost nothing, or only a few dollars in value? The average loss of the one per mile was over $8, and of the other over $2. It is obvious, we think, that such deterioration in value might properly be considered in solving the question whether, under the circumstances, unjustifiable pain or suffering was caused by the act or acts which produced it.

3. There was no error in allowing the state to rebut the prisoner's statement by evidence, though the witness in rebuttal repeated some of his previous testimony. Had there been no reply to the statement, the jury may have thought that the witness had forgotten the exact facts, and this inference would be obviated, perhaps, by allowing the witness, after hearing the prisoner's version, to restate them. At all events, the matter was subject to the discretion of the court, and there was no abuse of the discretion that we can discern in the present case.

4. The verdict was justifiable with respect both to law and evidence. Though not the strongest, the case for the state was strong enough to warrant a conviction.

5. The act of September 21, 1881, (Acts 1880–81, p. 142,) is not cited in the margin of the Code, and therefore was overlooked when we suggested, in our judgment of affirmance in the present case, that the sentence pronounced by the city court be reconsidered. The learned and able judge of that court has since called our attention to the act above referred to, and there can be no doubt that under it his sentence was warranted by law; this act expressly adopting section 4310 of the Code as the measure of punishment. Though the acts of 1875 and 1876 were both wholly repealed, this did not hinder the present case from being governed as to penalty by section 4310 of the Code. Judgment affirmed.

(82 Ga. 299)

HUGHES v. GRISWOLD.

(*Supreme Court of Georgia.* July 31, 1889.)

USURY—COMMISSIONS TO MIDDLEMEN.

1. In its principal elements and characteristics, this case is ruled by Merck v. Mortgage Co., 79 Ga. 218, 7 S. E. Rep. 265.

2. Where the money actually lent belonged to none of the middlemen engaged in procuring the loan, that the notes and mortgage were made payable to one of them, who shared in the commissions paid by the borrower, will not infect the loan with usury, the lender knowing nothing touching the payment or agreement to pay commissions, and having acted in person in contracting to make the loan, fixing the terms thereof, and accepting the security, and having parted with the full amount of the loan and delivered the money to one of the middlemen engaged in procuring it.

3. In such case, the fact that one of the middlemen used his own money in turning over the net proceeds of the loan to the borrower, the same being done when the lender's money was in the hands of another middleman at a distant point, will not infect the loan with usury by reason of the commissions retained by or paid to the middlemen in pursuance of the contract of the borrower

Digitized by Google

made with one of them at the time of engaging him to procure the loan. The substitution of his money in place of that of the lender was only a mode and means of exchange.

4. That one of the middlemen had advertised that he would loan money, and that he had loaned it in other instances, would not affect this particular loan if it was actually made, not by him, but on his application in behalf of the borrower, and by an outside and independent party.

5. That after the loan was made the middlemen took part in facilitating the payment and transmission of accrued interest thereon, would not infect the loan with usury, these services being voluntary, and beneficial as well to the business of the middlemen as to both the lender and borrower.

6. Objections to evidence, the grounds of which are not stated, are not for adjudication by the supreme court.

(*Syllabus by the Court.*)

Error from superior court, Wilkinson county; JENKINS, Judge.

Action by one Griswold against Hughes to recover $1,000 loaned by him to said Hughes, and the accrued interest thereon. Verdict was rendered for plaintiff, and defendant brings error.

F. Chambers and *J. W. Lindsay*, for plaintiff in error. *J. H. Hall* and *Clifford Anderson*, for defendant in error.

BLECKLEY, C. J. 1. In its principal elements and characteristics this case is ruled by Merck v. Mortgage Co., 79 Ga. 213, 7 S. E. Rep. 265. Here, as there, the loan was secured by the joint services of three intermediaries, consisting of what might be termed a central, a rural, and an urban middleman. Here, as there, a part of the loan never in fact reached the borrower's own hands, although every cent of it passed from the lender. The amount retained by the middlemen was 15 per cent., and this was divided among them in the ratio of 7 to the central, and 4 each to the others. Here, as there, the lender had no share in these commissions, nor any knowledge that they were exacted. In that case the contract of lending was made by an agent, the lender being a corporation. In this case it was made by the lender himself, the person or firm with whom he dealt directly being the urban intermediary, to whom was delivered, by the lender, the whole sum of $1,000. The decision in Merck's Case being that there was no usury, it is only necessary now to examine the points of difference in the present case, and to determine whether any or all of them require or justify a different adjudication of the question as to this case.

2. The station of the urban intermediary was at Hartford, Conn. This intermediary was a partnership (Moore & Co.) composed of several persons, of whom Tallman was one. He, alone, may be considered as the urban intermediary, since the effect of his connection with this case would be the same whether his relation to it was as an individual, or as a member of the partnership to which he belonged. The notes and mortgage were made payable to Tallman, and his firm received part of the commissions. In this respect the present case is unlike Merck's Case. We think, however, as there was positive proof that neither Tallman nor his firm was the lender, and also that Griswold, the real lender, knew nothing of any compensation to the intermediaries, or of any participation by Tallman therein, this fact is, legally speaking, immaterial; more especially as the jury must have found, under the charge of the court, that what was paid to Tallman's firm was for actual services rendered, and not by way of shift or contrivance to conceal or cover up usury,—that question having been submitted to them in the charge, with instructions that, if the share of Moore & Co. in the commissions was not received in good faith for for services, the loan would be usurious. This element of the charge was probably more favorable to the borrower than he was entitled to. The compensation to Tallman's firm did not proceed directly from the borrower, but came from the central intermediary, and was the fruit of a contract which the latter had made with that firm, covering as well this loan as any others that they might be instrumental in negotiating upon applications forwarded by him. According to the decided weight of authority, had Tallman been a direct and immediate agent of the lender, his receiving for his own use and benefit commissions from the borrower, without authority from or knowledge of the lender, would not infect the loan with usury. 1 Jones, Mortg. § 642; Boardman v. Taylor, 66 Ga. 638; Call v. Palmer, 116 U. S. 98, 6 Sup. Ct. Rep. 301; Stillman v. Northrup, 109 N. Y. 473, 17 N. E. Rep. 379; Boylston v. Bain, 90 Ill. 283; Cox v. Insurance Co., 113 Ill. 382; Williams v. Bryan, (Tex.) 5 S. W. Rep. 401; Vahlberg v. Keaton, (Ark.) 11 S. W. Rep. 878. And the same rule applies where the negotiation is through brokers. Brown v. Mortgage Co., 110 Ill. 235; Hoyt v. Institution Co., Id. 390; Haldeman v. Insurance Co., 120 Ill. 390, 11 N. E. Rep. 526. The prevailing opinion seems to be that, with knowledge on the part of the lender, the loan is infected where his own agent exacts a bonus. Bonus v. Trefz, (N. J.) 2 Atl. Rep. 369, and notes; Payne v. Newcomb, 100 Ill. 614; Thompson v. Ingram, (Ark.) 11 S. W. Rep. 881. As to when knowledge ought to be imputed or implied, see Vahlburg v. Keaton, supra. In Call v. Palmer, 116 U. S. 98, 6 Sup. Ct. Rep. 301, supra, the agent of the lender took commissions, and the notes (and presumably the mortgage) were made payable to him; and there it was held by the supreme court of the United States that the loan was pure as between his principal and the borrower, the principal having no knowledge as to the charge or receipt of commissions by the agent. See, also, Dayton v. Moore, 30 N. J. Eq. 543, where the mortgage was made to the mortgagee's attorney, who was not described as such in the instrument. The true position of Tallman, until he transferred the mortgage and the notes, was that of a trus-

Digitized by Google

tee holding for the benefit of Griswold, the real lender; and though Tallman shared in the commissions, as the lender did not know of it, he was not affected thereby.

3. The station of the central intermediary (whose name was Lawton) was at Macon. Through him an application was made by Hughes, the borrower, for the loan. This application was partly in print and partly in writing. It contained answers to numerous questions; a description of the land offered as security, and a plat of the same; the whole concluding with a promise "to pay all expenses incurred in negotiating the above loan, examining the premises, investigating the title to the land offered as security, and executing all necessary papers." According to Lawton's testimony, these expenses were then or afterwards agreed upon and fixed at $150, which was the amount retained out of the loan. And Hughes himself testified that he did not demur to paying Lawton his commissions; by which he doubtless meant this gross sum of $150, the whole of which was deducted by Lawton at the time he paid Hughes the net proceeds of the loan, to-wit, $850. The manner in which these proceeds reached Hughes is another circumstance which distinguishes this case from Merck's Case. The application bears date in May, and a lender was not found till September. The application being examined at Hartford by Griswold, the lender, in person, he made known to Moore & Co., Tallman's firm, his acceptance of the same, and delivered the $1,000 to them, which they deposited in bank to their credit. They telegraphed to Lawton that the application was approved; by which they meant that a lender had been found. After receiving this telegram, Lawton had the mortgage executed by Hughes, and thereupon advanced to him, of his own funds, $850, at the same time checking upon Moore & Co. for $1,000, the amount requisite to reimburse himself for this advance and to pay the agreed commissions. While the circumstance that the borrower got Lawton's money, and not that which belonged to Griswold, or ever had belonged to him, complicates the matter somewhat, we think the true interpretation of this transaction, under all the circumstances, is that it was only a mode and means of exchange. Griswold's money was in Hartford, Conn.; Lawton's, at Macon. The latter was substituted for the former, and by reason of this substitution Lawton became the equitable owner of an equivalent amount of the money which was on deposit in Hartford. It was there under the control of Moore & Co., his agents, and might be considered, therefore, as in his own hands. The testimony was clear that Lawton had no purpose to lend his money to Hughes; that, although he did not know who the real lender was, yet he did know that some person had agreed to make the loan, and he intended the advance of his own money to be temporary, and made it for convenience and to save time. Of course, had he been the real lender, and used the mortgage, notes, etc., as a cover and device to secure a loan made by himself, the transaction would have been usurious; and so, in effect, the court charged the jury, submitting to them fairly and fully the question of whether the loan was really made by Lawton, and whether there was any device or contrivance by him to cloak usury. The evidence shows clearly that Lawton carried on an independent business, as did Nelson & Barker in the Merck Case, and as did one or more of the intermediaries in Security Co. v. Townes, (Miss.) 1 South. Rep. 242. He it was who paid the compensation of both the other intermediaries by contract made severally with them, to which neither the borrower, Hughes, nor the lender, Griswold, was a party, and of the existence of which they were alike ignorant.

4. Although it was shown that Lawton had advertised that he would loan money, and although he had doubtless loaned money, as he was a banker, the proof being that he did not loan it on this occasion, and the jury having found that he did not, the advertisement has no material bearing on the present controversy.

5. Both Lawton and Moore & Co. took part in facilitating the payment and transmission of accrued interest on this loan, Lawton on several occasions giving notice to the borrower that interest was soon to become due, and requesting that it be forwarded promptly through him, so as to meet the interest notes at maturity. These services were beneficial to both the lender and borrower, and, as they seem to have been rendered voluntarily, they were doubtless beneficial also to the business of the intermediaries. No express stipulation appears, either as to rendering them, or as to paying for them, and we see not how they could have tainted the loan with usury. Furthermore, if they did taint it, we are unable to see how any deduction on account of them could be made from the debt, as there was no proof of their value. Upon the whole, we are convinced that there is nothing in this case to distinguish it, legally, upon the question of usury, from that of Merck v. Mortgage Co. Although we have not discussed the grounds of the motion for a new trial specifically, we have dealt with the real questions which underlie them, and which control the case.

6. Six of the grounds, however, were not considered at all, for they go to the overruling of objections to certain evidence, and, as it nowhere appears what these objections were, they were not properly before us for adjudication. The result is that, so far as appears to us from the record, the court committed no error in upholding the verdict in favor of the plaintiff below for the whole debt, principal, accrued interest, and attorney's fees, or in denying the motion for a new trial.

Judgment affirmed.

Digitized by Google

(82 Ga. 312)

RILEY v. OLIN.

(*Supreme Court of Georgia.* July 31, 1889.)

USURY.

1. On its substantial merits, this case is covered by Hughes v. Griswold, ante, 1092.

2. Voluntary services rendered by middlemen, through whose agency a loan was procured, in looking after the payment of taxes on the mortgaged property, and in collecting and remitting accrued interest on the loan, will not render the loan usurious, the services, though beneficial to the lender, being also beneficial to the middlemen, and being rendered in pursuance of a known custom of their business.

3. That one of the middlemen, in turning over the net proceeds of the loan to the borrower, reserved for his own benefit a small sum to cover exchange, the money actually lent being at a distance from the point of settlement, would not render the loan usurious.[1]

(*Syllabus by the Court.*)

Error from superior court, Houston county; GUSTIN, Judge.

Hardeman & Davis, for plaintiff in error. *J. H. Hall* and *C. Anderson*, for defendant in error.

BLECKLEY, C. J. 1. In so far as the various requests made of the court to instruct the jury were legal and appropriate, their substance was covered by the general charge as given, a copy of which is in the record. On the merits of this case, there is no substantial difference between it and Hughes v. Griswold, ante, 1092, just decided, and no debatable difference whatever except as to a few minor details.

2. It appears that by the known custom of their business, the intermediaries, Moore & Co. and Lawton, might be expected to render, and they did in fact render, service beneficial to the lender in looking after the payment of taxes on the mortgaged property, as well as in collecting and remitting accrued interest on the loan, but all this was without any express contract with any one, and seems to have been voluntary, and quite as much for their own benefit as for that of those with whom they had dealings. Moreover, in this, as in the previous case, there was no evidence of the value of these services.

3. When Lawton, after being advised that a lender had been found, paid out of his own money to the borrower the net proceeds of the loan, or sent the same to the rural intermediary to be paid over, he deducted therefrom a few dollars as the price of exchange. It did not appear that this deduction exceeded the current rate of exchange between Hartford, where the lender's money was, and Macon or Perry, where the borrower received the money from Lawton through the other intermediary. We think this deduction on account of exchange did not render the loan usurious as between the lender and the borrower. The jury have found under a proper charge from the court that the loan was not made by Lawton, and this being so, the borrower simply left in the hands of his own agent the amount deducted for exchange, if Lawton had no right to retain it. As in the previous case, there is no possible room for doubt that the lender parted with every cent of the loan, and that he derived no benefit, directly or indirectly, from any transaction had between the borrower and Lawton in their settlement concerning the proceeds of the loan. Judgment affirmed.

[1] In general, as to what constitutes usury, see Pass v. Security Co., (Miss.) 6 South. Rep. 239, and note; Myers v. Roller, (Va.) 8 S. E. Rep. 483, and note; Callaway v. Butler, (Ga.) 7 S. E. Rep. 224, and note.

(86 Va. 256)

DAVIS' ADM'R v. McMULLEN'S ADM'R.

(*Supreme Court of Appeals of Virginia.* June 27, 1889.)

LIMITATION OF ACTIONS—RUNNING OF STATUTE—WAIVER—PLEADING.

1. The statute of limitations begins to run against a sealed agreement by defendant to execute notes at a specified time in payment for property purchased of plaintiffs, at that time, though in the same agreement plaintiffs covenant to convey the property to defendant at the same time and fail to do so.

2. In covenant for alleged breach of the contract to execute the purchase-money notes, the fact that defendant accepted a deed to the property from plaintiffs six years after the time specified in the agreement does not constitute a waiver of the stipulation, so as to cause the statute of limitations to run only from the acceptance of such deed, where plaintiffs do not aver that they were ready and willing and offered to convey at the time specified, or were prevented from being ready and willing to convey or from conveying at that time by defendant, and there is no evidence that at the time of defendant's accepting the deed there was an agreement that the original contract was waived.

3. A plea to such action, that defendant "did not, within 20 years next before the bringing of this suit, break his covenant, as the plaintiff hath alleged," is a good plea of the statute of limitations, as it is equivalent to saying that the cause of action did not accrue within that time.

4. Even if such plea were defective, it is cured after verdict, where it is not demurred to, by Code Va. 1873, c. 177, § 3, which provides that no judgment shall be reversed for any defect or imperfection in the pleadings which might have been taken advantage of on demurrer, but was not so taken advantage of.

Error to circuit court, Smyth county.

D. Trigg, for plaintiff in error. *Shiffey & Richardson* and *Buchanan & Buchanan*, for defendant in error.

RICHARDSON, J. This was an action of covenant, brought in the circuit court of Smyth county, in 1882, by Harold P. Davis, surviving obligee of himself, James F. Pendleton, and E. H. Scott, who sued for the benefit of A. G. Pendleton, administrator of J. F. Pendleton, deceased, against F. Alexander, administrator of F. McMullen, deceased. The action was founded on the following contract:

"This contract, made this 18th day of May, 1853, between James F. Pendleton, Edward H. Scott, and Harold P. Davis of the one part, and Fayette McMullen of the other part, witnesseth, that said Pendleton, Scott, and Davis on their parts have this day sold to said McMullen, for the sum of two thousand seven hundred and seventy-five dollars, the brick

Digitized by Google

house and lot in the town of Marion formerly owned by Robert A. Davis, and purchased by James F. Pendleton at the sale made by W. B. Morgan, trustee; and Pendleton, Scott, and Davis bind themselves to make or cause to be made to said McMullen a good title to said lot and appurtenances on or before the first day of October next, and now give said McMullen possession of said lot and appurtenances, reserving the rents that may accrue on any part or the whole of same up to 1st October next, and to see that no part of said property be injured by negligence, and that it be delivered up in its present condition, except natural wear and tear; and said McMullen on his part has this day paid to said Pendleton, Scott, and Davis the sum of twelve hundred and two dollars in a check on the bank at Jeffersonvile, upon which he is to have interest till 1st October next, and on that day to execute bonds in equal amounts, payable in one and two years from their date, for the residue of said two thousand seven hundred and seventy-five dollars. For the faithful performance of the foregoing stipulations the parties bind themselves to each other in the penal sum of six thousand dollars. Witness the following signatures and seals:

[Signed] "J. F. PENDLETON. [Seal.]
"E. A. SCOTT. [Seal.]
"HAROLD P. DAVIS. [Seal.]
"F. MCMULLEN. [Seal.]
"Teste: W. D. STROTHER."

It appears by the record that said Pendleton, Scott, and Davis did not on said 1st day of October, 1853, make or cause to be made to said McMullen the deed, according to their undertaking, as set forth in the contract aforesaid. On the contrary, no deed was made or offered to be made until the 18th day of April, 1860, when, by the direction of said McMullen, the said Pendleton, Scott, and Davis caused the said W. B. Morgan, trustee, to convey said house and lot to one John H. Thompson, and contemporaneously therewith said Thompson, in consideration of the conveyance to him, conveyed to said McMullen a valuable farm in Smyth county. The plaintiff declared on the contract above set forth, and averred in general terms that "he and his co-obligees did do and perform all things which, by the terms, and according to the true interest and meaning of said writing obligatory, they had undertaken and were bound to do and perform; and he further says that said McMullen, in his life-time, did not, on the 1st day of October, 1853, execute his bonds in equal amounts payable in one and two years for the residue of $2,775, against the form and effect of the said writing obligatory, and of his covenant made in that behalf as aforesaid, and so the plaintiff says," etc. At the September term, 1886, the death of the plaintiff H. P. Davis was suggested, and by agreement the cause was revived and proceeded with in the name of John W. Richardson, treasurer of Smyth county, and as such administrator of H. P. Davis, deceased. Thereupon the defendant demurred to the plaintiff's declaration, and the plaintiff joined therein, and on consideration the court sustained the demurrer; and on motion of the plaintiff, by his attorney, leave was given him to amend his declaration, and for that purpose the cause was remanded to rules. The amendment not having been made at rules, the cause stood dismissed, but at the April term, 1887, the dismission of the cause in the office was set aside on the motion of the plaintiff, and he filed his amended declaration, to which the defendant demurred, and the plaintiff joined therein, and the cause was continued. The amended declaration, after repeating the general averment in the original, that the plaintiff and his co-obligees did do and perform all things which by the terms and according to the true intent and meaning of the said writing obligatory they had undertaken and were bound to do and perform, added the words: "They did cause the said property to be conveyed by W. B. Morgan, trustee, to John H. Thompson, the vendee of the said McMullen, according to the directions of said McMullen." And for breach it is alleged that "said McMullen, in his life-time, did not, on the 1st day of October, 1853, or at any other time, execute his bonds," etc.; the breach being laid as in the original, except with the addition of the words "or at any other time." At the August term, 1887, the court sustained the defendant's demurrer to the plaintiff's amended declaration, and on motion of the plaintiff leave was given him to again amend his declaration, and for that purpose the cause was remanded to rules. The powers of F. Alexander, as administrator of F. McMullen, having been revoked, the estate was committed to F. W. Leonard, sheriff of Smyth county, and as such administrator *de bonis non* of F. McMullen, deceased, and by agreement of parties the cause was revived and proceeded with accordingly, and at the December term, 1887, leave was given the plaintiff to file his second amended declaration, which was accordingly filed. This amended declaration, after setting forth, as was done in the original and in the first amended declaration, the terms of the contract, for the alleged breach of which the action was brought, then proceeds to aver, in addition to what had been averred in the two previous declarations, "that in lieu of making or causing to be made to said McMullen a good title to said house and lot, they did cause the said property to be conveyed by W B. Morgan, trustee, to John H. Thompson, the vendee of the said McMullen, which was accepted by the said McMullen in lieu of the covenant, to make or cause to be made to him a good title;" and then adding the former averment of breach, "that the said McMullen, in his life-time, did not, on the 1st day of October, 1853, or at any other time, execute his bonds in equal amounts, payable in one and two years, for the residue of $2,775.00, against

Digitized by Google

the form and effect of the said writing obligatory, and of his covenant in that behalf, as aforesaid," etc. To this second amended declaration of the plaintiff the defendant also demurred, and the plaintiff joined in the demurrer, but the court overruled the demurrer, and thereupon the defendant pleaded as follows: "The defendant, for plea, saith that his intestate, in his life-time, hath well and truly observed and performed the condition of the writing in the declaration mentioned, and that his said intestate did not break his covenant in manner and form as the plaintiff hath complained, and of this he putteth himself upon the country. And the said defendant, for further plea, saith that his intestate did not, within 20 years next before the beginning of this suit, break his covenant, as the plaintiff hath alleged;" and for further plea pleaded payment, and with his plea of payment the defendant offered his account of payments, to the filing of which the plaintiff objected, but the court overruled the objection, and allowed the account to be filed. Issue was thereupon joined upon the defendant's said plea, and the trial was then proceeded with before a jury.

At the trial, when the plaintiff had introduced his evidence and rested, the defendant asked for a single instruction, to which the plaintiff objected, but the court overruled the objection, and gave the instruction as asked, and the plaintiff excepted, and this is the plaintiff's exception No. 1. Then the plaintiff asked for a single instruction, which was objected to by the defendant, and the court sustained the objection, and refused to give the instruction, and the plaintiff again excepted, and this is his exception No. 2. The jury, after hearing all the evidence, returned the following verdict: "We, the jury, find for the defendant." And Thompson, the plaintiff, by his counsel moved the court to set aside the verdict as contrary to the law and the evidence, which motion the court refused, and proceeded to give judgment according to the finding of the jury, to which action of the court the plaintiff also excepted, and this is his bill of exceptions No. 3, in which the court certifies all the evidence at the trial. And to the judgment of the court refusing to set aside the verdict and grant a new trial, a writ of error and *supersedeas* was allowed by one of the judges of this court.

The sole question for consideration and decision is, does the statute of limitations apply in this case? This question is fairly and fully presented in the instruction asked for by the defendant and given by the court. It is in these words: "The court instructs the jury that the breach of the covenant by the defendant's intestate, F. McMullen, sued for, was the failure of said McMullen to execute the bonds as stipulated in said covenant, and if the jury believe from the evidence that the breach aforesaid occurred more than 20 years before the institution of this suit, exclusive of the war and reconstruction period, (7 years, 8 months, and 14 days,) then they must find for the defendant." On giving this instruction, as asked for by the defendant, the plaintiff then asked for a counter-instruction, as follows: "The court instructs the jury that there was no right of action in this case until a performance by the plaintiffs of the covenant upon their part, as alleged in the declaration, by the execution of the deed provided for in the contract of ———, 1853, or a waiver of the terms of the contract and acceptance of the deed to Thompson by the defendant McMullen, as alleged, and if the jury believe from the evidence that on the 18th day of April, 1860, the said right of action to the plaintiff first accrued to sue upon the said contract, then the period of limitations is to be estimated from that time, and that in estimating the said period of limitations the jury are to exclude from said estimate the term of seven years, eight months, and fourteen days." This instruction was refused by the court. These two instructions are the subjects, respectively, of the first and second bills of exception taken by the plaintiff.

It is unquestionably true that the instruction asked for by the defendant and given by the court, and which is the subject of the plaintiff's said first bill of exceptions, correctly propounds the law. And for like reasons it is equally true that the instruction asked for by the plaintiff, and refused by the court, was properly so refused, especially in view of the state of pleadings and evidence in the cause. The real question thus presented to the jury was whether or not the defendant's plea of the statute of limitations applied to the case. The action was for the alleged breach of his covenant by the defendant's intestate, in his life-time, in not executing his bonds for the deferred payments of purchase money for the house and lot in the declaration mentioned, as stipulated for in the contract which was the foundation of the action. On behalf of the defendant, the court in effect instructed the jury that the breach sued for occurred on the 1st day of October, 1853, and that, if they believed that more than 20 years elapsed between said breach and the time when the suit was brought, exclusive of the stay law passed, then they should find for the defendant; and, it clearly appearing that more than 20 years had so elapsed, the jury accordingly found for the defendant. And in overruling the plaintiff's motion for a new trial, and entering judgment for the defendant, the court uses this language: "This day came again the parties, by their attorneys, the plaintiff's motion to set aside the verdict obtained against him in this cause on Saturday last, and to grant him a new trial, having been fully considered, is overruled, the court considering that the plea of the statute of limitations applies to this case. Therefore it is considered," etc. The plea of the statute of limitations was thus a complete bar to any recovery, unless the plaintiff could reply

Digitized by Google

something to take the case out of the statute; but this he did not attempt to do, and hence the finding and judgment complained of.

The plaintiff's second bill of exceptions is predicated upon the idea that, although the plaintiff and his co-obligors, in the life-time of the latter, did not make or cause to be made to the defendant's intestate the deed for the house and lot, as by the express terms of their covenant they were bound to do, to-wit, on the 1st day of October, 1853, yet, inasmuch as they did afterwards, to-wit, on the 18th day of April, 1860, by the direction of the defendant's intestate, convey to his vendee, John H. Thompson, such after-conveyance amounted to a waiver by the defendant's intestate of the stipulation in the contract, and that the statute only began to run from the time when the conveyance was actually made, and that the court therefore erred in refusing to give said instructions asked for by the plaintiff. It is not possible to maintain this view under the pleadings and evidence in the cause. The covenants set forth in the contract are mutual and dependent covenants. The plaintiff and his co-obligors expressly covenanted to convey, or cause to be conveyed, to the defendant's intestate the house and lot on the 1st day of October, 1853, and the defendant's intestate covenanted to execute his two bonds for the deferred payments at the same time. It is alleged in the declaration that the plaintiff and his co-obligors "did do and perform all things which, by the terms, and according to the true intent and meaning of the said writing obligatory, they had undertaken and were bound to do and perform, except that they did not make to said McMullen a good title to said house and lot; and the plaintiff avers that in lieu of the making or causing to be made to said McMullen a good title to said house and lot, they did cause the said property to be conveyed by W. B. Morgan, trustee, to John H. Thompson, the vendee of the said McMullen, according to the directions of said McMullen, which was accepted by said McMullen in lieu of the covenant to make or cause to be made to him a good title," etc. This is but an admission that the plaintiff and his co-obligors broke their covenant, and did not convey until some six years after the time they had bound themselves to convey. There is no averment that the plaintiff and his co-obligors were at the stipulated time ready and willing to convey or cause to be conveyed the house and lot, or that they, being so ready and willing, offered to convey, or that any act of the defendant's intestate prevented them from being then ready and willing to convey, or from actually conveying, as they had undertaken and bound themselves to do. Nor does the declaration contain any averment of anything which, if proved, could amount to a waiver of the rights of the defendant's intestate under the sealed contract between the parties. Surely the acceptance of a conveyance long after he was entitled to have it could have no such effect as to deprive the defendant's intestate of the protection afforded him by the express covenants contained in the sealed agreement. There can be no doubt that the contract relations of the parties remained unchanged, and that the rights of the defendant's intestate were in no way impaired by his acceptance of the deed at a later day than that stipulated in the contract.

McCombs v. McKennan, 2 Watts & S. 216, 37 Amer. Dec. 505, was an action of covenant upon a sealed agreement by which the plaintiff bound himself to deliver to the defendant 200 bushels of clover-seed at the town of Indiana or at the city of Pittsburgh, or 100 bushels at each locality, on or before the 1st of February, 1839. The defendant agreed to pay $15 per bushel at the time of delivery. After 55 bushels had been delivered at Pittsburgh, the defendant agreed to receive the residue at Indiana, which the plaintiff accordingly delivered at that place within the time specified. The defendant made payments as follows: Upon the 29th of January, 1839, $75, and upon the 14th of February following, $72.50. No other payments being made, after demand the plaintiff removed the seed, and sold it for the sum of $11.50. In the action, which was on the original sealed agreement, there was a verdict and judgment for the plaintiff, and on writ of error it was held—(1) That the place of delivery of articles stipulated in sealed contract is a condition precedent merely, imposed upon the party bound, which may be waived by the party entitled to its performance without producing any alteration of the original contract; (2) that agreement to accept delivery at a place other than that specified in the original contract does not constitute a new contract; (3) that covenant may be sustained upon a contract under seal, notwithstanding by subsequent consent of the parties the place at which the articles called for were to be delivered was altered, and performance may be shown by evidence of a delivery at the place agreed upon; (4) that upon a contract to deliver articles at a particular time and place for a specified price the party bound thereby, after making delivery in the manner agreed upon, if the price be not paid, may remove the articles, and resell them, and may recover upon the original contract as for a breach thereof; (5) that a recovery is not defeated by the acceptance by the contractor of a portion of the consideration, prior to the removal and sale by him of the articles delivered; (6) that the measure of damages is the difference between the contract price and the sum for which the articles were subsequently sold. That case is the converse of the case at bar, and while much that was decided therein has no direct application to the case in hand, yet, for the purposes of this case, it illustrates the fact that in this case no new contract was made amounting to a waiver of the sealed agreement between the parties, and that the action was therefore necessarily brought for the alleged breach of the original contract; and the

Digitized by Google

further fact that, though the defendant's intestate, McMullen, accepted the deed after the breach of the original contract, that fact in no manner varied the terms of that contract, nor in any way deprived him of his defense thereunder, there being no proof of any express agreement at the time of the acceptance of the deed that the original contract was waived. The principle is that the alteration of the contract must be such as to constitute a new contract, (McManus v. Cassidy, 66 Pa. St. 260;) and that a stipulation by parol, waiving performance of part of a covenant, is not an alteration of a sealed agreement, (Lawall v. Rader, 24 Pa. St. 285; McGrann v. Railroad Co., 29 Pa. St. 82;) but if the modification by parol is in relation to some particular matter essential to the defendant's liability upon the original agreement, the latter will be treated as abandoned, and the form of the action in that case is *assumpsit*, (Navigation Co. v. Harlan, 27 Pa. St. 442.) See note to McCombs v. McKennan, supra, at page 508. In the present case, not only is there nothing alleged amounting to a waiver of the stipulation to convey to the defendant's intestate on the 1st day of October, 1853, when he was to execute his bonds for the deferred payments, but the action is founded on the original contract, and is for the alleged breach by the defendant's intestate in failing to execute his bonds at the time therein specified. Obviously, if the plaintiff desired to rely upon the fact that the cause of action did not accrue until the 18th of April, 1860, he should have so declared in the proper form of action, or by filing a special replication to the plea of the statute of limitations. 2 Chit. Pl. (Ed. 1876;) Ang. Lim. §§ 282, 292; Rice v. White, 4 Leigh, 474.

At the hearing here, for the first time, the objection is made by counsel for the plaintiff in error that the statute of limitations, as pleaded, raised an immaterial issue; and it is insisted that a repleader should be awarded. The form of the plea is that the "defendant's intestate did not, within 20 years next before the bringing of this suit, break his covenant, as the plaintiff hath alleged." It is a good plea in an action of covenant to plead that the defendant had not broken the covenant as alleged in the declaration. 5 Rob. Pr. 668. And if it can be pleaded generally that the defendant did not break his covenant at all, surely it is sufficient in form and substance to plead that he did not break it within 20 years next before the institution of the suit, for that is tantamount to saying that the right of action did not accrue at any time within that period. Kanawha Co. v. Adams, 17 Grat. 427, was an action of covenant in which the defendant company pleaded that it had not broken the covenant, on which plea issue was joined, and there was a verdict for the plaintiff. So, too, in the action of *assumpsit*, the form of pleading the general issue is that the defendant did not undertake or promise in manner or form as alleged; and the plea of the statute of limitations is that he did not undertake or promise, as alleged, within five years. In 1 Selw. N. P. (Wheaton) 138, it is said: "There are two forms in which this statute is usually pleaded: (1) That the defendant did not at any time within six years next before the commencement of the plaintiff's action undertake or promise, etc.; (2) that the cause of action mentioned in the declaration did not accrue at any time within six years next before the commencement of the plaintiff's action, etc." And in respect to these two forms of pleading the statute the learned author says: "The second form, viz., that the cause of action did not accrue within six years, may be adopted with safety in all cases, but it is more peculiarly applicable to the cases of actions brought for breach of promises founded on collateral and executory considerations, in which cases the first form would be improper, as will appear from the following case: The declaration stated that in consideration that the plaintiff would receive A. and B. into his house as guests, and diet them, the defendant promised, etc. Plea, *non assumpsit infra sex annos*, to which the plaintiff demurred. Judgment for the plaintiff in the common pleas: on error in B. R. it was agreed by that court that the plea was ill; for, this being an executory collateral promise, the defendant cannot plead *non assumpsit infra sex annos*, but should have pleaded *causa actionis non accrevit infra sex annos;* for, if the cause of action accrued within six years, it was immaterial when the promise was made." For obvious reasons the principle above laid down has no application to the plea in the present case. But, however this may be, our statute of jeofails puts the matter at rest. The statute, section 3, c. 177, Code 1873, among other things, provides that no judgment shall be reversed for any defect, imperfection, or omissions in the pleading which could not be regarded upon demurrer, or for any other defect, imperfection, or omission which might have been taken advantage of on demurrer or answer, but was not so taken advantage of.

It is clear in the present case—*First*, that the statute of limitations was well pleaded; and, *second*, if the plea was defective in form or substance, the defect was the subject of demurrer, and, there having been no demurrer, the defect cannot be taken advantage of after verdict. So, in Lincoln v. Iron Co., 103 U. S. 415, it is said that it is a rule of the common law that where there is any defect or omission in a pleading, whether in substance or in form, which would have been fatal on demurrer, yet, if the issue joined necessarily required on the trial proof of the facts so defectively stated or omitted, and without which it is not to be presumed that the judge would have directed the jury to give the verdict, such defect or omission is cured. We are clearly of opinion that the statute was well pleaded, and that, were it otherwise, the defect is cured after verdict.

Digitized by Google

We are therefore of opinion to affirm the judgment of said circuit court of Smyth county. Judgment affirmed.

(81 Ga. 342)

BAKER v. MILLS *et al.*

(*Supreme Court of Georgia.* May 2, 1888.)[1]

APPOINTMENT OF RECEIVER.

Where a partnership has been dissolved, and the remaining partner is selling goods of the firm for which the purchase price is owing, there is no abuse of judicial discretion in granting an injunction and appointing a receiver, on the filing of a creditors' bill, the condition being that the debtor may, by giving bond, retain possession and continue the sales.

Error from superior court, Fulton county; MARSHALL J. CLARKE, Judge.

The plaintiff in error, J. R. Baker, was a member of a partnership consisting of himself and Benjamin Woolman. They became indebted for goods to defendants in error, Mills & Gibb, and others. They paid a portion of the claim of Mills & Gibb, which was their principal indebtedness, and gave a check for another payment of $300, stating, at the time of giving it, that there was no money on deposit to pay it. It was never paid. Soon after this Woolman sold out to Baker, who agreed to pay the debts of the firm. On the application of the defendants in error, by filing a creditors' bill, to enjoin Baker from selling the property, and for the appointment of a receiver, and for general relief, a rule *nisi* was issued, and a temporary receiver appointed. At the hearing, Baker moved to dismiss the bill on the grounds: (1) Because there was no cause of action set forth. (2) Because complainants had no lien, and showed no special reason taking them out of the general rule and entitling them them to an extraordinary remedy. (3) Because the charges of fraud were not sufficiently specific, there being no sufficient charge of defendant's mingling the goods with his own goods, and no charge that such mingling occurred fraudulently. The motion being overruled, Baker answered the creditors' bill, admitting the indebtedness, but denying that portion of the bill which alleged false representations in the purchase of goods, and fraudulent intent in dissolving the partnership and continuing the business. Woolman also answered the bill, admitting that the indebtedness to the plaintiffs is due and unpaid; that, the firm being insolvent, respondent desired to make an assignment or other legal arrangement, so that their creditors might share alike, and his negotiations with Baker resulted in his selling out to the latter; that he was induced to make this sale by its being held out to him that Baker would assume all indebtedness of the firm. The court granted the injunction, and appointed a receiver, subject to be dissolved by the giving in 10 days of a bond in double the value of the goods in the receiver's hands, conditioned for the payment of such amount as the complainants might recover of the defendant in the case. Defendant assigned error.

Hoke & Burton Smith, for plaintiff in error. *Walter R. Brown* and *J. H. Lumpkin*, for defendants in error.

SIMMONS, J. The court below did not abuse its discretion in granting this injunction. Judgment affirmed.

(81 Ga. 356)

NEWMAN v. KEITH.

(*Supreme Court of Georgia.* May 16, 1888.)[2]

APPEAL—WEIGHT OF EVIDENCE.

Where the verdict is justified by the evidence, and no error of law is complained of, the judgment will be affirmed.

Error from city court of Newnan; POWELL, Judge.

Newman sued Keith for breach of warranty of a mule. On the trial the evidence was conflicting. The judge of the city court gave judgment for defendant. Plaintiff moved for a new trial because the verdict was against evidence and contrary to law. The motion was overruled, and plaintiff excepted.

P. F. Smith, for plaintiff in error. *P. H. Brewster* and *J. S. Powell*, for defendant in error.

BLECKLEY, C. J. This was a controversy involving the question of the soundness of a mule at the time it was sold. The evidence justified the verdict, and there is no complaint of any error of law committed by the court upon the trial; and the judgment refusing a new trial is therefore affirmed.

(81 Ga. 353)

DUNCAN *et al.* v. MAYOR, ETC., OF TOOMBSBORO.

(*Supreme Court of Georgia.* May 21, 1888.)[3]

INCORPORATION OF TOWNS.

A petition of 29 citizens was presented to the judge of the superior court showing that they had posted three notices within the limits of a proposed town; that they would apply for an order incorporating the town, the boundaries being set forth in the notice; that at the expiration of 30 days the voters, pursuant to the notice, met and voted on the subject of incorporation or no incorporation. A list of the 30 voters voting at the election was offered, all the votes being in favor of incorporation. The list was certified to by three persons, styling themselves "freeholders," as managers of the election. An order was entered by the judge reciting the above facts, and ordering an election of town officers. *Held* a sufficient compliance with Code Ga. §§ 775–778, relating to the incorporation of towns.

Error from superior court, Wilkinson county; JENKINS, Judge.

The only question involved in this case is the legality of the incorporation of the town of Toombsboro as provided by Code Ga. §§ 775–778. The evidence introduced was: (1) Petition of N. B. Baum and 28 others to the judge of the superior court of Wilkinson

[1] Publication delayed through failure to receive copy.

[2] Publication delayed through failure to receive copy.

Digitized by Google

county, showing that they posted within the proposed limits three notices that they would apply to said judge for an order incorporating the town of Toombsboro, as provided by law, the boundaries being set forth in said notice; that at the expiration of 30 days the voters met and cast their ballots for incorporation or no incorporation; that said election was held by three managers living within the limits mentioned. Petitioners prayed the granting of an order of incorporation under the name of Toombsboro. The notice described the boundaries, and requested the qualified voters, within said boundaries, to meet at a designated place to vote on the question of corporation or no corporation. A list of voters, living within the limits mentioned, voting in the election, was offered. The list contained 30 names, and was accompanied by a tally-sheet of the votes cast, showing 30 votes for incorporation and none against; the whole being certified by three persons, styling themselves "freeholders," as managers of the election. (2) Order of the judge of Wilkinson superior court reciting the petition, with satisfactory evidence of the facts therein set forth, and ordering that the town of Toombsboro be incorporated, with certain boundary lines. Also appointing three named persons managers to hold an election for "mayor and four councilmen and one recorder." Ordering, further, that the petition and order be entered on the minutes. The court held the town legally incorporated under the act of 1872, and complainants excepted.

P. W. Edge, for plaintiffs in error.

SIMMONS, J. There was no error in the court below in refusing to grant the injunction prayed for in this case, under the facts disclosed in this record. Judgment affirmed.

(82 Ga. 290)

HAMMOND v. HIGHTOWER.

(*Supreme Court of Georgia.* Nov. 9, 1888.)[1]

ACTION FOR ASSAULT—EXPULSION OF TRESPASSER.

1. There was no error in allowing a witness to testify in an action for assault and battery that he had employed plaintiff, and owed her $8, which he had offered to pay but she refused, claiming $16, and had sued him for the latter sum, and came to his house to collect it when the alleged assault occurred; that while in his service she was fussy with the servants, who threatened to quit if she did not cease coming; and that he nailed up a fence between his place and where she stayed, next door,—where it was not objected to on the trial, and was admitted to throw light on plaintiff's conduct at the time of the provocation.

2. Plaintiff testified that she called at the house of defendant's father to get money due her, and was admitted; that defendant and his brothers told her to leave; that the father caught her by the arm, pushed her into the hall, and slammed the door in her face; that she went to the porch and defendant caught her by the arm and jerked her across the porch, and tried to throw her down the steps; that he let her go on her saying she would leave; that she made no disturbance in the house. Defendant, his father and brothers, all denied any violence used, and stated that plaintiff was very boisterous and disorderly, and refused to go; that the father led her by the arm out of the room; that she continued to be boisterous on the porch, and defendant took her by the hand and led her down the steps. *Held*, that instructions that if defendant is guilty without lawful justification, then the jury should find damages; and that any placing of the hands upon the person of another, without legal justification, is an assault; and that "defendant sets up that he did not commit the offense of assault and battery; that what he did he was justified in doing,"—were not erroneous, although justification had not been pleaded.

3. A charge that "what the father and head of the house could do legally the son could do" is not incorrect in its general sense.

4. A charge that "every man's house is his castle;" that "this is an old expression, and comes down to us from those feudal times when the grand people lived in large and fortified houses, which were called 'castles.' In these castles they resisted any entrance except by permission. From this source has come the expression that 'every man's house is his castle.' In accordance therewith every man's abode, however humble, is his castle; as is said, 'Even though the winds of heaven may blow through it, and the rain pour into it, the king of England cannot enter it,'"—is not argumentative, and does not present the law at more length than defendant was entitled to.

5. A charge that if plaintiff and defendant's father had a dispute as to the correctness of the wages due, and plaintiff had chosen to sue her account, she had no right, while the suit was pending, to go to the house to dun the father, does not charge upon testimony illegally admitted, nor transfer the case from the jury to the court.

6. A charge that "persecution is not allowed under the right to ask the payment of a debt, nor to make one's self insulting and offensive," is not argumentative.

7. A charge that if plaintiff "was requested to leave, and would not, and defendant used only such force as was necessary to compel her to leave, there was no assault and battery," is not objectionable, on the ground that plaintiff had a right to dun defendant's father, and was not a trespasser on request to leave so as to authorize defendant in expelling her with force.

Error from superior court, De Kalb county; R. H. CLARKE, Judge.

Action by Miss M. M. Hammond against J. B. Hightower for assault and battery, alleged to have been committed on October 3, 1885. No written plea was filed by defendant. The testimony of plaintiff showed that she was 63 years old at the time of the alleged assault; that she went to the house of defendant's father to collect some money due her, knocked on the door of the dining-room, and was admitted by another son; that, as soon as she entered, four of the sons (defendant being one) began telling her to go, as their father would kill her; that the father came in, caught her by the arm, jerked her to the door, pushed her into the hall, and slammed the door in her face; that she then went to the front porch and sat down to put her overshoes on. Defendant stood over her and when she finished caught her by the arm and jerked her across the porch. She caught on a post. He pulled her hands from it, and started to throw her down the steps. She told him to let her alone and she would go. He loosed her and she left. She raised no disturbance in the house, had never had fusses with the servants, etc. Defendant,

[1] Publication delayed through failure to receive copy.

Digitized by Google

his father, and two brothers, all testified, denying the use of any violent or unnecessary means to expel plaintiff from the house. She entered the house and called for money, which she claimed to be due her for wages; was very boisterous and disorderly; was asked to go, and refused. The father then led her by the arm out of the room. She went upon the porch and continued her boisterous behavior, when defendant took her by the hands and led her down the steps. Defendant's father, T. J. Hightower, also testified that plaintiff had been employed by him. He owed her $8, which he offered to pay, but she refused it, claiming $16. She sued him for the money in a justice's court, and afterwards came to his house, when the matters above stated occurred. Also, that when she was in his service she was fussy with the servants. They threatened to quit if she did not quit coming over, and he nailed up a fence between his place and where she was staying, next door; was told she took it off. The verdict was for the defendant. A motion for new trial was made by plaintiff, on the following grounds: (1–3) Verdict contrary to law and evidence. (4) Error in admitting testimony of T. J. Hightower that plaintiff was fussy when with him, with his servants, who threatened to quit if she did not quit coming over, and that he then nailed up a fence between his place and where she was staying, next door. The error assigned is, no connection or knowledge is brought to defendant. The alleged provocation is too remote from the tort complained of. These provocations were not specially pleaded, and were inadmissible under the appearance plea marked on the general docket by counsel for defendant. (It is not alleged that this evidence was objected to on the trial. The evidence was not admitted as provocation, but to throw light on conduct of plaintiff at time of provocation.) (5) Error in admitting testimony of T. J. Hightower as to suit against him by plaintiff in a justice's court. The error assigned is the same as in the preceding ground, and also because the testimony was parol as to court papers, the absence of which was not accounted for. (It is not alleged that this evidence was objected to on the trial.) (6) Error in charging: If defendant is guilty of this, (assault and battery,) and without lawful justification, then the jury would find damages. The error assigned is that the charge includes justification, which was not in issue, no plea of justification having been filed. (7) Error in charging: If defendant used the force as charged, without lawful justification, you would find some damages, but how much depending, as just stated, on the conscience and impartiality of jurors. Error assigned is the same as just stated. (8) Error in charging: Any placing of the hands upon the person of another, without legal justification, is an assault and battery. Same error assigned. (9) Error in charging: Defendant sets up that he did not commit the offense of assault and battery; that what he did he was justified in doing. Same assignment. (10) Error in charging: What the father and head of the house could do legally the son could do. Error assigned is that no such plea or defense was set up, and the charge in its unqualified, general sense is incorrect. (11) Error in charging: Every man's house is his castle. This is an old expression, and comes down to us from those feudal times when the grand people lived in large and fortified houses, which were called "castles." In these castles they resisted any entrance, except by permission. From this source has come the expression that "every man's house is his castle." In accordance therewith every man's abode, however humble, is his castle; as is said, "Even though the winds of heaven may blow through it, and the rain pour into it, the king of England cannot enter it." Error assigned is that it is argumentative, and presents the law at more length and force than the defendant was entitled to. (12) Error in charging: If they had a dispute as to its correctness, and Miss Hammond had chosen to sue her account, then she had no right, while the suit was pending, to go there to dun Mr. T. J. Hightower. Error assigned is: Charges upon testimony illegally admitted; no evidence that suit was pending at the time of the visit; as unqualified and general statement, without reference to circumstances, it takes the whole matter from the jury, and transfers it to the court. (13) Error in charging: Persecution is not allowed under the right to ask the payment of a debt, nor to make one's self insulting and offensive. Assigned as error because argumentative and unfair presentation of the case. (14) Error in charging: If this lady was requested to leave and would not, and defendant used only such force as was necessary to compel her to leave, there was no assault and battery. Assigned as error, because plaintiff had a right to dun the elder Hightower, and did not, therefore, become a trespasser on a mere request to leave. In dunning and receiving request to leave she was not put in a position that permitted defendant to expel her with force. The motion was overruled, and the plaintiff excepted.

Mason & Hill, for plaintiff in error. *Read & Candler*, for defendant in error.

BLECKLEY, C. J. The court did not err in refusing to grant a new trial on any of the 14 grounds set forth in the motion, or upon all of them taken together. Judgment affirmed.

(82 Ga. 288)

CITY OF COLUMBUS v. PEARSON.

(*Supreme Court of Georgia.* Feb. 15, 1889.)[1]

MUNICIPAL CORPORATIONS—DEFECTIVE STREETS—EVIDENCE.

In an action against a municipal corporation for personal injuries sustained by falling into

[1] Publication delayed through failure to receive copy.

Digitized by Google

a sewer at the edge of the sidewalk, which plaintiff's evidence showed was carelessly left open and unlighted at night, and of the construction of which plaintiff testified that he had no previous knowledge, defendant's evidence showed that there was no regular sidewalk, but that a ditch, covered for part of its length, was next to a wall or building on that side of the street, and that the usual passway was between this ditch and the sewer; that at the time of the accident most of the sewer was filled in; that the unfilled portion was about eight feet from the passway, and the morning after the accident showed no signs of having been fallen into; that the unfilled portion was properly lighted on the night in question; that plaintiff might have fallen into an old ditch which had been maintained by the city for many years; that he could have traveled as easily by another route; and that the work on the sewer had been carried on for some time, and was obvious to passers. *Held*, that the evidence warranted a verdict for plaintiff.

Error from superior court, Muscogee county; SMITH, Judge.

Action by J. A. Pearson against the mayor and council of Columbus for personal injuries alleged to have been sustained by falling into a certain sewer in that city, which had been carelessly left open and unlighted at night, along and near the usual passway on the west side of a certain street. The evidence for plaintiff tended to show that the sewer had been left open upon the edge and probably cutting a little into the usual sidewalk upon one side of a street of the city, and that plaintiff fell into it one night when it was left unlighted, and that he sustained injuries sufficient to warrant a verdict for the amount which he recovered. Defendant's evidence showed that there was no regular sidewalk upon that side of the street, but that a ditch, covered for a part of its length, was next to a wall or building running along that side of the street; that the usual passway was between this ditch and the sewer; and that, at the time in question, most of the sewer had been filled in, only a small portion of it being left partly unfilled, for a depth of about two feet, this unfilled portion being eight or ten feet from the passway; that at this point the sewer had been partly filled with loose earth, and, on being examined the morning after the alleged casualty, it gave no indication of having been fallen into; that this point of the sewer was properly lighted on the night in question; that plaintiff might have fallen into an uncovered portion of an old ditch, which seems to have been maintained by the city, and had been in existence at this point for thirty or forty years; that the construction of this sewer had been carried on for some time and was obvious to an ordinary passer; and that plaintiff could have gone by another route which was as short and convenient, at the time in question, instead of by passing along this side of the street in question, and near this ditch and sewer. Plaintiff testified that he had no previous knowledge of the city being engaged in constructing the sewer at this point, though it was his habit to frequently pass along the opposite side of the street. The jury found for plaintiff $500. Defendant moved for new trial on the grounds that the verdict was contrary to law and evidence, and because of error in refusing to charge as requested by defendant. The motion was overruled, and defendant excepts.

Peabody, Brannon & Hatcher, for plaintiff in error. *MaNeill & Levy*, for defendant in error.

SIMMONS, J. 1. The requests to charge which were refused by the court, so far as they were legal, were included substantially in the general charge of the court, and it was unnecessary for the court to repeat the same.

2. There was sufficient evidence to authorize the finding of the jury. There was, therefore, no error in overruling the motion for a new trial. Judgment affirmed.

(82 Ga. 294)

SPARKS v. ETHEREDGE.

(*Supreme Court of Georgia.* Feb. 18, 1889.)[1]

EXECUTION—DISCHARGE—EVIDENCE.

A judgment obtained in October, 1884, and execution issued thereon, were transferred in December to one H., and a year later to plaintiff, who levied it on defendant's property in 1887. Defendant alleged that the execution had been satisfied, and produced cotton receipts apparently for 50 bales of the crop of 1886. He testified that he shipped the firm which first obtained the judgment 50 bales of cotton, before they transferred the execution, and instructed them to apply it thereon, and that a member of the firm told him that there was $400 due on the execution, and that he agreed to pay H. $400. Another witness testified that some time in 1886 he heard defendant tell plaintiff that he wanted the balance of the 1886 crop to apply "on that old execution," and defendant alleged that this was the only execution against him then in plaintiff's hands. Plaintiff's evidence showed that defendant had paid only $400 on the execution, which was for more than $2,000, and had after the levy acknowledged that the execution was outstanding; that he procured its transfer to plaintiff to avoid being pressed by H. for payment; that the cotton was applied to other indebtedness of defendant to plaintiff. All this defendant denied. A member of the firm which obtained the judgment testified that he did not remember that defendant shipped the firm any cotton in 1884. *Held*, that the evidence warranted a verdict that the execution was in force.

Error from superior court, Harris county; SMITH, Judge.

On a judgment obtained October 13, 1884, for $2,132.49, principal, with interest, attorney's fees, etc., in favor of Barnes & Sparks against T. N. Sparks, an execution issued. This execution and judgment, on December 11, 1884, were transferred to B. T. Hatcher, and on December 28, 1885, Hatcher transferred them to Slade & Etheredge. On January 11, 1887, the execution was levied on certain property of defendant. He interposed by affidavit of illegality the defense that, before the transfer to Hatcher, he had delivered to the plaintiffs in *fi. fa.* cotton of sufficient value to pay the execution, with instruction to sell the cotton and apply the proceeds to said execution; also that while Hatcher

[1] Publication delayed because of failure to receive copy of opinion.

Digitized by Google

owned the *fi. fa.* he paid Hatcher $400 on it; also that after Slade & Etheredge became its owners, he shipped to them $1,646.66 in cotton of that net value, with instruction to apply it to what might be due on the *fi. fa.* Hence he says that the *fi. fa.* has been fully discharged. Also that Slade & Etheredge agreed to advance the money to take up or pay off the *fi. fa.*, or whatever might be due on it, and the amount advanced was to be repaid by defendant shipping cotton to them, etc. Therefore, he says said taking up was a payment on the *fi. fa.* and judgment. Plaintiff traversed the truth of the grounds of illegality, and, Slade being dead, the cause proceeded in the name of Etheredge, surviving partner. Upon the trial, defendant introduced cotton receipts given to him and his tenants, apparently for 50 bales of the crop of 1886, by Slade & Etheredge. Defendant testified that he sent Barnes & Sparks 50 bales of cotton before they transferred the execution, and instructed them to apply it to the execution; that a member of the firm of Barnes & Sparks afterwards told him there was $400 left due on the execution; that after the transfer to Hatcher, witness told him he thought the execution had been paid; that he agreed to pay Hatcher $400. Did not admit that the execution was all right after the levy; and did not authorize Walton to negotiate for its transfer to Slade & Etheredge. This execution was the only one in the hands of Slade & Etheredge against witness at the time of conversation between witness and Slade, testified about by William Payne. Witness was indebted to Slade & Etheredge on account for 1884, and in 1885; but as to how much, and what payments he made, his testimony is indefinite. William Payne testified that some time in 1886 he heard defendant tell Slade that he wanted balance of the crop of 1886 to go "on that old execution." Did not say what execution, or what was the balance due.

The evidence for plaintiff tended to show that defendant had never paid but $400 on the execution, which was paid to Hatcher, and entered as a credit on the execution itself; that up to and after the time of the levy, he acknowledged that the execution was outstanding against him; that, being pressed by Hatcher, he procured Slade & Etheredge, through Walton, to have the execution transferred to them that he might gain more time; that the cotton he claimed to have turned over to Barnes & Sparks was shipped by Sparks, of that firm, to Slade & Etheredge, and applied to the existing indebtedness to Slade & Etheredge of the defendant; that defendant owed Slade & Etheredge a balance in 1886, independently of the execution in question; that he contracted additional indebtedness to them in 1886, and shipped the cotton of 1886 to them under an agreement that its proceeds were to be applied first to said indebtedness of 1886, and the balance to the other indebtedness, exclusive of the execution; that Slade & Etheredge received 40 bales only of the cotton of 1886, duplicate receipts having been given for some of the bales; that after applying all payments made by defendant to Slade & Etheredge, defendant was considerably indebted to them, over and above the execution in question. O. S. Barnes, a member of the firm of Barnes & Sparks, testified that he did not remember that defendant delivered a single bale to the firm in 1884. The jury found the execution "open and in full force." Defendant moved for a new trial on the grounds that the verdict was contrary to law and evidence. The motion was overruled, and defendant excepts.

Thornton & Cameron, for plaintiff in error. *Goetchius & Chappel* and *B. H. Walton*, for defendant in error.

BLECKLEY, C. J. The evidence warranted the verdict, and the court did not err in refusing to grant a new trial. Judgment affirmed.

(82 Ga. 61)

SNOOK *v.* GEORGIA IMP. CO.

(*Supreme Court of Georgia.* July 22, 1889.)

RAILROAD COMPANIES — CHANGE IN TERMINUS — SUBSCRIPTIONS—CHARTERS.

1. Where a railroad corporation obtains authority from the legislature to change one of its termini and to increase its capital stock without the consent of a subscriber to stock under the original charter, the latter is released from his subscription, though at the time thereof the general law, under which the first charter was obtained, authorized amendments to the charter increasing the capital stock, and changing the route, as such law did not authorize a change in the termini.

2. After the incorporation of the A. & H. R. Co., under the general railroad law, the legislature passed an act entitled "An act to incorporate the A. & H. R. Co., to confer certain powers and privileges on said company, and for other purposes." The corporators named in the act were not entirely the same as those to whom the original charter was granted, and the act stated that "they are hereby created a body politic and corporate," and gave them all powers necessary to any railroad company, appointed directors, etc. Subsequently an amendment to this act was passed, entitled "An act to amend the charter of the A. & H. R. Co., to change the name thereof, * * * to authorize the extension thereof, * * * and for other purposes." This amendment changed the name of the company, and gave it, in the construction of the extension, all the powers granted by the amended act. *Held*, that these acts constituted a separate and distinct charter, creating a new corporation, and were not amendments to the original charter.

Error from city court of Atlanta; VAN EPPS, Judge.

T. W Birney and *Abbott & Smith*, for plaintiff in error. *Payne & Hull*, for defendant in error.

SIMMONS, J. The Georgia Improvement Company brought its action against Snook for $250, which it alleged Snook had subscribed to the Atlanta & Hawkinsville Railroad Company, now the Atlanta & Florida Railroad Company, the name having been changed by an act of the legislature approved October 24, 1887. To this action Snook filed the plea of the general issue, and four special pleas.

Digitized by Google

The plaintiff demurred to the special pleas. Its demurrer was sustained by the court, and the plaintiff had a verdict. The defendant moved for a new trial, which was refused by the court, and he excepted.

The main question in this case is whether the court erred in sustaining the demurrer to the defendant's special pleas. The view we take of the case renders it unnecessary for us to discuss all the pleas which were stricken by the court. The only ones we will discuss are the third and fifth, because, if they are sufficient in law, and are true, the plaintiff cannot recover. The third plea, after being stripped of its redundancy and superfluous verbiage, is, in substance, that the defendant subscribed for $250 of stock in the Atlanta & Hawkinsville Railroad Company, which had been incorporated under the general railroad law; that the charter granted to said corporation provided that the railroad should run from Atlanta to Hawkinsville, through certain counties named in the charter; that subsequently to this charter, and to his subscription, said company, through its directors, applied to and obtained from the legislature another charter, which charter changed the capital stock from $250,000 to $500,000, and changed the route of the road, and allowed said company to construct a line from Atlanta in a southerly direction to or near Hawkinsville, or to or near Thomasville in Thomas county, or both, and run through such counties as might be necessary to one or both of said points. The plea further alleges that afterwards, on the 24th of October, 1887, said Atlanta & Hawkinsville Railroad Company procured the legislature to pass another act, in which the name of the company was changed to the Atlanta & Florida Railroad Company, and the route changed, the company being allowed to make various extensions and branches from Thomasville to any point on the state line of Florida. The plea further alleges that each of these changes was material, and without the defendant's consent, and had not been considered or anticipated in his contract to take stock, and that he was therefore released from obligation to do so. The fifth plea alleges, in substance, that the original scheme contemplated by the original corporators of the Atlanta & Hawkinsville Railroad was given up and abandoned, and the subscribers thereby released; and that afterwards certain persons (naming them) applied to the legislature, and obtained from it a charter under the name of the Atlanta & Hawkinsville Railroad Company, which company, under the name of the Atlanta & Florida Railroad Company, made the alleged transfer of his subscription to the plaintiff. He alleges that said company was a different one from the one to whose capital stock he had subscribed, and that he had never subscribed to the stock of the Atlanta & Florida Railroad Company.

1. We think the court erred in sustaining the demurrer to these pleas. The doctrine is now well settled that if the charter of a corporation is materially, fundamentally, or radically changed by the legislature after a person has subscribed for stock therein, without his consent, he is released from such subscription. On this subject the only difference in the decisions of the court now is as to what amounts to a material, fundamental, or radical change. They hold that this is a question of law to be decided by the courts, and not a question of fact for the jury. Most of them hold that no general rule can be laid down as to what is a material or fundamental change, but that each case must be determined upon its own state of facts. It is also held that the charter of a corporation is a contract of a dual character,—*First*, a contract between the state which grants the charter and the corporation; and, *secondly*, a contract between the corporation and its members; and while the state, if it reserves the power to do so, can alter and amend the charter, and the corporation itself cannot object to the alteration or amendment, yet the state has no power to make any material or essential alteration in the contract between the members themselves and the corporation. Winter v. Railroad Co., 11 Ga. 438; Wilson v. Railroad Co., 33 Ga. 466; Railroad Co. v. Sullivan, 57 Ga. 240; Railroad Co. v. Collins, 40 Ga. 617; Thomp. Liab. Stockh. § 70; 1 Ror. R. R. 147, 200; Pierce, R. R. 68; Witter v. Railroad Co., 20 Ark. 463; Plank-Road Co. v. Arndt, 31 Pa. St. 317; Plank-Road Co. v. Lapham, 18 Barb. 315; Railroad Co. v. Pottle, 23 Barb. 21; Stevens v. Railroad Co., 29 Vt. 545; Fry's Ex'r v. Railroad Co., 2 Metc. (Ky.) 314; Thompson v. Guion, 5 Jones Eq. 118; Turnpike Corp. v. Locke, 8 Mass. 267; Hester v. Railroad Co., 32 Miss. 378; Railroad Co. v. Marsh, 17 Wis. 13; Railroad Co. v. Elliott, 10 Ohio St. 57; Railway Co. v. Hodgens, 77 Pa. St. 190; Caley v. Railroad Co., 80 Pa. St. 368. As to the character of the contract between the state and the corporation and between the subscribers to the stock of the corporation, and as to the power of the state to alter or amend the charter, see an able and learned discussion of the subject by Chancellor ZABRISKIE, in Zabriskie v. Railroad Co., 18 N. J. Eq. 178. Applying these rules to the facts of this case, we find that certain persons obtained a charter under the general railroad law, authorizing them to construct a railroad from Atlanta to Hawkinsville. After this was done Snook subscribed $250, for which amount he is sued in this action. The capital stock, at the time of his subscription, was $250,000. Afterwards, the company, without Snook's assent, applied to the legislature and obtained an amendment to the charter, or a new charter, (whether it be an amendment or a new charter is immaterial for the purposes of this argument,) which changed the southern terminus, and the capital stock of the railroad from $250,000 to $500,000. When Snook made his subscription the charter of the company designated Hawkinsville as the southern terminus, and his subscription was made under the terms of that char-

Digitized by Google

ter. That charter was the constitution and the law to him and the other subscribers. He agreed with them and the company that he would pay so much in order to have a road constructed from Atlanta to Hawkinsville. According to his plea, nothing was said, anticipated, or contemplated about any other southern terminus. Nor was anything said about an increase of the capital stock from $250,000 to $500,000, or to $2,000,000, as afterwards provided by the act of 1887. Snook may have been willing to subscribe for the construction of a railroad from Atlanta to Hawkinsville. He may have owned property at Hawkinsville, or may have had other good reasons for desiring to have the terminus there; and he may have been unwilling for the terminus to be changed from Hawkinsville to Thomasville. He may also have been willing to embark in the enterprise when the capital stock was only $250,000, and may have been unwilling to have the capital stock increased to $2,000,000. Whether willing or unwilling, he stands upon his express contract, which he made with the company and the other subscribers, that the southern terminus should be at Hawkinsville, and its capital stock only $250,000; and, in our opinion, he had the right to stand upon that contract, and neither the company nor the legislature had a right to change his contract so that the southern terminus of the road should be at Thomasville, and the capital stock $2,000,000, without his consent. But it is argued that when he subscribed the general law under which the first charter was obtained authorized amendments to be made to the charter, the route to be changed, and the capital stock increased. If this be true, the particular mode and method as to how these changes may be made was pointed out in the general law. The increase of the capital stock could only be done by vote of the stockholders, and the change of route could only be made by a two-thirds vote of the directors; and it may be that he could insist upon its being done in the mode contemplated by the charter of the company to whose stock he had become a subscriber. Whether this be true or not, the general law, under which the first charter was obtained, nowhere provides for a change of terminus of the road after the terminus has been agreed upon by the stockholders. It provides for a change of route between the termini, and provides for branch roads and extensions; but, as said before, it gives no authority to the stockholders or the directors, or the legislature, to change the terminus of the road. The weight of authority is to the effect that a change of the terminus of a road is a fundamental alteration, which releases the subscriber who subscribed to the stock before the change was made, if made without his consent. For these reasons, and for others which might be added, we hold that this change was a material and fundamental one, and that the defendant was released from his subscription. Of course, if it should appear upon the trial that the facts stated in the plea are untrue, and that the railroad was constructed to Hawkinsville, and no change of terminus made, or that, if it has been changed, Snook assented to it, then he would not be released.

2. We think the court erred also in sustaining the demurrer to the fifth plea. We think that the act of 1886 is not an amendment to the original charter of the Atlanta & Hawkinsville Railroad Company, obtained under the general law, but is a separate, independent, and distinct charter. The title to the act is: "An act to incorporate the Atlanta & Hawkinsville Railroad Company, to confer certain powers and privileges on said company, and for other purposes." Acts 1886, p. 102. The first section of the act then names the corporators, and they are not the same altogether as the corporators in the original act. The act further says, after naming these persons, that "they are hereby created a body politic and corporate, under the name," etc., and then proceeds to give them all the powers that are necessary for any railroad company whatever, the right to sue and be sued, to hold property, to condemn land, to mortgage. The amount of the capital stock is fixed, and the right given to join with other railroads. Certain persons are appointed directors, to act until a regular election can be held by the stockholders, etc. This act was passed and approved in December, 1886. The legislature which passed the act adjourned in December until the summer of 1887, when the same body amended this act of the preceding session. The title to this amendatory act is as follows: "An act to amend the charter of the Atlanta & Hawkinsville Railroad Company, to change the name thereof to the Atlanta & Florida Railroad Company, to authorize the extension thereof to the Florida line, and for other purposes." The first section of that act recites that "the name of the railroad corporation chartered heretofore by the act of this legislature under the name of the Atlanta & Hawkinsville Railroad Company be changed to the Atlanta & Florida Railroad Company." The sixth section of the act says that "said railroad company shall have, in the construction of said extension, all the rights, powers, privileges, and immunities granted to and conferred upon the Atlanta & Hawkinsville Railroad Company by the legislature of Georgia, by act approved December 7, 1886." Construing these two acts together, and the phraseology of the acts, and the fact that the corporators in the original charter and those mentioned in the act of 1886 are not entirely the same, we conclude that these acts are not amendments to the charter granted under the general railroad law, but a separate and distinct charter granted by the legislature. If they intended to incorporate the same company as that already incorporated under the general law, they certainly attempted a very useless thing, for the general law being, as we think, valid and constitutional, the stat-

Digitized by Google

utory incorporation under it was all that was needed. It perhaps was a safer, and certainly as safe, a charter as any that would be granted by a special law, while that general law was unrepealed. Counsel for the defendant in error cited us to the case of Johnston v. Crawley, 25 Ga. 316, which it was claimed holds that such acts are amendments to the charter, and not a new charter. We do not think that case should control our decision in this case, under the facts of the present case. Besides, from a reading of the facts of that case, it will be seen that it was not necessary to the decision of that case for the court to hold that these two charters were the same. The main issue in that case was, whether a claimant who had purchased property under judgments which were junior to a mortgage could hold the property against the mortgagee. Johnston bought the mill and machinery under judgments junior to Crawley's mortgage, and bought with notice that the judgments were junior to the mortgage. The mortgage was foreclosed, and was levied upon the mill and machinery, and a claim was interposed by Johnston. All that it was necessary to decide in that case was a very plain proposition of law,—that Johnston's title, arising from a sale under junior judgments, could not prevail over the older lien of the mortgage, whether the corporations were the same or different. We therefore do not think that case should control us in our decision of this case, when it is manifest from the acts of the legislature themselves that they were intended to create a new corporation, and not to amend the charter obtained under the general law. For these reasons we reverse the judgment of the court below. Judgment reversed.

(83 Ga. 156)

McGee v. Long *et al.*

(*Supreme Court of Georgia.* July 8, 1889.)

USURY—REVIEW ON APPEAL.

1. Payments made upon an usurious debt are to be deducted from the principal and lawful interest, where the suit is upon renewal notes executed after such payments, but without purging out the usury.

2. Evidence excluded, which derives its materiality alone from a part of the plea stricken out, need not be considered by the supreme court, more especially where much of it is not set forth in the motion for a new trial, but presented in an exhibit to the same, consisting of a long extract from the stenographic report of the trial, such extract being rife with tedious and irrelevant matter.

(*Syllabus by the Court.*)

Error from superior court, Crawford county; GUSTIN, Judge.

R. D. Smith and *L. D. Moore*, for plaintiff in error. *J. H. Hall* and *Hardeman & Davis*, for defendants in error.

BLECKLEY, C. J. 1. The action was by executors upon several promissory notes, payable to their testator or bearer, dated March 1, 1881, and due one day after date. To the plea of the general issue, the defendant added a special plea by amendment, setting up that the consideration of the note was illegal because consisting in large part of usury. The special plea then entered into particulars as to how the contract for usury arose out of a loan made to him by the testator, in 1871, specifying the rate of interest agreed upon and the amount of usury that had accrued up to the date of the notes in suit. It also alleged specifically the making of several payments on the loan, giving the amount of each of them, and also specifying, with more or less certainty, the date of each. It averred that these payments (all of which were made before the notes in suit were executed) paid up the loan in full, together with legal interest thereon. It concluded with a prayer that the plaintiffs make to him a deed reconveying to him certain land which he had conveyed to the testator as security for this loan. At the trial, this plea was demurred to generally. It appears from an order found in the record that the demurrer was sustained as to all the payments alleged to have been made upon the loan. The motion for a new trial complains of the striking of the plea upon demurrer, and we take it that the striking referred to was only to the extent shown by the order of the court sustaining the demurrer. We infer therefore that the plea was left to stand as a plea of usury, but not as a plea of payment, total or partial. We think the court erred in putting the alleged payments out of the case; for, although the plea is exceedingly loose and informal, we think its plain import is that the notes declared upon were infected with usury, at least to the amount of the usury specified in the plea, because given in whole or in part on account of a loan which, save as to the usury, had been fully paid before these notes were executed. Certainly the plea should have been more specific in alleging the connection of the notes with that loan; but its want of directness and explicitness in that regard was amendable, and, had it been demurred to specially for such a defect, no doubt it would have been amended. What we rule is that it was error to eviscerate it on a general demurrer. If there was usury in the original loan, which was not purged out when these notes were given, and if that usury is in them, they are contaminated just as the original contract was; and all payments made in the interval are to be treated, not as payments of usury, but payments made on the original debt, principal and lawful interest. Archer v. McCray, 59 Ga. 546; Wilkinson v. Wooten, Id. 584. Upon this ground of the motion, the court ought to have granted a new trial.

2. With regard to the other special grounds of the motion, which relate to the rejection of evidence, we make no ruling, since from our understanding of the case the excluded evidence had no materiality, as the pleadings stood when it was offered. Its significance rested altogether upon the alleged payments which were stricken from the special plea. Moreover, as to much of this evidence, we

Digitized by Google

are referred by the motion for a new trial to an exhibit annexed to it, to ascertain what the evidence was; and that exhibit consists of a long rigmarole, apparently a stenographic report of questions, answers, remarks by counsel, remarks and rulings of the court, etc., the evidence being scattered up and down divers pages, with these irrelevant, tedious, and distracting matters interspersed. That we are not going to fish up evidence in fragments from such muddy water we have plainly intimated in Wiggins v. Norton, ante 607, (this term,) and perhaps in previous cases. Other courts are beginning to complain of this nuisance. Cahn v. State, (Tex.) 11 S. W. Rep. 727.

Judgment reversed.

(82 Ga. 752)

YOUNG *et al.* v. STATE.

(*Supreme Court of Georgia.* July 8, 1889.)

ASSAULT WITH INTENT TO KILL—APPEAL.

1. On a trial for assault with intent to murder, a charge requested by defendants that if they could have done the murder, but desisted of their own accord, the acts are not assault with intent to murder, and that if they began the assault with intent to murder, but desisted before the consummation of the intent, then they are not guilty, is properly qualified by adding, "unless the acts committed prior to desisting amount to assault with intent to murder."

2. A verdict of conviction with which the trial judge is satisfied will not be disturbed on appeal, though in the opinion of the supreme court the evidence seems to inadequately sustain the charge.

Error from superior court, Decatur county; BOWER, Judge.

Harrison & Peeples, (*D. A. Russell*, of counsel,) for plaintiffs in error.

SIMMONS, J. 1. McRae and Young were tried and convicted of assault with intent to murder. The main grounds argued by counsel for the plaintiff in error, for reversal of the judgment of the trial court in refusing to grant the motion for a new trial, were the third and fourth grounds of the motion, which are as follows: (3) Error in refusing to give in charge to the jury the following request of counsel for the defendants: "If the defendants, or either of them, charged with intent to murder, could have done the murder, and yet did not do it, and nothing prevented him or them, and they desisted of their own accord, then the true theory of the law is that the acts are not assault with intent to commit murder, but are assault and battery." This request the court gave, but with the following qualification: "Unless the acts committed prior to desisting amount to assault with intent to murder." The refusal to give the charge as requested, without qualification, and the qualifying of the same as above stated, is alleged to be error. (4) Error in refusing to charge the jury as requested, without qualification: "If the defendants, or either of them, began the difficulty with the intention of murdering either of the parties named in the bill of indictment, and after pursuing that intent to any point short of consummation of that intent, and then, by agreement or other reason, repented and desisted from the accomplishment of the act of murder, then he is not guilty of assault with intent to commit murder." And error in qualifying this request as follows: "Unless the acts already committed before desisting amount to assault with intent to commit murder." We think the court was right in qualifying the request to charge as he did. When a man has an intent to commit a certain crime, and does an act concurrent with the intent sufficient to constitute a lesser crime of the same nature, and repents or desists from his first intention, he is still indictable for the lesser offense. "If, however, he abandons his evil intention at any time before so much of the act is done as constitutes a crime, such abandonment takes from what has been done its indictable quality." Stephens v. State, 107 Ind. 189, 8 N. E. Rep. 94; 1 Bish. Crim. Law, §§ 208*a*, 733, 766; 4 Amer. & Eng. Cyclop. Law, 677.

2. The next ground insisted on by counsel for the plaintiff in error was that the verdict was contrary to the evidence. We have read the evidence carefully, and we affirm the judgment of the trial judge very reluctantly. It seems to us that the evidence is rather weak to sustain the charge of assault with intent to murder, but that it makes out a case of aggravated assault and battery. But as the jury found the defendants guilty, and the judge who tried the case was satisfied with their verdict, we conform to the uniform rulings of this court, and will not disturb their finding on this ground. Judgment affirmed.

(83 Ga. 387)

COAST LINE R. CO. v. BOSTON.

(*Supreme Court of Georgia.* July 8, 1889.)

EXCESSIVE DAMAGES—NEW TRIAL.

1. In an action for personal injury, caused by being thrown from a street-car, plaintiff testified that the car stopped, and, as she was stepping off, the driver whipped up the team, starting the car with a sudden jerk, which threw her to the ground and hurt her arm. She was dependent on her labor for support, and the wound greatly disabled her, and reduced her earnings. Her statement as to the wound was corroborated by her physician. Her testimony as to how the accident occurred was contradicted by witnesses, who swore that she attempted to get off when the car was in motion, without notice to the driver, and that the car did not stop. At a former trial, on substantially the same testimony, plaintiff got a verdict for $1,250, but defendant obtained a new trial. On the new trial the jury gave plaintiff a verdict for $1,240. *Held*, that there was sufficient evidence to sustain the verdict, and that it was not excessive.

2. It is not error to overrule a motion for a new trial, based on newly-discovered evidence, when the affidavits in support of the motion are rebutted by counter-affidavits of the adverse party.

Error from city court of Savannah; HARDEN, Judge.

In an action for personal injuries, brought by Belle Boston against the Coast Line Railroad Company, plaintiff testified that she boarded a street-car of defendant to put her daughter on, intending to at once leave the car herself. The rear platform of the car

Digitized by Google

was crowded, so she got on the front platform, and told the driver that she was going to put the child on, and then get off; saw her sister in the car, and put the child in her custody, and, without entering the car, started almost immediately to get off. The driver stopped the car for her. When in the act of stepping down the driver whipped up the mules, without any notice, and she fell with left arm under one of the wheels of the car, where it was badly mashed. Before she was hurt she washed and ironed for a living, averaging $35 a month, after paying expenses. She was hurt on the 28th day of November, 1886, and did not get able to work again until March, 1887, and then went into service at $12 a month, but could not do the work, and her wages were reduced to $8 or $10 a month. Her physician testified that he examined her the night she was hurt; found the skin torn off the arm, the flesh and muscles of the arm mashed and bruised, and the bone of the upper arm scraped as if between two flat surfaces. The wound was a complicated one, and did not heal. She suffered great pain, and had hysterical attacks. The tissue around the bone was destroyed, and it caused the bone to decay partially, and to omit an offensive odor. Partial death of the bone ensued, abscesses formed, and had to be opened with a knife several times, and the nerves of the arm were injured, which weakened the grasp of the little finger and the finger next to it. He testified that the injury would more or less affect the use of the arm for life; that he could not state what proportion of the capacity to work she had lost. The testimony for defendant was that plaintiff got in the car, and then started out, without giving notice to the driver; jumped off while the car was in motion, by reason of which she received her injury. There has been a former trial of the case, upon which substantially the same evidence had been introduced as on the latter trial. On that trial the jury found for plaintiff $1,250. Defendant obtained a new trial, on the grounds that the verdict was contrary to law and evidence, and was excessive. On the second trial the verdict was for the plaintiff for $1,240. Defendant again moved for a new trial on the grounds that the verdict was contrary to law and evidence, and was excessive, and because of the newly-discovered evidence of R. E. Cobb. The affidavit of Cobb in support of the last ground was as to a conversation had with Dr. Nichols after the last trial. Dr. Nichols made a counter-affidavit, denying, in effect, the conversation alleged in the Cobb affidavit. The motion was overruled, and from the order denying it defendant brings error.

James Atkins, for plaintiff in error. *R. R. Richards* and *W. R. Leaken*, for defendant in error.

SIMMONS, J. Boston sued the railroad company for personal injuries, and recovered a verdict for $1,240. The defendant made a motion for a new trial, on the grounds that the verdict was contrary to law, to the evidence, and to the charge of the court, and was excessive, and upon the ground of newly-discovered evidence. The motion was overruled by the court, and the defendant excepted.

1. There was sufficient evidence to sustain the verdict of the jury.

2. Under the facts in the record the verdict for $1,240 was not excessive.

3. There was no error in overruling the motion for a new trial, upon the ground of the newly-discovered testimony of Cobb. Cobb's affidavit was rebutted by the affidavit of Dr. Nichols.

Judgment affirmed.

(83 Ga. 391)

RICHARDSON v. LUMSDEN.

(*Supreme Court of Georgia.* July 8, 1889.)

INJUNCTION—WHEN LIES.

Injunction will not lie to restrain the enforcement of judgments which petitioner alleges that he allowed defendant to obtain against him as administrator, on the latter's promise not to hold him liable, but only to hold the judgments as an older claim than a judgment which might be obtained in a suit then pending against petitioner by third persons, where defendant's judgments are defective, and not enforceable until amended, especially as petitioner could set up the agreement in defense to a suit to enforce the judgment.

Error from superior court, White county; WELLBORN, Judge.

H. H. Perry and *H. H. Dean*, for plaintiff in error. *A. F. Underwood & Son* and *J. J. Kimsey*, for defendant in error.

SIMMONS, J. Lumsden, as administrator, filed his petition, alleging, in substance, that Richardson, as administrator of Williams, in September, 1888, obtained two judgments against him in a justice's court; that, before suit was brought against him in the justice's court, Richardson and his counsel told him that they desired to obtain judgments against him as administrator, so that if the Pitners, who had a suit pending against the petitioner in the superior court, obtained judgment against the petitioner, Richardson would have the oldest judgment against the petitioner, and could claim the money in the superior court in preference to the Pitners; that if he would suffer said judgments to go against him they would only use them for that purpose, and never seek to hold him liable. Acting upon this promise of Richardson and his attorney, the petitioner acknowledged service in these suits in the justice's court, and allowed judgment to be entered against him. Had they not promised to use the judgments only to claim money in the superior court in the event the Pitners recovered against the petitioner, the petitioner would have filed his defense to the suits in the justice's court. He had no assets belonging to his intestate when suit was brought and when the judgments were recovered, which was well known to Richardson and his attorney. Since they obtained

Digitized by Google

said judgments they have been dunning him for the money, and threatened, in case he should fail or refuse to pay it, to bring suit upon his bond. He alleges that said judgments were thus obtained by fraud, and prays an injunction restraining Richardson from enforcing said judgments. Richardson filed his answer, denying the material allegations in the petition. The court granted the injunction prayed for, and the defendant excepted and assigned error thereon.

We think the court erred in granting this injunction, under the facts disclosed in the petition. It seems to us that according to the allegations in the petition Richardson got only the kind of judgments which the petitioner agreed for him to have. According to his petition he agreed that Richardson might have these judgments against him as administrator. These are the only judgments that Richardson obtained, if he obtained any. According to the judgments set out in the record, as they now stand, they are evidently not judgments against the petitioner, either individually or in his representative capacity. They may, however, be so amended as to make them good judgments against him as administrator, but without amendment they are not enforceable. The petitioner alleges that Richardson agreed that he would only enforce them to claim money in the superior court if recovered by the Pitners. We think, therefore, the petitioner is not entitled to an injunction, at least in the present state of the case. Indeed, we do not see, under the allegations in the petition, that it would ever be necessary for him to apply for an injunction. If Richardson should violate the agreement as stated by the petitioner, and should bring a suit upon the petitioner's bond, we do not see why he could not enforce this agreement as a defense to that suit, if such an agreement was made under circumstances that would render it a fraud not to abide by it. We think, therefore, that the court erred in granting this injunction. Judgment reversed.

(82 Ga. 767)

JOHNSON *et al. v.* HART *et al.*

(*Supreme Court of Georgia.* July 31, 1889.)

TRANSACTIONS WITH DECEDENT.

According to the principle of Doerflinger v. Nelson, 76 Ga. 101, one of the makers of an absolute note under seal is not a competent witness to prove that when it was delivered to the attorney (now deceased) of the payees, neither of the payees being present, there was a parol understanding with the attorney that unless the payees did certain things the note was not to pass from the attorney to his clients, the payees, but was to be returned to the makers. The attorney with whom the transaction was had being dead, the party is incompetent to show what transpired between him and the attorney.

(*Syllabus by the Court.*)

Error from superior court, Warren county; LUMPKIN, Judge.

E. P. Davis, for plaintiffs in error. *James Whitehead*, for defendants in error.

BLECKLEY, C. J. The note sued upon was under seal, purported to be for value received, and was absolute in its terms. The court ruled that one of the makers was an incompetent witness to prove a parol condition agreed upon between the makers and the attorney of the payees, to whom the note was delivered; that condition being to the effect that unless the payees did certain things the note was not to be delivered to them by their attorney, but was to be returned to the makers. The ground on which the witness was ruled incompetent was that the attorney was dead. This ruling is within the principle of Doerflinger v. Nelson, 76 Ga. 101, and is supported more or less directly by Odom v. Gill, 59 Ga. 180; Langford v. Commissioners, 75 Ga. 502; and Parish v. Sewing Machine Co., 79 Ga. 682, 7 S. E. Rep. 138. Although the payees are alive, it is not shown that either of them was present when the alleged transaction was had with their attorney, or that they had any personal knowledge on the subject. The only witness, therefore, who could have made any reply to the evidence offered was the attorney, who was dead at the time of the trial. Judgment affirmed.

(83 Ga. 431)

HUGHES *v.* MCINTOSH *et al.*

(*Supreme Court of Georgia.* July 8, 1889.)

TEMPORARY INJUNCTION.

On application for injunction, plaintiffs alleged that defendant was about to close an alley, and thereby deprive them of a valuable easement to their property. Defendant answered that the alleged alley was her private property, was closed at the time of plaintiffs' purchases, and that they bought with a full knowledge of these facts. The answer was supported by corroborating affidavits. *Held*, that the judge did not abuse his discretion in granting a temporary injuction till the case could be heard.

Error from superior court, Thomas county; HANSELL, Judge.

In an action by T. M. McIntosh and S. B. Burr against Mrs. F. W. Hughes, to enjoin the closing of a certain alley, plaintiffs alleged as follows: The plaintiff McIntosh made affidavit that he purchased from defendant a certain lot; that before and at the time of making the conveyance defendant owned a parcel of land at the corner of Jefferson and Dawson streets, about 210 feet square. She sold complainant a portion of this land, fronting on Dawson street, and extending to an alley 15 feet wide; that by virtue of this deed complainant holds and owns an easement in said alley, and defendant threatens to close it, which would greatly injure him. He prayed for injunction. At the hearing S. B. Burr was made a party complainant to the bill, alleging that he was the owner of a lot, which defendant had sold to Mrs. Mary H. Hardaway. When examining the lot with a view of purchasing, he found a 15-foot alley opening from Jefferson street along the rear of the lots owned by T. M. McIntosh and Mrs. Hardaway to the lot occupied by defend-

Digitized by Google

ant, affording an easy means of access from Jefferson street to the rear of all three of said lots; that without said alley the lot owned by him would be of very much smaller value than it is with the alley, the front of his lot being quite narrow, etc. In view of these facts, he would not have been willing to take the place at the price offered but for the alley; and, relying upon the representations made him, and the fact that said alley was open and in use, he purchased the lot, went into possession, and made improvements and additions of such a nature as to make it impossible for him to have access to the rear of it for wagons or cattle without great damage to him. Attached to his petition is a copy of the deed from Mrs. Hughes to Mrs. Hardaway, which, as part of the description of the property conveyed, states that the lot runs back from Dawson street "a distance of 195 feet to an alley fifteen feet wide." The *habendum* clause of this deed is: "To have and to hold the above bargained and described town lot, with all and singular the rights, easements, and privileges to the same in any manner belonging," etc., and there is a similar *habendum* clause in the deed from Mrs. Hughes to McIntosh, which also bears date May 12, 1884. Defendant answered that when she sold to McIntosh and Mrs. Hardaway she reserved for her own use a strip of land 15 feet (wide) extending from her horse-lot in the rear of her premises to Jefferson street. At the time she made the sale there was no alley extending along the rear of her premises, but simply a strip of land 15 feet wide running from the rear of her horse-lot to Jefferson street, and this strip was not an open way, but was inclosed by a fence, which remained there two years; when, finding that she did not need a large horse-lot, she allowed the fence and gate to be removed, and had for about two years and a half left that portion of her horse-lot open. She sold the lands without any reference to the use of an alley, the word "alley" in the deeds being used simply to define their metes and bounds; and the strip was called an "alley" because it was only 15 feet wide. No consideration was paid her for such an easement, and when Burr bought from Mrs. Hardaway defendant expressly notified him that the strip of land in dispute was her private property, and might be closed at any time. The case was heard on the bill, the amendment of Burr, the defendant's answer, and certain affidavits. McIntosh and one Mallette made affidavits for the complainants, tending to sustain their allegations. The husband of defendant made affidavit tending to sustain her answer. Two other affidavits were produced by defendant, tending to show the existence of the gate at the place and for the time mentioned; and one of the affiants swore that at the time of the sale from defendant to Mrs. Hardaway and McIntosh there was no open alley. The presiding judge granted the injunction prayed for, to continue until the final hearing, from which decision defendants appeal.

Alex. R. Jones, for plaintiff in error. *S. G. McLendon* and *Hansell & Merrill*, *contra*.

SIMMONS, J. Under the facts as disclosed by the record the trial judge did not abuse his discretion in granting the injunction in this case until the facts could be passed upon by the jury. Judgment affirmed.

(82 Ga. 714)

McBRIDE v. McBRIDE.

(*Supreme Court of Georgia.* July 22, 1889.)

TRANSACTIONS WITH DECEDENT.

Where, in ejectment, defendant, who claimed under certain legatees under the will of plaintiff's grantor, contended that the deed from decedent to plaintiff was made in fraud of creditors, and redelivered to decedent in his life-time, and offered evidence by an uninterested witness to that effect, plaintiff, as a witness in his own behalf, is not competent to show that he gave up his deed to decedent to aid him in writing another, under Code Ga. § 3854, subd. 1, providing that, where one of the original parties to the contract or cause of action on trial is dead, the other party shall not be admitted to testify in his own favor.

Error from superior court, Fayette county; HARRIS, Judge.

Action in ejectment by B. F. McBride against A. J. McBride, Jr., to recover possession of certain land held by him under deeds from certain legatees under the will of A. J. McBride, Sr., deceased. Judgment for defendant, and plaintiff appeals.

P. H. Brewster, for plaintiff in error. *Bigby & Dorsey* and *John I. Hall*, for defendant in error.

BLANDFORD, J. The plaintiff in error brought his action in ejectment to recover the possession of a certain parcel of land lying in the county of Fayette. The action was against A. J. McBride, Jr., executor of A. J. McBride, Sr. The action of ejectment is not a personal or real action, but is a mixed action, brought alone for the recovery of the possession of land; and in this case it is not against the defendant as executor, but is against him individually, the possession of the land, as shown by the record, being in him. On the trial of the case, after testimony had been introduced to show that a certain deed which had been put in evidence by the plaintiff had been cancelled or rescinded, the defendant contending that the plaintiff had delivered up the deed to A. J. McBride, Sr., in his life-time, and that the same had been made by the deceased to the plaintiff in order to defraud deceased's creditors, the plaintiff was offered as a witness to show that when he delivered the deed to A. J. McBride, Sr., in his life-time, it was merely for the purpose of aiding A. J. McBride, Sr., to write another deed by. The record does not show that the witness who had been introduced by the defendant had any interest in the subject-matter in controversy. The court below, upon objection made by the defendant, ruled that the plaintiff was an incompetent witness, on account of the death of A. J. McBride,

Digitized by Google

Sr., to testify to anything that took place between himself and the deceased, the title to the premises being derived by the parties plaintiff and defendant from A. J. McBride, Sr.; the plaintiff claiming under a deed from the deceased, and the defendant claiming under deeds made to himself by certain legatees, under the will of A. J. McBride, Sr., the deceased.

The question in this case is, under the facts of the case, was the plaintiff, B. F. McBride, a competent witness? Certain decisions of this court have been referred to by the plaintiff in error, which he relied upon as showing the competency of the plaintiff. The case of Wood v. Isom, 68 Ga. 417, was the first case relied upon by the plaintiff. The decision in that case was to this effect: One party to a transaction cannot testify to matters which occurred between him and the other party, since deceased; yet he is competent to rebut testimony concerning transactions or conversations testified to by living witnesses introduced by the opposing party. But it does not appear from the record in that case whether the witnesses introduced were interested in the event of the suit then pending. It may be fairly presumed, from other decisions of this court, that the witnesses who testified in that case were interested. And to the same effect is the case of Parkerson v. Burke, 59 Ga. 100, where heirs at law caused defendant to defend suit as administrator, and they testified in the case. Plaintiff was allowed to testify.

In the case of Stanford v. Murphy, 63 Ga. 410, this court held that an administrator was competent to testify in respect to transactions subsequent to the death of the decedent, but incompetent as to everything which transpired prior thereto between himself and the deceased; the matter in controversy in that case being a promissory note, which the administrator claimed the estate of the deceased owed him, and the opposite parties being heirs at law of the deceased, and claiming that the note was a forgery, or that the same had been paid off. And in the case of Bank v. Neel, 74 Ga. 576, it was decided that the cashier of a bank, who had dealings with the deceased person, was competent to explain what transpired between himself, as such cashier, and the deceased, where testimony had been introduced by the representative of the deceased showing the sayings of the cashier, or admissions made by him.

It is very clear that these decisions do not cover the case at bar. They seem to be put upon the equitable idea that where witnesses have been introduced the other party may rebut their testimony, although according to the strict letter of the evidence act they would probably have been incompetent to testify. In the case of White v. White, 71 Ga. 670, the plaintiff in that case was allowed to testify that he owned the property in controversy, although the person who originally owned it was dead. The gift, which the plaintiff relied on, was proven by other witnesses who were disinterested. The case of Scott v. Mathis, 72 Ga. 119, was an action of trespass *quare clausum fregit*. The title to the land was not involved in that case, and this court held that the plaintiff was competent to testify, as to her possession of the land, that her husband had bought it from her father and paid him for it, although he received no deed, the father and the husband both being dead. We think that case stands upon a different principle from the present case. In the present case, the title to the premises in dispute was directly involved in the action, it being an action of ejectment. These are the main cases relied on for the plaintiff in error, and in our opinion they do not cover the present case.

But the case of Niles v. Groover, 73 Ga. 808, is more like the present case; indeed it runs nearly all fours with it. In that case, the plaintiff claimed title under one who had a deed from the defendant, but who was dead at the time of the trial. It was held that the defendant was incompetent to show that such deed was not delivered to the deceased. The proposition here is to allow the plaintiff in this case to testify that a deed made by a deceased person to himself had never been rescinded or cancelled or delivered up to such deceased person in his life-time. We think the principle decided in the case of Niles v. Groover, supra, covers the present case, and that the plaintiff in this case was not a competent witness to testify, he falling within the proviso to section 3854 of the Code, which proviso is in the following language: "Where one of the original parties to the contract or cause of action in issue or on trial is dead, or is shown to the court to be insane, or where an executor or administrator is a party in any suit on a contract of his testator or intestate, the other party shall not be admitted to testify in his own favor." Judgment affirmed.

(84 Va. 523)

EAST v. GARRETT *et ux.*

(*Supreme Court of Appeals of Virginia.* Feb. 2, 1888.)[1]

WILLS—CONSTRUCTION.

1. Testator devised land to his illegitimate son "and his legitimate children forever," upon condition of payment of a certain annuity and his indebtedness to testator, "but if he will not pay the above annuity and what he owes me, and shall die leaving no legitimate child," then to S. and her children; "but if she should die leaving no child," then to certain nieces and children of a nephew. The son paid the indebtedness and the annuity up to his death, intestate, unmarried, and without legitimate children, leaving sufficient property to pay the annuitant during her life. *Held*, that he took an estate tail, enlarged by statute to a fee-simple, which vested upon payment of the indebtedness and the annuity, but was defeated on his death without legitimate issue, and passed to S. under the will.

2. As the evident intention of the testator, as substantially stated in each and every other clause of the will disposing of real estate, was that his nieces and children of a nephew were to be the ultimate devisees, the words "will not pay the

[1] Publication delayed through failure to receive copy.

Digitized by Google

above annuity and what he owes me, and" serve no intelligent purpose, and may be rejected as obscuring the meaning intended to be expressed; or, if used to emphasize the negative pregnant in the preceding words, the copulative "and" must be construed as the disjunctive "or."

Error to circuit court, Accomac county.

Ejectment by Benjamin H. East against Cornelius S. Watkinson, on the demise of George W. Garrett and Eliza F., his wife, to recover a tract of land, mentioned in the fifth clause of the last will of Dr. Southey S. Satchell, and devised to Edward P. East and his legitimate children forever, upon certain conditions. The will reads as follows: "*Item* 1. I give to Mary C. Rew, during her life-time, the lands which I purchased of Richard R. Drummond and George F. Wilkins. I also give to Mary C. Rew forever the following articles: One thousand dollars ($1,000) in money; my large dairy on the Drummond farm; my best milch cow and calf on the same farm; ten barrels of corn, and three stacks of fodder. At the death of Mary C. Rew I give the above-mentioned lands to my nieces, Mrs. Mary Scarburgh, Mrs. Sarah Duffield, Miss Virginia L. Joynes, and the children of my nephew, Thomas R. Joynes, Jr., and their heirs forever. (2) I give to Isaac Satchell, (col.,) during his life-time, the whole of the farm on which I reside, lying on the west side of the road leading from Drummondtown to Locustville. I also give to Isaac Satchell forever the following articles: My cart and harness; one cow and calf; all of my farming implements; ten barrels of corn, and three stacks of fodder. At the death of Isaac Satchell I give the above-mentioned land to Eliza Frances Scott and her children forever; but if she should die leaving no child, I then give the above-mentioned land to my nieces," etc., as in clause 1. "(3) I give to Lucy Ewell, (col.,) her heirs and assigns forever, one hundred dollars. (4) I give to Caleb Satchell, (col.,) his heirs and assigns forever, my small dairy on the Drummond farm; one cow and calf on the same farm; and five hundred dollars in money, including what he owes me. (5) I give to Edward P. East and his legitimate children forever, the farm which I purchased of Major John Savage, upon condition that he will pay to Eliza P. Scott, Sr., one hundred and thirty dollars annually, as long as she lives, and will also pay what he owes me; but if he will not pay the above annuity to Eliza P. Scott, Sr., and what he owes me, and shall die leaving no legitimate child, I then give the above-mentioned farm to Eliza Frances Scott and her children forever; but if she shall die leaving no child, I then give the above-mentioned farm to my nieces," etc., as in clause 1. "I also give to Edward P. East forever, all my overcoats, coats, vests, and pantaloons. (6) I give, devise, and bequeath to Eliza Frances Scott and her children forever, the whole of the farm on which I reside, lying on the east side of the road leading from Drummondtown to Locustville; but if she should die leaving no child, I then give the above-mentioned part of my farm on which I reside to my nieces," etc., as in clause 1. "I also give to Eliza Frances Scott and her heirs forever, all the rest and residue of my estate not otherwise disposed of, after paying my debts."

The following are the facts agreed: "That the said testator, at the time of his death, was residing on his farm near Drummondtown, having retired from the practice of his profession (*i. e.*, medicine) for a number of years; and that he lived alone, surrounded by his family servants, Isaac Satchell, Lucy Ewell, and Caleb Satchell. That the said testator never was married, but was a man of considerable estate, both real and personal, all of which he disposed of by his will and testament. That the said testator, at the time of his death, was seised and possessed in fee-simple of the real estate devised by his last will and testament. That the tract of land devised by said will to Isaac Satchell, colored, for his life, with remainder to Eliza Frances Scott, was at the date of said testator's death of the value of $2,500. That the tract devised by said will to Edward P. East was at the date of said testator's death of the value of $2,500; and that the tract devised by said will to Eliza Frances Scott was at the date of said testator's death of the value of $9,000; and that under the residuary clause embraced in the sixth item of said will there was paid to said Eliza Frances Scott, by said executors, on or about the 6th day of March, A. D. 1876, the sum of $7,356.02, the same being the balance appearing upon the audit to be due from said executors to the estate of said testator. That the Mary C. Rew mentioned in the first item of said will was permitted by said testator to live upon the land mentioned in the first item of said will, and to occupy the buildings thereon for several years before his death. That said Mary C. Rew was a spinster, whom the said testator visited frequently, but that said Mary C. Rew was not related by blood to the said testator. That the Isaac Satchell, Lucy Ewell, and Caleb Satchell mentioned in the second, third, and fourth items are colored people, who were formerly favorite slaves of the testator, who remained with the testator after their emancipation up to the date of his death, and that for those servants, and particularly the first named, the testator had great regard and affection. That the devisee Edward P. East, mentioned in the fifth item of said will, was the natural son of the said testator, and was so regarded and acknowledged by said testator, and recognized by the community; and that the real estate, to recover which this action is brought, is all the land owned by said testator at the date of his death, which he purchased of Major John Savage. That the said Edward P. East, at the date of said will and the death of said testator, was living on said testator's land, which he devised to said Isaac Satchell, with a colored woman as his mistress, and that by said colored woman he had, at the date

Digitized by Google

of said will, at least two children, which were recognized by the community and by said East as his children; and that said Edward P. East owned at the said date no other estate known or visible than the stock upon said farm, and the necessary farming implements, and some little household and kitchen property. That the devisee Eliza Frances Scott, mentioned in the fifth and sixth items of said will, is now the defendant Eliza F. C. Garrett, and that she intermarried with the defendant George W. Garrett on the 23d day of August, A. D. 1887. That the said Eliza F. C. Garrett is the natural daughter of the said testator, was so regarded and acknowledged by the said testator and recognized by the community. That the said testator had great regard and consideration for his said daughter, and expended his money and means in her education, maintenance, and support, and also in the support and maintenance of her mother, Eliza P. Scott, Sr. That the said Eliza P. Scott, Sr., is the annuitant mentioned in the fifth item of said will, and, as above stated, the mother of the said Eliza F. C. Garrett, and was and is a spinster, whom the said testator visited frequently. The said Eliza P. Scott, Sr., had no estate, real or personal, at the date of said testator's will, or at his death. That the mother of the said devisee Edward P. East was Ailsie East, who died several years before the said testator's death. That at the date of the death of said testator the said Edward P. East was thirty-one years of age, the said Eliza Frances Scott was twenty-five years of age, the said Eliza P. Scott, Sr., was sixty-five years of age, and the said Isaac Satchell, colored, was seventy-two years of age. That upon the death of said testator the devisees aforesaid took possession of the tracts of land devised to them, respectively. That the said Edward P. East held continuous possession of the tract devised to him until his death, which occurred on the 30th day of March, A. D. 1885; and that the said Eliza Frances Scott and the said Isaac Satchell, colored, have held continuous possession of the tracts devised to them respectively, and still hold possession thereof. That the administrator of said Edward P. East, shortly after his death, rented out the tract of land devised as aforesaid to said Edward P. East, for the balance of the year 1885. That the said Eliza F. C. Garrett, who holds all her property as her sole and separate estate, rented the said tract of land for the balance of the year 1885, and sub-rented it to the original defendant to this action, Cornelius S. Watkinson, for said balance of said year 1885. That the said Eliza F. C. Garrett, claiming that under the said last will and testament, upon the death of said Edward P. East, the said tract of land so devised to him passed to her, and that she would be entitled to possession of the same as devisee on the 1st day of January, A. D. 1886, rented the said tract of land to the said Cornelius S. Watkinson for the year 1886; and that the said Cornelius S. Watkinson was the actual occupant of said tract of land at the time of the institution of this action. That at the date of the death of said testator, the said Edward P. East's indebtedness to him was evidenced by two bonds, which, on the 10th day of January, A. D. 1874, the said Edward P. East paid to the executors aforesaid, amounting, principal and interest, to the sum of $406.62. That the said Edward P. East, during his life-time, paid to the said Eliza P. Scott, Sr., the annuity which by the said fifth item of said last will and testament he was required to pay to her; and that his administrator has, since his death, paid to her the said annuity up to the 1st day of January, A. D. 1886, when the same fell due; and that the personal estate of the said Edward P. East, deceased, is more than sufficient to meet and pay the said annuity during the life of the said Eliza P. Scott, Sr. That the said Edward P. East died intestate, and never was married. That Benjamin H. East, the plaintiff in this action, is the half-brother of the said Edward P. East, having the same mother, but a different father, and was, at the time of the death of said Edward P. East, and now is, the said Edward P. East's sole heir at law. That the said testator never had anything to do with the said plaintiff, and furnished nothing for his maintenance and support, he, the said plaintiff, having left the county of Accomac when a boy, and never having returned until long after the death of the testator, Southey S. Satchell, and until after the death of his said half-brother, Edward P. East. And it was further agreed between the parties that the foregoing statement of facts should be a part of the record in this case, but not to be considered as a technical case agreed."

The action was originally brought by the plaintiff, Benjamin H. East, against the defendant Cornelius S. Watkinson, who was the tenant of the defendant Eliza F. C. Garrett, the wife of the defendant George W. Garrett. The declaration and notice having been served upon said tenant as required by statute, subsequently, to-wit, at the February term, 1886, of said circuit court, George W. Garrett and Eliza F. C. Garrett, his wife, appeared, and on their motion were made defendants in the place of the said lessee, Cornelius S. Watkinson, and, having so been made defendants, they pleaded "not guilty," upon which plea issue was joined, and, neither party demanding a jury, the whole case was submitted for determination to the judgment of the court; and upon consideration the court gave judgment for the defendants, whereupon the plaintiff moved the court to set aside its said judgment, and enter judgment for the plaintiff, or to award the plaintiff a new trial, on the ground that said judgment "is contrary to the law and the evidence;" but the court refused said motion, and the plaintiff excepted, and upon his application a writ of error to said judgment was awarded.

Digitized by Google

Neely & Quimby, for plaintiff in error. *Gunter & Blackstone* and *George T. Garrison*, for defendants in error.

RICHARDSON, J., (*after stating the facts as above.*) This case turns upon the proper construction to be given to the fifth item of the last will and testament of Dr. Southey S. Satchell, late of Accomac. That item of the testator's will is for convenience here reproduced: "(5) I give to Edward P. East and his legitimate children forever, the farm which I purchased of Major John Savage, upon condition that he will pay to Eliza P. Scott, Sr., one hundred and thirty dollars annually as long as she lives, and will also pay me what he owes me; but if he will not pay the above annuity to Eliza P. Scott, Sr., and what he owes me, and shall die leaving no legitimate child, I then give the above-mentioned farm to Eliza Francis Scott and her children forever; but if she should die leaving no child, I then give the above-mentioned farm to my nieces, Mrs. Mary Scarburgh, Mrs. Sarah Duffield, Miss Virginia S. Joynes, and the children of my nephew, Thomas R. Joynes, Jr., and their heirs forever. I also give to Edward P. East forever, all my overcoats, coats, vests, and pantaloons." The devisee Edward P. East was, it seems, a robust young man of 31 years of age at the date of the testator's death. He was the natural son of the testator by Ailsie East, who predeceased the testator by several years. The annuitant, Eliza P. Scott, Sr., was, at the date of the testator's death, 65 years of age. Eliza Frances Scott, who is the defendant Eliza F. C. Garrett, is the natural daughter of the testator, Southey S. Satchell, by said annuitant, Eliza P. Scott, Sr., and she was, at the date of testator's death, 25 years of age. It is a conceded fact that the testator had great regard and consideration for his said daughter, and expended his money and means in her education, maintenance, and support, and also in the support and maintenance of her mother, Eliza P. Scott, Sr. Upon the death of the testator the several devisees took possession of the lands devised to them respectively, and the said Edward P. East held continuous possession of the tract devised to him until his death, which resulted from accident on the 30th of March, 1885. He died intestate, never having been married, and, of course, left no legitimate child or children; and, having met an untimely death, he left surviving him the said annuitant, who was greatly his senior,—an event that could not have been anticipated by the testator. Edward P. East accepted under the will, paid the debt due by him to the testator, took possession of the land devised to him, and during his life-time paid to Eliza P. Scott, Sr., the annuity which, by the fifth item of the testator's will, he was required to pay to her; and his administrator, after his death, paid said annuity up to the 1st of January, 1886. Benjamin H. East, the plaintiff below, and the plaintiff in error here, is the half-brother of the said Edward P. East, having the same mother, but by a different father, and at the death of Edward P. East, was, and now is, the sole heir at law of the latter, and as such, he claims the land in controversy.

On behalf of the plaintiff in error it is insisted that under the fifth item of the testator's will Edward P. East took, upon the payment of the debt due the testator, an estate tail, enlarged by our statute into a fee-simple, which estate, after having vested, as alleged, upon the performance of the condition precedent aforesaid, was liable to be divested only by the concurrence of the two events alleged to be conditions subsequent: (1) The failure of Edward P. East to pay the annuity to Eliza P. Scott, Sr.; and (2) the death of Edward P. East without leaving any legitimate child or children. And thus it is contended that the sole question for decision is whether the estate so alleged to have vested was liable to be defeated by the happening of either one of these events, or whether, in order to defeat the estate, both events must happen.

The case is very fully and ably argued for the plaintiff in error in the petition, where it is said: "The words, 'and his legitimate children forever,' would not, perhaps, have been sufficient to create this estate if used in a deed; but they are quite sufficient in a will, 'wherein greater indulgence is allowed,' for in a will 'an estate tail may be created by a devise to a man and his seed, or to a man and his heirs male, or by other irregular mode of expression;' citing 1 Tuck. Bl. Comm. bk. 2, p. 47. Or it may be created by a devise 'to a man and his children, if he has no children at the time of the devise, or to a man and his posterity, or by any other words which show an intention to restrain the inheritance to the descendants of the devisee;'" citing 1 Bl. Comm. bk. 2, marg. p. 115, note 20; 2 Minor, Inst. 968, and cases cited. Doubtless the law is thus correctly stated; but it is obvious that the doctrine last above cited, to the effect that an estate tail may be created by any "words which show an intention to restrain the inheritance to the descendants of the devisee," by no means tends to uphold the contention of the plaintiff in error; for not only is there no mention in the will of any person, or class of persons, that could embrace the plaintiff in error, but, on the contrary, the manifest and clearly expressed intention of the testator, as evinced both in the immediate context and in the general scheme of the will, is that the estate should not vest absolutely except in the event of the death of Edward P. East leaving legitimate children, thereby clearly restraining the inheritance to the descendants of the devisee, failing which, the estate goes over to the testator's natural daughter, Eliza Frances Scott, and her children forever, but upon the further contingency that, if Eliza Frances Scott should die leaving no child, then over "to my nieces, Mrs. Mary Scarburgh, Mrs.

Digitized by Google

Sarah Duffield, Miss Virginia S. Joynes, and the children of my nephew, Thos. R. Joynes, Jr., and their heirs forever;" thus making these blood relations the ulterior devisees in fee upon the happening of the two events specified,—*First*, the death of Edward P. East without leaving any legitimate child; and, *second*, the death of Eliza Frances Scott leaving no child.

On behalf of the plaintiff in error it is claimed, and it was so held by the court below, that of the three conditions annexed to the devise in question only one of them, to-wit, the payment of the debt due to the testator, is a condition precedent, and that the other two, namely, the payment of the annuity by Edward P. East, and the event of his death leaving no legitimate child, are conditions subsequent, and that both of these events must concur before the limitation over to Eliza Frances Scott can take effect; and the circuit court held with the plaintiff as to the character of the conditions named, but at the same time held that each and all of the conditions must be performed; or, to state it differently, that upon the happening of either one of the events specified the estate devised on condition to Edward P. East failed, and the limitation over took effect, and that this result necessarily followed when Edward P. East died leaving no legitimate child.

Though it is not necessary to a proper decision of this case, let it be conceded for the sake of the argument, that the payment of the debt due to the testator was the only condition precedent, and that on the performance thereof the estate created vested in Edward P. East, yet it must be remembered that the estate so created and vested was not an absolute estate, but an estate on condition. This is so obviously true, that any contention to the contrary necessarily involves the absurdity of utterly disregarding the plainly expressed words of condition which immediately follow the words creating and devising the estate. It is insisted that, inasmuch as the estate vested in Edward P. East on the performance by him of the condition precedent, *i. e.*, the payment of the debt due by him to the testator, then both of the conditions subsequent must happen; and in argument the question is asked: "Shall the language [of the will] be varied in order to defeat a vested estate? Or shall it be construed naturally, not to say strictly, to prevent such a result?" The natural construction insisted on by counsel refers to the language introducing the limitation over to Eliza Frances Scott, which is as follows: "But if he will not pay the above annuity to Eliza P. Scott, Sr., and what he owes me, and shall die leaving no legitimate child, I then give," etc. The court below, holding that each of the conditions expressed must be performed, also held that, as Edward P. East died without leaving any legitimate child, one of the very events had happened which, according to the manifest intention of the testator, defeated the previous estate on condition, and caused the limitation over to take effect. This ruling of the circuit court was the result of substituting the disjunctive word "or" for the copulative word "and," where the latter word occurs in the language above quoted, the effect of which is to make the limitation over read: "But if he will not pay the above annuity to Eliza P. Scott, Sr., *or* what he owes me, *or* shall die leaving no legitimate child, I then give the above-mentioned farm to Eliza Frances Scott and her children forever," etc. But it is insisted that this construction is unwarranted by anything contained in the will, is subversive of the established rules of construction, and is opposed to the great majority of adjudged cases in which similar language has been construed. In other words, it is contended that the words in question must be taken in their natural grammatical sense, and that, when so taken and read, the limitation over is dependent upon the concurrence of all the events specified. In support of this view, numerous authorities are cited by counsel for the plaintiff in error, prominent among which are the following: Jenkins v. Van Schaack, 3 Paige, 242; Grey v. Pearson, 6 H. L. Cas. 105, 106; Doe v. Jessep, 12 East, 288; Day v. Day, Kay, 703; Cooke v. Mirehouse, 34 Beav. 27; Janney v. Sprigg, 7 Gill, 197; 1 Redf. Wills, 473, 474, and note 6; 3 Lomax, Dig. marg. pp. 125–127, and cases cited; and Brewer v. Opie, 1 Call, 212.

But before examining these authorities, let us refer briefly to some of the general principles in regard to the construction of wills, and especially to such as respect the words "or" and "and," here under consideration. Counsel for the plaintiff in error, quoting from Grey v. Pearson, supra, state the rule thus: "In construing wills * * * and all written instruments, the grammatical and ordinary sense of the words is to be adhered to, unless that would lead to some absurdity, or some repugnance or inconsistency with the rest of the instrument, in which case the grammatical and ordinary sense of the words may be modified, so as to avoid that absurdity and inconsistency, but no further." In 2 Williams, Ex'rs, 715, the author, in giving the general rules for the construction of wills, states that "the will must be most favorably and benignly expounded, to pursue, if possible, the intention of the testator. To effectuate, therefore, the clear intention, as apparent upon the whole will, words and limitations may be transposed, supplied, or rejected. * * * So, in order to advance the apparent intention of the testator, 'or' may be construed 'and,' and *vice versa*, in cases of legacies as well as devises of real estate. So, 'if' may be construed 'when' for the same purpose." See opinion of DORSEY, C. J., in Janney v. Sprigg, supra, a case relied on by counsel for the plaintiff in error. And in Jackson v. Blanshan, 6 Johns. 54, KENT, C. J., after a careful examination of all the authorities upon the subject, quotes with approbation the rule "that the words 'or' and

Digitized by Google

'and' are not, in deeds and wills, to be always held to a strict grammatical sense, but 'or' is to be taken for 'and,' and 'and' is to be taken for 'or,' as may best comport with the intent and meaning of the grant or devise."

Now, as to the authorities cited and relied on by counsel for the plaintiff in error, there is not to be found in any of them a single utterance which can be said to be opposed to the principles above laid down. In many cases, as well those referred to as others, words have been rejected or supplied, and in many others "or" has been taken as "and," and *vice versa*, but always with the avowed purpose of carrying into effect the intention of the testator as collected from the whole will, and in pursuing this cardinal principle of construction, it is almost universally admitted that established rules of construction, however wise and just, can at best only serve as aids to a just conclusion. Such is the rule, especially when construing plain words and expressions in common use, which have not acquired a definite legal signification. Hence, in the old case of Gulliver v. Poyntz, 3 Wils. 141, it was said: "Cases in the books upon wills may serve to guide us with respect to general rules in the construction of devises in wills, but unless a case cited be in every respect directly in point, and agree in every circumstance with that in question, it will have little or no weight with the court, who always look upon the intention of the testator as the polar star directing them in the construction of wills." This language was substantially quoted, and with approbation, by PENDLETON, P., in Kennon v. M'Roberts, 1 Wash. (Va.) 97; and in Eden v. Wilson, 4 H. L. Cas. 284, Lord ST. LEONARDS said: "If the most illiterate person makes his own will, though there is not a word of correct grammar in it, yet, if you can collect the intention, you are bound to give legal effect to it." In the case at bar the manifest intention is easily collected from the whole will, and the circuit court has simply collected that intent and given effect to it. In the recent case of Stokes v. Van Wyck, 83 Va. 724, 3 S. E. Rep. 387, this court said: "In construing wills, it is universally admitted that the intention of the testator must be sought after as the 'pole-star,' and, when found, must be followed as the 'sovereign guide,' and that the intention must be looked for and found in the will itself. But it must be borne in mind, however, that the true inquiry is not what the testator meant to express, but what the words used by him do express. * * * And it must also be remembered that, though the testator's intention, when ascertained, is implicitly obeyed, however informal the language in which it is conveyed, yet the courts, in construing that language, always resort to certain established rules—rules deeply imbedded in the law—by which particular words and expressions, standing unexplained, have acquired a definite legal signification, which does not always comport with their popular acceptation;" citing Burke v. Lee, 76 Va. 389, and 3 Jarm. Wills, top pp. 669, 670.

Now, in the light of these principles, the inquiry is, does the testator make manifest his intention by what he has said in his will? The easy and true answer is that, whether we look alone to the words to be construed in the light of the immediate context, or to those in connection with other parts of the will, the intention is clear beyond all question. This being so, and the intention thus collected not being in contravention of any legal principle, our simple duty is to give legal effect to that intention. The evident general intention of the testator, and that which is substantially, if not expressly, stated in each and every clause disposing of real estate, is that his immediate family relatives, his nieces, Mrs. Mary Scarburgh, Mrs. Sarah Duffield, Miss Virginia S. Joynes, and the chidren of his nephew, Thomas R. Joynes, Jr., are the ultimate objects of his bounty, subject only to the preceding life-estate, as to the land devised by the first clause; and as to the lands devised by the second, fifth, and sixth clauses, the same nieces, and the children of his nephew, named in the first clause, are made the ulterior objects of his bounty, subject to the contingencies expressed in these clauses respectively; or, to state it differently, the general intention is evinced by these prominent features, which pervade the whole will: (1) The testator's plain intention to dispose of his whole estate; (2) his equally clear description of the persons to take; and, when conditions are annexed to the devises, respectively, the careful, though inartificial, manner of stating such conditions; (3) the manifest intention that the persons or classes of persons named or described by the testator, and none other, should share his bounty, so far as he by law was permitted to provide. Hence, by the first clause of his will, the testator gives certain lands to Mary C. Rew, remainder to his said nieces and the children of his said nephew, and their heirs forever. Observe here there is no condition, limitation, or restriction whatever. After carving out the previous life-estate, the absolute fee is given, and to persons or classes of persons carefully designated and described. By the second clause the testator gives to his aged and faithful servant, Isaac Satchell, that part of the farm on which he (the testator) lived, lying on the west side of the road described, and at the death of said life-tenant, to his said natural daughter and her children forever; "but if she should die leaving no child," then over to the testator's nieces, and the children of his nephew, mentioned in the first clause. Here, though providing for his natural daughter, to whom he was deeply attached, and who, upon the face of the will, was evidently the chief object of his bounty, it appearing in evidence that what she got absolutely as residuary legatee, together with the limitations over in her favor in the event of leaving at her death a child or children,

Digitized by Google

is in amount or value the great bulk of the estate, yet the testator was careful, even in dealing with this obvious favorite of his, to prescribe a limitation over to his said blood relations in the event his said natural daughter should die leaving no child. By the third and fourth clauses the testator bequeaths to his two old servants, Lucy Ewell and Caleb Satchell, respectively, certain amounts in personalty. But, passing over the said third and fourth clauses as not necessarily involved in the matter of construction in hand, it need only be remarked that it is perfectly clear by the concurrent testimony of every other clause in the will, that the testator's general intention was as stated above. Observe, too, the logical consistency of thought and expression by which the testator makes it manifest that his special intention was to make his said natural daughter the chief object of his bounty; for, in perfect accord with the aforesaid general intention, he gives the land devised by the second clause to her and "her children forever,"—that is, after the preceding life-estate to Isaac Satchell; but in the event she should die leaving no child, then over to the testator's said nieces and the children of his said nephew, without any limitation or restriction whatever.

Now, for the present passing by the fifth clause, the one in question, we find that the testator, by the sixth clause, gives to his said natural daughter, Eliza Frances Scott, and her children forever, "the whole of the farm on which I reside, lying on the east side of the road leading from Drummondtown to Locustville, but if she should die leaving no child, I then give the above-mentioned part of my farm on which I reside to my nieces," etc., naming them, they being the same persons mentioned in the first, second, and fifth clauses. Thus the lands mentioned in the second and sixth clauses, which together constituted the farm on which the testator lived, were intended to come together as the property of Eliza Frances Scott and her children forever, but, be it observed, with a clear and explicit limitation over in the event Eliza Frances Scott should die leaving no child. Eliza Frances Scott had no children, either at the date of the will or at the testator's death; hence it is obvious that the estate given by the words "to Eliza Frances Scott and her children forever" is defeasible in the event of her death "not leaving a child," in which event the limitation over to the testator's said blood relations must take effect, because it is so expressly provided in plain words. So far everything is plain, both as to the general and the special intent. We come, however, to the fifth clause, in which the testator does not so clearly express himself as in other clauses; or in which it may be said the testator is guilty of needless, if not senseless, repetition, out of which has grown all the trouble. The testator says: "(5) I give to Edward P. East and his legitimate children forever, the farm which I purchased of Major John Savage, upon condition that he will pay to Eliza P. Scott, Sr., one hundred and thirty dollars annually as long as she lives, and will also pay what he owes me; but if he will not pay the above annuity to Eliza P. Scott, Sr., and what he owes me, and shall die leaving no legitimate child, I then give the above-mentioned farm to Eliza Frances Scott and her children forever; but if she should die leaving no child, I then give the above-mentioned farm to my nieces, Mrs. Mary Scarburgh, Mrs. Sarah Duffield, Miss Virginia S. Joynes, and the children of my nephew, Thos. R. Joynes, Jr., and their heirs forever. I also give to Edward P. East all my overcoats, coats, vests, and pantaloons." The trouble arises mainly, if not entirely, out of the useless, if not senseless, repetition involved in the use of the words "will not pay the above annuity to Eliza P. Scott, Sr., and what he owes me, and," between the words "but if he," where they first occur, and the words "shall die leaving no legitimate child," etc. Obviously, these words serve no intelligent purpose, and they must have been inadvertently used, for the preceding words, "upon condition that he will pay to Eliza P. Scott, Sr., one hundred and thirty dollars annually as long as she lives, and will also pay what he owes me," fully express, so far as they go, the conditions annexed to the gift; and by necessary implication they fully and clearly express the idea that, if the conditions be not performed, the estate will not pass. The result is that by the use of these words the word "and," without necessity and without sense, is twice needlessly introduced, and obviously each time only serving to obscure the testator's meaning plainly collectible from the whole context. Then these words should be rejected, not only as surplusage, but as words that can serve no other purpose than to confuse and obscure the meaning intended to be expressed, as clearly appears from the context. Without these words the clause will read: "(5) I give to Edward P. East and his legitimate children forever, the farm which I purchased from Major John Savage, upon condition that he will pay to Eliza P. Scott, Sr., one hundred and thirty dollars annually as long as she lives, and will also pay what he owes me; but if he shall die leaving no legitimate child, I then give the above-mentioned farm to Eliza Frances Scott and her children forever; but if she should die leaving no child, I then give the above-mentioned farm to my nieces, Mrs. Mary Scarburgh, Mrs. Sarah Duffield, Miss Virginia S. Joynes, and the children of my nephew, Thomas R. Joynes, Jr., and their heirs forever." So read without the useless words that only serve to becloud the manifest intention as gathered from other parts of the will, the words introducing the limitation over in the event of the death of Edward P. East without leaving legitimate children are, "but if he shall die leaving no legitimate child," and is, if not precisely, substantially in the same language employed to introduce

Digitized by Google

similar limitations over in the event of the death of Eliza Frances Scott without children, the language as to her in each case being, "but if she should die leaving no child," thus bringing the language employed in introducing the limitation over in the event of the death of Edward P. East, leaving no legitimate child, into entire harmony with that employed in the second, fifth, and sixth clauses introducing similar limitations over in the event of the death of Eliza Frances Scott leaving no child, and into like harmony with the manifest general intention of the testator that his said nieces, and the children of his said nephew, should, upon the happening of the events specified, ultimately own and enjoy all his real estate.

The above construction, by which certain words in the fifth clause are rejected as utterly useless and meaningless, is not necessarily in conflict with the construction given by the circuit court; for while the words rejected are useless, they may possibly have been used by the testator to emphasize the negative pregnant necessarily carried by the preceding words annexing conditions to the devise. And it is probable that the circuit court took that view, and in doing so found no difficulty in construing the word "and," twice unnecessarily introduced, as "or," it being manifest from the whole context that the intention was to defeat the estate given on condition, if Edward P. East should fail to pay the annuity, or fail to pay the debt due the testator, or should die leaving no legitimate child. Why, and for what conceivable reason, should the testator so carefully limit over in each case the estate in the land devised to his natural daughter in the event she should die leaving no child, if a similar limitation over in respect of the land devised to Edward P. East, his natural son, is to go for naught? If the testator had said such was his purpose, and had said it in plain and unambiguous terms, that would have sufficed, and would preclude all mere conjecture upon the subject. He, however, does not say so, but quite the contrary, if we are to heed his real meaning as collected from the whole will. It surely cannot be contended that the devise to Edward P. East and his legitimate children created a greater estate than the similar devises to Eliza Frances Scott and her children; nor can any natural reason be assigned why, in the former case, Edward P. East, hedged around by these conditions, should take an absolute estate upon the performance of only one of them, when one only of such conditions, if not performed, shall be sufficient to defeat the estate devised to Eliza Frances Scott and her children. Nor can it be consistently argued, in the light of the circumstances which surrounded the testator when he wrote his will, that there is not a deep significance in the words "legitimate children," employed in the devise to Edward P. East, as compared with the simple word "children," employed in each of the devises to Eliza Frances Scott.

In attempting to repel the view taken by the judge of the circuit court in his opinion, which is part of the record, it is insisted in the petition for writ of error that the fact that Edward P. East "was living in open shame with a negro mistress," by whom he had, at the date of the will, at least two illegitimate children, did not conduce, considering the very promiscuous life led by the testator himself, to a less degree of regard by the latter for Edward P. East than was entertained for his natural daughter, Eliza Frances Scott. It is true that the testator seems to have been quite irregular in his life, and was the father only of children born out of wedlock; but it is also true that his children, though unlawfully begotten, were born of women of his own race. Edward P. East, in whose veins the blood of the testator ran, seems to have been less fastidious in his tastes, and to have preferred illicit life, open shame, and to be the father of illegitimate children by a negro mistress. To say that such a course of life was not offensive to the testator, his own sins to the contrary, notwithstanding, is to falsify all experience, and to fix upon the white race a stigma not deserved by the great majority of that race. It is, then, in view of the evidence, in view of the greater affection felt by the testator for his natural daughter, and in view of the great preference shown for her over Edward P. East upon the face of the will, but natural to conclude that in using the words "legitimate children" in connection with the devise to the one, and only the word "children" in connection with the other, the testator intended to emphasize his disapprobation of the course of Edward P. East, and to annex, as he did, a further condition that the estate given should not vest absolutely except in the event of his death leaving a legitimate child or children.

In opposition to these views, which speak out in the circumstances which surrounded the testator, and which assert themselves unmistakably in almost every feature of the will, it is insisted that the word "and," where it occurs as aforesaid, must be taken in its natural grammatical sense; that, Edward P. East having paid the debt due the testator, the estate vested in him; and that the other two conditions must concur, to divest the estate so previously vested. Counsel for the plaintiff in error are unquestionably right in quoting from Grey v. Pearson, 6 H. L. Cas. 105, the rule as follows: "In construing wills * * * and all written instruments, the grammatical and ordinary sense of the words is to be adhered to, unless that would lead to some absurdity, or some repugnance or inconsistency with the rest of the instrument, in which case the grammatical and ordinary sense of the words may be modified, so as to avoid that absurdity and inconsistency, but no further." This is the rule which we have adhered to in the construction above given. What could be more absurd, looking to the whole will, or what more incongruous,

Digitized by Google

than to give to the words in question the construction contended for? Or what could stand more flatly opposed to the manifest testatorial intent? The counsel for the plaintiff in error quote the remark of Sir RICHARD ARDEN in Harrison v. Foreman, 5 Ves. 209, which is: "Where there are clear words of gift, giving a vested interest to parties, the court will never permit that absolute gift to be defeated, unless it is perfectly clear that the very case has happened in which it is declared that interest shall not arise." This quotation exposes the vice which lies at the very root of the whole contention, and is but the bare assumption that on the payment of the debt due the testator the estate devised vested absolutely in Edward P. East; or, in other words, that it vested and could not be divested, except upon the concurrence in the breach of the other two conditions,—a conclusion that can only be reached by utterly ignoring not only the express terms in which the conditions are annexed to the gift, but by disregarding also the whole context. Many other authorities to the same effect are referred to, but they either do not apply to the case in hand, or are not at variance with the rule laid down in Grey v. Pearson, supra, a rule universally admitted, and the rule which has been our guide in the present case. After referring to a large number of authorities, the contention for the plaintiff in error culminates in the citation of Brewer v. Opie, 1 Call, 212, which it is claimed makes the insistence so plain that its discussion is rendered superfluous in Virginia. The case of Brewer v. Opie makes nothing plain, except that the construction we have given in this case is warranted by the circumstances. That case only decides the simple proposition stated in 1 Jarm. Wills, 506, and which has been long settled, "that a devise of real estate to A. and his heirs, or, which would be the same in effect, to A. indefinitely, and in case of his death under 21, or without issue over, the word 'or' is construed 'and,' and consequently the estate does not go over to the ulterior devisee, unless both the specified events happen." And Mr. Jarman states the sum of the reasons for the rule to be that the change of "or" into "and" in such case substitutes a reasonable for a most unreasonable scheme of disposition. But this in no wise upholds the plaintiff's contention, the rule being, as already stated, that "or" will be changed into "and," and "and" into "or," as will best comport with the testator's intention, when that can be collected from the context. The contention for the plaintiff in error amounts, in effect, to the assertion of the proposition that the rule above stated lends no aid to a construction favorable to a limitation over, yet the case of Janney v. Sprigg, 7 Gill, is confidently relied on. The same contention was made in that case,—a very leading one,—but in delivering the opinion in that case, DORSEY, C. J., said: "Numerous decisions have been adduced to show that where a testator has devised property in fee with a limitation over, in case of the death of the first devisee 'under twenty-one, or without issue,' or of his dying 'under twenty-one, unmarried, or without issue,' the word 'or' is to be interpreted as if it were 'and.' The principle thus asserted is now so well established that it is unnecessary to enumerate the cases on which it depends, or in that respect to make any comment upon them. The conversion of 'or' into 'and,' or of 'and' into 'or,' say the appellant's counsel, is never to be made in the construction of last wills and testaments, unless it be for the benefit of the first devisee or his issue; it is not to be allowed in any case for the benefit of the ulterior devisee. For this broadly asserted proposition, so materially qualifying or changing the general rule heretofore so universally recognized upon the subject, no decision of any court, or even *dictum* of a judge, has been produced." There is nothing in this case to aid the claim of the plaintiff in error, but, on the contrary, it is a strong case against him; and in it many cases are cited fully sustaining the view we take in the present case. The case here turns upon the propriety of changing "and" into "or." The necessity of making the change is rendered apparent by the intention of the testator as collected from the whole will, and we unhesitatingly make the change. Not to do so would be in effect to permit the whole scheme of disposition to be defeated, and this in behalf of a stranger, one of whom the testator knew but little, and cared less, and one who is alien to every sentiment expressed in the will or in the evidence. The judgment of the circuit court is eminently correct, and must be affirmed. Judgment affirmed.

(84 Va. 519)

COMMONWEALTH v. PLUNKETT.

(*Supreme Court of Appeals of Virginia.* Feb. 16, 1888.)[1]

CONSTITUTIONAL LAW—OBLIGATION OF CONTRACTS.

Act Va. 1883–84, p. 590, § 65, prohibiting the sale of tax-receivable coupons from the bonds of the state of Virginia without a special license, is not unconstitutional as impairing the obligation of contracts. Following Com. v. Maury, 1 S. E. Rep. 185.

Error to corporation court of Lynchburg.

R. A. Ayers, Atty. Gen., for the Commonwealth. *W. W. Larkin*, for defendant in error.

FAUNTLEROY, J. The record in this case shows that on the 3d day of February, 1887, the grand jury of the corporation court of the city of Lynchburg found an indictment against C. T. Plunkett (the defendant in error) for selling tax-receivable coupons, cut from the bonds of the state of Virginia, without a special license so to do, as prescribed by section 65 of the revenue act of 1883–84, (Acts Assem. 1883–84, p. 590.) On the 17th day of February, 1887, upon the motion of

[1] Publication delayed by failure to receive copy of opinion.

Digitized by Google

the said C. T. Plunkett, defendant, the said court ordered the said indictment to be quashed, upon the ground that the act of assembly 1883–84, upon which it was founded, is in conflict with, and repugnant to, the constitution of the state of Virginia and the constitution of the United States. On the 17th day of February, 1887, the attorney for the commonwealth, at the same term of the said court, moved the said court to reconsider its opinion and order quashing the said indictment against C. T. Plunkett, and to reinstate it, which motion the court overruled, and the commonwealth excepted to the said ruling. The record in this case shows that it is, in every respect, exactly similar to the case of Com. v. Larkin, 5 S. E. Rep. 526, and was decided by the corporation court of the city of Lynchburg at the same time, and upon the same ground. Like that case, it is ruled by the decision of this court in the case of Com. v. Maury, 82 Va. 883, 1 S. E. Rep. 185. For reasons given in the case of Com. v. Larkin, supra, we are of opinion that the judgment of the corporation court in this case quashing the indictment against the defendant, C. T. Plunkett, is erroneous, and that it must be reversed and annulled, and the case be remanded to the said court with instructions to proceed in conformity to the law and the views herein expressed. Judgment reversed.

COMMONWEALTH *v.* KRISE.

(*Supreme Court of Appeals of Virginia.* Feb. 16, 1888.)[1]

Error to corporation court of Lynchburg.

R. A. Ayers, Atty. Gen., for the Commonwealth.

W. W. Larkin, for defendant in error.

FAUNTLEROY, J. The record in this case shows that on the 17th day of February, 1887, the grand jury of the corporation court for the city of Lynchburg found an indictment against P. A. Krise for selling tax-receivable coupons, cut from the bonds of the state of Virginia, without a special license so to do, in violation of section 65 of the revenue act of assembly 1883–84. Acts Assem. 1883–84, § 65, p. 590. On the 18th day of February, 1887, upon the motion of the defendant, P A. Krise, the court ordered that the indictment be quashed, on the ground that the said act of assembly 1883–84, upon which it was founded, is in conflict with, and repugnant to, the constitution of the state of Virginia and the constitution of the United States, and therefore void. On the eighteenth day of the same term of the said court, the attorney for the commonwealth moved the said court to reconsider its opinion and order quashing the said indictment against the said defendant, P. A. Krise, and to reinstate it; which motion was overruled by the court, and the commonwealth excepted to the ruling. The record in this case shows that it is, in every respect, exactly similar to the case of Com. v. Larkin, 5 S. E. Rep. 526, and was decided by the corporation court of the city of Lynchburg at the same time, and upon the same ground. Like that case, it is ruled by the decision of this court in the case of Com. v. Maury, 82 Va. 883, 1 S. E. Rep. 185. For reasons given in the case of Com. v. Larkin, supra, we are of opinion that the judgment of the corporation court of the city of Lynchburg, in this case, quashing the indictment against the said defendant, P. A. Krise, is erroneous, and that it must be reversed and annulled, and the case be remanded to the said corporation court of the city of Lynchburg, with instructions to proceed in conformity to the law and the opinion of this court. Judgment reversed.

[1] Publication delayed by failure to receive copy of opinion.

(86 Va. 295)

TROUT'S ADM'R *v.* TROUT'S ADM'R.

(*Supreme Court of Appeals of Virginia.* Sept. 12, 1889.)

CONTRACTS.

A wife made a written agreement with certain heirs of her husband that she would relinquish her right of dower and distributive share in consideration of the heirs, each paying to her $5,000, at the death of her husband. In pursuance of the agreement each of the heirs made and delivered to the wife his bond for $5,000, payable at the death of her husband. The agreement was afterwards delivered up to and canceled by the wife, but she still retained the bonds. On her husband's death she received her distributive share. *Held*, that there could be no recovery on the bonds by her administrator, as the agreement was canceled by the wife, and never performed by her.

Phlegar, Berkeley & Johnson, for appellant. *Penn & Cocke*, for appellee.

LACY, J. This is an appeal from a decree of the circuit court of Roanoke city, rendered at the April term, 1888. The case is as follows: The bill was filed at November rules, 1886, in the circuit court of Roanoke city, by the administrator of Mrs. Martha B. Trout, deceased, to enforce an agreement made between the said Mrs. Trout and her husband, John Trout, in July, 1881, whereby he, in consideration of her uniting with him in conveying a certain tract of land to one Joseph I. Doran, agreed to bequeath to her at his death $10,000.

The bill alleges that the said John Trout had died intestate, leaving his widow, Martha B. Trout, surviving him, and unprovided for by will; that the said John Trout was, during the coverture, seised of extensive real property; that he had alienated a quantity to his children by a former marriage, his wife uniting with him in the sale; that he subsequently conveyed $40,000 worth of real estate to the said Joseph I. Doran; that his wife, the said Martha B. Trout, declined to join in executing the deed of conveyance to the said Doran for the said tract of land, and to relinquish her contingent right of dower therein, until and unless her husband, the said John Trout, should give her a reasonable compensation for such relinquishment, and for the similar rights on the other lands which they had already united in conveying; that thereupon the said John Trout agreed with her to give her $10,000, which he placed in the hands of his son, Henry S. Trout, and his son-in-law, Peyton L. Terry, to be paid to her at his death, and made his will, bequeathing her $10,000, and the house and lot in which he resided, for her life; that an agreement in writing was entered into by the said Martha B. Trout and the said Henry S. Trout and Peyton L. Terry, by which the said Henry and Peyton covenanted as follows, viz.: "That immediately upon the death of the said John Trout the said Trout and Terry bound themselves each to pay to her the sum of $5,000,

Digitized by Google

and she agreed to relinquish and release all claim to the $10,000 provided for her under her husband's will, and to accept the payment of the said sums, and the real estate devised to her by the said will, in full satisfaction of all right or claim to dower, or to a distributive share in the personal property of her said husband." The word "or" is not distinct enough to be copied, and it is said by the copyist to be either "or" or "and." Much discussion was indulged in, and some testimony taken, on this dispute, but I regard it as immaterial. The meaning must have been the same whichever was actually written; and, moreover, in the view we take of this case, the agreement itself is immaterial.

The agreement, being signed, was delivered to H. S. Trout, and the said Henry and Peyton each executed an agreement as follows, viz.: "$5,000. Immediately after the death of John Trout, I promise to pay to Mrs. Martha B. Trout five thousand dollars, the same stipulated upon by me in a contract made on this day between P. L. Terry, Henry S. Trout, and Mrs. Martha B. Trout, the interest to be paid to John Trout during his life," etc. The matter stood thus until Mrs. Trout became dissatisfied with the arrangement, and upon her complaint her contract was delivered up to her and canceled by tearing therefrom the names, and the will of her husband destroyed. But she kept the bonds of $5,000, and at her death this suit was brought by her administrator, she having survived her husband.

The defense is that, when Mrs. Trout refused to unite in the sale to Doran, her husband agreed to provide for her by will, and made his will, as stated; that subsequently she became dissatisfied with the way the matter stood, and, upon the ground that her husband might not keep the faith, and might destroy the will if he chose, she asked for the stated contract and two bonds, and received them as security for the due execution of his will, as agreed; that subsequently Mrs. Trout asked for the agreement for inspection, and refused to again deliver it, and tore off the signatures, but kept the bonds. Mrs. Trout abandoned the above stated agreement when she found that her distributive share of the personal estate would amount to more than the $10,000 provided for her by the other arrangement. That she did, during her lifetime, receive the real estate mentioned in the will, which was prepared, and afterwards destroyed in the life-time of the maker, and that she was actually paid over $11,000 out of the personal estate of her husband, (the proceeds of the sale to Doran,) and that the original agreement and the bonds having been executed to be in lieu of her said share of the personal estate, and she having destroyed the agreement and received the distributive share aforesaid, her administrator could not now collect of the appellees, Henry S. Trout and Peyton L. Terry, the bonds which were executed to be in lieu thereof. There were depositions taken, the two $5,000 bonds and said agreement, with the signatures torn therefrom, were exhibited, and at the hearing the circuit court dismissed the bill of Mrs. Trout's administrator, and he applied for and obtained an appeal to this court.

We think the decree of the circuit court was plainly right. The bill was demurred to, and the demurrer was overruled by the court, and the bill dismissed on the merits. The demurrer is ably argued by the learned counsel for the appellees, (the bill being claimed by them to be multifarious,) being a demand, first, against Henry S. Trout, as administrator, and then against him individually for $5,000, and then against Peyton L. Terry on his promise to pay $5,000, thus, it is contended, stating two distinct causes of action wholly inconsistent with each other, and incapable of standing together; citing Insurance Co. v. Devore, 83 Va. 267, 2 S. E. Rep. 433, and other cases. We waive this question, however, because in this case, if the bill had been held to be multifarious, it would have been proper to dismiss it at the hearing, and this was done, (Hudson v. Kline, 9 Grat. 379; Beckley v. Palmer, 11 Grat. 625; Green v. Massie, 21 Grat. 356; Bart. Ch. Pr. 252;) and the order of the circuit court is plainly right.

There is no principle upon which this agreement can be enforced. (1) It was canceled and annulled by the parties thereto. (2) It was to be in lieu of a distributive share of the estate, which was not surrendered, but was demanded and received after the agreement had been canceled. The decree of the circuit court of Roanoke city, appealed from, is affirmed.

(86 Va. 291)

THOMAS *et al.* v. FARMERS' NAT. BANK OF SALEM *et al.*

(*Supreme Court of Appeals of Virginia.* Sept. 12, 1889.)

JUDICIAL SALE—CONFIRMATION—PARTITION.

1. Where defendant's undivided interest in certain lands is sold to satisfy certain liens, and no upset bid is offered at the sale, and it does not appear that the price paid was inadequate, and no guaranty is given that a higher price would be realized by a resale, such sale is properly confirmed, notwithstanding a certificate filed by defendant that, in the opinion of the several affiants therein, defendant's interest in such land, if severed, would command a higher price, but without stating the facts on which such opinion is based.

2. The sale of such land before it was partitioned is not erroneous, where no objection thereto is offered either at the sale or at the time the decree was entered, and nothing appears indicating that defendant was prejudiced thereby.

Appeal from circuit court, Montgomery county.

Phlegar & Johnson, for appellants. *Mr. Tompkins*, for appellees.

LEWIS, P. This was a suit in the circuit court of Montgomery county to subject the lands of the defendants, John M. Thomas and Giles D. Thomas, to the satisfaction of the judgment liens thereon. The liens and

Digitized by Google

their priorities were duly ascertained and reported, after which there was a decree of sale. Among the lands ordered to be sold was a tract of 898½ acres, situate in Montgomery county, which was jointly owned by the defendant Giles D. Thomas and his wife, Mrs. Matilda C. Thomas, and as to which the commissioner of sale reported that he had sold the undivided moiety of Giles D. Thomas therein for $6,024.25, upon the terms specified in the decree of sale. The confirmation of the sale, however, was opposed by John M. Thomas, who, in some of the debts upon which the judgments sought to be enforced had been obtained, was a joint principal with Giles D. Thomas, and in others his surety, and the grounds of his objection were (1) that, before a decree of sale was entered, partition of the land between Giles D. Thomas and his wife ought to have been made; and (2) that the price bid for the land was inadequate. He also filed with his exceptions a certificate, subscribed and sworn to by various persons, which is in these words: "We are of opinion that if the land of Giles D. Thomas was divided between himself and his wife, and the interest allotted to him sold, it would bring at least $25 per acre." The difference between this estimate of the value of the interest and the price for which it actually sold is $5,213.25. The exceptions, however, were overruled, and the sale was confirmed by the decree complained of.

We are of opinion that there is no error in the decree. While it is true that before confirmation of a judicial sale the contract is incomplete, and the accepted bidder is not regarded as the purchaser, yet, in acting upon the report of sale, the court must exercise, not an arbitrary, but a sound legal discretion, in view of all the circumstances of the case. Brock v. Rice, 27 Grat. 816; Coles v. Coles, 83 Va. 525, 5 S. E. Rep. 673; Todd v. Manufacturing Co., 84 Va. 586, 5 S. E. Rep. 676. In the present case it is not questioned, nor do we doubt, that it was competent for the appellant John M. Thomas to object to the confirmation of the sale, inasmuch as he is jointly bound for the debts reported in the cause, and the proceeds of the sale are not sufficient to pay all the debts; but we do not think, in view of the circumstances, that there was error in confirming the sale. No upset bid was offered, nor any guaranty given or offered, that, in the event of a resale, the interest of Giles D. Thomas would bring a better price; nor is there anything in the record which warrants the conclusion that the interest was sold for an inadequate price.

The certificate filed with the exceptions to the report of sale is extremely vague, and merely embodies the expression of an opinion on the part of the signers of the paper that, if his interest in the land were assigned to him in severalty, it would bring at least $25 per acre. But the grounds upon which this opinion is based are not stated, nor does anything appear in the record to enable us to form an estimate as to the probable value of such an opinion. It is not stated where the affiants reside, or what opportunities they have had, if any, of correctly estimating the value of the land, and it is merely an inference that they are acquainted with the land at all. For aught the record shows, they may have never seen it, or know nothing of the value of it; and yet their certificate of opinion is the only evidence adduced by the appellant.

There is no absolute rule which forbids a sale of land in a case like this before partition is made. The court, however, must exercise in every such case a sound discretion, having a due regard to the interests of all concerned. The general rule undoubtedly is that, before a sale is decreed, any cloud on the title, or any impediment of any kind to a fair sale, ought to be removed, as far as it is practicable to do so, in order that the land may be sold to the best advantage. Horton v. Bond, 28 Grat. 815; Rossett v. Fisher, 11 Grat. 492; Terry v. Fitzgerald, 32 Grat. 843; Brown v. Lawson, 9 S. E. Rep. 1014. But what is such an impediment must be determined upon the circumstances of each particular case. Because a sale of an undivided interest in one case would result in a sacrifice, it does not follow that such must necessarily be the result in every similar case; and therefore no inflexible rule on the subject can be laid down.

In the present case there was no objection to the decree of sale when the decree was entered, or at any time before the sale was made; and as there is nothing to show that the appellant, who alone is complaining, has been prejudiced by the sale, the decree must be affirmed.

(86 Va. 2[illegible])

TURNER'S ADM'R v. STAPLES *et al.*

(*Supreme Court of Appeals of Virginia.* Sept. 12, 1889.)

DECISION ON PRIOR APPEAL.

1. The conclusiveness of a decision by the supreme court on appeal, by which the principles of a cause are settled, is not affected by the fact that additional evidence is taken after the case goes back to the trial court.

2. The supreme court will not review one of its own decrees, in the same cause, rendered at a previous term, even though error therein be apparent.

Appeal from circuit court, Pulaski county.

A. M. Lybrook, for appellants. *Staples, Tompkins & Phlegar*, for appellee.

LEWIS, P. This appeal is the sequel to Staples v. Turner, 29 Grat. 330. It appears from the record that in November, 1871, the appellee, Samuel G. Staples, executor of Abram Staples, deceased, had a settlement with Murray Turner, administrator of Rufus Turner, deceased, when a balance was found to be due the administrator of $1,176. This balance was subsequently assigned to Hardin W. Reynolds and James H. Rangeley, for whose benefit two actions at law were brought to recover it. Thereupon Staples filed his bill in equity for an injunction and

Digitized by Google

an account, alleging that there were errors in the above-mentioned settlement, and that the agreement between the parties was that he was to be held individually responsible only for what was due from him in his individual character. The cause was referred to a commissioner, who reported a balance due by the plaintiff of $964, and for this sum a decree was rendered against him. This court, however, on appeal, reversed the decree, on the ground that the commissioner, in stating the account, had blended the plaintiff's individual matters with his accounts as executor, and because the decree proceeded upon the idea that Staples was personally liable for the whole account, notwithstanding it was expressly agreed that he should only be bound for what was charged against him individually; and the cause was remanded for an account to be taken to ascertain what, if anything, was due from him individually. After the case went back to the circuit court, the defendants in the original bill filed a cross-bill, insisting that the above-mentioned sum of $964 was due from Staples individually, and praying that a decree be rendered against him in their favor for that amount. The cause was again referred to a commissioner, pursuant to the mandate of this court, and a decree was finally rendered confirming the commissioner's report, ascertaining a balance due to Staples individually by Turner's administrator of $235.43, and to Turner's estate by Staples as executor of $1,078.99; and from this decree an appeal was allowed by one of the judges of this court.

We are of opinion that there is no error in the decree. It was expressly held by this court on the former appeal that the sum of $964.01 was not due by Staples individually, and that his personal liability extended no further than for what was charged against him individually in the settlement of November, 1871, as appeared from the agreement of the parties at the time. And the very grounds upon which it is now insisted that he is liable for the whole balance due the estate of Turner were set up in the answer to the original bill, so that the matter is *res adjudicata;* and the fact that additional evidence was taken after the case went back to the circuit court does not affect the conclusiveness of the decree by which the principles of the cause were settled.

The decree of the circuit court was declared to be erroneous because it proceeded "upon the idea that Samuel G. Staples is personally liable for the whole account, although it was agreed that he should only be bound for what was charged against him individually, and because it dissolved the injunction for $964, which was the balance due R. Turner's administrator, in the opinion of the circuit court, upon the whole account, individually and fiduciary." It is true nothing was said, either in the opinion or the decree of this court, as to the W. R. Staples, Mendenhall, Houston, and Kellogg tickets; but the principle was none the less finally settled that Samuel G. Staples was liable only for what was charged against him individually, in the settlement above mentioned; and whether right or wrong—as to which we express no opinion—this view is conclusive of the matter, since the rule as laid down in Campbell's Ex'rs v. Campbell's Ex'r, 22 Grat. 649, and in numerous subsequent cases, is that it is not competent for this court to review one of its own decrees rendered at a previous term, even though error therein be apparent. The decree complained of must therefore be affirmed.

(82 Ga. 478)

MACINTYRE v. COTTON STATES LIFE INS. CO.

(*Supreme Court of Georgia.* Sept. 16, 1889.)

LIFE INSURANCE—INTEREST ON PREMIUMS—FRAUD—LACHES.

1. The policy of life insurance involved in this case, interpreted by its own terms, without aid from extrinsic evidence, imports that premium money not paid up, but retained by the assured as a loan made to him by the company, was to bear interest from the time the premium became due. Each annual premium, as to the full amount thereof, was due at the time fixed by the policy for its payment, and so much of the money as was not then paid remained due for the purpose of bearing interest, and it bore interest, during the whole period the assured retained it as a loan, to-wit, up to the maturity of the policy.

2. Nothing appears in the extrinsic evidence which requires or justifies a different construction of the policy, in reference to the question of interest, from that to which its own terms give rise.

3. A clause in the prospectus of the company saying: "We require interest on one loan paid annually in advance; all other interest paid by dividends,"—did not import a guaranty by the company that the dividends would be sufficient to pay all other interest, but signified merely that dividends, so far as they might be sufficient, would be received in discharge of interest, save that which was specified as payable in advance.

4. Upon the facts of the case, an alternative prayer in the declaration for a rescission of the contract of insurance for alleged fraud ought not to be granted after the lapse of more than 15 years after the fraud, if any, was committed.

(*Syllabus by the Court.*)

Error from superior court, Bibb county; GUSTIN, Judge.

Hill & Harris and *Bacon & Rutherford*, for plaintiff in error. *Lanier & Anderson*, for defendant in error.

BLECKLEY, C. J. 1. According to the terms of the policy, the company insured the life of MacIntyre, in January, 1870, for $10,000, payable at the expiration of 15 years, or at his death, in the event of his dying before that period expired. The consideration of the contract was "an annual premium of $736.60, to be paid on the 24th of January in each and every year, for fifteen years next succeeding the date of this policy, or during its continuance; which annual premium is to be paid in the manner following: An annual loan of $368, and a cash annual premium of $368.60, to be paid on the 24th day of January." From the sum insured were to be deducted "the balance of the year's premium on this policy, if any, and also all the notes or credits for premiums thereon, and other indebtedness of the insured to this company."

Digitized by Google

Among the conditions set out in the instrument was one declaring that "if the premiums due on this policy shall not be paid at the time above mentioned, and the interest on one note or credit for premiums on this policy paid annually, in advance, to this company, or its authorized agent, * * * this policy shall terminate and become void and of no effect." What is the proper construction of the policy on the question whether the loans bore interest while the policy was running to maturity? Did the interest required to be paid in advance upon one loan only include all the interest that was to accrue upon all the loans? Or did each loan bear, in addition to this paid-up interest, lawful interest for each year, save one, that elapsed after the loan was made? We have quoted from the document the sole expression touching interest which it contained, and, were that expression the only clue to the meaning of the policy, there might be some difficulty in arriving at the conclusion that more interest accrued than was required to be paid in advance; but, as the policy made the whole premium for each year due in January, the whole would have been payable then in cash, had it not been stipulated that nearly half of each should be payable in a loan. No time was expressed for the loan to become due; but, as it was a substitute for cash, it seems to us that it ought to be considered due for the purpose of bearing interest at the time it was made. No doubt it was intended to run on without payment until the policy matured, but, to make it the equivalent of cash, it would have to be treated as an investment of that much money, producing an income, which income, as no other measure was adopted, could be measured only by the lawful rate of interest,—7 per cent. per annum. The contract, on this question, as well as on every other, ought to be construed with reference to the nature of the business in which the insurance company was engaged. Its business was to accumulate money, not only for the benefit of its stockholders, but for the redemption of its policies. There can be no presumption that it, or those who dealt with it, contemplated the lending of its assets gratuitously, or for merely friendly accommodation, without interest. How could such an institution afford to leave half of its premiums in the hands of its patrons, unemployed and unproductive? Or how could it afford to accept a single year's interest, paid in advance, as compensation for the use of loans spreading over various periods from fifteen years to one year, respectively? It seems to us that such a system of business cannot rationally be supposed to have been adopted, or to have been in the contemplation of either of the parties to this contract. All writings are to receive a reasonable construction, with reference to the nature of the business or subject-matter to which they relate. It would be unreasonable, even to the verge of absurdity, to hold that a business corporation, such as a bank or an insurance company, intended to loan its funds for years upon years, in the regular course of its business transactions, without interest or income as compensation to it for the use of them, by the borrower. Moreover, under the charter of this company, (Acts 1868, p. 47,) each of the insured was entitled to participate in the profits, by sharing in dividends. The chief, if not the only, capital employed in producing dividends in behalf of policy-holders, we may assume, was money taken in as premiums from the insured on their respective policies. If some of the insured paid the whole of their premiums in cash, and some paid only half, themselves borrowing from the company the other half, there would be a great inequality in allowing dividends to both these classes on equal terms; and the charter contains nothing warranting unequal terms, either with reference to furnishing money with which to produce profits, or in the distribution of dividends.

We cannot escape the conviction that, as the whole annual premium upon the policy now in question became due in January of each year, the contract really meant that the company was to have for it, as a whole, either the cash, so as to use the same itself, or the equivalent of cash, if the insured retained the money for its own use, under the name of "loans." This equivalence could be arrived at by computing legal interest on the loans, and in no other way. Our conclusion is that the court below construed the policy rightly, and that unpaid interest on the various loans, as well as their principal, was to be deducted from the $10,000 on final settlement, after maturity of the policy. While the general rule no doubt is that interest will not accrue without contract, express or implied, until after default in making payment, yet the usual instances of implied contract for interest enumerated in the books are not exhaustive, but the implication "extends to every case in which the circumstances indicate a manifest intention on the part of the creditor to claim interest, and on the part of the debtor to accede to such a claim." 2 Story, Const. § 1485.

2. The next question is whether anything appears in the extrinsic evidence which ought to vary or modify the construction of the policy, based upon its terms, at which we have arrived. The extrinsic evidence consists, in part, of a printed circular or prospectus issued by the company, and used by its agent in procuring the application for insurance which was made by MacIntyre, and in pursuance of which the policy issued. Without passing upon the question respecting the use of the prospectus to add to, contradict, or vary the policy in its legal effect, (as to which see Insurance Co. v. Ruse, 8 Ga. 534; Bliss, Ins. §§ 382, 383,) we will consider briefly the terms of the prospectus bearing upon the matter of interest on loans, and see whether they are inconsistent with the policy itself, interpreted as we have construed it. Three relevant expressions occur in the prospectus,

Digitized by Google

—the first in these words: "The loan plan is as safe and profitable to the comany, and as beneficial to the policy-holders, as the all-cash plan, because the loans bear interest, and are perfectly safe." The second is in these words: "We require interest on one loan paid annually, in advance; all other interest paid by dividends." The third, which follows immediately after the second, is in these words: "When the annual premium amounts to $50 or more, a loan, if desired, will be given for half of the amount, (more or less the fraction of a dollar;) but on all such loans seven per cent. interest must be paid every year, in advance. A failure to pay the interest in all cases forfeits the policy." The last of these clauses, if standing alone, would plainly import, not only that the loans bore interest every year, but that all the interest had to be paid in advance; and while the latter requirement is checked by the immediately preceding clause, as well as by the policy, there is nothing in either of the preceding clauses to negative the implication that interest would run during the whole period the loans were outstanding. The first clause states, expressly, "the loans bear interest;" and the second, after saying that the interest of one loan must be paid annually, in advance, adds, "all other interest paid by dividends." What other interest could be referred to in this clause save legal interest upon the loans from their date to the maturity of the policy, with one annual payment made in advance on each deducted? It is manifest, therefore, that the scheme indicated by the prospectus as to the accrual of interest upon loans is the same precisely as that involved by fair implication in the terms of the policy.

The other extrinsic evidence on the subject is the parol testimony set out in the report, and it, likewise, plainly shows that, throughout the negotiations, both parties contemplated that there would be continuously accruing interest upon the loans; the only possible misunderstanding being as to whether that interest, or any of it, would have to be paid by the insured otherwise than by the application of his share of the contemplated dividends. We may add that nothing to the contrary is intimated or indicated upon the face of the statements furnished annually by the company to the insured by way of call for payment of the cash part of the premium, together with the advance annual payment of interest on one loan, according to the terms of the policy. The object of the statement was simply to show each year how much cash was then due from the insured, and for what it was due. There was no occasion to set out accrued interest which would not be payable until the maturity of the policy, and no attempt to show how the account stood between the parties, further than the account for unpaid cash then or shortly to become due and payable. Any inference tending to negative the right of the company to the interest now in controversy, founded on the absence of any such interest from the statement, would be wholly illogical and unwarranted.

3. Having seen that, whether we look inside or outside of the policy, or both inside and outside, interest on loans accrued, and continued to accrue until the policy matured, the question remains to be considered whether or not the company, in its contract with the insured, warranted or guarantied that the dividends would or should be sufficient to discharge all the interest not included in the advance payments expressly provided for by the terms of the policy. Several considerations bearing upon this question are to be noticed. In the *first* place, there is no authority in the charter empowering the company, or authorizing its officers or agents, to make such a warranty. *Secondly.* Nothing of the kind appears in the policy, the writing solemnly executed for the purpose of manifesting the contract between the parties, and the undertakings and obligations of the company assumed as parts of that contract. A stipulation so important as this cannot be supposed to have been left out of the writing, unless done by mistake, and no mistake is alleged, and no application made to reform or correct the policy in this particular or any other. Under these circumstances, if such an undertaking on the part of the company was in the contemplation of the parties while the negotiations were in progress, as the parol evidence might seem to indicate, it must be assumed now, after the lapse of more than 15 years, that when the contract was finally closed, and its terms reduced to writing, this feature of the preceding negotiations was deliberately abandoned, and constituted no part of the terms of the contract as finally closed. *Thirdly.* The clause in the prospectus, quoted above, saying: "We require interest on one loan paid annually in advance; all other interest paid by dividends,"—even had it been inserted in the policy, would not necessarily import such a warranty or guaranty as is now in question. The more reasonable construction of it would be that such interest might be paid in dividends, and would be so paid if the dividends proved adequate. This would leave the amount of the dividends to the risk of the party who was to be benefited by them; namely, the insured. The charter made them his property, declaring that "nine-tenths of the net profits thus accruing should be placed to the credit of the mutual policy-holders, who shall participate in the mutual profits of the company in proportion to the amount of premium paid, respectively, and which may be applied, as desired by the policy-holder, to the reduction of premium, increase of policy, or drawn by him or her in cash, as provided for in the by-laws." Why should the company undertake to guaranty to any policy-holder that his share of the dividends should be sufficient in amount to keep down unpaid interest on his loans? How could the company give such a guaranty to one policy-holder, and not to all? And how

Digitized by Google

to any or all, consistently with business principles, or with legal and moral duty, in the conduct of an institution whose declared dividends had to be limited to "net profits." Charter, art. 5, § 8. Surely the company had no power or means to produce net profits up to any arbitrary or conventional amount; and, unless it had such power or means, how could it stipulate with any policy-holder that his due share in the dividend should be so much, or enough to pay any part of his debt to the company, whether principal or interest? The true meaning of the prospectus, in the clause which we are considering, is and was that dividends should, so to speak, be a legal tender for all interest, except that required to be paid in advance. This, no doubt, is the meaning which the company attached to it, and which, as we think, those accepting policies issued by the company should have attached to it. Any other construction would be too literal and narrow for either of the parties or a court to adopt and act upon. Contemplated from a business or legal stand-point, we are unable to discover the slightest reason why the interest which was to accrue upon the loans was to be measured by the dividends, rather than by the legal rate of interest prescribed by the law of the state. It appears from the record that dividends to the amount of $567.80 accrued to the plaintiff during the period for which he was insured; and for this sum the company gave him due credit, and the same was deducted on the trial below from the amount of interest with which he was chargeable. To this extent the interest was "paid by dividends;" and the only reason why all the interest was not so paid was that there were no more dividends, as far as the evidence shows, to be thus applied.

4. Touching the alternative prayer in the declaration for a rescission of the contract on the ground of fraud, we shall be very brief. The fraud complained of is, in substance, that the company's agent represented that the business of the company was of such extent that its profits were sufficient to protect the policy-holders against liability for the loans, and all interest thereon, and that the business would be carried into new fields, and still further extended. No specific fact as to what the business amounted to appears to have been represented by the agent. He gave no figures, and, so far as appears, was asked for none, either as to past or prospective business. If the plaintiff had intended to make these statements—the agent's representations—the basis of his action, in contracting with the company, due care on his part would have required that he should have inquired into details, and ascertained how much business the company was doing, what its net profits amounted to, and what assurance the agent had that there would be an increase of business, etc. If this care was exercised, and reports or statements emanating from the company were exhibited, read, and relied upon, it should be shown what these reports or statements contained, and in what respect they were untrue. After the plaintiff had stood upon the contract, as delivered to him in writing, for 15 years or more, in which writing none of these representations appeared, it is certainly too late for him to call upon a court to rescind the contract in his behalf; more especially where he has not yet made for himself any absolute election to rescind it, but has founded his suit in part upon the contract as good and valid, and only claims a rescission in the event that his construction of it is not correct. He certainly had the means of discovering, long before the 15 years elapsed, whether the company was really doing the business which the agent represented it was doing, and whether the extension and increase of which the agent spoke had been realized. So far as appears, he made no inquiry upon the subject, and entered into no investigation, until after the company had carried the risk for the full term, and had thus fully and completely performed its undertaking, so far as risk of life was concerned. In view of all the facts in the record, we think the charge of the court upon this branch of the case—namely, that there could be no rescission unless the jury could discover some way of restoring the parties to their original situation—was as favorable to the plaintiff as the law would warrant. Had application been made in due time for rescission, the case would have been a weak one, inasmuch as a large part of the agent's representations must have been matter of opinion only, and inasmuch as the residue consisted of generalities, with no specification as to details and particular facts; but the application being only in the alternative, and coming at so late a day, it is still weaker, and so much out of time and manner that it appears to us to merit little or no consideration. In Insurance Co. v. Carter, 65 Ga. 228, there were no such obstacles to a rescission as those which the present case presents.

We have thus dealt with the topics appertaining to the controversy which were discussed in argument, and we think our treatment of them has been sufficiently comprehensive to take in the substance of all the material points and questions presented by the motion for a new trial. Without dealing with each of these separately, we consider them all as virtually disposed of by what we have ruled. The court committed no error in refusing a new trial. Judgment affirmed.

(82 Ga. 501)

MAYOR, ETC., OF MACON v. EAST TENNESSEE, V. & G. RY CO.

(*Supreme Court of Georgia.* Sept. 16, 1889.)

RAILROAD COMPANIES—GRANTS—LIMITATIONS.

1. Where a statute, granting to a railroad company part of the public domain of a city, provides, in effect, that the grant shall not be operative without the assent of the municipal authorities, and that the terms, conditions, and limitations of the grant shall be matter of agreement between said authorities and the company, and where, on application of the company to the city for its consent, the municipal authorities lay down terms,

Digitized by Google

conditions, or limitations, and there is not some writing, executed by the company, accepting or assenting to the same, the question of acceptance of the grant by the company is one of fact for decision by a jury.

2. If the company did accept the grant with the limitation put on it by the city in giving its consent,—namely, for so long as the property should be used for railroad purposes, as specified in the statute,—the property, if not appropriated to any of these purposes within a reasonable time, would cease to be affected by the statute, and would again be the public domain of the city, just as it was before; there being no consideration for the grant, save the local benefits which might be expected to result from the use of the premises in the manner contemplated.

3. If the grant was accepted, but terminated, or became subject to be terminated, by reason of non-user, the proper party to re-enter or bring suit for the premises was not the state, but the city, whether the limitation to the uses expressed be regarded as a special limitation strictly, or only as a condition subsequent.

(*Syllabus by the Court.*)

Error from superior court, Bibb county; GUSTIN, Judge.

R. W. Patterson and *Hill & Harris*, for plaintiffs in error. *Bacon & Rutherford*, for defendant in error.

BLECKLEY, C. J. As the court below restricted the functions of the jury to the single question of identity of the premises in dispute, we shall deal with the case and discuss it only far enough to show that this restriction was erroneous. We think two additional questions were for determination by the jury,—the first being whether the Macon & Brunswick Railroad Company accepted the grant made to it by the state in conjunction with the city of Macon; and the second, whether, if it did, that company, or its successor, the East Tennessee, Virginia & Georgia Railway Company, lost the grant by failure to devote the property, within a reasonable time, to the objects and purposes for which it was acquired.

1. At the time the act of 1863 (Acts 1863, p. 225) was passed, the title to the Macon reserve was not in the state, but was in the corporate authorities of the city of Macon; the same having passed out of the state by the act of 1856, (Acts 1855–56, p. 495.) It was not the purpose of the act of 1863 to grant to the Macon & Brunswick Company a donation of gratuity; for the act was not passed by the general assembly in the method prescribed touching donations by the constitution of 1861. Code 1863, § 4948. Had it been so passed, the yeas and nays would have been entered on the journals of each house. Id. § 4940. We have examined these journals, (House, p. 167; Senate, p. 146,) and find that the yeas and nays were not so entered. The act may well be construed, therefore, (since by its own terms it would have no force without the assent of the city council of Macon,) as a conveyance from that municipality to the railroad company, made in consideration of local benefits to the city expected to be derived from the use of the property in the manner contemplated by the act. The preceding act of 1856 expressly disabled the city to alien, or even offer to sell, alien, or convey. The act of 1863 took off this restriction as to the premises to which the latter act applied. Perhaps the most accurate view would be to treat the act as a joint grant made by the state and city; the title to the property at that time being in the city, and the city's assent to the grant being expressly required. The language of the act, including the caption thereto, is as follows: "An act to grant the use of certain grounds in the Macon reserve to the Macon and Brunswick Railroad Company, and the Milledgeville Railroad Company, for depot purposes, with the consent of the city of Macon. Section 1. Be it enacted by the general assembly of the state of Georgia that the state of Georgia will, and hereby does, grant to the Macon and Brunswick Railroad Company and the Milledgeville Railroad Company ten acres each, out of the lands belonging to what is known as the 'Macon Reserve,' to be used by said railroad companies for depots, shops, and other conveniences and fixtures necessary for said railroad companies, (the assent of the city council of Macon being first had thereto,) upon such terms, conditions, and limitations as shall be agreed upon between the city council of Macon and said railroad companies." Section 2 repeals conflicting laws. It will be seen that the "terms, conditions, and limitations" were left to be agreed upon between the city council and the railroad company. Of course, therefore, no title whatever passed to the company by mere force of the act itself. It follows that whether any terms, conditions, and limitations were agreed upon, and, if so, what these were, must be determined as a preliminary for holding that the company acquired any interest in the land; and surely these matters cannot be adjudicated as pure questions of law, but are in large degree questions of fact, depending upon what took place between the city council and the company, and upon subsequent conduct, as shown by the evidence, both written and unwritten.

If enough appeared in the documents to form the basis of a conclusive legal presumption that the company accepted the grant upon the terms, conditions, and limitations laid down in the report of the committee, which the city council adopted, then the aid of the jury upon this part of the case could be dispensed with; but no writing appears in the record which shows that the company ever agreed to the terms, conditions, and limitations proposed by the city council. Without such agreement, either express or implied, what the legislature did, and what the city council did, would be of no avail, since, by the provisions of the act, some agreement between the council and the company was absolutely essential. Admitting that it would follow, from the fact that the action of council was in response to a petition made to it by the company, that the company's ac-

Digitized by Google

ceptance might be presumed, yet this presumption would not be conclusive. It would only be *prima facie*, and might be overcome by circumstances tending to show that the company did not accept; such, for instance, as that it never took possession of the premises, or exercised dominion over them, and delayed for an unreasonable time appropriating them to the use contemplated by the grant. It would be extremely harsh and arbitrary logic to infer, with the force of a conclusive presumption, that, because the company invited the city to consult, it thereby gave the city a *carte blanche* to fix any terms, conditions, or limitations it might choose to impose.

2. There can be no doubt that, if the Macon & Brunswick Company accepted the grant on the terms fixed by the city council of Macon, (and it could accept no other,) it was with the limitation that the estate acquired was to exist only so long as the property was used for the purposes specified in the act. Such a limitation is distinguished from an ordinary condition subsequent, inasmuch as it marks the limit or boundary beyond which the estate conveyed could not continue to exist. 2 Bl. Comm. 155, 156; 2 Minor, Inst. 263; 2 Washb. Real Prop. 23–25, (457–459;) Smith, Ex. Int. §§ 34–42; 2 Kent, Comm. 129; Henderson v. Hunter, 59 Pa. St. 335; Ashley v. Warner, 11 Gray, 43. Where the mode of use, however, not a special or collateral limitation, as we consider it, but a condition subsequent, the use would have to be begun within a reasonable time, in order to save the estate from forfeiture. Hayden v. Inhabitants of Stoughton, 5 Pick. 528; Allen v. Howe, 105 Mass. 241; Hamilton v. Elliott, 5 Serg. & R. 375. According to some authorities, a grant made for a charitable use is not forfeited by non-user. McKissick v. Pickle, 16 Pa. St. 140; Pickle v. McKissick, 21 Pa. St. 232. Here there was no charitable motive or object involved; and, as we have seen, the grant was not made by the general assembly as a donation or gratuity. Nor can we suppose that it was intended as such by the municipal authorities of Macon. Nothing was paid for it directly by the company, and no consideration is expressly mentioned in the documents relating to it; but there can be no doubt that local benefits were in contemplation, which benefits could be realized only by the use of the property in the manner specified. As long as the company held it with a view to improve and use it in that manner, the holding was not inconsistent with the terms of the grant; but after the lapse of a reasonable time, under all the circumstances, for the actual use to commence, if it did not commence the company's estate was terminated *ipso facto*, if the words relating to the use be construed as a limitation, and, if construed as a condition subsequent, the estate was forfeited, or became subject to forfeiture upon entry made, or action brought in behalf of the proper party. In some jurisdictions the question of reasonable time seems to be for decision by the courts; but under our system, where, as in this case, some of the facts bearing upon the case are not evidenced by writing, we think the solution of the question is for the jury. If the grant had been otherwise paid for by the company, it might well be said that no question of reasonable time would be involved, or, if involved, that a very remote time would be reasonable. But, any and all other considerations being wanting, it results that a period of time reasonably necessary for the purpose, under all the circumstances, must have been in contemplation; for otherwise the property might have gone out of use altogether. If the company could hold it beyond a reasonable time without commencing the use, it could do so for all time; so that, if reasonable time be not the limit to non-user, there is no limit whatever. It follows, from what has been said, that, if a reasonable time had elapsed before the assets of the Macon & Brunswick Railroad Company were seized and sold out, that company had lost the grant, and these premises were not its property at the time of the sale. But, if a reasonable time had not then elapsed, the company now claiming as its successor would be entitled to any additional time required, when added to the time already elapsed when it succeeded to the former company's rights, to complete the period; and if, when this action was brought, the period of reasonable time was complete, whether completed while the right was in the former company, or not until the latter acquired it, the present action was maintainable, provided it was brought by the proper party.

3. We have no doubt whatever that the proper party to bring the action was the mayor and council of the city of Macon. That corporation had the title, under the act of 1856, save in so far as it parted with the same under the act of 1863. The state never has resumed the title to any part of the Macon reserve, but, on the contrary, by the act of 1866, (Acts 1866, p. 89,) has for a consideration, to-wit, $10,000, paid by the authorities of the city of Macon, relinquished to the city council all the state's contingent interest, and vested the same in the mayor and council. We do not cite this last act as legislation necessary to the conclusion which we have reached; for, whether the title of the railroad company was terminated by limitation or by condition subsequent, the title would go back to where it was, under the act of 1856, and, if re-entry or suit was necessary to such a restoration of title, the proper party to re-enter or to bring suit would be the city of Macon, and not the state.

Except such matters as are involved directly or indirectly in the points we have discussed, we find no error in the record which we deem material; and we leave the new trial, which must be had, to take place under such light touching the law of the case as has been shed by this opinion. Judgment reversed.

Digitized by Google

(82 Ga. 512)

BRANCH v. COOPER.

(*Supreme Court of Georgia.* Sept 16, 1889.)

PARTNERSHIP—MISTAKE—EQUITY.

1. Where there was a mistake in partnership books, in consequence of which the interest of the selling partner in the bulk of the partnership assets seemed much larger than it was, and the mistake was unknown to both partners, and neither was in laches in respect to its discovery, and where the purchase by one from the other of such interest was made at a price evidently based on the erroneous state of the books, the price being paid in full before the mistake was discovered, the consequences of the mistake ought, in equity, to be corrected, if it can be done without injustice to the selling partner.

2. Whether, after it is too late for a rescission, the correction can be made by refunding a part of the purchase price, and, if so, how much ought to be refunded, are questions depending upon natural justice and equity, under all the circumstances, and these may be treated as questions of fact for determination by a jury.

3. Suggestion that the case, in its totality, be submitted to the jury; or, if either party objects, under Code, § 4206, that among the specific questions submitted the above be included.

(*Syllabus by the Court.*)

Error from superior court, Chatham county; ADAMS, Judge.

Geo. A. Mercer, for plaintiff in error. *Denmark & Adams*, for defendant in error.

BLECKLEY, C. J. 1. Under the evidence, there is no possible doubt that, upon taking an account of stock of the partnership on June 30, 1886, entries were made in the partnership books showing that Branch had an interest in the partnership assets to the amount of $17,721.71, and that Cooper had a like interest to the amount of $10,542.68. It is equally certain that, in consequence of a mistake in computing the assets, resulting from entering and counting certain stocks, bonds, etc., twice, these sums did not correctly measure the interest of either partner; the amount to the credit of each being too large by $5,000, or upwards. Both partners were ignorant of the mistake, and, so far as appears, neither of them had cause to suspect that the books were not absolutely correct. Inasmuch as the difference between their individual accounts rendered their clear net interest in the assets unequal, there was no measure of the interest of each, at least as to the bulk of the assets, except the books. The books constituted the partnership register, by which the interest of each partner, in the regular course of business, would be measured; and it is clear, therefore, that either or both partners had a right to look to the books, and may have been expected to do so, as a basis for computing the value of the interest of either, when offered for sale. As there was no reason to suspect any error in the books, we can see no cause for attributing to Branch laches or neglect in not looking outside or beyond them, or in accepting them as correct, without a special examination to verify them. Whether Cooper negotiated on the basis of the books or not, he must have known that Branch, as a rational man, would resort to them as a basis; and it is clear, from the evidence, that Branch did so; that, in making his contract for the purchase of Cooper's interest, he was influenced by the books, treating them as correct. As they were not correct, but contained a material mistake, of which both parties were ignorant, and that mistake influenced Branch in making the contract, it was a mutual mistake, whether it influenced Cooper or not. He himself testifies that he thought the books correct; had no doubt of it; and was astonished afterwards, up to the point of incredulity, when he heard that the error had been discovered. He was so startled that he became ill. One fact testified to by him is decisive upon the intention of both parties to consummate their bargain, as finally closed between them, upon the basis of the business as it stood on June 30, 1886. The contract for the sale of Cooper's interest was made about the middle of the following July, and the dissolution was to take place on the 31st of July. Cooper testifies that in the final contract it was agreed that he should remain until the end of the month, and should receive, as his compensation for the business of July, $400. This shows that his interest, as it existed on the 30th of June, when the books were made up, was the real subject-matter of the sale, and that there was a separate and distinct stipulation, covering the firm operations for the whole of July, by which his income for that month was fixed definitely at $400,—about the twelfth part of his half of the profits made by the firm in the preceding year, ending June 30th.

The result of the mistake being to cause Branch to contract for the purchase of Cooper's interest, and to pay for it at a price several thousand dollars in excess of its real value, and in excess of the value which would have been shown by the books had they been correct, there can be no doubt that, apart from the mere form and shell of contract, Cooper received more for his interest than in equity and good conscience he was entitled to. Had the facts been as both parties thought them to be, Branch would have had value received for all he paid out; but the mistake of fact as to the *quantum* of Cooper's interest in the bulk of the assets caused Branch to promise and to pay several thousand dollars for which he got nothing. If the consequences of the mistake can be repaired by the resources of a court of equity, they certainly ought to be. Not to be able to afford some remedy in such a case would, to use the language of Chancellor Kent, after Lord Eldon, be "a great defect in the moral jurisdiction of the court."

2. It is obvious that the mistake was discovered too late to admit of a rescission of the contract; the discovery not being made until the books were closed for the next year, which was done May 31, 1887,—"a month earlier than had been customary while the firm existed and transacted business. The discovery was confirmed and made certain by the services of an expert employed for the purpose, whose examination was completed early in August. Before any one had knowl-

Digitized by Google

edge or intimation of the mistake, the whole purchase price had been paid in full, and Cooper had incurred expenses in founding another business of like kind, and was engaged in carrying it on. The situation of the parties had so changed that to restore the *status quo* between them was altogether impossible. The only means, therefore, of repairing the consequences of the mistake, would be to allow Branch to recover back from Cooper so much of the price paid as had nothing to represent it in the value of Cooper's interest,—the subject-matter of the sale.

It is said that to allow this would be to make a new contract for the parties; especially as Cooper would not have sold for a less price had he known of the mistake. Undoubtedly there is much force in this suggestion; but we think the sounder view of the law is that in all business dealings there is, if neither party be in laches, an implied agreement to correct mutual mistakes, and repair their consequences, when the same can be done without injustice; and we can see no injustice whatever to Mr. Cooper in requiring him to refund so much of the price as resulted from the mistake, and for which he gave no value. In ascertaining the amount which he ought to refund, he should be allowed the benefit, not only of the value of his interest as exhibited by the books when purged of the mistake, but any additional value which his interest really had at the time of the sale. Though Mr. Branch made the purchase at the book valuation, yet he should account for all he got at its real value, not merely at the value shown by the books after correction; for certain assets, such as the lease of the store, etc., were not shown by the books at all, and it would not be just to correct in his favor the mistake, without making him account for every dollar in value which he received, whether entered on the books or not. Thus, if the true value was as found by the jury $7,368, rather than $5,182.60, as shown by the books purged of the error, the difference between the former sum and what he paid, to-wit, $10,000, should be the measure of his recovery. So it seems to us; but whether there would be injustice, under all the circumstances of the case, in requiring Mr. Cooper to refund, as well as how much ought to be refunded, may well be treated as a question of fact for a jury. The rule of law on the subject seems to us to be the rule of natural justice only. There is no obstacle in the law requiring Cooper to refund so much as in natural justice he ought to refund; and he can be required to refund that much, but no more.

We distinguish this case from Steadwell v. Morris, 61 Ga. 97, in several particulars. In that case there was no measure, by the partnership books, of the interest bought and sold. There was nothing showing that the mistake was mutual, or that the party aggrieved by it was not in laches, and there was no attempt to repair the consequences until after the lapse of several years. Here, books of the firm, treated alike by both partners as correct, by mistake measured values erroneously. There is no ground for imputing a want of diligence to either. The mistake was discovered and verified within a reasonable time, and this bill for redress was filed within about six months after the verification.

3. The several questions of practice made in the record need not be specifically dealt with, as they are not likely again to arise. We have preferred to confine our examination to the substantial merits of the controversy; and what we have ruled will serve, we think, as a sufficient guide on another trial. The case should be tried over; and, as it involves in so large a degree principles of natural equity, we would suggest that it be submitted to the jury in its totality, with instructions from the court as to the law, conformable to the views announced in this opinion. Should the parties, or either of them, not acquiesce in this suggestion, but claim the right given by Code, § 4206, it would be well for the court to submit, as special questions of fact, with others, the two which we have indicated, namely, whether, according to natural justice, anything, under all the circumstances, ought to be refunded, and, if anything, how much. Judgment reversed.

(82 Ga. 412)

POULLAIN *et al.* v. BROWN.

(*Supreme Court of Georgia.* Sept. 16, 1889.)

EXECUTORS AND ADMINISTRATORS—BONDS.

1. Under Code Ga. § 2555, providing that sales by an administrator of property belonging to a decedent's estate must be by leave of the ordinary, except that annual crops may be sent to market, and section 2569, requiring, on a sale of an annual crop, the submission of vouchers showing the quantity, price, name of purchaser, and time of sale, an administrator has no authority to ship cotton belonging to his decedent's estate to a foreign market, and, if he does so, the loss resulting is a *devastavit*.

2. It is no excuse for sending such property to a foreign market that it was done to avoid seizure by the government.

3. Under Code Ga. § 2546, requiring contracts of labor for the benefit of the estate to be approved by the ordinary, the administrator is chargeable with losses resulting to the estate, where he employs laborers and carries on decedent's farm without such approval.

4. In an action by an administrator *de bonis non* against the sureties in the bond of his predecessor for a *devastavit*, it is no defense that plaintiff was also administrator of a deceased co-surety in the bond sued on, and distributed the estate of the deceased co-surety with full knowledge of his liability on said bond.

Error from superior court, Greene county; JENKINS, Judge.

Billups & McDaniel, D. B. Sanford, C. Heard, Foster & Butler, and *W. H. Branch*, for plaintiffs in error. *H. T. & H. G. Lewis*, for defendant in error.

SIMMONS, J. James L. Brown, administrator *de bonis non*, etc., of Dawson, brought his action against Thomas N. Poullain, as surety on the administrator's bond of Seabrook, and also brought another action against

Digitized by Google

Poullain and Ann C. Davis, administratrix of her husband, as sureties on another administrator's bond of Seabrook. Both cases, involving the same issues, were consolidated in the court below. The plaintiff recovered, and the defendants made a motion for a new trial on the several grounds set out therein, which motion was overruled, and they excepted.

The main ground relied on by counsel for the plaintiffs in error for reversal of the court below was alleged error in the following charge of the court to the jury, and the exclusion of certain evidence hereinafter detailed: "The court charges you that an administrator has, by law, no authority to ship or remove beyond the limits of this state property in his hands belonging to the estate of his testator or intestate, as the case may be, and such act, if committed, would be illegal; and if, in consequence of such act, the property of the estate is damaged, it would amount to a *devastavit*, for which the administrator and his sureties would be liable on their bond to the extent of the damage sustained by the estate. This the court charges you to be the law applicable to all administrators in the management of estates."

It appears from the record in this case that Seabrook, the administrator, in the year 1867 or 1868 undertook to ship a certain number of bales of cotton belonging to the estate of his intestate from Albany, Ga., to Liverpool; that after the cotton had been placed on board the steamer at Albany, and the steamer had started down the river to Apalachicola, it ran upon a snag and sank, and the cotton was lost. Seabrook, in his returns to the court of ordinary of Dougherty county, attached to the returns an explanation, and gave his reasons for shipping the cotton to Liverpool. These reasons, in substance, were that he thought it was for the best interest of the estate to make the shipment, because he could obtain a much better price in Liverpool than in the markets of Georgia, and that he was fearful that the cotton would be seized by the treasury agents of the general government. On the trial of the present case in the court below, Col. Billups was offered by the defendant as a witness to prove that he had attempted, about the same time, to ship cotton to Liverpool, where it was worth 51 cents per pound, and that he was led to do so by reason of danger of seizure by the United States government, and the prospect of better prices; that frequent seizures were made all through Georgia by persons claiming to be agents of the government, resulting in loss to those whose cotton was seized. This evidence was excluded by the judge, and this ruling is also complained of. Upon this state of facts the above charge was given.

1. We do not think this charge was erroneous. We think it was a correct exposition of the law of this state concerning the duties and liabilities of executors and administrators. They are *quasi* officers of the courts of ordinary. Their duties in regard to the sale of the property belonging to the estates of their decedents are well defined. In all cases of sales by them, except of annual crops and wild land, the mode and the means of fixing the time and place of sale are prescribed by law. If the law is followed by them in this respect, and the sale conducted fairly, they are not liable, whether the property brings much or little. "Under the common law, the absolute control of the personal property of the decedent was vested in the executor or administrator, and he had the legal power to dispose of any or all of such property at discretion. He could sell the personal property either at private or public sale. If he sold at private sale, he was chargeable with the full value of the property rather than the price obtained." Schouler, Ex'rs, §§ 339–341. Our statute has changed the common law, and requires the executor or administrator to apply to the ordinary for leave to sell, which application, in the case of personal property, shall be made at least 10 days before the order is granted, and that advertisement be made of the day and time of sale. The intention of the law of this state seems to be that all sales of the property of decedents shall be public, after full notice to all parties interested therein. Annual crops, however, are exempted from these rules, and executors and administrators are allowed to send them off to market. Code, § 2555. It is insisted by counsel for the plaintiffs in error that this cotton which was lost by the sinking of the steamer was part of an annual crop; that under this exception to the general rule, Seabrook, the administrator, had authority to send it off to market, and that, Liverpool being a cotton market, he had authority to send it thither; that, as long as the Code does not say what market, it is in the discretion of the administrator to send it to any market to which in his opinion it is for the best interest of the estate to send it.

We cannot agree with counsel for the plaintiffs in error in this view of the law. We think that the market meant in this section of the Code is a domestic market,—a market within the jurisdiction of the courts of this state. The intention of the law is to control executors and administrators in the administration of the assets of the estate. The law did not mean, in our opinion, by this exception to allow administrators, at their discretion, to send annual crops to any markets but those in the jurisdiction of the state. It could not mean to allow them, at their discretion, to send crops beyond the jurisdiction of the state. If an administrator could send to Liverpool at his discretion, there is no reason why he should not send it to Italy, Russia, or China. The law requires him to make annual returns to the court of ordinary, and, if he should sell annual crops, he is required, when his return is made, to submit vouchers to the ordinary, showing the quantity of cotton, the price at which it was sold, the name of the purchaser, and the time of sale. Code,

Digitized by Google

§ 2569. The sale of the annual crops being a private sale, this provision was doubtless made to compel the administrator to make a full showing in regard to such sale, in order that persons interested in the estate might, for themselves, examine into the sale. If the law is complied with, full *data* are given to all persons interested, whereby they can make this examination. By such examination they can ascertain the quantity of the cotton, the price, the purchaser, and the time when sold. This requirement is a strong circumstance going to show that the law intended the market to be a domestic one. If it were a foreign market, this section of the Code could scarcely be complied with by the administrator, and it would in most cases be impossible for persons interested in the estate to have an opportunity of making the examination which this section evidently intends to give them. They could not, without great expense, visit foreign countries to make this examination. We therefore think that the law and the public policy of the state forbid executors and administrators from removing the assets of the estate from the jurisdiction of the state. If, therefore, an executor or administrator sends the assets of the estate beyond the jurisdiction of the state, it is an illegal act, and a *devastavit per se*, and no evidence of good faith or good intentions should be received in order to relieve the administrator from his illegal act. Nor would the fact that the administrator was shipping the cotton in order to prevent its being seized by the treasury agents of the government relieve him. The presumption is that cotton seized by the agents of the government is legally seized. If illegally seized, the administrator would have his remedy. No court could countenance such an excuse as this. No court could hold that any person would be justified in running property away to avoid seizure by the government.

If these views are sound, of course the court did not err in refusing to give the contrary principle in charge, as complained of in the ninth ground of the motion for a new trial, nor in ruling out the evidence of Billups, as complained of in the twelfth ground, or the evidence of Vason to the same effect, as complained of in the seventh ground; nor did the court err in his ruling upon the evidence of Vason, as complained of in the eighth ground. Taken in connection with the evidence already adduced on the trial, it was not such newly-discovered evidence as would authorize the grant of a new trial, as required by the act of 1885. Acts 1885, p. 94.

2. The court did not err in refusing to give in charge the request set out in the tenth ground of the motion. It appears that Seabrook, the administrator, hired laborers and carried on the farm of Dawson in the year of 1866 without the approval of the court of ordinary, and the court refused to charge that the amount lost by Seabrook for that year in carrying on the farm should be allowed him by the jury. Such contracts by the administrator can only be charged up and bind the estate when the same are made with the approval of the ordinary of the county. Of course, if he had no such approval, and loss was sustained, it would not fall upon the estate, and the court was right in refusing to give the request in charge. Code, § 2546; Johnson v. Parnell, 60 Ga. 661.

3. The next point relied on by counsel for the plaintiff in error was that the court erred in striking the fourth plea. That plea, in substance, averred that Brown, the defendant in error, was the administrator of one Strain, as well as administrator of Dawson; that Strain was a co-surety with these plaintiffs in error; that Strain having died, and Brown having administered on his estate, distributing the assets of that estate to the heirs and creditors of Strain, with a full knowledge of Strain's liability as a co-surety upon the administrator's bond of Seabrook, he being a plaintiff in the suit on his bond as administrator of Dawson, these plaintiffs in error were thereby released to the extent of the value of the assets of Strain's estate paid out by him. We think the court did not err in striking this plea. Brown, as administrator of Strain, was in law a different person from Brown, as administrator of Dawson. When he distributed the assets of Strain, he did not do so in the character or capacity of administrator of Dawson, but as administrator of Strain. In making this distribution of Strain's assets, he was not acting as administrator of Dawson; it was not any act of his as a representative of Dawson's estate, and consequently not that of a creditor of these parties as debtors of that estate. It was just the same in law as if A. had been the administrator of Strain, and B. the administrator of Dawson. A.'s act in distributing the assets of Strain could not in any way affect the sureties on Seabrook's bond, made for the benefit of Dawson's estate, although Strain may have been a co-surety on that bond. It was no part of the duty of B. to look after the protection of the sureties upon Seabrook's bond, but that duty devolved upon themselves.

4. The evidence was sufficient to authorize the verdict of the jury.

5. Having affirmed the judgment complained of in the original bill of exceptions, the cross-bill of exceptions is dismissed. Judgment affirmed.

(82 Ga. 675)

VERDERY *et al.* v. SAVANNAH, F. & W. RY. CO.

SAVANNAH, F. & W. RY. CO. v. VERDERY *et al.*

(*Supreme Court of Georgia.* Sept. 16, 1889.)

ADVERSE POSSESSION — INSANITY — EVIDENCE — INSTRUCTIONS — NEW TRIAL.

1. Upon admitted or undisputed facts, the court may decide the question of title by prescription as matter of law, without submitting the same to the jury.

2. Wholly withdrawing from the jury, by the general charge, certain defenses set up and relied

Digitized by Google

upon by the defendant in ejectment, is equivalent to withdrawing all evidence relating to these defenses, and this cures any error committed in admitting such evidence.

3. While realty, of which a debtor has had adverse and continuous possession under written color of title, is in the hands of a receiver, appointed by a court of equity at the instance of creditors, the statute of prescription continues to run in favor of such debtor's title against strangers to the pending litigation. The possession of the receiver may be tacked to that of the debtor, and to that of the purchaser of the premises at a sale made under a decree in the cause, to make out the full period of the prescriptive term.

4. Though no prescription works against the rights of an insane person so long as the insanity continues, yet different lucid intervals, amounting in the aggregate to as much as seven years, may be put together, and the effect will be to bar the right of action.

5. The certificate of the ordinary to an exemplification of the proceedings on a commission of lunacy showing that the papers exemplified are of file in his office, the exemplification is not inadmissible because it does not otherwise appear that the papers were filed, or because they were not recorded, or because no judgment was entered on the verdict which found that the person proceeded against was not a lunatic. Though there might have been other possible objections on which the exemplification should have been excluded, the specified objections were not well taken.

6. Where the court gives in charge a written request, superadding observations, a general exception to the matter superadded will not avail if any part of it be legal. Where part is legal and part illegal, the exception must distinguish.

7. Newly-discovered evidence, if cumulative or immaterial, or if due diligence be lacking, will not justify the grant of a new trial.

8. There is enough evidence in favor of the verdict to uphold it, the presiding judge below being satisfied.

(*Syllabus by the Court.*)

Error from superior court, Chatham county; ADAMS, Judge.

R. B. Tripp and *J. A. Cronk*, for Verdery *et al.* *Chisolm & Erwin*, *W. R. Leakin*, and *S. T. Kingsberry*, for Savannah, F. & W. Ry. Co.

BLECKLEY, C. J. 1. Upon the admitted facts in the case, the presiding judge decided as matter of law that the plaintiff, as to her own individual right to half of the premises in dispute, was barred by the statute of prescription. We see not the slightest indication in the record that this ruling was erroneous. Nor do we entertain any doubt that where the facts are admitted or undisputed, the judge may decline to submit them to the jury, and may decide directly the question of law arising upon them. Of course, had any of the material facts involved in this branch of the case been in dispute, the jury should have dealt with them, under proper instruction from the court as to the law.

2. According to the charge of the court, and to the statements contained in the order overruling the motion for a new trial, the right of the plaintiff to recover as the administratrix of her deceased brother, George H. Conn, was made to turn wholly upon the defense of prescription, as to the one undivided half of the premises which he took under his father's will. Inasmuch as all other defenses were expressly withdrawn from the jury, the evidence as to them, whether rightly or wrongly admitted, became immaterial; indeed, withdrawing the defenses themselves amounted virtually to withdrawing all the evidence which had been submitted in support of them.

3. George H. Conn attained his majority in 1869, and died in 1886. This action was brought by his administratrix in 1887. The adverse possession under written color of title in the defendant corporation, and those under whom it claimed, had been continuous and uninterrupted from the year 1866, consequently for more than 16 years during the life-time of the plaintiff's intestate after his minority ceased. During the first part of the period the possession was held by the Atlantic & Gulf Railroad Company. Then came an interval of some two years, in which the property was in the hands of a receiver appointed by the United States circuit court upon a bill filed against the company by its creditors, to subject the same to the payment of its debts. The residue of the term of possession was by the defendant in this action, under a sale and conveyance made in pursuance of the decree rendered by said court upon the bill just mentioned. Had Conn been under no disability, by reason of unsoundness of mind, his rights would have been barred irrespective of the holding by the receiver; for adverse possession of lands, under written evidence of title for seven years, gives title by prescription. Code, § 2683. The possession, however, must be public, continuous, exclusive, uninterrupted, and peaceable, and be accompanied by a claim of right. Id. § 2679. An inchoate prescriptive title may be transferred by the possessor to a successor, so that the successive possessions may be tacked to make out the prescription. Id. § 2689. The alleged disability of Conn, had it in fact existed and been continuous, would have hindered the statute of prescription (Code, § 2686) from running against him at all; but as it was intermittent, the question arose in the case whether the time, or any of it, during which the property was in the hands of a receiver, could be counted as a part of the prescriptive period. The court thought it could be counted, and so instructed the jury. Upon principle, we consider this correct, and all the authority we can find on the subject tends to support it. It may safely be affirmed that the property of a debtor in the hands of a receiver for the purpose of being appropriated for the mutual benefit of the debtor and his creditors, is held by the receiver as a successor of the debtor, if not as a *quasi* agent for him. As against strangers to the suit, such holding is no breach of continuity. The statute of limitations (or of prescription) in favor of the debtor's inchoate prescriptive title is not suspended, but continues to run pending the receiver's possession. Kerr, Rec. 160, 161; Beach, Rec. §§ 1, 219, 220; High, Rec. §§ 135, 184, 556. There is nothing in our statutes indicative of a purpose by the legislature

Digitized by Google

to stop the running of prescription because a court has possession by its receiver; and certainly there is no necessity for treating the period of such possession as an implied exception, for a stranger who claims the property is not without a remedy. On the contrary, he has two remedies, one of which is discretionary with the court whose receiver has possession; the other is matter of right in all cases. By petition *pro interesse suo*, the claimant to the property held by a receiver is entitled always to a hearing, should the court in its discretion think proper to deny him leave to bring a separate action in his own behalf. 2 Story, Eq. Jur. 833*a*; 3 Daniell, Ch. Pr. *1744; Beach, Rec. § 654; High, Rec. § 139. The reluctance of courts to ingraft exceptions upon statutes of limitations is everywhere apparent. A comprehensive view of it may be had by consulting Tyler on Ejectment, 928–933. And in Jones v. Bivins, 56 Ga. 538, it was ruled that the exceptions specified in the Code, by which a prescriptive title will be defeated, are exhaustive, and will not be enlarged by construction.

4. No prescription works against the rights of an insane person so long as the insanity continues; but he has a like number of years after the disability is removed to assert his claim against the person prescribing. Code, § 2686. A prescription commenced ceases against a person under disability, pending the disability, but, on its removal, the prior possession may be tacked or added to the subsequent possession to make out the prescription. Id. § 2687. In view of these two rules, the court instructed the jury that if adverse possession, with all the characteristics required by the statute, existed after George H. Conn became of age, during periods which added together make more than seven years while he was of sufficiently sound mind to understand his rights, if they had been explained to him, the jury would find against his administratrix. We think this correct, taking it in the light of the evidence contained in the record. There is no reasonable probability that Conn was insane at all until 1873, and in so far as the evidence renders definite the intervals of sanity, compared with those of insanity, the former would seem to be about three-fourths, and the latter one-fourth, of each month. It is true that these definite terms apply directly to certain years, (1879, and two or three years thereafter,) but the witness who testifies was a physician who treated him, and who gave it as his professional opinion that similar intervals had been realized by his patient for several years previously.

5. In 1883 proceedings were had under section 1855 of the Code, on a commission of lunacy sued out in Douglas county, the object of which was to have Conn committed to the lunatic asylum. The finding of the jury on this commission was in Conn's favor, and that he was not a lunatic. An exemplified copy of these proceedings was admitted in evidence by the court at the instance of the defendant over objection by the plaintiff. Several objections are mentioned in the motion for a new trial, but the only ones verified as having been presented are that the papers had never been filed or recorded, and that no judgment had been entered thereon. The certificate of the ordinary verifying the exemplification shows that the papers were on file in his office, and there is no law requiring them to be recorded, or providing for or authorizing any judgment to be entered upon the verdict of the jury, inasmuch as the verdict found that the party was not a lunatic. The evidence might have been objectionable for other reasons, but we think it was not amenable to the objections above specified.

6. The fifth ground of the motion for a new trial, which complains that the court superadded certain observations after giving in charge the request made by the plaintiff, must fail, because some of the superadded matter is undoubtedly legal. The rule is that unless the whole of the charge excepted to is illegal, the exception must specifically point out the illegal part.

7. The alleged newly-discovered evidence is so obviously insufficient to require or authorize a new trial that we need not discuss it.

8. On the general question of the verdict being warranted by the evidence, there might well be two opinions. Had the court below granted a new trial, we should not have disturbed its judgment. A careful reading of the evidence satisfies us that we should, in like manner, defer to the decision refusing a new trial. There is enough evidence in favor of the verdict to uphold it. The judgment in the main case being affirmed, the cross-bill of exceptions is dismissed. Judgment affirmed.

END OF VOLUME 9.

Digitized by Google

Digitized by Google

Digitized by Google

Digitized by Google

Digitized by Google

Digitized by Google

Digitized by Google

Digitized by Google

Digitized by Google

Digitized by Google

Digitized by Google

Digitized by Google

Digitized by Google

Digitized by Google